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ENGLISH REPORTS ANNOTATED

[1869] E. R. A.

FULL COURT OF APPEAL. Nov. 3, 6, 1868.

CLINCH *v.* THE FINANCIAL CORPORATION (LIMITED).

38 L. J. Ch. 1; L. R. 4 Ch. 117; 19 L. T. 334; 17 W. R. 84: affirming, [1868] E. R. A. 295; 37 L. J. Ch. 281; L. R. 5 Eq. 450; 18 L. T. 197 (V.C.).

Distinguished, *Stace and Worth's case*, [1869] E. R. A.; L. R. 4 Ch. 682; 21 L. T. 182; 17 W. R. 751 (L. JJ.). Followed, *Postlethwaite* v. *Port Philip Colonial Gold Mining Co.*, [1890] E. R. A.; 59 L. J. Ch. 201; 43 Ch. D. 452; 62 L. T. 60; 38 W. R. 246 (Ch. D.); *Southall* v. *British Mutual Society*, [1871] E. R. A.; 40 L. J. Ch. 97; L. R. 11 Eq. 65; 23 L. T. 682; 19 W. R. 236 (M.R.): affirmed, [1871] E. R. A.; 40 L. J. Ch. 698; L. R. 6 Ch. 614 (L. JJ.); *Cleve* v. *Financial Corporation*, [1874] E. R. A.; 43 L. J. Ch. 54; L. R. 16 Eq. 363; 29 L. T. 89 (V.C.); *New Zealand Gold Co.* v. *Peacock*, [1894] E. R. A.; 63 L. J. Q.B. 227; [1894] 1 Q.B. 622; 70 L. T. 110 (C. A.); *In re Bank of South Australia*, [1895] E. R. A.; 64 L. J. Ch. 144; [1895] 1 Ch. 578; 72 L. T. 273; 43 W. R. 299 (Ch. D.): affirmed, [1895] E. R. A.; 64 L. J. Ch. 397; [1895] 1 Ch. 587; 72 L. T. 275; 43 W. R. 359 (C. A.); *Thomson* v. *Henderson*, [1908] E. R. A.; 77 L. J. Ch. 501; [1908] 1 Ch. 765; 98 L. T. 815 (Ch. D. & C. A.).

Referred to, *Bank of Hindustan* v. *Alison*, [1871] E. R. A.; 40 L. J. C.P. 1; L. R. 6 C.P. 54; 23 L. T. 616; 19 W. R. 505 (C.P.): affirmed, [1871] E. R. A.; 40 L. J. C.P. 117; L. R. 6 C.P. 222; 23 L. T. 854; 19 W. R. 507 (Ex. Ch.).

Company—Sale of Business of one Company to another—Ultra Vires—Suit by one Shareholder on behalf of himself and all others—Parties—Delay.

COMPANY.—*A financial company made an arrangement with a banking company for a combination of the two. By this arrangement it was agreed that the financial company should be wound up voluntarily; that the banking company should advance money to discharge the liabilities, and should receive the proceeds of all the assets of the financial company as realized; that after complete liquidation and payment to the bank by means of the assets (assisted, if necessary, by calls upon the shareholders in the financial company) of a certain sum over and above all advances, the shareholders of the financial company were to be at liberty to exchange every three shares (2l. paid) in it for one (5l. paid) in the banking company. The arrangement not being sanctioned by the articles of association of the financial company*:—Held, *affirming the decision of* Wood, V.C., *that it could not be supported as a sale of assets in consideration of shares within the* 161*st section of the Companies' Act*, 1862.

A suit by one member of a company on behalf of himself and all other share-

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holders, to set aside a contract which is ultra vires, is properly constituted, though a majority of shareholders may have assented to the arrangement, and they are not made parties to the suit.

The deed of arrangement having been executed on the 17th of May, the plaintiff objected to it early in June, but did not file his bill till November:—Held, *that the suit being one, not for avoiding a contract into which the plaintiff had de facto entered, but for asserting and maintaining rights of which he had never been deprived, he was not disentitled to relief on the score of delay.*

This was an appeal by the Oriental Commercial Bank (Limited) from a decree of Wood, V.C., declaring that an arrangement come to between the directors of the Financial Corporation (Limited) and the Oriental Commercial Bank (Limited), for an amalgamation of the two companies, was not authorized by the articles of association or by the Companies' Act, 1862, and giving consequential relief.

The case is reported in 37 L. J. Ch. 281, where the facts and arguments are fully set out.

Sir R. Palmer, Mr. Druce and *Mr. M'Naghten*, for the appellants, relied upon the 161st section of the Companies' Act, 1862[1] as sanctioning the arrangement. They also contended that the plaintiff could not maintain the suit on behalf of himself and all other shareholders, many of whom were assenting parties to the arrangement, and whose interests, therefore, were not identical with his own—*Jones* v. *Garcia Del Rio* (Turn. & R. 297); *Carlisle* v. *the South-Eastern Railway Company* (1 Mac. & G. 689; 2 Hall & Tw. 366; 19 L. J. Ch. 477); *Richardson* v. *Larpent* (2 You. & C. C.C. 507). They also relied upon the plaintiff's delay in filing his bill until it had become impossible that there should be a *restitutio in integrum* as disentitling him to relief, and cited *The Era Assurance Society's case* (2 Jo. & H. 400: on appeal, 1 De Gex, J. & S. 29; 32 L. J. Ch. 206).

At the conclusion of the arguments for the appellants, their Lordships took time to consider whether they would call upon counsel for the respondents.

Mr. W. M. James and *Mr. A. E. Miller*, for the plaintiff, were not called upon.

Mr. John Pearson, Mr. Kay, Mr. Haddan, Mr. Eddis, Mr. C. T. Simpson and *Mr. A. G. Marten*, appeared for the other respondents.

The Lord Chancellor (*Nov.* 6).—The arrangement between the Oriental Commercial Bank and the Financial Corporation, which, in the papers in this case, and in the argument, has been called an amalgamation or combination,

(1) This section enacts: "Where any company is proposed to be or is in the course of being wound up altogether voluntarily, and the whole or a portion of its business or property is proposed to be transferred or sold to another company, the liquidators of the first-mentioned company may, with the sanction of a special resolution of the company by whom they were appointed, conferring either a general authority on the liquidators, or an authority in respect of any particular arrangement, receive in compensation or part compensation for such transfer or sale shares, policies, or other like interests in such other company, for the purpose of distribution amongst the members of the company being wound up, or may enter into any other arrangement whereby the members of the company being wound up may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the purchasing company; and any sale made or arrangement entered into by the liquidators in pursuance of this section shall be binding on the members of the company being wound up; subject to this proviso that if any member of the company being wound up, who has not voted in favour of the special resolution passed by the company of which he is a member, at either of the meetings held for passing the same, expresses his dissent from any such special resolution in writing addressed to the liquidators or one of them, and left at the registered office of the company not later than seven days after the date of the meeting at which such special resolution was passed, such dissentient member may require the liquidators to do one of the following things as the liquidators may prefer; that is to say, either to abstain from carrying such resolution into effect, or to purchase the interest held by such dissentient member at a price to be determined in manner hereinafter mentioned, such purchase-money to be paid before the company is dissolved, and to be raised by the liquidators in such manner as may be determined by special resolution."

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was, in substance, a transfer by the corporation to the bank of the business, goodwill, connexion and property of the former in consideration of 25,000 shares in the latter.

The transaction is thus described in article 1. of the deed executed between the two companies on the 17th of May, 1865: "The whole and entire business, goodwill, connexion and property of the former in consideration of 25,000 shares net property and assets thereof, after payment and provision thereout in the due course of the said voluntary winding-up of and for all the debts and liabilities of the said corporation (but subject to the provision hereinafter contained for the members of the said corporation making good the said assets, in the event and to the extent of such deficiency as hereinafter mentioned; and subject to other the provisions hereinafter contained), shall be and the same are hereby purchased by the said Oriental Commercial Bank (Limited), as from the 4th day of April now last, from and since which day the same net property and assets (subject as aforesaid) shall be deemed to have become and to be the property of the said Oriental Commercial Bank (Limited), in consideration of the allotment to and among the shareholders or members of the said Financial Corporation, in manner hereinafter mentioned, of 25,000 shares in the said Bank of the nominal value of 20*l.* each, which are hereinafter mentioned, and on each of which the sum of 6*l.* (credited as 5*l.*) is to be made up as paid in the manner and by the means hereinafter more particularly mentioned. And the said liquidators under the winding-up of the said corporation shall, subject to the other provisions of these presents, enter into and execute all contracts and transfers, and do all other things whatsoever which shall be requisite for giving effect to the said purchase." The provision here referred to for the members of the corporation making good the assets was, in substance, a provision that if the surplus assets, after paying debts, should not amount to 100,000*l.* the deficiency should be made good by a call on members of the corporation.

The plaintiff Clinch, a shareholder in the corporation, objected to and dissented from this arrangement, and he complains that it is *ultra vires* of the corporation, and he has filed this bill on behalf of himself and all other members of the corporation to restrain the arrangement being carried into effect.

It was admitted in the argument, and, indeed, it could not be denied, that there was no power in the special constitution of the corporation which would warrant an arrangement of this nature; and that, if it could be supported at all, it must be supported under the provisions of section 161. of the act of 1862. It was also admitted, and, indeed, it could not be denied, that if the meaning and construction of the documents in which the arrangement rested was, that all the shareholders in the corporation were to be made to guarantee that the assets, after paying all debts, were equal to 100,000*l.*, and that this guarantie was to be enforced by a call on all the shareholders, the arrangement could not be supported. This, I say, could not, in my opinion, be denied, because I think that section 161. clearly contemplates a sale of the assets of the liquidating company for such an equivalent in value as is pointed out in that section, and does not contemplate the subjecting of the shareholders in the liquidating company, without their unanimous consent, to a fresh and original liability in the shape of a guarantie.

But it was argued that the meaning and intention was that the call to make good this guarantie should be made on those only who accepted shares in the bank, and thus assented to the arrangement. This is a question of construction, and is to be answered by a reference to a few passages in the documents. Before, however, referring to those passages, I wish to say that, although it is not necessary to decide, still I entertain a strong opinion that, even if the construction were such as is contended for by the appellants, namely, that those persons only who accepted shares in the bank should be subjected to this call, still the arrangement is one which would not be within the provisions of section 161. It is sufficient to say that, in my opinion, the liquidators of a company would have no right to place a shareholder of a company in this position; that he must

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either dissent altogether from the arrangement and be subject to have his shares taken from him at a valuation, or else come in under the arrangement and thus be forced to subject himself to the liability to which I have referred, namely, the liability of guaranteeing the sufficiency of the assets. However, as regards the construction, the outline of the basis for combination was to this effect: it begins by stating, "The Financial Corporation (Limited) has a nominal capital of 3,000,000*l.*, of which one-half has been subscribed, in 75,000 shares of 20*l.* each, 2*l.* per share paid or in course of being paid." Further on it continues, "The paid and called-up capital of the Financial Corporation (Limited) is 1,500,000*l.*, besides a reserve fund and profits carried forward amounting to about 15,000*l.*, subject to certain provisions for the realization of assets of the said corporation, or for the collection of an equivalent amount of further capital by way of call upon the shareholders of the same; so that in any case, besides the contribution and payment over to the said Oriental Commercial Bank (Limited) of a sum or sums equal to 2*l.* upon each of the present 75,000 shares of the said Financial Corporation (Limited) as above recited, the said Financial Corporation (Limited), as at present constituted, shall be bound to pay and discharge (or to indemnify the combined company, if the latter shall have to advance, for payment of) the whole of the debts and liabilities of the said Financial Corporation (Limited). It is now agreed to grant one share in the said Oriental Commercial Bank (Limited) for every three shares in the said Financial Corporation (Limited), so that the present 75,000 shares of the latter shall be replaced, as to all reciprocal rights and obligations, by 25,000 shares in the said Oriental Commercial Bank (Limited); but inasmuch as a large proportion of the assets of the said Financial Corporation (Limited) are not yet realized, and further, inasmuch as the proposed combination is considered beneficial in protecting such realization, whilst it is not in any wise intended that the said Oriental Commercial Bank should adopt any responsibility, either as to the liquidation of the said Financial Corporation (Limited) or as to the validity of the proposed combination, in so far as the members of the said Financial Corporation (Limited) are or might be concerned, the following arrangement is now adopted and mutually agreed to between the said combining companies: that is to say, 1, that it shall be incumbent on the said Financial Corporation (Limited), and on the directors of the same, to render the combination as proposed and the transposition of capital, transfer of business, exchange of shares, and all other matters incidental thereto, obligatory and binding upon all and every the members of the said Financial Corporation (Limited), being also *bona fide* holders of 75,000 shares as aforesaid." Then, further on, under the fourth head, "That a suspense account shall be opened for the purpose of such said liquidation, and under the proper control of such said liquidator or liquidators, and that all assets of the said Financial Corporation (Limited) which may remain outstanding and not taken over in account by the said Oriental Commercial Bank (Limited) at the date of the said proposed combination shall be passed to such suspense account, for the purposes of such liquidation, and to be dealt with to meet the bills and obligations of the said Financial Corporation (Limited) accruing to maturity as aforesaid, and the other engagements hereby contracted towards the said Oriental Commercial Bank (Limited), and otherwise as hereinafter set forth. 5. That the 25,000 shares of the said Oriental Commercial Bank (Limited), granted to the present members of the said Financial Corporation (Limited) in exchange for and in extinction of their actual 75,000 shares as aforesaid, shall at the date of the said proposed combination be credited with 4*l.* each, subject to the provisions of clause 7. in case of deficiency in the realization of assets." Then clause 7. was to this effect: "That if, within a reasonable time, to be mutually agreed upon, the assets of the said Financial Corporation (Limited) realized and paid over as aforesaid shall not have been sufficient to cover the requirements hereinbefore mentioned, it shall be incumbent upon the said liquidator or liquidators to make a special call or calls, to such amount as may be requisite, upon the members of the said

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Financial Corporation (Limited) as at present and heretofore separately constituted, in respect of the uncalled balance on their respective shares therein, and to appropriate the proceeds of such call or calls in completing the payments to and through the said Oriental Commercial Bank (Limited) as hereinbefore mentioned."

The deed finally executed was to the same effect. Now, in my opinion, there are clear provisions that if the net assets of the corporation should not amount to 100,000*l.*, that is, 4*l.* each on 25,000 shares, a call should be made, and should be made upon all the members of the corporation, to raise the deficiency. The call must not be made upon those merely who took shares in the bank. It is a call to be made by the liquidators in the ordinary course of business, and according to the powers to make calls upon the members of the corporation in respect of the unpaid capital; and it is beyond doubt that a partial call upon a certain number of members of the corporation would not have been a call of that description. It is impossible, therefore, in my opinion, to put any construction upon these provisions except this,—that there was to be a call for the purpose of giving effect to the guarantie, and that that call was to be made upon all members of the corporation, whether they assented to or dissented from this arrangement. If that be so, the arrangement is one which, in my opinion, is clearly not authorized by section 161. of the act of parliament, and Mr. Clinch was entitled to object to it.

It was argued, however, that a number, and indeed a majority, of shareholders in the corporation had assented to the arrangement, and had actually taken shares in the bank under it, and that the plaintiff could not sustain this bill as a bill on behalf of himself and all other members of the corporation, at all events without making all or some of those parties who had assented to the arrangement parties to the suit; but the contract was one between the two corporations, and if the contract was *ultra vires* of the Financial Corporation, it is a contract which in the eye of this Court it is for the benefit of all the shareholders in the corporation to arrest; and in my opinion a proper form of suit in which to accomplish this end is a suit by one member of the corporation on behalf of himself and all other members, making the executive of the corporation and the other contracting company parties as defendants.

The appellants further argued that the plaintiff was open to a personal exception on the score of delay in instituting the suit. The deed to which I have referred was executed on the 17th of May, 1865. The plaintiff objected to the arrangement to his own company early in June, 1865. Some correspondence took place between this date and the month of November as to the terms on which he might be relieved from liability, and on the 10th of November, 1865, he filed his bill. So far therefore as his own company was concerned, they were aware from a very early period, that he not only dissented from the arrangement, but challenged its validity. In addition, however, to this, it is to be observed that this is not a case of delay in asserting an equity, or in taking steps to avoid a contract into which the plaintiff has *de facto* entered. The plaintiff was and continued throughout to be the owner of his shares in the corporation, and of all rights incident to those shares, unless those rights were taken away or effectively bound by the arrangement of amalgamation, and he was simply asserting and maintaining those rights. Those rights, in my opinion, have not been taken away, and I think he is not disentitled to relief for the purpose of protecting them upon the score of any delay.

There was a declaration in the decree to which particular and subsidiary objection was made by the appellants. It was in these words; after declaring the invalidity of the compromise in a manner which appears to me to be perfectly accurate, the decree proceeded thus: "It is further declared that, without prejudice to any question as between the shareholders of the said Financial Corporation (Limited), who have been registered as shareholders by the said Oriental Commercial Bank (Limited), and the creditors of the said bank, the said shareholders are, between themselves and the said bank on the one hand,

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and between themselves and the said corporation on the other, entitled to have their shares in the said corporation restored to them on the delivery up of the certificates of their shares, as registered in the books of the Oriental Commercial Bank (Limited), and that the defendant Lewis Henry Evans, as the official liquidator of the Financial Corporation (Limited), is bound to re-deliver the said certificates to Arthur Cooper, the official liquidator of the said Oriental Commercial Bank (Limited). And it is ordered accordingly. And any of the parties are to be at liberty to apply under the two orders specified, made for the winding-up of the corporation and the bank in respect of the last-mentioned declaration as they shall be advised."

Now, this clause was objected to, as if it had been a clause ordering the delivery up and restoration of shares allotted in the bank, but that is not what the decree provides for. It simply declares that the shareholders in the corporation are entitled, if they deliver up the shares in the bank, to a re-delivery to them of their own original shares in the corporation, a provision which simply flows from the previous part of the decree, and is, in my opinion, nothing more than what those persons are entitled to. At the same time it appears to me, subject to any observation that Mr. James, on the part of the respondents, may desire to make on the subject, and subject to the opinion of the Lords Justices, that everything that the plaintiff can desire is given by the other parts of this decree, and that it might safely be left to the proceedings in the winding-up to accomplish what was intended to be effected by the part of the decree which I have read. But whether this portion of the decree is omitted or retained, it appears to me that it ought not to make any difference with regard to the costs of this appeal, and that this appeal ought to be dismissed with costs.

Mr. James.—We did not ask for the declaration and order referred to by your Lordship, but it was thought to be a right belonging to some of the other parties.

WOOD, L.J.—I have very little to add after the clear exposition which the Lord Chancellor has given of the grounds upon which the decree may be supported as the correct decree of the Court. I can only now say that I have not seen any reason to change the view which I entertained at the time of the original hearing. As regards the reasons which have been assigned, the case has now had the advantage of having the foundation of that decision rested upon grounds more clearly expounded than in that judgment which I then gave, or any which I could now give. I acquiesce entirely in the proposed alteration as to that which the Lord Chancellor has termed the subsidiary portion of the decree. It is unnecessary for me, under those circumstances, to add more on the present occasion.

SELWYN, L.J.—It has not been contended that the arrangement in question in this suit can be supported under the articles of association of the Financial Corporation, but it was distinctly stated by Sir Roundell Palmer that, if good, it is good under the 161st section of the act of 1862. The words of that section are doubtless very wide and comprehensive, but it contains no power to impose any new or additional liabilities upon the shareholders of the selling company, but provides for the payment of the purchase-money of the shares of the dissentient shareholders which is directed to be paid before the company is dissolved, and to be raised by the liquidators in such manner as may be determined by special resolution. It was also admitted that if the construction of the documents in question which was adopted by the Court below was correct, the arrangement which was carried into effect by those documents was not one falling within the scope of the 161st section, and in particular, that if the Vice Chancellor was right in supposing that the calls were to be made upon all the shareholders, no one would argue that the arrangement was *intra vires*. The substantial question therefore is one, as the Lord Chancellor has already said, upon the construction of those documents; and in addition to the passages already referred to by his Lordship, I would mention that in the preamble of the document of the 24th of March, 1865, which is called the outlines of basis

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for combination, a sum or sums equal to 2*l.* upon each of the 75,000 shares of the Financial Corporation is to be paid over to the bank, and the present 75,000 shares in the corporation are to be replaced as to all reciprocal rights and obligations by 25,000 shares in the said Oriental Bank (Limited). Throughout the whole of this preamble the sums and number of shares are spoken of as one entire and definite amount or amounts, without any suggestion of probable or possible diminution. In like manner, in clause 6, we find again the provision that they are to make up 6*l.*, to be credited as 5*l.*, as paid into the capital and premium account of the said Oriental Commercial Bank (Limited) for every one of the said 25,000 shares, the amount credited as set forth in the foregoing clause, No. 5, being reckoned as the first instalment of such 6*l.* credited as 5*l.*, and the said shares thus participating in the entire combined reserve fund rateably, and that the said 25,000 shares shall accordingly from time to time and respectively receive credit for such further payments upon them out of capital suspense account as may be effected by the liquidator or liquidators. The provisions of the deed of the 17th of May, 1865, are upon this point exactly in accordance with those of the outlines of basis for combination. The first clause of the deed transfers the whole and entire business and goodwill of the Financial Corporation (Limited). This transfer is absolute and unconditional, not dependent upon the assent of any particular number or proportion of the shareholders, but absolute, immediate and unconditional, and the consideration which is stated in the same clause is said to be the allotment of 25,000 shares, not of any aliquot or proportionate part of them. In like manner clause (4. B.) provides that the assets specified in section A. are to be credited by the bank in or towards paying 4*l.* a share on each of the 25,000 shares of 20*l.* each in the bank, the allotment of which is to form the consideration for the aforesaid purchase; and, again, as the Lord Chancellor has already observed, the call is to be made on all, and no power is attempted to be given, if any such power could have been given, to make any partial call. The next clause (4. D.) was much relied upon by counsel for the appellants, as shewing that in one event the whole of the shareholders might not have been entitled to the benefit of the arrangement. But the payment of the 2*l.* per share which is referred to in that clause was a liability or obligation existing before the date of the arrangement, and not in any way consequent upon it, and this clause (4. D.) merely provides that this previously existing liability shall be discharged by every shareholder before he becomes entitled to participate in the allotment of the 25,000 shares. Clause 12. of the same deed imposes upon the bank immediately and unconditionally the discharge of certain onerous duties and obligations, and it was urged upon us in argument by the appellants' counsel, that as the bank had in fact discharged these onerous duties and obligations, it would now be unjust to set aside that arrangement. But upon the question of construction, it is material to observe that on this most important clause no provision whatever is made for the release of the bank from their obligation in the event of a large proportion of the shareholders refusing to accede to the arrangement; and this leads me to the further observation that throughout all the documents and resolutions no trace is to be found of any such provisions as would have been necessary for the protection of the parties, if the arrangement contemplated had been of such a partial and conditional character as is contended for by the appellants. There is no resolution or provision for the payment of the purchase-money of the interest of any dissentient shareholder. The consideration therefore of that which is contained in these documents, as well as the absence of any such provisions as those to which I have alluded, is such as, in my judgment, to lead irresistibly to the same conclusion as the Court below has arrived at. I think, therefore, although it may be expedient to alter the decree by the omission of that clause to which the Lord Chancellor has referred, which in my judgment carries the matter no further than the original declaration, the appeal substantially fails, and must be dismissed, with costs.

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MALINS, V.C., Nov. 5, 1868.

THE METROPOLITAN BOARD OF WORKS *v.* SANT.

38 L. J. Ch. 7; L. R. 7 Eq. 197; 19 L. T. 260; 17 W. R. 25.

Practice—Jurisdiction—Sir John Rolt's Act (25 & 26 *Vict. c.* 42)*—Lands Clauses Consolidation Act—Title to Land—Ejectment.*

COMPULSORY PURCHASE.—*There being two adverse claimants to money assessed for compensation in respect of land "injuriously affected" within the meaning of the Lands Clauses Consolidation Act, the parties by whom the compensation-money was payable filed a bill for an inquiry as to which of the two claimants was entitled to such money. But the Court, holding the real question at issue to be the title to the* land, *refused to order a reference to chambers to inquire into that title, and directed the question to be tried by an action of ejectment.*

This suit was instituted to ascertain the right to a sum of 9,237*l.*, representing compensation money for damage to certain warehouses and land "injuriously affected" by the construction of the Thames Embankment. The defendants, Messrs. J. & W. Sant and W. A. P. Cockburn, who were in possession of the premises in question, had claimed compensation from the plaintiffs, the Metropolitan Board of Works, under the 68th section of the Lands Clauses Consolidation Act, as owners in fee simple; and upon the matter being carried before a jury in the usual way, the damage was assessed at 9,237*l.*

Shortly afterwards, the other defendant, G. J. Drummond, made a claim upon the Board of Works for compensation in respect of the same premises; and it was agreed between the Board and the defendant Drummond that he should receive the same sum of 9,237*l.* in the event of his claim being established. His alleged title was this. The premises in question lay contiguous to other lands, of which Messrs. Sant and Cockburn had been for many years in possession, under a lease from Drummond's predecessor in title. The lease under which those lands were held expired in June, 1867; and, according to his contention, the premises now in dispute were an accretion to those lands, and as such, under the original Thames Embankment Act of 1770, became the property of the party entitled to the latter. Upon the expiration of the lease, Messrs. Sant and Cockburn gave up possession of the lands comprised therein; but not, as the defendant Drummond insisted they should have done, of this accretion to them.

In this state of circumstances, an agreement was entered into between Messrs. Sant and Cockburn and the Board, under which the sum of 9,237*l.* was paid by the Board into a bank, and there deposited in two names to abide the decision by a competent Court as to the title to the freehold of the premises in respect of which it had been awarded; the agreement stipulating that if it should be necessary to institute a suit the plaintiffs should institute the same, the defendants Messrs. Sant and Cockburn in that case undertaking to facilitate the payment of the money into Court in such suit. The plaintiffs now filed this bill, alleging that, in consequence of the conflicting claims, they were unable to pay either of the claimants the sum assessed as aforesaid, and asking a determination of the question whether the defendants Messrs. Sant and Cockburn or the defendant Drummond were or was entitled to the compensation money, with such inquiries and directions into and as to the title to the premises as should be necessary or proper.

Upon the cause coming on, the question argued was, whether the Court would direct an inquiry as to the title in chambers, under the jurisdiction conferred by Sir John Rolt's Act (25 & 26 Vict. c. 42), or whether the right must be tried by an action of ejectment.

Mr. C. Hall appeared for the plaintiffs.

Mr. Glasse and *Mr. C. Barber*, for the defendants Messrs. Sant and

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Cockburn, objected to an inquiry in chambers, arguing that they were in possession, and the onus was on the adverse claimant, Drummond, to prove that he had a better title, which he ought to do in the ordinary way, viz., by bringing an action of ejectment.

Mr. Chitty, for the defendant Drummond, contended that the object of the suit being to ascertain the title to the money, the question of title to the land was incidental only to the main question in the suit, and therefore the case came exactly within the meaning of Sir John Rolt's Act. Besides which, the question depended on a mass of documentary evidence which would be far more conveniently investigated in His Honour's chambers than before a jury.

MALINS, V.C.—This is a question of principle. Mr. Drummond's title, as I understand it, is this. It is admitted that Messrs. Sant and Cockburn were his tenants of some lands immediately contiguous to the premises in question, and that the lease of those other lands expired in June, 1867. Mr. Drummond says that the premises in dispute follow the title of the lands held under the lease, because they are an accretion to the lands of which Messrs. Sant and Cockburn were lessees; and therefore that these defendants were under the same obligation to deliver up possession of these premises as attached in respect of the other lands. This, therefore, is a case in which persons claiming to be lessees have wilfully retained possession of land which they were bound to deliver up. Now the ordinary remedy against a tenant who holds over on the expiration of his lease is to bring an action of ejectment; and, but for the accidental circumstance of this land being injuriously affected by the Metropolitan Board of Works, it is clear that ejectment would have been Mr. Drummond's only remedy. The real question at issue is the title to the land. It is admitted that whoever is entitled to the land is likewise entitled to the money awarded in consequence of its being injuriously affected. The title to the money, therefore, is only incidental to the title to the land. Hence, it is only proper that Mr. Drummond should prove his title to the land in the usual way. I cannot permit the accidental intervention of the Board of Works to give him a larger remedy than he had before, enabling him, by the machinery of an inquiry in chambers, to put the defendants Messrs. Sant and Cockburn, who are in possession, to prove their title against an adverse claimant. Though probably the question of legal title might be decided at chambers, it is not the course of this Court to do so; and I see no reason for departing from the usual practice. With respect to Sir John Rolt's Act, no doubt, in all cases properly within its jurisdiction, this Court is now compelled to decide questions of law or fact without sending them to be determined elsewhere. But this is not a proper case for such a decision within that statute; for, by the 4th section, it is provided that wherever the question to be dealt with is with respect to the title to any land, such relief only should be given in equity as would have been proper according to the rules and practice of this Court, if that act had not passed. The money will be brought into Court and invested, and Mr. Drummond must try his title by bringing an action of ejectment within a month.

GIFFARD, V.C., Nov. 5, 1868.

FOULKES *v.* DAVIES.

38 L. J. Ch. 9; L. R. 7 Eq. 42; 19 L. T. 479; 17 W. R. 69.

Pleading—Inconsistent Titles to same Relief—Demurrer.

PRACTICE.—*The plaintiff having filed a bill praying that a deed by which she conveyed her property to the defendant might be declared void on the ground of undue influence, afterwards, under a general power contained in the*

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deed, appointed the property to herself, and then filed a second bill, praying that if, at the hearing of the first suit, the deed should not be declared void, it should be delivered up to herself as sole cestui que trust under it. A demurrer to the second bill was overruled.

In June or July, 1867, the plaintiff, who was in a weak state of health, both in body and mind, executed a deed by which she conveyed all her property to the defendant, who had for some time had the entire management of her affairs. The property was to be held by the defendant upon such trusts as the plaintiff should, by deed attested by two witnesses, appoint; and subject to and in default of any such appointment, in trust for the plaintiff for life; and after her decease, subject to the payment of a few small sums of money to other persons, in trust for the defendant absolutely.

In February, 1868, the plaintiff filed a bill against the defendant, seeking to have the deed declared void, on the ground of the fiduciary relations which existed between the defendant and herself at the time of its execution, and of his having exercised undue influence over her.

That bill prayed that the deed might be declared void, and might be delivered up to be cancelled; and that the defendant might pay all the costs.

In the course of the proceedings in that suit, she, on the 19th of March, obtained inspection of the deed, and for the first time became aware that it contained the general power of appointment overriding all the other trusts. She therefore, on the 24th of March, executed a deed-poll duly attested, by which she appointed all the property to herself absolutely. Her solicitor then requested the defendant to give up the deed of 1867, offering to stay proceedings in the suit. The defendant, however, refused to agree to this proposal; and, on the 27th of June, 1868, the bill in this suit was filed by the plaintiff against the same defendant, stating the above-mentioned facts, and praying that, in case the deed of 1867 should not be declared void, as prayed by the first suit, it might be delivered up to the plaintiff, as being now sole *cestui que trust* under it.

To this bill the defendant demurred.

In the course of the argument, the question was mooted as to the proper mode of bringing the new case before the Court, whether by amendment of the first bill, supplemental statement, or new bill; and it was decided that, as the facts upon which the plaintiff based her new title had occurred since the filing of the first bill, the proper mode of bringing them before the Court was by a new bill.

Mr. Kay and *Mr. W. S. Owen*, for the demurrer.—The plaintiff seeks for alternative relief on two inconsistent aspects. If a single bill had been framed, stating these facts and praying the alternative relief asked for by both bills, it would have been demurrable—*Rawlings* v. *Lambert* (1 Jo. & H. 458). The main ground of the case is fraud, and failing on that, relief will not be given on any secondary ground—*Myddleton* v. *Lord Kenyon* (2 Ves. 391); *Kendall* v. *Beckett* (2 Russ. & M. 88; 9 L. J. Ch. 24). This, then, being a case which could not have been presented whole in a single bill, neither can it be done by two. The plaintiff has no right to harass the defendant with these two suits at the same time; she ought either to have had her first bill dismissed, or brought to a hearing before filing the second.

Mr. Druce and *Mr. F. O. Haynes*, in support of the bill.

[GIFFARD, V.C.—The question is, can you approbate and reprobate? file one bill saying the deed is void, and another relying on its validity?]

Suppose the deed-poll had been executed before the first bill was filed, we say that the plaintiff might have made her whole case by one bill. Two different independent titles may well be alleged to the same relief. The cases relied on by the other side merely decide that different inconsistent kinds of relief cannot be prayed for on alternative inconsistent grounds—*Archbold* v.

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the Commissioners of Charitable Donations and Bequests for Ireland (2 H.L. Cas. 440).

Mr. Kay, in reply.—The same relief is not asked for by both bills. One asks for a declaration of invalidity and for cancellation; the other, for mere delivery up. The prayers are really inconsistent. He also referred to—*Glascott* v. *Lang* (2 Phill. 310; 16 L. J. Ch. 429).

GIFFARD, V.C.—I should not be disposed to allow this demurrer, unless bound to do so by technical rules; because it is evident that, on the hearing of both bills together, substantial justice can be done. It has been decided that, on two inconsistent grounds, two inconsistent kinds of relief cannot be asked for by the same bill. Here, in substance, we have the same relief sought in both bills, viz., restoration of the plaintiff's property from the defendant. In *Myddleton* v. *Lord Kenyon*, the Court thought justice could not be done except by dismissing the bill. The other cases cited are also substantially different from the present. It would be very hard on the plaintiff, who alleges two substantial grounds for saying the property is hers, to put her to the delay and inconvenience of waiting till the first suit is heard before stating her second case, while by overruling the demurrer I do not put any hardship on the defendant. I am satisfied that common sense and justice allow this suit to proceed, and there is no technical objection.

Demurrer overruled.

LORDS JUSTICES, July 11, 1868.

BRADFORD *v.* BROWNJOHN.

38 L. J. Ch. 10; L. R. 3 Ch. 711; 19 L. T. 248; 16 W. R. 1178: varying, [1868] E. R. A. 208; 37 L. J. Ch. 198; 18 L. T. 388; 16 W. R. 500 (V.C.).

Referred to, *Isaac* v. *Wall*, [1877] E. R. A.; 46 L. J. Ch. 576; 6 Ch. D. 706; 37 L. T. 227; 25 W. R. 844 (V.C.).

Tenant for Life and Remainderman—Renewable Estates for Lives—Apportionment of Fines—Interest.

COPYHOLD. ESTATE.—*Where a tenant for life of renewable estates or leases for lives has renewed the lives, the proportions of the fines and expenses of the renewals, payable as between his estate and that of the remainderman entitled to the property, are to be estimated with regard to the actual enjoyment of the property; and compound interest at 4l. per cent. per annum with annual rests on the amount payable by the remainderman will be allowed to the estate of the tenant for life for the period between the renewal and his death; simple interest only after that event.*

This was an appeal from the decision of Vice Chancellor Stuart given upon a special case.

The questions were as to the amount which a remainderman should pay to the estate of a tenant for life who had renewed certain renewable estates for lives in copyholds and leaseholds for lives; and also what interest should be allowed.

The Vice Chancellor held that the apportionment should be made having regard to the actual enjoyment of the property by the tenant for life, and the value of the life of the *cestui que vie* (which it had been agreed between the parties should be valued as from the death of the tenant for life); and that simple interest at 4*l.* per cent. from his death should be paid upon the sum to the estate of the tenant for life.

From this decision the representatives of the tenant for life appealed, upon the ground that they were entitled to compound interest from the renewal until the death of the tenant for life.

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The facts are fully stated in the former report, 37 L. J. Ch. 198.

The following is a brief outline. The plaintiff was, by a title derived under the will of Thomas Allen, entitled to nine fortieth parts of the copyholds in question, and the defendants to the remaining thirty-one fortieths. There were altogether four copyhold tenements, two held for lives and two on leases determinable upon lives. The will had bequeathed all the tenements to the testator's widow, Elizabeth Allen, for life; then to William Hollins for life, and in remainder to persons through whom the present parties claimed. The will contained no directions as to renewal.

At the testator's death the existing lives in three of the tenements were Thomas Allen the son and Joseph Allen. In the other tenement, called Jennings', the lives at the testator's death were William Hollins, then tenant for life in remainder, and James Cowderoy.

In 1828, William Hollins added the lives of Francis Gale and himself to the existing life in the three tenements; Thomas Allen the son being then dead.

In the same year, William Hollins added the life of Francis Gale to the existing lives in Jennings' tenement.

Joseph Allen died in January, 1830.

Elizabeth Allen, the widow, died in January, 1832.

William Hollins died a bachelor on the 2nd of April, 1865.

The date of Cowderoy's death was not stated.

William Hollins paid about 2,079*l.* 1*s.* 2*d.* for all the renewals, each tenement being assessed and paid for separately.

The parties had agreed to set a value on the life of Francis Gale for the purposes of determining the proportion of fines payable.

Mr. Greene and *Mr. Fischer*, for the appellants, contended that the representatives of W. Hollins ought to have compound interest from the date when the money was paid, upon the plaintiff's proportion of the renewal moneys for his shares in remainder, *Nightingale* v. *Lawson* (1 Bro. C.C. 440) being clear on this point, and confirmed by *Giddings* v. *Giddings* (3 Russ. 241). They cited *Lewin on Trusts*, p. 300, commenting on *Nightingale* v. *Lawson*. As to Jennings' Farm, it was clear that W. Hollins took no benefit by the renewal, and he ought therefore to be repaid all the expense.

Mr. E. K. Karslake and *Mr. F. H. Colt*, for the respondents, contended that *Nightingale* v. *Lawson* was distinguishable, for in that case the value of the reversionary interest had been taken as upon the date of renewal as the basis for calculation, which having been done, the value of the reversion was proportionately decreased, and it thereby became necessary to give compound interest in order to put the parties on an equal footing. But the two modes of calculation ought not to be combined. The Court ought not to take the actual lapse of time as a means of calculating the proportion of the fine, and then to allow compound interest on such proportion. The effect of so doing would be to treat the estate of the remainderman as of equal value with an estate in possession at the date of renewal; and compound interest, if given on such amount, would unduly raise the remainderman's proportion of the fines. Supposing the rule of actual enjoyment to be adopted, each person in possession ought to keep down the interest on the whole fine. The right of renewal was the thing settled, and the expense of purchasing the partial interest should be divided proportionally to actual enjoyment; just as if raised by mortgage, in which case the whole principal and interest would be paid by the end of the term purchased.

They cited and commented on the cases mentioned in the former report; and, in addition, *Verney* v. *Verney* (Amb. 88); *Rowe* v. *Chichester* (Amb. 715); *Stone* v. *Theed* (2 Bro. C.C. 243); *Carter* v. *Sebright* (26 Beav. 374; 28 L. J. Ch. 411); *Ainslie* v. *Harcourt* (28 Beav. 313; 30 L. J. Ch. 686).

Wood, L.J.—We need not trouble you to reply in this case, Mr. Greene. The question is, how the price paid by the tenant for life for the renewal of leases for lives is to be distributed, the tenant for life not having

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survived during the whole of the new lives that were introduced. I thought the principle had been settled long ago by *Nightingale* v. *Lawson*, and that, in the subsequent cases, there had been no departure from it. Upon carefully reading Lord Eldon's judgment in *White* v. *White* (4 Ves. 24; 5 Ves. 554; 9 Ves. 554), it is impossible to say that he could have been deceived by *Nightingale* v. *Lawson;* for although, no doubt, *Nightingale* v. *Lawson* is not well reported, because it was a difficult case to be understood, yet Lord Eldon says, to the best of his recollection, "Lord Kenyon assisted Lord Thurlow in making the decree." Lord Eldon says, in *White* v. *White*, that the decree in *Nightingale* v. *Lawson* has stood for twenty years (and now we may say it has stood for half a century), and the decree has never been disputed. On the contrary, it has been followed in *Giddings* v. *Giddings*. But, after such a series of authorities, when you think what is relied upon, the principle is clear enough, although it is a difficult matter to adjudicate upon with perfect nicety and justice, and there may be some degree of harshness in it. The principle before Lord Thurlow's time was that the tenant for life should have one-third and the others two-thirds of the produce. That would work justice in no way whatever. But Lord Thurlow's principle is exceedingly simple and easy to understand, though it may not always work out complete justice. His assumption is simply this: take the case where there is a lease for forty years, suppose twenty years had expired and you wish to make it still forty years, that is, you are about to buy a lease in reversion and to pay for it twenty years before it falls into possession. The mode in which the lessors are in the habit of computing those interests is this: they say, What is about the value of this lease as a lease for twenty years in possession? Having ascertained that, they say, Inasmuch as it will not fall into possession for twenty years, you cannot pay the value down as if you were going to take possession immediately; what you must pay down is a sum of money which invested twenty years will exactly be the value of the lease in possession. But how simple it becomes if you have this case, that the tenant for life happened to die at the end of the original forty years and before the forty years came into possession. Then you find that he had bought entirely in the interest of those who came after him a twenty years lease in possession. They, finding a twenty years lease in possession, ought to pay for it according to its value. What is that value? I have already said that the value is the sum paid down twenty years ago, with compound interest upon it. Then it is said at once, It is only simple interest after the death of the tenant for life, because you have bought an estate for the trustee, and you have a right to be let into possession of it on my death, and the price is the value I paid twenty years ago, and that being the value I shall have the interest on the purchase-money for the remainder of the time. The whole thing becomes extremely simple and easy. It has all arisen in this way: that, originally, when there was a leasehold for lives or for years in succession which was renewed, the Courts would not allow any individual having a partial interest to come in. Of course, an equity immediately arose that you could not take as against the person who made himself trustee without paying him for it. That being the case, it is not material to know whether he paid too much or too little. You are not obliged to take the estate, and if you take it you must simply pay for it. That is the whole proposition. Then, in *Jones* v. *Jones* (5 Hare, 440), Wigram, V.C. very carefully lays down the different cases that may happen. There may happen a case of a settlor declaring the fine to be a charge on the estate, and then the remainderman must take the thing exactly as he finds it. But when there is no such direction you take from your trustee what he has bought and pay accordingly. Take the simple case of twenty years, and suppose a man lives nineteen years of those twenty years, every year you get the value of whatever fragment there may be of the lease in possession and pay compound interest. Then it comes into possession. If there is only one year left he will have to pay whatever is to be appropriated for that one year. The tenant in remainder will only have bought a year. Then you will find what was paid down with compound interest to arrive at that interest in possession.

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Then, as to its being lives instead of years, Wigram, V.C., in that very case, begins his judgment by saying that he thinks it settled upon the authorities that there is no difference between lives and years. There is simply the difficulty of arriving at the value. You must assume the value for lives according to the tables, which are always properly framed for this purpose, and then the principle applies exactly in the same way that a value for years is assigned to the lives, and you calculate the compound interest upon it. In this particular case the parties have agreed that the surviving life shall be taken to be of the value it is at the present time. That does not alter the principle at all. It only comes to this, that that has happened which would probably happen. Both sides have agreed—or rather it has been agreed for them in chambers—that this was an ordinary life that was taken, and therefore it is taken just as well at its value now as if you were to go back and make a calculation and computation from the time the money was paid down. Therefore, the answer to the case must simply be, following *Nightingale* v. *Lawson*, that the proportion to be paid by the plaintiff for and in respect of the fines and expenses should be ascertained by reference to the actual enjoyment by William Hollins and to the value to be set upon the life of Francis Gale at the death of William Hollins, and having regard to the agreement to have a value set upon the life of Francis Gale at the death of William Hollins, and then compound interest should be computed at the rate of 4*l.* per cent. per annum, with annual rests on the proportion payable by the plaintiff during the life of William Hollins, and simple interest at 4*l.* per cent. should be computed for what shall be found due at the death of William Hollins for principal and interest as aforesaid till payment to the defendants.

SELWYN, L.J.—One point which was strongly urged upon us was that the tenant for life ought, at all events, to have been decreed to keep down during his life the interest on the money borrowed for renewal, and many cases have been cited in support of this contention. Those cases consist principally of three classes: first, where a provision has been made by the testator or settlor for the expense of renewal by sale or mortgage of the estate itself, in which case the tenant for life loses the rents of the part sold in the case of a sale, and keeps down the interest in the case of a mortgage; secondly, where the same provision is made by means of the sale or mortgage of another estate, in which case the tenant for life of the estate is in a similar position, and the case of *Ainslie* v. *Harcourt* (28 Beav. 313; 30 L. J. Ch. 686) affords an instance of both these classes. The third class of cases is where the expenses of renewal are directed to be paid out of the rents and profits, in which case the whole burden is thus thrown upon the tenant for life, as in the case of *Solley* v. *Wood* (29 Beav. 482; 30 L. J. Ch. 813). But where, as here, there is no provision made by the testator, but the estate is in fact reserved, it is clearly settled that the expense is to be borne by the parties interested in proportion to their enjoyment. At the time of the renewal the tenant for life in effect purchases an estate in possession, and the remainderman an estate in remainder; and if at that time they could foresee exactly the sums which certainly would have to be paid, and if it was then ascertained that out of a sum of 2,000*l.* required for that purpose 1,800*l.* was to be paid by the tenant for life and 200*l.* by the remainderman, no interest would become due by or to any person. So, if neither of them had the means of paying his share except by borrowing, and both had accordingly borrowed from a third person, each of them will have to pay interest of the sum so borrowed. But, in the present case, instead of borrowing from a third person, the tenant for life has paid the whole, and when the remainderman comes to claim the benefit of that renewal, upon what principle can he claim to be in a better position with respect to interest than if he had paid his share; that is to say, 200*l.* out of his own pocket or borrowed it from a third person? If he accepts the estate, it is clear that the 200*l.* was paid for his benefit at the time it was paid, and consequently must bear interest as against him from that time; and the authorities

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are decisive upon the point that interest is to be calculated with annual rests, upon the same principle as interest is calculated upon reversionary estates. That calculation is made up to the time when the reversion falls into posesssion, that is, up to the day of the death of the tenant for life, and from the time the remainderman—if he accepts the estate subject to the burden of paying his share of the renewal—becomes entitled, like an ordinary purchaser, to the rents and profits as from that day, and becomes subject to the ordinary right of interest on the purchase-money. This is, I apprehend, the meaning of Lord Thurlow's observations in *Nightingale* v. *Lawson*, where he says, after the death of the tenant for life, the demand upon the remainderman becomes a common debt. I think, therefore, that the order in this case must be in the form the Lord Justice has mentioned.

The following are the minutes of the order:

Their Lordships do order, that the said decree or order, dated the 17th of February, 1868, be varied; and their Lordships do declare, that the proportion to be paid by the plaintiff for and in respect of the fines and expenses of renewal in the special case mentioned, must be ascertained by reference to the actual enjoyments under the renewal grants and leases in the said special case mentioned by the said William Hollins, the late tenant for life of the estates, comprised in such renewal grants and leases, and by Elizabeth Allen, the testator's widow, and to the value to be set upon the life of Francis Gale, the *cestui que vie*, at the death of the said William Hollins; and having regard to the agreement, to have a value set upon the life of the said Francis Gale, the *cestui que vie*, at the death of the said William Hollins, that compound interest ought to be computed at the rate of 4*l*. per cent. per annum, with annual rests on the proportion of such fines and expenses payable by the plaintiff Henry James Bradford, as the person entitled to nine fortieth shares of the reversionary interest, from the times of the several payments thereof up to the day of the the death of the said William Hollins; and that simple interest ought to be computed at the rate of 4*l*. per cent. per annum on the total amount of such proportion and interest from the death of the said William Hollins until payment to the defendants Walter John Brownjohn and Charles Percival Titt.

MALINS, V.C., Nov. 12, 1868.

HEATH *v.* FISHER.

38 L. J. Ch. 14; 19 L. T. 805; 17 W. R. 69.

Practice—Dissolution of Partnership—Sale of Mines ordered on Motion.

PARTNERSHIP.—*The partners in a mine being hopelessly embarrassed, and their position becoming more critical every day, the Court interfered against a dissentient partner on motion before the hearing, and ordered an immediate sale of the mine and partnership property.*

This was a suit by six partners, as plaintiffs, against the only other partner, for the dissolution of a partnership between them in a certain colliery and other mines, in respect of which an agreement had been entered into with the owner of the soil for a lease of the mines, but which agreement had not been carried out for want of sufficient capital on the part of the intended lessees to work the undertaking. The landowner had filed a bill against them for the specific performance of the agreement, or, in the alternative, to have it rescinded, and had obtained an injunction against their working the mines, and an order for the appointment of a manager and receiver.

The plaintiffs, being still unable to find capital to carry on the works, or to arrange with the defendant for the winding up and sale of the concern, now filed this bill against him, praying for a dissolution of the partnership, and that

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an immediate sale of the mines and plant might be ordered on motion before the hearing.

Mr. Glasse and *Mr. F. H. Colt*, in pursuance of notice, now moved for an order that the mines in question, with the plant and machinery employed in the working of them, might be forthwith sold and disposed of, either by public auction or private contract; and that such sale might be ordered as of a going concern, with proper directions in that behalf.

The motion was supported by evidence that the landowner was threatening to proceed with his suit, and also to re-enter for breach of the covenant in the intended lease; that the partners, who were mere working men, were unable to keep up the payment of the rents and royalties, or to find capital to carry on the mines, that further delay in winding up the concern would lead to the forfeiture of the right to the lease, the utter loss of the assets and the ruin of the partners; and that this could only be averted by an immediate sale of the property, for the purchase of which an advantageous offer had been made.

The following authorities were referred to: *Lindley on Partnership*, p. 219, 228-9, 2nd edit.; *Bailey* v. *Ford* (13 Sim. 495; 12 L. J. Ch. 482); *Jennings* v. *Baddeley* (3 Kay & J. 78, 83).

The defendant had been duly served but did not appear. Upon an affidavit of service,

MALINS, V.C. made an order according to the terms of the notice of motion, appointing an early day to consider the offer for purchase at chambers.

LORDS JUSTICES, July 16, 1868.

In re OVEREND, GURNEY & CO.; *Ex parte* BARROW.

38 L. J. Ch. 15; L. R. 3 Ch. 784; 19 L. T. 271; 16 W. R. 1160.

Referred to, *In re Welsh Flannel Co.*, [1875] E. R. A.; 44 L. J. Ch. 391; 32 L. T. 361; 23 W. R. 558 (V.C.).

Company—Winding-up—Interest on Calls—Payment into Court as a Security—Companies' Act, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 75; 3 *&* 4 *Will.* 4. *c.* 42. *s.* 28.

COMPANY.—*Certain contributories in a company disputed their liability to be such, and appealed to the House of Lords. Meanwhile a call was made. The notice of the call contained an intimation that if it should not be paid interest would be charged. At their request they paid the call into the bank, not to the liquidators' general account, but to one entitled as a security account, to await the decision of the House of Lords. Afterwards that decision was unfavourable to them, and the money was applied for the purposes of the winding-up*:—Held, *that the contributories who had paid their money to the security account were liable to pay interest upon it until the time when it was applied.*

The question in this case related to the liability of Mr. Barrow to pay the sum of 66*l.* interest due upon a sum of 2,000*l.* The circumstances were as follows. Mr. Barrow, with a number of other gentlemen, disputed their liability to be contributories; they were, however, held by his Honour to be so on the 9th of February, 1867.—(See the report, 36 L. J. Ch. 233, and on appeal to the House of Lords, 36 L. J. Ch. 949, where the facts appear.) Previously to this, viz., on the 15th of September, 1866, a call had been made by the liquidators of 10*l.* per share, payable on the 15th of September into the Bank of England. The notice to the shareholders of this call contained a note that if the call should not be paid on the day named, interest, at the rate of 5*l.* per cent., would be charged.—See *Lintott's case* (36 L. J. Ch. 510; 4 L. R. Eq. 184).

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On the 21st of December, 1866, Mr. Barrow and the other contributories who disputed their liability obtained an order allowing them to pay the call into the Bank of England to the credit of an account, "The account of the liquidators in respect of the security of Adam Thom and others," and that upon such payment being made, all proceedings to enforce payment of the call should be stopped. The object of the payment was to secure the repayment to them of the amount of their call in the event of their establishing their freedom from liability. Mr. Barrow paid 2,000*l.* into the Bank under this order, together with interest up to the date of payment. In August, 1867, the decision of the House of Lords was pronounced, and soon afterwards, under the direction of the chief clerk, the money standing to the security account was taken possession of by the liquidator. The present claim of the liquidator was, therefore, for interest between the 21st of December, 1866, and the 24th of August, 1867, the day on which the money was so received by the liquidator.

Mr. Cotton and *Mr. Chitty*, for Mr. Barrow.—First, we say, that no interest was properly payable. [This point was taken, but not argued, in the the Court below, because it had been previously decided by his Honour in another case—*Lintott's case* (36 L. J. Ch. 510; 4 L. R. Eq. 184).] We submit that the decision in the former case is wrong. There was no reason why interest should run. The note at the foot of the notice of the call was not a demand within the meaning of Baron Parke's Act (3 & 4 Will. 4. c. 42), and the call was not an order of the Court. Next, assuming *Lintott's case* to be correct, still in the present case there can be no interest payable. The call directed us to pay the money into the Bank. This we did, and having complied with the exigency of the demand, 3 & 4 Will. 4. c. 42. s. 28. does not apply. Even if we had not paid it to the special account the liquidator could not, in the face of the litigation which was pending, have parted with the money. The separate account was merely a formal recognition of what would otherwise have been the proper course to pursue, viz., to keep the money until the right had been properly determined. The call, therefore, must be considered as paid, and no interest is due.

Mr. Cole and *Mr. Ferrers* were for the liquidators, but were not called upon.

WOOD, L.J.—I think it would be contrary to the intention of the legislature and to justice if shareholders who pay their calls at the proper time are to be placed in a worse position than those who dispute their liability to do so, and so delay payment. The company may owe debts bearing interest, which would be running, and it would, I think, be hard and unjust to those who pay punctually that this interest should fall upon them, as it would do if the defaulters escape payment of interest. It may be that interest upon calls would not be payable in many cases under the articles of association, but the legislature has provided for these very cases by enacting, in section 75. of the Companies' Act, 1862, that the call shall be a specialty debt accruing at the time when the liability is incurred, though not payable till the calls are made. Making the call then, and, as in the present case, fixing a time for payment, complete the liability. It is immaterial whether the payment is to be made to the company or the liquidator. It is a specialty debt, and this, I think, brings it within the meaning of 3 & 4 Will. 4. c. 42. s. 28, as a debt payable at a certain time. There seems then, every reason why interest should be paid at the ordinary rate, and none to the contrary. As to the payment into the Bank, to the security account, this must be considered as made for the convenience of the shareholders who dispute their liability. They, by it, obtained an order staying proceedings against them. The money could not have been dealt with without the order of the Court, and therefore it was not applicable for the purposes of the company or the liquidation. It was merely a security, and the security might have been given in any other way. The payment was certainly no discharge of the debt, and interest ought to be paid up to the date of actual payment.

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SELWYN, L.J—The debt upon the call is, I think, under section 75. of the act, a debt payable at a certain time by virtue of a written instrument, within the meaning of 3 & 4 Will. 4. c. 42. Therefore a jury would, I think, have given interest. The argument before us was, that the debt was not due either to the company or to the liquidators, but the money was to be paid into the bank. This is answered I think, by section 92. of the Companies' Act, 1862, for by that section it is quite clear that the liquidator was the person to enforce payment. Ought then a jury to give interest in this case? Now, the liquidator could, as soon as the day for payment of the call arrived, have taken proceedings for compelling payment. These shareholders, however, applied to have those proceedings stayed, and this was done on the terms of security being given. Though no injunction was in form granted, preventing the liquidators from dealing with the money, the effect was the same: they could not without a breach of duty have applied the money in payment of the debts of the company. If the money was not invested, it was only the fault of those upon whose application the order was made. A jury in such a case ought, I think, to give interest, and we, acting as a jury, must now do so. The appeal must be dismissed with costs.

MALINS, V.C., Nov. 3, 1868.

WHITTEMORE *v.* WHITTEMORE.

38 L. J. Ch. 17; L. R. 8 Eq. 603; 19 L. T. 236.

Referred to, *Goddard* v. *Jeffreys*, [1882] E. R. A.; 51 L. J. Ch. 57; 45 L. T. 674; 30 W. R. 269 (Ch. D.); *Jolliffe* v. *Baker*, [1883] E. R. A.; 52 L. J. Q.B. 609; 11 Q.B. D. 255; 48 L. T. 966; 32 W. R. 59 (Q.B. D.). Commented on, *In re Terry and White's Contract*, [1886] E. R. A.; 55 L. J. Ch. 345; 32 Ch. D. 14; 54 L. T. 353; 34 W. R. 379 (C. A.). Referred to, *In re Fawcett and Holmes' Contract*, [1889] E. R. A.; 58 L. J. Ch. 763; 42 Ch. D. 150; 61 L. T. 105 (C. A.). Considered, *Jacobs* v. *Revell*, [1900] E. R. A.; 69 L. J. Ch. 879; [1900] 2 Ch. 858; 49 W. R. 109 (Ch. D.).

Will—Estate taken by Trustees—Trust to pay Annuity.

TRUST AND TRUSTEE.—*A devise before* 1838 *to trustees in trust to pay a life annuity with power to raise it by distress or sale as for rent in arrear gives them the legal fee.*

The only point in this suit calling for a report was the question in whom the legal estate was vested under the will of John Mennell, who died in November, 1831, the will being dated the 25th of July, 1830.

The testator, after giving various legacies and making divers specific devises, gave and devised his residuary real estate to his wife and three other persons, their heirs and assigns (subject and chargeable, along with his personal estate, to the payment of the said legacies and the annuity thereinafter mentioned), upon trust, that these four persons and the survivors and survivor of them, and the heirs, executors and administrators of such survivor, should by and out of the rents, issues and profits thereof, in the first place *pay and secure*, or cause to be paid and secured, unto Elizabeth Smith (therein described), for and during the term of her natural life, one annuity of 20*l*., to be payable half-yearly as therein mentioned, and to be for her sole and separate use, with power to raise and levy the same *by distress and sale* as for rent in arrear, in the event of the same remaining unpaid for thirty days after falling due. And subject thereto, upon trust, in the next place, to permit and suffer the testator's said wife to have the free and uninterrupted use and possession of the same real estate, and to permit her to receive and take the residue of the rents and profits thereof for and during the term of her natural

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life, she keeping the same in good and tenantable order and repair; and from and after her decease, then the testator willed and directed that the said trustees, and the survivors and survivor of them, and the heirs, executors and administrators of such survivor, should stand seised of the same real estate to the use of eight persons therein named as tenants in common; and the testator empowered his trustees to reimburse themselves for all costs, charges and expenses out of any moneys which should come to their hands by virtue of his will, or any trust therein declared.

The testator having died without an heir, the Attorney General was made a party to the suit, in order to have the question determined in whom the legal fee was vested.

Mr. J. Pearson and *Mr. Holmes*, for the heir-at-law of the surviving trustee, contended that the devise to the trustees being upon trust to pay an annuity, they took the legal fee—*Fenwick* v. *Potts* (8 De Gex, M. & G. 506).

Mr. Wickens, for the Attorney General, submitted that they only took the legal estate for the life of the annuitant.

Mr. Cotton, Mr. Lawson, Mr. Faber, Mr. Glasse, Mr. Wintle, Mr. F. Bacon and *Mr. Boyle*, appeared for other parties.

MALINS, V.C.—It is clearly established that when the trustees have any duty to perform, *e. g.*, to sell, or mortgage, or pay an annuity, to enable them to discharge that duty, they are held to take the legal fee. Here the testator has given the trustees an express power to raise the annuity by distress or sale; therefore it, in fact, amounts to a trust to sell if need should be. But the rule I have stated is well settled, and the general principle of the rule is, that the annuity may possibly fall in arrear, and to enable the trustees to recover or raise those arrears they must have some estate *ultra* the life of the annuitant; and if they must have such an estate they can take nothing short of the fee. Therefore there must be a declaration that the legal estate in fee is vested in the heir-at-law of the surviving trustee.

LORD ROMILLY, M.R., Nov. 9, 19, 1868.

In re THE SOUTH OF FRANCE WINE-GROWING DISTRICTS COMPANY; *Ex parte* DE BEVILLE.

30 L. J. Ch. 18; L. R. 7 Eq. 11; 17 W. R. 90.

Referred to, *In re China Steamship, etc. Co.; Drummond's case*, [1870] E. R. A.; L. R. 4 Ch. 772; 21 L. T. 317; 18 W. R. 2 (L.J.); *In re Baglan Hall Colliery*, [1870] E. R. A.; 39 L. J. Ch. 591; L. R. 5 Ch. 346; 23 L. T. 60; 18 W. R. 449 (L.J.); *Ilfracombe Railway* v. *Nash*, [1870] E. R. A.; 22 L. T. 209; 18 W. R. 431 (C.P.). Distinguished, *In re Church and Empire Fire Insurance Co.; Pagin & Gill's case*, [1877] E. R. A.; 46 L. J. Ch. 779; 6 Ch. D. 681; 37 L. T. 89; 25 W. R. 905 (V.C.).

Winding-up—Contributory—Paid-up Shares.

COMPANY.—*B. subscribed the memorandum of association of a company, in respect of preference shares and also paid-up shares*:—Held, *that he was liable to contribute only in respect of the preference shares.*

Baron de Beville subscribed the memorandum of association of the above company as a shareholder for 450 preference and 138 paid-up shares. On the winding-up of the company he was placed on the list of contributories in respect of the whole 588 shares. This was a summons adjourned into Court to remove his name from the list. It was admitted at the bar that he was liable for the 450 shares.

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Mr. Southgate and *Mr. G. N. Colt*, for the Baron de Beville, said that the preference shares were sufficient to satisfy the requirements of the act as to subscribing the memorandum. Even supposing that if he had not taken the preference shares, he would have been liable on the paid-up shares, there was no reason why a person should not subscribe the memorandum in respect of paid-up shares.

Mr. Jessel and *Mr. Fischer* contended that the subscribers to a memorandum were in a similar position to directors,—in fact, they were the first directors, and therefore would be liable to contribute on paid-up shares to the extent that they had not actually paid the company—*Universal Provident Life Association; Daniel's case* (1 De Gex & J. 372; 26 L. J. Ch. 563); *Cosmopolitan Life Assurance Society; Nickoll's case* (24 Beav. 639). Further, the very point had been decided—*South Blackpool Hotel Company; Migotti's case* (36 L. J. Ch. 531; 4 L. R. Eq. 238).

Mr. Southgate replied.—*Daniel's case* was decided on the fact that the directors had no power to allot themselves shares. *Migotti's case* simply decided that where a person had contracted to take shares by subscribing the memorandum of association, he could not satisfy that contract by taking shares which had been issued to somebody else.

The MASTER OF THE ROLLS said—This is an application by Baron de Beville, a French gentleman, to have his name removed from the register of contributories so far as regards 138 shares. He is put on the list for 588 shares; he signed the memorandum of association as holder of 588 shares, of which 138 were there stated to be paid-up shares. As to those which are not specified to be paid-up shares there is no question, and he is a contributory. But, as regards the others which appear on the memorandum of association as paid-up shares, I think he is not a contributory. Section 23. of the Companies' Act, 1862, as construed by the decisions, appears to me to amount to this. A person cannot sign the memorandum of association for shares generally and afterwards say that some, or all of them, are paid-up shares, unless the money or money's worth was actually paid by him, or on his behalf, for those particular shares; and also, if he sign the memorandum of association in respect of shares there stated to be paid-up shares when they are really not so, he will, in my opinion, be liable to pay the amount due on the shares. And the Court cannot make the distinction between one set of shares and another which does not appear on the memorandum of association, and he is, therefore, liable for all; but if the distinction is already made on the memorandum of association, and the shareholder sign in respect of 100 shares generally, and in respect of another 100 as paid-up shares, then, though he is a contributory in respect of the first 100 shares, he is not, in my opinion, a contributory in respect of the 100 paid-up shares. He has contracted for them as paid-up shares; either the directors or company had the power to enter into the contract with him, or they had not. In neither case does it appear to me that he can be made liable to calls in respect of these paid-up shares. If they had the power to issue them, he has paid-up shares in respect of which, unless by his consent, he cannot be put on the list of contributories; if they had not the power, the shares are nothing. No shareholder is deceived, because he has notice of it. The 100 shares for which he has subscribed without qualification are sufficient to satisfy the statute. But when he subscribes for paid-up shares alone, and they are not paid up, then the subscriber is liable to calls on all the shares, and will be made a contributory accordingly, because, as I observed, no distinction can be made between shares which appear on the memorandum of association to be all in the same category. Of course, he will be allowed in taking the accounts all moneys paid by him in respect of such shares, or money's worth given for them. This is not so when the contributory subscribes for a number of shares generally, and for another part as paid up; that other set are either paid-up shares, or nothing, and in neither case can the contributory be made liable in respect of them.

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STUART, V.C., July 14, 15, 16, 1868.

BLACKMORE v. THE LONDON AND SOUTH-WESTERN RAILWAY COMPANY.

38 L. J. Ch. 19; 16 W. R. 1105: decree varied, [1870] E. R. A.; 39 L. J. Ch. 713; L. R. 4 H.L. 610; 23 L. T. 504; 19 W. R. 305 (H.L.).

Lands Clauses Consolidation Act, 1845, *ss.* 127, 128.—*Surplus Lands—Right of Pre-emption—Lands within a Town, or built upon, or used for building purposes.*

COMPULSORY PURCHASE.—*In* 1861 *the London and South-Western Railway Company gave notice to the plaintiff that they required two strips of his land which were afterwards conveyed to the company. At that time, and until* 1864, *the plaintiff's property touched certain superfluous lands of the company at one corner only. In* 1864 *the company conveyed to the plaintiff certain lands, including a portion of those which he had previously sold to them. The effect of that conveyance was to bring the boundary of the plaintiff's property in contiguity to the superfluous lands. In* 1866 *the company put up for sale the superfluous lands, describing them as "freehold building land," and "well adapted for villa residences, or a terrace of houses":*—Held, *that the plaintiff had, by the act of the company, become an owner of lands immediately adjoining theirs, within the meaning of the Lands Clauses Consolidation Act*, 1845; *and, as such owner, was entitled to a right of pre-emption of the surplus lands put up for sale:*—Held, *also, that for surplus lands of a company to be within the exceptions of the Lands Clauses Consolidation Act*, 1845, *s.* 128, *as lands within a town, or built upon, or used for building purposes, such lands must be surrounded by the buildings which constitute the town; or must be actually built upon, or actually used, and not merely nitched or staked out for building purposes:*—Held, *also, upon the evidence in the case, that Teddington, in the county of Middlesex, is a village, and not a town.*

This suit was instituted, by Mr. R. D. Blackmore, of Gomer House, Teddington, in the county of Midlesex, against the defendants, the London and South-Western Railway Company, and George Clement, a purchaser of some of the superfluous lands of the company.

The questions in the case were, first, whether the plaintiff was a person whose lands, within the meaning of the Lands Clauses Consolidation Act, 1845, s. 128, immediately adjoined those of the company which they sold to G. Clement? Secondly, whether, if the plaintiff was such a person, he was entitled, under that section of the act, to a right of pre-emption of the lands sold to G. Clement? Thirdly, whether Teddington was a town within the meaning of the same section? Fourthly, whether the lands sold to G. Clement were within the town? and, fifthly, whether they were built upon or used for building purposes? By the Lands Clauses Consolidation Act, 1845, section 127, it was, with respect to lands acquired by the promoters of the undertaking, under the provisions of that or the special act, or any act incorporated therewith, but which should not be required for the purposes thereof, enacted as follows; "Within the prescribed period, or if no period be prescribed within ten years after the expiration of the time limited by the special act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands, and apply the purchase-money arising from such sales to the purposes of the special act; and in default thereof, all such superfluous lands remaining unsold at the expiration of such period, shall thereupon vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same."

And by the 128th section of the act, as follows, "Before the promoters of the undertaking dispose of any such superfluous lands they shall, unless such lands be situate within a town, or be lands built upon, or used for building

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purposes, first offer to sell the same to the person then entitled to the lands, if any, from which the same were originally severed; or if such person refuse to purchase the same, or cannot after diligent inquiry be found, then the like offer shall be made to the person or to the several persons whose lands shall immediately adjoin the lands so proposed to be sold, such persons being capable of entering into a contract for the purchase of such lands; and where more than one such person shall be entitled to such right of pre-emption, such offer shall be made to such persons in succession, one after another, in such order as the promoters of the undertaking shall think fit."

The bill in the suit stated that on the 23rd of May, 1866, the company put certain of their lands up for sale, as surplus lands, by public auction, at the London Tavern, in Bishopsgate Street. The particulars and conditions of sale were partly as follows: "The London and South-Western Railway surplus lands at Teddington, Hampton Wick and New Kingston. Freehold residences and building land. Particulars and conditions of sale of two freehold residences and twenty-eight plots of extremely valuable freehold land, immediately available for building purposes, being situate adjoining the Teddington, Hampton Wick and New Kingston Stations, on the London and South-Western Railway, within easy access of Bushey Park, Richmond Park, Kew Gardens, Hampton Court Palace and Gardens, and the river Thames; attainable at all hours of the day, by railway or omnibus, from the City and West End, and possessing frontages to excellent roads."

And, after other statements to which it is unnecessary to refer in detail, the particulars were partly as follows: "Particulars.—Building land at Teddington. . . . . Lot 9. (see Plan, *post*, p. 23) comprises a plot of freehold land, having frontages as in lot 8. (*i. e.* to the road to the station, and a private road), amounting altogether to upwards of 370 feet, and well adapted for the erection of semi-detached villa residences or a terrace of houses.

"Lot 10. (see Plan, *post*, p. 23) comprises a plot of freehold building land, having a frontage to the road of 128 feet, and suitable for the erection of villa residences or a terrace of houses.

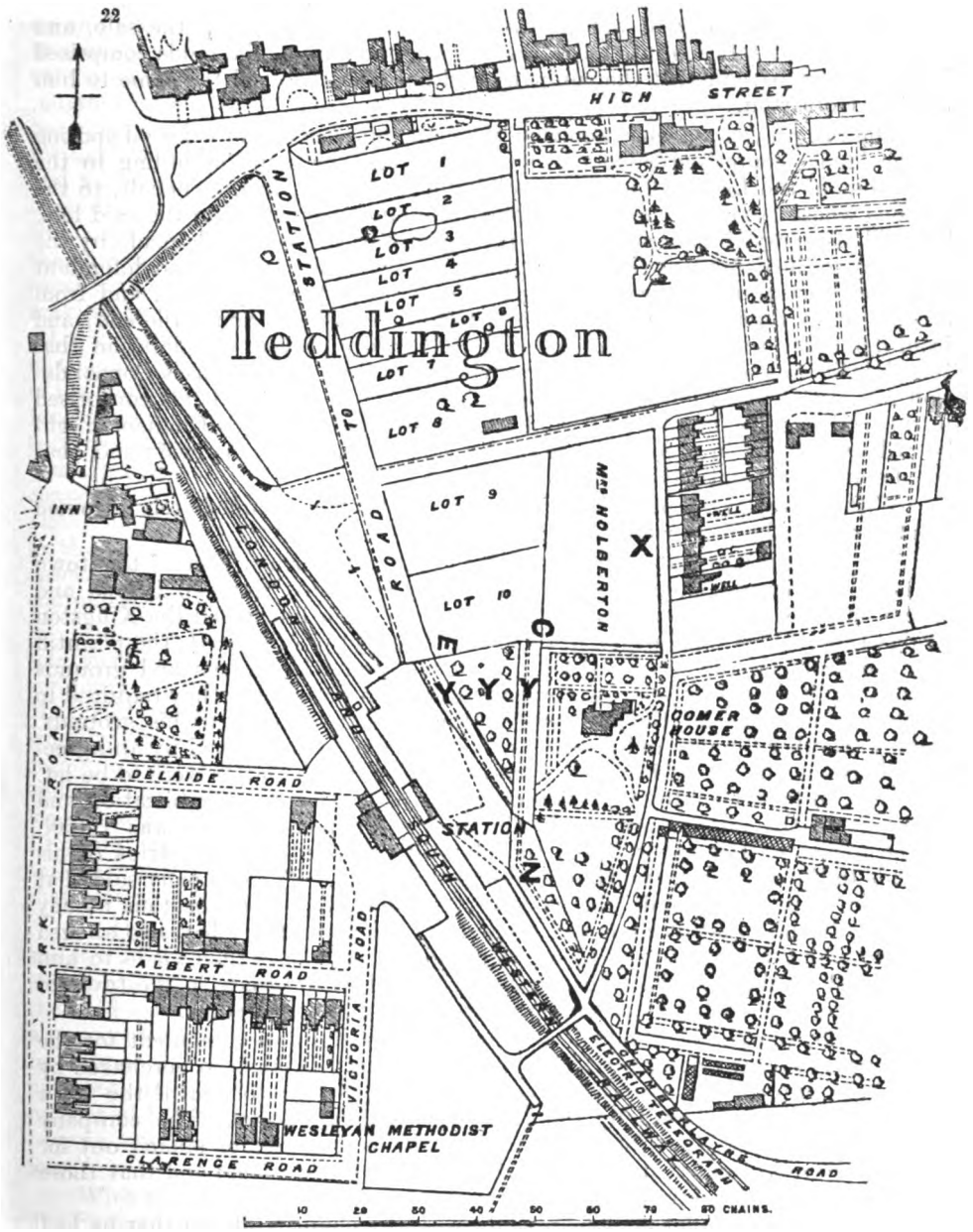
The third condition of sale was in part as follows: "It shall be assumed that all necessary persons were made parties to such conveyances (*i. e.* the conveyances of the lands to the company); that the company had full power to acquire the premises; that they are duly vested in the company; and that the company have full power to sell and convey the premises free from all rights of pre-emption, and no objection or requisition shall be made on the title, nor any evidence required in support thereof."

Before the sale was completed, but on the said 23rd of May, 1866, the plaintiff gave notice to the defendant company, and the notice was read by the auctioneer aloud at the sale, that the plaintiff objected to the proposed sale. The grounds of his objection, stated in the notice, were these: "That his lands immediately adjoined the said lots 9. and 10; that no offer to sell the said lots had ever been made to him; and that he was able and willing to purchase the same; and he claimed the right of pre-emption reserved to adjoining owners by the Lands Clauses Consolidation Act, 1845, s. 128." He also stated his intention to proceed against any parties who should disregard that notice.

The sale was, however, allowed to go on to completion, and the defendant G. Clement was declared the purchaser of lots 9. and 10, for the sum of 1,220*l.*, after which he was served with a copy of the plaintiff's notice. On the 12th of July, 1866, the company executed a conveyance of the lands, containing the covenants for title usual in such cases, to the purchaser.

Soon after the sale the plaintiff wrote to the defendant G. Clement, with respect to the right of pre-emption, claiming the benefit of it, and of the contract. The defendant, in reply, told him he had purchased the land for building purposes, and was guaranteed by the company against the plaintiff's right of pre-emption. But he offered to let him have the benefit of the contract on certain terms, to which, however, the plaintiff did not accede.

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When the lands in question were sold to the defendant G. Clement, a Mrs. Holberton was the owner of others (marked X on plan) in immediate juxtaposition to those comprised in both lots 9. and 10; but on the 12th of July, 1866, she released her right of pre-emption, as such owner, to the plaintiff.

The bill stated that the plaintiff and Mrs. Holberton were the only persons whose lands immediately adjoined those comprised in lots 9. and 10, or either of them; that the plaintiff was previously to and at the date of the sale, and now, capable of entering into a contract for the purchase of the lands comprised in lots 9. and 10; but that the company had not offered to sell the same to him or Mrs. Holberton.

The bill prayed a declaration that the company was bound before disposing of the lands, comprised in lots 9. and 10. to sell the same according to the provisions of the Lands Clauses Consolidation Act, 1845, in that behalf, to the persons whose lands immediately adjoined the lands comprised in the said lots. The bill also prayed a decree that the conveyance of the said lands made by the company to the defendant G. Clement might be set aside, and the said defendant restrained by injunction from selling or disposing of the said lands, and from digging up or excavating the same, and from erecting any house thereon, and from damaging the surface thereof. The bill finally prayed a declaration that the plaintiff was entitled, under the provisions of the Lands Clauses Consolidation Act, 1845, to a right of pre-emption in respect of the said lands comprised in the said two lots numbered 9. and 10; that the defendant G. Clement might be ordered to join in a conveyance of the said lands to the plaintiff; and that the defendants might pay the costs of the suit.

With respect to the plaintiff's allegation that his lands immediately adjoined lots 9. and 10, the facts were these:

The lands comprised in those two lots originally formed part of the town lands of Teddington, purchased by the railway company, from B. Duppa and others, in 1863, for the purposes of that portion of their line called the Kingston Bridge Line, which was opened in that year. In and prior to 1861, the plaintiff was the occupier and owner of Gomer House, and the gardens and grounds attached to it. In that year the company gave him notice that they required to purchase and take, for the purposes of their act, two strips of his grounds, making together 3 roods and 4 perches. That notice was followed by an agreement between the plaintiff and the company, whereby the latter were to be let, and were, in fact, let into possession of the strips, subject to an arbitration and award as to the purchase-money. The sum ultimately awarded was 1,160*l*. In the month of December, 1862, the plaintiff conveyed the two strips of his grounds to the company, and they paid him the 1,160*l*. The company said that that sum included not only the price of the lands, but compensation money for injury to the adjacent lands and property of the plaintiff. They also alleged that the plaintiff's claim to compensation and the payments then made to him were based on the fact that the two strips of land were situate in the town of Teddington, or were lands built upon or used for building purposes.

In 1863, the plaintiff and the company entered into an agreement for the re-conveyance by the company to him of a portion of the lands so purchased by them from him as last aforesaid, together with a further portion of the town lands, originally purchased by them for their railway works. The company alleged that at that time the aforesaid town lands were set or staked out for building purposes, and that the plaintiff had notice of that fact; and that those lands were then offered for sale.

Subsequently to that agreement, however, the plaintiff alleged that he had sundry grievances against the company, and claimed to be entitled under the company's acts to certain accommodation works and compensation, and to divers other rights not provided for by the aforesaid submission to arbitration; and a further agreement was entered into with the view of putting an end (as the company alleged) to all grounds of complaint and difference between the parties. Accordingly, an indenture, dated the 12th of August, 1864, was made

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and executed between and by the company of the one part, and the plaintiff of the other part. It recited, *inter alia*, that the plaintiff was the owner in fee simple of lands situate at Teddington, adjoining or near to the company's railway or to the land taken by the company for the purposes thereof; that he had claimed compensation from the company in respect of the damage and inconvenience which he alleged he had sustained or would thereafter sustain by the execution of the company's works, and had also required the company to make certain roads and approaches and accommodation works, for the more convenient use and occupation of the said lands; and (as will appear from the judgment, *infra*) that the plaintiff was desirous of including the lands now to be conveyed to him within the area of his pleasure-grounds. The deed then recited the agreement entered into between the parties, and what was to be, and had been, done by each of them; and Witnessed that, in pursuance of that agreement and in consideration of the premises, and of the sum of 155*l.* paid by the company to the plaintiff, he did thereby remise, release and quit claim to the company all rights, claims and demands whatsoever which he then or might at any time thereafter have against them, for compensation by reason of the making of the company's railway, or of the works in connexion therewith, or otherwise by the exercise of any of the powers of the said acts, or any or either of them, within the limits of the said lands and hereditaments, or other lands of the plaintiff near or adjacent thereto, or for or in respect of any roads, bridges, fences, approaches or accommodation works, to which he or they might be or become entitled, for the more convenient ownership, use or occupation of the same lands and hereditaments, or any part thereof. The indenture then conveyed four plots of the company's lands to the plaintiff. Three of those plots (marked Y Y Y, on plan) were described as parts of the lands purchased by the company from B. Duppa and others; and the fourth plot (marked Z) was described as "parcel of the 3 roods and 4 perches of land purchased by the company from the plaintiff, as aforesaid."

Previous to that purchase, it was said that Mrs. Holberton was really the sole owner of lands adjoining those in lots 9. and 10, for that the lands of the company themselves surrounded them on every side, except that on which Mrs. Holberton's lay. But prior also to that conveyance of the four plots of land by the company to the plaintiff, one corner of his lands had touched a corner of the lands of the company (at point C on plan), and that purchase and re-conveyance brought the boundary of the plaintiff's property into a lengthened contiguity with that of the lands comprised in the lots 9. and 10. along the line E C). Those lots, moreover, the plaintiff insisted, had, until the time of the sale of them to G. Clement, been one plot of land only, but that that plot was divided by the company for the mere purposes of the sale.

In that state of things the plaintiff contended that he was "entitled to land situate at Teddington, which immediately adjoined the lands comprised in lots 9. and 10; his said land being in immediate juxtaposition to that portion of the said lands so offered for sale which was comprised in lot 10; and that he was so entitled previously to and at the time when the said lands so advertised for sale as aforesaid were proposed to be sold by the company; that there was not then, or now, any person who was entitled to any right of pre-emption in respect of the lands from which lots 9. and 10. were originally severed; and that he was now entitled to the pre-emption of the lands comprised in those two lots."

With respect to the other questions in the case, the plaintiff contended that Teddington was not a town within the meaning of the act, but a village only; that when the company acquired lots 9. and 10. those lands were not within the ambit of a connexion of houses; that Teddington consisted of one street only, and that the lots 9. and 10. were not within it, being in fact about 540 feet from it; and lastly, that the lots were not, and never had been, built upon or used for building purposes, but had been described in certain particulars of sale in 1852 as, and in fact then were, and always had been, pasture lands.

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The company, by their answer, insisted that when they purchased the lands included in lots 9. and 10, in 1863, the plaintiff was not in fact the owner of any land adjoining thereto. The land in respect of which the plaintiff now claimed to be such an owner was separated from lot 10. by a brickwork fence, six feet high, belonging jointly to the company and the plaintiff, and kept up, according to the agreement of 1864, at their joint expense. They denied that the plaintiff was now the owner of any lands immediately adjoining lots 9. and 10, or in immediate juxtaposition to lot 10; and they also denied that he was entitled to the right of pre-emption on which he insisted. They submitted whether he could enter into a contract for the purchase of the lots 9. and 10; and said it was not true that those lots had never been offered to the plaintiff, for the company had entered into negotiations with him in respect of them in the early part of 1864. They also contended, and adduced various plans and maps, and other evidence, to shew that Teddington was a town within the meaning of the act, and contained several streets and shops of different kinds, to the S.W. of the railway, as shewn on the plan. They also insisted that the lands in question were within the town, and that those lands, together with others formerly belonging to the same owners, lying adjacent or near thereto, had been divided into sundry lots, and laid out for building purposes, in or prior to the year 1852; and had ever since been used for such purposes, and had in fact been sold as building land. In particular, in 1852 and 1853, lots 9. and 10, although referred to in the particulars of sale then published, as pasture lands were really put up for sale with other lands, as building lands; and part of such other lands was sold as building land to the National Freehold Land Society. Moreover, when the company purchased those lots in 1863, they were in use, being actually set, or staked out and offered for sale, for building purposes. The lands had been required and used by the company for the purposes of their railway station, approaches and works; and although not actually built upon, remained as they had always been, "plotted or staked out," and were now "nitched and stumped," for building purposes. They further said, that if the 127th section of the act at all applied to the case (which they denied), as the lands in question were divided by joint properties (*i.e.* by the fence aforesaid), the plaintiff was not an owner of lands adjoining lots 9. and 10, or of any part thereof; and would in any case be estopped by his aforesaid deed of release from setting up any right to the pre-emption of those lands.

The defendant G. Clement, by his answer, admitted that he was in possession of, and intended to build upon the lands sold to him. He denied the plaintiff's right to the pre-emption. He stated, however (notwithstanding the above-mentioned allegation in his correspondence with the plaintiff), that the company had not agreed to indemnify him from the consequences of his purchase, otherwise than by the ordinary covenants for title, in his conveyance.

Mr. Bacon and *Mr. Martineau* were for the plaintiff.—They stated the facts of the case, to the effect above set forth, and referred to the Ordnance Survey and an authoratative book published in 1864; and to parliamentary and other plans and documents, in support of their statements. After citing *Lord Carrington* v. *the Wycombe Railway Company* (37 L. J. Ch. 213; 3 L. R. Ch. Ap. 377), and asking for a decree in this case, identical with the one pronounced in that, they were stopped by the Court.

Sir Roundell Palmer, *Mr. Greene* and *Mr. Locock Webb*, for the defendants, the company, contended that the right of pre-emption was confined to lands acquired by a company from the landowner under its parliamentary powers. Here, however, the plaintiff set up a claim to such a right, in respect of land conveyed to him, in consequence of a private contract between himself and the company. The only way in which he attempted to bring himself within the act was by the purchase of 1864. Prior to that period the plaintiff's lands had touched those of the company at one corner only (C on plan); they did not adjoin those of the company. But the statute never was intended to enable a man to take advantage of a sale made to him of adjoining lands, and so claim

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the right to have other lands sold to him which were not originally adjoining, and were only made to adjoin by reason of his purchase. Independent of the transaction of 1864, the plaintiff could have had no sort of right of pre-emption. Of course the company could not set up a claim of their own in respect of the adjoining lands, but Mrs. Holberton could have done so. Moreover, by the 128th section the company might, where there were several adjoining owners, prefer any one they chose to the total exclusion of all others. Supposing Mrs. Holberton, who was clearly, in 1864, the sole adjoining owner, had then wished to exercise her undoubted right of pre-emption, could they have defeated her claim by selling the land to the plaintiff, and then preferring him to her? The question was one of the construction of the act; and it was plainly contrary to the whole spirit and intent of it, to permit the sales of surplus lands by the company, to introduce new claims on the part of persons calling themselves adjoining owners, which would not have existed if those sales had not taken place. It was manifest that the plaintiff had no such right of pre-emption as he claimed. Then, again, if Mrs. Holberton was entitled to that right, she could not release it to the plaintiff; for if she did not choose to exercise the right, the company was entitled to sell the lands to any one else, upon the best terms they could for the benefit of the shareholders. Moreover, independently of the circumstance of the joint fence (along the line E C) the statute, by the word "adjoining," meant "having a frontage"; and inasmuch as prior to 1864, one angle only of the plaintiff's land met that of the company, at a mere mathematical point, the plaintiff clearly was not then, and if his purchase of 1864 did not make him—as they had submitted it did not—an adjoining owner within the act, he was not now such an owner—*Moody* v. *Corbett* (5 Best & S. 859; 34 L. J. Q.B. 166; and on appeal to the Exchequer Chamber, 35 L. J. Q.B. 161; 1 L. R. Q.B. 510). That was further shewn from this: supposing that the lands in lots 9. and 10. had not been put up for sale, or sold to the defendants, but had come to be considered as lands not required by the company for their railway, then, in this case, at the end of ten years, viz., in 1877, the lands must be offered to the persons from whose property they were originally severed. It was not shewn that such persons might not be found; at all events, even assuming the plaintiff to be, in some sense, an adjoining owner within the meaning of the 127th section of the act, *Moody* v. *Corbett*, ubi supra, shewed that he must be in possession of a frontage to the lands to be allotted to him. But what extent of frontage had he in 1861, 1863 or 1864, in proportion to which these lands could be offered to him? Clearly none. They then referred to the documentary and other evidence of surveyors and others to prove that Teddington was a town within the meaning of the act, and that the lands in lots 9. and 10. were within it. They also contended that the lands having always been, and being now, ready for and adapted to building purposes, even although not actually built upon, were within the exception in the 128th section of the act.—They also cited *The Queen* v. *Cottle* (16 Q. B. Rep. 412; 20 L. J. M.C. 162), and *Coventry* v. *the London, Brighton and South Coast Railway Company* (37 L. J. Ch. 90; 5 L. R. Eq. 104), and submitted that the plaintiff's bill in this suit was founded on an entire misconception of his rights, and ought to be dismissed with costs.

Mr. C. Russell and *Mr. A. Anderson* appeared for the defendant G. Clement.

STUART, V.C.—This seems to me to be a very clear case. The plaintiff claims a right of pre-emption under the 128th section of the Lands Clauses Consolidation Act, 1845. The defendants insist that the lands in question are within one or other of the exceptions contained in that section. In that section there are excepted lands within a town and lands built upon or used for building purposes. The railway company contend that the lands in question are lands within a town; that they are lands which, although not built upon, are used for building purposes. The lands are situated near Teddington. The defendants contend that Teddington is a town. In the Ordnance Survey, in the

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authoritative book, published in 1864, Teddington is described as a small village. If that be a correct description, of course there is an end of the contention that it is a town, or that the lands in question can be considered as situated within a town. But what is the evidence adduced in support of the contention that Teddington is a town? Four or five surveyors and the solicitors of the company have brought their minds to such a condition with regard to opinion that they swear that Teddington is a town. Now, that evidence is of the sort which consists of the expression of opinion on oath, but does not state any facts. None of those witnesses in their evidence state anything which supports their opinion, except that there are a certain number of hair-dressers, shopkeepers and tradesmen of different kinds in Teddington, and that is stated with the view of shewing that Teddington, containing so many shops and tradesmen of such different characters, must be considered a town.

The fallacy of all that reasoning is made still clearer by the evidence which the defendants themselves produce: by the maps, some taken from the Ordnance Survey, and others being delineations made for the purposes of this suit. No man of ordinary apprehension, I think, can look at those maps and say that Teddington is in any respect to be considered a town. My opinion therefore is, that Teddington is properly described in the Ordnance Survey as a village. But if it were a town it would be necessary for the company to shew that the lands in question are within the town. Now I do not depart, and I see no reason for departing, from what I said in *Lord Carrington's case*. Nothing was said by either of the Lords Justices on appeal, nor in any of the other cases that were cited in the Courts of common law, in any degree inconsistent with this: that for the purposes of the Lands Clauses Consolidation Act, when the question arises whether land is within a town that land cannot be considered within a town which is not encompassed by the buildings which constitute the town. In this case it is impossible to say that this land and the adjoining lands were encompassed by any buildings at all. It is outside the town, and outside the land, towards, I suppose it would be, the south and west, which is open country. My opinion therefore is, upon the construction of the act of parliament, that the lands in question are not within a town; that even if Teddington were a town the lands are not within it; in fact, they are not within the village, and therefore not within that exception in the 128th section.

But it was sought to bring these lands within the other exception, which speaks of lands used for building purposes. The evidence on that part of the case is most extraordinary. It shews, I think, to what extent, where the matters in controversy relate more to questions of opinion than of fact, things may be carried. The lands were exposed for sale by the railway company as freehold lands immediately available for building purposes. "Available" refers to the future, and does not in any degree countenance the notion that at the time of their exposure the lands were described or considered as lands used for building purposes. The description of one part of the lands is this: "A plot of freehold building land, well adapted for the erection of semi-detached villa residences or a terrace of houses." "Freehold building land,"—that is what it must be contended to be. If it be building land it is land used for building purposes. By freehold building land, described in the terms in these particulars of sale, I understand, not land used for building purposes, but land which it is considered desirable to be used by the purchaser for the purpose of building. Witnesses swear that these lands were, in the year 1852, advertised for building purposes, advertised as lands sold with a view to building. There is nothing in that to shew that they were at that time used for building purposes. It was also said that they were at a later period staked out, that is what is technically called "nitched and stumped," and that nitching and stumping—that is, delineating on the surface of the ground what shall shew the particular parts of it—the lots and divisions in which it is proposed to be sold—that that process of nitching and stumping is using the lands for building purposes. I am of opinion that it is impossible, consistently with any rational view of the expression

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"used for building purposes," to say that what is done preparatory to making land capable of being used for building purposes is the use of it for those building purposes. Therefore, that contention seems to me entirely to fail.

Next it was said by the company, that these lands are not "immediately adjoining lands" within the meaning of the 128th section of the Lands Clauses Consolidation Act. The persons to whom that section directs the lands to be offered, and to whom it gives a right of pre-emption, are the several persons whose lands shall immediately adjoin the lands proposed to be sold. First, it was said that the plaintiff's lands adjoin only by means of a purchase, which he made in the year 1864, of those lands which make his property to adjoin the lands proposed to be sold along the whole length of those lands upon one side. Some attempt—a very faint one indeed, and hardly worth notice—was made to construe the words of the conveyance by which the plaintiff bought the land, into a renunciation of his right of pre-emption. There is nothing to countenance that argument at all, because, properly read, the words of the release by the plaintiff are only a release of all right of compensation in respect of any other exercise of the compulsory powers under the act of parliament. My opinion is, that, whether by purchase from the company or anybody else, if at the time when this section of the act comes into operation it is necessary for the company to consider who are the owners of lands immediately adjoining theirs—if the company have at that time, by sale and contract, made a person in the situation of the plaintiff to be an adjoining owner, he is certainly such an adjoining owner within the meaning of the act.

But the case would not rest there, because it is necessary to consider why the plaintiff bought the lands in 1864. The plans shew that one corner of the land which he bought in that year touched and came in contact with and therefore joined at that corner (see C on Plan) his own land, and therefore he was naturally desirous of purchasing it. His own pleasure-grounds came up to that corner, and it is shewn on the face of the conveyance that the purpose of his purchase was to include this ground in his own previously-existing pleasure-ground. The language of the conveyance is this: after describing the four particular parcels which he purchased, it is said that these lands—including this piece, the corner of which touched his land—"which now form part of, or are intended to form part of, the garden and pleasure-grounds attached to the residence of Mr. Blackmore"—that is, the plaintiff—"or the road leading thereto." But why did the company sell to Mr. Blackmore without offering the lands to Mrs. Holberton? It he was not an adjoining owner, they had no right to sell to him without first offering them to Mrs. Holberton; and it seems to me to be their own act in dealing with him. If Mrs. Holberton was not the adjoining owner, there must have been some one who was such an owner. But it is no matter whether it was Mrs. Holberton or anybody else, because if the corner of the plaintiff's land touching the corner of the superfluous land did not make him an adjoining owner, how did he come to be a purchaser at all? They had no right to sell to him without offering to sell to some one. By their own act they regarded him as an adjoining owner, inasmuch as by their conveyance they so treated him.

But it was said, on behalf of the company, that that point of junction, where the one corner of the plaintiff's land touched the corner of the company's lands, that that was a mere mathematical point. The learned counsel who said that must have a very different notion of mathematical points from what I have, if he considers that where two corners of lands touch each other, that makes a mathematical point. That is the very sort of point which it is not. Contact is junction. Lands which join, are adjoining lands; and in my opinion, if this case had depended upon the question whether the corner of the one plot of land touched the corner of the other, they are clearly adjoining lands.

It is proper, however, to notice the case of *Moody* v. *Corbett*. The Court of Exchequer Chamber had occasion in that case to consider the construction not of the 128th section of the act, but of the 127th, which is a very different thing.

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The 127th section says that "the superfluous lands shall vest in and become the property," in certain events, and not being sold, "of the owners of the lands adjoining thereto in proportion to the extent of their lands respectively adjoining the same," in proportion to the extent of their lands. Now, it is very unfair, I think, to the Court which pronounced that decision, to read it as referring to anything else than the case then before it. But what was the case then before it? There being in that case a line of frontage, it appeared that all the lands ran along the line of frontage, and the question in the case arising as to the proportions, the Court held that it was to be determined by the length of frontage. The Chief Justice Erle, in his judgment, supposed the extent of the frontage in question to be twenty feet, and that each of the proprietors was entitled, one to ten feet, and the other to ten feet, then that, he thought, was the way of ascertaining the due proportions. But there is no question here of ascertaining the proportions; a question which is obviously one of very great difficulty. The proportions to be ascertained are the proportions to the extent of the lands respectively adjoining thereto. No question whatever of extent occurs here. Therefore that decision, which evidently did justice in determining the proportions, and the principle upon which in that case they were to be settled, seems to me in no respect to govern the present one This is a case in which, to my mind, the plaintiff has clearly made out his right of pre-emption, and in which the company have entirely failed to shew that they can bring the lands in question within any one of the exceptions contained in the clause of the statute. If there were a doubt upon it—I entertain none whatever—but if there were any, I think it necessary to make this observation: the clause of the act in question is one that confers a benefit upon landowners from whom land has been compulsorily taken; and if ever a doubt should in any case occur, that doubt ought to be solved by a construction of the clause favourable to the rights of those landowners for whose benefit it was introduced into the act.

The proper decree to be made in this case is, I think, one that will be in terms almost the same as that which was pronounced in *Lord Carrington's case*; adding liberty to apply, in order to ensure the assistance of the Court should any difficulty arise in respect of that. The costs of this case must go as did those in that of Lord Carrington, and they must be paid by the defendants.

MALINS, V.C., Nov. 3, 1868.

MICHAEL *v.* FRIPP.

38 L. J. Ch. 29; L. R. 7 Eq. 95; 19 L. T 257; 17 W. R. 23: further proceedings, [1870] E. R. A.; 18 W. R. 423 (V.C.).

Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 99.—*Infant Shipowner—Guardian—Invalid Mortgage.*

INFANT. SHIPPING.—*The guardian of an infant shipowner has no power, under the 99th section of the Merchant Shipping Act* (17 & 18 *Vict. c.* 104), *to mortgage or sell a ship of which such infant is the owner.*

This bill was filed by John William Michael, then an infant, by his grandfather and next friend, for an account in respect of various transactions that had taken place with reference to a ship called the *Bloomer*; and the main question in the cause was as to the validity of a mortgage of the ship made by the plaintiff's guardian under the following circumstances:

In the year 1864, Jacob Michael, the father of the plaintiff, was the owner of the *Bloomer*; and in the same year, for the purpose, as it was alleged, of remunerating the plaintiff for his services as clerk in his father's office, the father gave him this ship by way of advancement, the value of it being between

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2,500*l.* and 3,000*l.* The plaintiff, however, was not registered as owner until the 9th of September, 1865, when he was described on the register as a minor.

On the 5th of May, 1865, the father was appointed guardian of the plaintiff's estate by order of the Master of the Rolls, and thereupon he assumed the control and management of the ship on behalf of the plaintiff, together with two other vessels, of which he also acted as manager. In the month of August, 1865, he entered into negotiations with Messrs. W. Fripp & R. Spear Begbie, merchants, for the chartering of the three ships for a voyage, on condition of their being properly repaired, Messrs. Fripp & Begbie stipulating in the case of the *Bloomer* for a very extensive outlay upon that ship; and, in order to provide for the outlay which Fripp & Begbie required to be made, it was arranged that they should advance from time to time the moneys wanted for the purpose, taking a mortgage of the ship to secure their account current for the moneys so advanced. Accordingly, on the 11th of November, 1865, Jacob Michael, avowedly acting as guardian of the plaintiff, executed a mortgage of the ship to Fripp, as trustee for his firm, to secure the balance of the moneys which should ultimately be found due to them upon their account current with the ship; and the mortgage was registered in the port of London.

On the 13th of December, 1865, Fripp transferred the mortgage to the Maritime Credit Company, as collateral security for a sum of 2,000*l.*

A large expenditure was incurred in the repairs of the *Bloomer*; and on the 13th of January, 1866, Fripp & Begbie, requiring further security for the disbursements made by them for such repairs, obtained from Jacob Michael a bill of sale of the ship to Fripp as trustee for the firm, which was also executed by Jacob Michael as guardian of the plaintiff, and was duly registered in London. This bill of sale was intended to secure the advances made by Fripp & Begbie to the amount of 3,000*l.* On the 24th of January, 1866, Fripp & Begbie cancelled the transfer to the Maritime Credit Company; and Fripp, as registered owner of the *Bloomer*, executed a fresh mortgage of the ship to the company to secure the sum of 3,000*l.*

The ship and freight had been insured by Fripp & Begbie to the amount of 4,800*l.*, and policies of insurance on the ship, amounting to 4,000*l.*, were deposited by them with the Maritime Credit Company as collateral security for the moneys due to the company.

On the 24th of March, 1866, the ship foundered at sea, and was wholly lost. The insurance moneys were duly paid, 4,000*l.* to the Maritime Credit Company, and the remaining 800*l.* to Fripp & Begbie.

Disputes then arose between Jacob Michael on the one hand, and Fripp & Begbie, on the other, as to the amount advanced for fitting out the ship and the moneys expended thereon, Fripp & Begbie charging the plaintiff with more than 5,000*l.* for moneys advanced for the ship, while Jacob Michael claimed to be paid out of the moneys received on the policies a sum of 2,000*l.* for disbursements made by himself. This controversy led to the filing of the present bill for an account against Fripp & Begbie and the Maritime Credit Company.

Shortly afterwards, Fripp & Begbie executed a deed of inspectorship for the benefit of their creditors.

The plaintiff had come of age since the filing of the bill, and now adopted the suit. The contention on his part was, that Jacob Michael had no power, as guardian, to effect a valid mortgage of the ship. It appeared that in all the transactions the fact of the plaintiff's minority and the character in which his father acted was stated. The plaintiff's case, therefore, was that Fripp & Begbie had full notice of the capacity in which Jacob Michael acted, and that the Maritime Credit Company having like notice, could acquire no better title than Fripp & Begbie; consequently, the defendants could claim nothing against the moneys arising from the policies of insurance, except in respect of such sums as had actually been laid out in increasing the value of the ship.

Mr. Cotton and *Mr. Hunter*, for the plaintiff, contended that the mortgage and bill of sale were invalid. The 99th section of the Merchant Shipping Act,

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1854 (17 & 18 Vict. c. 104),[1] was never intended to give a guardian power to sell or mortgage a ship. It merely applied to formal acts that might be necessary on the infant's behalf, but did not in any way alter the law with respect to the power of an infant to deal with his property, or that of a guardian to make away with it. Fripp & Begbie had full notice of the character in which Jacob Michael dealt with them, and the Maritime Credit Company had the same. But if the company had not, Fripp was improperly on the register; and being so, could give no title to any one else, for the registration does not confer an absolute title at law, unless the mortgage or bill of sale itself is actually valid—*Orr* v. *Dickinson* (Johns, 1; 28 L. J. Ch. 516). This mortgage and bill of sale, therefore, was, in each case, a mere nullity, and the registration of them useless.

Mr. Everitt, for the defendant Jacob Michael.

Mr. Westlake for the defendants Fripp & Begbie and the trustees of the inspectorship deed.

Mr. Glasse and *Mr. Daly*, for the defendants, the Maritime Credit Company, insisted that it was the express object of the 99th section to give the guardian absolute control over the ship, the property of his infant ward; the whole spirit and policy of the act being to render ships easily transferable from hand to hand. The section in question came under a general head of "Registrations, Mortgages, &c.," and clearly applied to this very case. But if the mortgage was bad, the company, at any rate, had not sufficient notice of the circumstances under which it was executed. The real owner of the ship was the father, and this was the father's suit, and considering his conduct in the matter the Court ought to give him no indulgence.

Mr. Cotton replied.

MALINS, V.C.—The transactions before the Court in this case are of a very remarkable character, and I should have been glad if I had felt myself warranted in coming to a different conclusion from that at which I have been compelled to arrive. It appears that in 1864 Jacob Michael gave the ship to his son, when he was eighteen years old, by way of advancement in life; but it was not until September, 1865, that the son's name was put on the register, and then he was described as a minor. Now, a ship is property of a peculiar kind, and it is clear that nothing can be more inconvenient than for a minor to be the owner of a ship, unless there be some person having complete power to represent him for the sale or mortgage of such a mercantile commodity. I can feel no doubt in this case that the intention of the father in making over this ship to his son was, that the father should have the same control over it as if there had been no such gift. Accordingly, when he wants money, he mortgages the ship himself; and though this is in form and name the suit of the son, it is in substance the suit of the father; and I cannot but regret that when unable to perform his own obligations he should put his son forward to claim the ship as his own. But the gift to the son is not impeached; the ownership of the son is admitted, and there could be no mistake about it, because the ship was registered in the name of the son as a minor. The transfer to Fripp & Begbie was made by the father as guardian of the infant, and Fripp & Begbie knew that Jacob Michael's title was that of guardian. *Orr* v. *Dickinson* does not apply here, because there is no conflict, as there was in that case, between the real and apparent owners; but that case shews that though the name on the register is *prima facie* evidence, it is not conclusive, and that the real ownership must be regarded, and not the

(1) Section 99. is as follows: "If any person interested in any ship or any share therein is, by reason of infancy, lunacy, or other inability, incapable of making any declaration or doing anything required or permitted by this Act to be made or done by such incapable person in respect of registry, then the guardian or committee, if any, of such incapable person, or, if there be none, any person appointed by any Court or Judge possessing jurisdiction in respect of the property of incapable persons, upon the petition of any person on behalf of such incapable person, or of any other person interested in the making such declaration or doing such thing, may make such declaration, or a declaration as nearly corresponding thereto as circumstances permit, and do such thing in the name and on behalf of such incapable person; and all acts done by such substitute shall be as effectual as if done by the person for whom he is substituted."

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apparent. Here, however, both are identical. Fripp & Begbie, therefore took with notice that they had only such title as the guardian of an infant could confer, and the Maritime Credit Company are in the same position, with the same interest as that of Fripp & Begbie; and the question is, what is the right of the guardian of an infant in respect of a ship of which the infant is the owner?

It was strongly urged that the 99th section of the Merchant Shipping Act, 1854, gives to such a guardian the absolute control over the ship, with a liability to account. On the other hand, it is said that the act has no application to the case of a sale or mortgage by a guardian, but extends only to formal acts of a less important character. There can be no doubt that the guardian of an infant's estate has considerable powers over it. He must do all acts necessary to preserve the infant's estate; he must keep the property in repair, and do what is needful for that purpose. In the case of a ship, therefore, it would be very convenient, according to mercantile usage, that the guardian should have the power of mortgaging it to the amount necessary to defray the repairs. But if it had been the intention of the legislature to give such an extensive power, we should have expected to find it in clear language, and nothing would have been easier than to have said that the guardian of an infant, or the committee of a lunatic, should have power to sell or mortgage, or otherwise deal with a ship, the property of such infant or lunatic, as the owner might have done if he had been of full age or under no disability. But the language of the act does not point to anything of the kind. The section in question relates to minor and comparatively unimportant acts. With every inclination, therefore, to put an interpretation upon the act which would enable a guardian to dispose of a ship when necessary, I am bound by the restricted language of the section to come to the conclusion that it does not authorize the guardian of an infant owner of a ship either to sell or mortgage it.

The securities, therefore, are invalid, and the plaintiff is entitled to a decree; but the defendants are entitled to a lien for the increase in the ship's value by means of the money expended in improvements, and that is the limit of their right. Considering the conduct of the plaintiff's father and the circumstances of the case, I shall give no costs on either side.

GIFFARD, V.C., Nov. 23, 24, 1868.

In re ORIENTAL COMMERCIAL BANK (LIMITED); *Ex parte* ALABASTER.

38 L. J. Ch. 32; L. R. 7 Eq. 273; 17 W. R. 134.

In re London and Northern Insurance Corporation; Stace and Worth's case, [1869] E. R. A.; L. R. 4 Ch. 682; 21 L. T. 182; 17 W. R. 751 (L. JJ.). Approved, *In re Empire Assurance Corporation; Dougan's case*, [1873] E. R. A.; 42 L. J. Ch. 460; L. R. 8 Ch. 540; 28 L. T. 649; 21 W. R. 495 (L. JJ.).

Company—Contributory—Void Agreement.

COMPANY.—*Where an agreement for an amalgamation between A. and B. companies was declared void and set aside by the Court*:—Held, *that a shareholder in A. company, whose name had, in pursuance and on the faith of the void agreement, been placed by the companies, without communication to the shareholder, on the register of B. company, was entitled, as against the creditors of B. company, to have his name struck off the list of contributories of that company, though an order for the winding up of B. company had been made.*

This was an application on the part of Mr. Alabaster to have his name struck out from the list of contributories of the Oriental Commercial Bank.

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Mr. Alabaster was, in March, 1865, a shareholder in the Financial Corporation. Between that corporation and the bank an agreement for an amalgamation was in that month entered into, which it was intended should be carried out throught the medium of a voluntary winding-up of the corporation. The basis of the amalgamation was agreed to between the directors of the corporation and the bank on the 24th of March, 1865. Notice was sent to the shareholders of the corporation on the 27th of March. On the 12th of April, 1865, the basis of the agreement was assented to at a meeting of the shareholders of the corporation. On the 9th of May, 1865, there was a second meeting, and on the 17th of May, 1865, a deed intended to bind the corporation and the bank was executed, founded on the terms and basis which had been agreed to. On the 6th of June, 1865, a circular, in the following terms, was sent to all the shareholders of the corporation, amongst others to Mr. Alabaster, from the secretary of the corporation: " Sir,—I am instructed by the liquidators to request that you will, at your early convenience, transmit to this office your present share-certificates in order that a proper requisition may be made, and the certificates for exchange in the Oriental Bank (Limited), may accordingly be prepared. Annexed is the form requiring your address, date and signature to accompany your returned certificates."

In answer to that, Mr. Alabaster filled up and returned to the liquidators of the corporation the inclosed form, which was in the following terms:

" Gentlemen,—I beg herewith to inclose to you my certificates, representing 100 shares in your company, in exchange for which I beg you will obtain certificates for the corresponding number of shares in the Oriental Commercial Bank (Limited), or say one share of the latter for every three of your company."

On the 9th of September, 1865, the liquidators of the corporation received certificates of shares from the bank in respect of Mr. Alabaster's shares, and Mr. Alabaster's name was placed on the share-register of the bank as a shareholder; but he was not informed of the fact until August, 1866.

In February, 1866, the directors of the bank issued a circular announcing a dividend of 10*l.* per cent. on the bank shares for the last six months. This dividend was not paid to Mr. Alabaster, but was credited in the books of the bank to the liquidators of the corporation.

On the 12th of July, 1866, the bank was ordered to be wound up under supervision. Mr. Alabaster applied to have his name removed from the share-register of the bank in January, 1867.

The deed of the 17th of May, 1865, and the terms and basis on which it was founded, were the subject-matter of a suit instituted by a Mr. Clinch, on the 9th of November, 1865, on behalf of himself and the other shareholders in the corporation. A decree was made in that suit by the Lord Justice Page Wood, then Vice Chancellor, on the 20th of February, 1868. The case is fully reported in *Clinch* v. *the Financial Corporation*, 37 L. J. Ch. 281. It is sufficient to state here that his Honour held that the agreement for amalgamation was *ultra vires*, and not binding on any of the members of the corporation. That decree was on the 6th of November, 1868, affirmed by the full Court of Appeal *ante*, p. 1.

Mr. Mellish, *Mr. Kay* and *Mr. Renshaw*, for Mr. Alabaster.—This case stood over until *Clinch* v. *the Financial Corporation* (ubi supra) was decided; and the question now is, what is the position of those shareholders in the Financial Corporation who assented to the amalgamation between the corporation and the bank. As between themselves and the bank they have, no doubt, a right to be struck off. That was decided in *Clinch* v. *the Financial Corporation* (ubi supra). We say that as between himself and the creditors of the bank Mr. Alabaster has also a right to be struck off. There was no contract between Mr. Alabaster and the bank; no correspondence passed between them, and Mr. Alabaster never in fact held himself out to the creditors of the bank as a shareholder. Where an act *ultra vires* of a company has been committed you must fix the shareholders with real knowledge of all the facts,

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or they are not liable—*Downes* v. *Ship* (37 L. J. Ch. 642; 3 L. R. H.L. C. 343); *Spackman* v. *Evans* (37 L. J. Ch. 752; 3 L. R. H.L. C. 171). Mr. Alabaster had no means of knowledge of the real facts of the case, and was not even aware that he was on the register of the bank until August, 1866. In *Pellatt's case* (36 L. J. Ch. 613; 2 L. R. Ch. Ap. 527), it was held that an agreement to take shares on special conditions which were *ultra vires* of the company, was not binding on either party. Here the whole agreement between the corporation and the bank has been declared void; that being so, Mr. Alabaster, who entered into the contract, if he contracted at all, on the faith of the void agreement, must be entitled to have his name struck off the list of contributories.

Sir R. Palmer, Mr. Druce and *Mr. Macnaghten*, for the official liquidator of the bank.—This application is too late. It was not made till after the bank was being wound up—*Lawrence's case* (36 L. J. Ch. 490; 2 L. R. Ch. Ap. 412); *Elkington's case* (36 L. J. Ch. 593; 2 L. R. Ch. Ap. 511); *Sewell's case* (3 L. R. Ch. Ap. 131). Besides, Mr. Alabaster must be fixed with knowledge of the position he was in. He must be taken to have known that Mr. Clinch had filed his bill.

Mr. W. M. James and *Mr. Eddis*, for the creditors' representative.—This case is entirely governed by the decision of the House of Lords in *Oakes* v. *Turquand* (36 L. J. Ch. 949; 2 L. R. H.L. C. 325). There was, in fact, a separate contract between Mr. Alabaster and the bank.

[GIFFARD, V.C.—I have heard nothing to shew me that Mr. Alabaster could enforce the contract against the bank.]

He had a perfect legal title to the shares. He could have sold them and made a good title to them. He authorized the bank directors to put his name on their share-register, and being so situated when the order to wind up the bank was made, he cannot now escape from his liability to the creditors of the bank.

Mr. Mellish, in reply.—Mr. Alabaster never agreed to become a member of the bank within the meaning of section 23. of the Companies Act, 1862. The only agreement was between the corporation and the bank. There is no privity of contract between Mr. Alabaster and the bank. This makes the substantial difference between this and all the cases cited against us. The bank was never bound, and would now successfully repudiate Mr. Alabaster's claim to be put on the register if it were in a flourishing state.

GIFFARD, V.C.—After stating the facts and referring to the judgments in *Clinch* v. *the Financial Corporation*, said—The general scope of the arrangement which was set aside was a sale of the good-will and assets of and an exchange of the shares in the corporation, 75,000 in number, for 25,000 shares in the bank, with superadded conditions and provisions, which, together, rendered it impossible to carry out the arrangement piecemeal. It was essential that the whole 75,000 shares should be exchanged for the 25,000, and the other conditions and provisions complied with and carried out, otherwise the whole must fail. This was never done, and the entire arrangement was set aside by the decree referred to. Mr. Alabaster however assented to the intended amalgamation. Now the most material documents as affecting Mr. Alabaster personally are, first, the requisition of the 6th of June, 1865, and his answer; secondly, the report and balance-sheet of the 22nd of February, 1866; and thirdly, the certificate handed to the liquidators and retained by them. Sir Roundell Palmer also read some communications between the manager of the bank and the liquidators, but unless the facts I have stated and the documents I have mentioned as most material afford sufficient grounds for holding Mr. Alabaster to be a contributory, his application must succeed.—[His Honour read the circular of the 6th of June and Mr. Alabaster's answer, and continued]—Then there was the circular of the bank directors of February, 1866; that circular was to this effect: "The directors have much pleasure in reporting that the profits of the bank for the six months ending the 31st of December last, after

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payment of all charges, amount to a sum equal to 23*l*. per cent. per annum on the amount of paid-up capital. The directors now declare an interim dividend of 10*l*. per cent." The end is, "The directors would remind the shareholders that this result has been obtained without the assistance of the additional capital of 125,000*l*. shortly falling due from the Financial Corporation. This sum when received and employed in extending the business of the bank, must tend still further to consolidate and strengthen its position as well as augment its future profits." Then there is the balance-sheet, which shews the items, corresponding in fact with what was contained in the amalgamation which was intended to be carried out. Then there is the certificate of shares, and the certificate of shares has this important clause in the margin, that it is "for account of the Financial Corporation (Limited) in liquidation, subject to the covenants of May 17th, 1865." That therefore, of course, is distinctly referring to the deed of amalgamation.

Every one of these documents, and everything that took place, must necessarily be referred to the deed, and the arrangements on which it was founded. The requisition as to the certificates and the handing them in was consistent with this; so was the special form of the certificates; so was the balance-sheet; so was the mode in which the dividends of 10*l*. per cent. were dealt with; for though declared, they were not paid, but carried over for the account of the Corporation on the whole 25,000 shares. The registration of Mr. Alabaster's name was not communicated to him; everything that was communicated was consistent with the intended completion of the amalgamation as one entire transaction. No certificates were handed to Mr. Alabaster, nor was he in a position to insist on their being so handed to him. No allotment was made to him; no dividend was paid to him; nor was he ever entitled to receive any. He did not know his name was on the register before August, 1866. That was after the winding-up. He did not believe himself to be a shareholder in the bank; he entered into no separate agreement or negotiation with the bank; all that took place was part and parcel of the amalgamation, originating from and based upon it. That amalgamation he never could have enforced against the bank or the bank against him. He had not the power to affirm or carry it out. The arrangements on which it was founded were void, and not voidable merely; and this being so, I am of opinion that what has been said as to *Oakes's case*, *Ship's case*, and *Lawrence's case* has no application. In the first of those cases there was an agreement with the individual which he could affirm, which was binding until he disaffirmed it, and which he did not disaffirm previously to the winding-up. In the other cases it was in the power of the individual to adopt and insist on, and obtain the benefit of what was done, and enforce his contract against the company, and an adoption, arising from what he did or neglected to do and abstained from doing, was held to be the result of his conduct. There is a wide difference between a voidable and a void transaction. If the transaction be void, there can be no contract. In this case nothing was done or took place but what was part and parcel of the void amalgamation; nothing transpired from which Mr. Alabaster ought to have known that his name was on the register, or which could be a ground for imputing that knowledge to him. He gave no authority to any one to place it there; the placing it there was not justifiable. The liquidators rightly retained the certificates, for they referred to the deed of amalgamation, and were part of that uncompleted transaction. Mr. Alabaster did not individually contract to become a shareholder, neither did he do anything that estopped him from denying that he was one. For these reasons, therefore, I am of opinion that his name ought to be taken from the list of contributories.

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MALINS, V.C., Nov. 4, 1868.

BUTLER *v.* CUMPSTON.

38 L. J. Ch. 35; L. R. 7 Eq. 16; 19 L. T. 274; 17 W. R. 24.

Followed, *Pike* v. *Fitzgibbon*, [1880] E. R. A.; 49 L. J. Ch. 493; 14 Ch. D. 837; 42 L. T. 525; 28 W. R. 667 (V.C.): reversed, [1881] E. R. A.; 50 L. J. Ch. 394; 17 Ch. D. 454; 44 L. T. 562; 29 W. R. 551 (C. A.). Not applied, *Hale* v. *Sheldrake*, 1889, 60 L. T. 292 (Ch. D.).

Trust and Trustee—Married Woman—Savings out of separate Estate—Restraint on Anticipation—Liability for Calls on Shares—Trustees's Indemnity.

HUSBAND AND WIFE. TRUST AND TRUSTEE.—*A married woman, having property settled to her separate use with a restraint against anticipation, and having separate property not subject to such restraint, induced one of her trustees to apply for, and accept in his own name, certain shares in a joint-stock banking company, upon the undertaking that she would pay for them out of the savings of her separate income. The bank shortly afterwards failed, and the trustee was made a contributory and paid calls in the winding-up*:—Held, *that he was entitled to indemnity out of such part of the separate estate of his cestui que trust as was not subject to the restraint against anticipation.*—Held, *also, that a fund representing savings out of the separate income which she had from time to time, partly before and partly after the transaction, invested in the names of her trustees, but without their knowledge and without any express declaration of trust, was available for the indemnity.*

Mr. Cumpston, on her marriage, in 1858, settled certain property, comprising fifty-five shares in the Leeds Banking Company, upon trust for her separate use for life, without power of anticipation, and after her death as she should by will appoint; but in default of appointment, upon trust to pay to her husband, in case he should survive her, an annuity of 500*l.* for his life, with an ultimate limitation for her next-of-kin. The shares were transferred into the name of the plaintiff, as one of the trustees of the settlement.

In June, 1864, the plaintiff accepted an allotment of eleven new shares in the company; such allotment being made in respect of the fifty-five shares already standing in his name. In the following September the bank failed. The plaintiff was placed on the list of contributories in the winding-up,[1] and paid calls to the amount of 110*l.* upon each share.

In the suit of *Sheriff* v. *Butler* (14 L. T. 510), instituted shortly after the winding-up by Mr. Sheriff, the second trustee (who had from the first refused to allow any of the shares to stand in his name), Vice Chancellor Kindersley held that the corpus of the trust funds was liable for the calls on the fifty-five original shares; but that, by reason of the restraint against anticipation, no part of the settled property could be resorted to for indemnity in respect of the eleven new shares. It appeared, however, that Mrs. Cumpston had saved large sums out of her separate income, the bulk of which, amounting to about 1,300*l.*, had been from time to time invested by her in the names of the trustees of her settlement, but without their knowledge, and without any communication on her part of an intention to settle it or place it out of her own control.

The plaintiff accordingly filed the present bill against Mrs. Cumpston and her husband, praying to be indemnified out of such parts of her separate estate as were not subject to the restraint against anticipation for the sums of money paid by him in respect of the eleven new shares.

The evidence went to shew that the plaintiff applied for the shares at the

(1) The circumstances attending the allotment of the new shares, and the subsequent failure and winding-up of this Bank, will be found at length in the report of *Dobson's case* (35 L. J. Ch. 75, 307; 1 L. R. Ch. Ap. 231), and *Ex parte Matthewman* (36 L. J. Ch. 90; 3 L. R. Eq. 781).

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instance of Mrs. Cumpston, and accepted them solely on her account. It appeared that certain parts of the formal letter of application were filled up in her handwriting, and that at the time of application she expressly intimated to the plaintiff that she had a sum of 351*l.* deposited in her name at the bank, with which she desired to purchase the shares at the price offered—viz., 30*l.* each. No payment, however, was ever made by her in respect of the shares, and the plaintiff's claim now amounted to 1,540*l.*, being 330*l.* paid upon the original allotment and 1,210*l.* for the subsequent calls.

Mr. Glasse and *Mr. Dunning*, for the plaintiff.—The mere investment of these savings by Mrs. Cumpston in the names of her trustees did not alter their character or make them subject to the trusts of the settlement. She never communicated any intention of settling the fund, but retained the absolute *jus disponendi* to herself, free from the restraint against anticipation. The acceptance of the shares was manifestly done by her express desire and for her sole benefit. She contracted to pay for them out of a specified sum then in her hands, and by that obligation she became liable for all consequential loss, as she would have been entitled to all the advantage had the investment resulted, as she then believed it would result, in a large profit. So far, therefore, as it can be reached, her separate estate is liable to indemnify the plaintiff, and for this purpose any funds representing the savings out of her separate income, and still under her control, are available. As to the capacity of a married woman to bind her separate estate, the learned counsel referred at length to the judgment of Lord Justice Turner in *Johnson* v. *Gallagher* (3 Ge Gex, F. & J. 494; 30 L. J. Ch. 298); and the decisions of Kindersley, V.C., in *Matthewman's case* (36 L. J. Ch. 90; 3 L. R. Eq. 781); and of Wood, V.C., in *Bolden* v. *Nicholay* (3 Jur. N.S. 884).

Mr. Cotton and *Mr. Kekewich*, for Mr. and Mrs. Cumpston, cited *Vaughan* v. *Vanderstegen* (2 Drew. 363; 23 L. J. Ch. 793), and *Blachford* v. *Woolley* (2 Dr. & Sm. 204; 32 L. J. Ch. 534), and contended that there was no obligation attaching to the separate estate in respect of the new shares. The authorities cited were not in point. In *Johnson* v. *Gallagher* (ubi supra), Lord Justice Knight Bruce took a different view from Lord Justice Turner, and a material point in that case was, that the husband and wife were living separately. In *Matthewman's case* (ubi supra) the shares were standing in the lady's own name. At all events Mrs. Cumpston's liability, if any, could only attach to such money as was standing in her own name; the savings out of her separate income, which had been invested by her in the names of the trustees, were an accretion to the settled property, and subject to the trusts of the settlement and the restraint against anticipation, and could not be applied for the purpose of the indemnity.

Mr. Bagshawe appeared for Mr. Sheriff, the other trustee.

Mr. Dunning was heard in reply.

MALINS, V.C. (after stating the facts) said—As to the 330*l.*, the price of these shares at the time of allotment, there was, in my opinion, a distinct promise by this lady that she would pay for them out of that specified sum of 351*l.* which was then standing in her name at the bank, and which it is admitted formed part of the savings of her separate estate. She was bound by that contract as much as if she was a *feme sole*. On this point there has been a great deal of discussion. I am sorry to find that in the case of *Johnson* v. *Gallagher*, to which my attention has been particularly directed, the Lords Justices did not take the same view, but my opinion accords entirely with that of Lord Justice Turner, and had there been no other authority, I should certainly have been disposed to adopt his view in preference to that of the Lord Justice Knight Bruce. But I am to a great extent relieved from any doubt upon this point by the decision of Sir Richard Kindersley in *Matthewman's case* (a case arising out of the winding-up of this same banking company), where a married lady who had taken shares in her own name was held liable in respect of those shares, and her name was kept on the list of contributories. I adhere

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to the rule which Sir R. Kindersley there laid down,—that if a married woman with separate property enters into pecuniary engagements upon the faith of such property, which if she had been a *feme sole* would constitute her a debtor, the person with whom she contracts has a right to make her separate estate liable, the application of the rule being of course dependent upon the circumstances of each particular case. Here the contract was distinct that the shares should be paid for out of the 351*l.* arising from the savings of her separate estate. That contract she is bound to fulfil to the extent of her separate estate, so far as it is available.

But it is said that although she may be liable as to the 330*l.*, it was not intended that she should be liable for future calls. The fact is that she never thought there would be any further calls; the concern was apparently in a most flourishing state; neither she nor the plaintiff at that time ever expected any loss or liability in respect of those shares; but it is clear that in point of law she contracted in such a manner as to render her separate estate liable, upon the same principle that she would have been entitled to the remuneration if the shares had turned out profitable. But it is said that there is nothing which the Court can resort to beyond the moneys actually standing in her name, and on this point the case is not free from difficulty, the difficulty being how she is to be made to pay. Now, it appears that, partly before and partly after the transaction in question, she was in the habit of saving money out of her separate income, the greater part of which she invested in the names of the trustees of the settlement, and it is said that the sums so invested constituted an addition to the original settlement, and therefore as she is restrained from anticipation by the terms of the settlement, the same restriction attaches to that which has been added. I admit that there is considerable force in the argument, but in order to put a construction upon the acts of the parties, we must look at the surrounding circumstances. This lady although she put her savings into the names of her trustees, made no communication to them of any intention of settling this money or adding it to the trust funds; she did it, I presume, solely as a means of protecting herself against her husband. Am I to consider that as necessarily such an addition to the settlement as to take it out of her control, so that she cannot touch her own money? I think that was not her intention, but she meant to reserve to herself the right to call on the trustees to re-transfer the fund at any time. The investment was simply made as a protection against her husband, with a resulting trust for her own separate use; therefore, in fact, she retained the absolute dominion over it.

The principle is well established that where a man settles property upon himself, with a condition that it shall go over to some one else in the event of his bankruptcy or insolvency, such a settlement is invalid, because it is an attempt to take the property out of the reach of creditors. That principle comes in aid here, and by analogy I consider that this lady, having pledged her credit with the plaintiff and induced him to purchase these shares in her behalf, was not at liberty without his consent to take these funds out of his reach by making them part of the settlement on herself. She could not after incurring a liability affecting this property make such a disposition of it as would prevent her from fulfilling the engagement and paying the future calls. Therefore I come to the conclusion that she is bound out of the separate estate to indemnify the plaintiff, and I must declare that all the money saved by her forms part of her separate estate, and as such is available for the purpose of this indemnity. If necessary, there must be an inquiry what part of her property is so liable, and what sums have been paid by the plaintiff on her behalf in respect of these shares. The costs must also come out of the separate estate.

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CAIRNS, L.C., Nov. 12, 1868.

In re THE TRENT AND HUMBER SHIP-BUILDING COMPANY (LIMITED).

38 L. J. Ch. 38; L. R. 4 Ch. 112; 19 L. T. 465; 17 W. R. 181: varying, [1868] E. R. A. 717; 37 L. J. Ch. 686; L. R. 6 Eq. 396; 18 L. T. 708; 16 W. R. 929 (V.C).

Referred to, *Re Cook's Policy*, [1870] E. R. A.; 39 L. J. Ch. 257; L. R. 9 Eq. 703; 22 L. T. 92; 18 W. R. 426 (V.C.); *In re Northern Counties of England Fire Insurance Co.*, [1881] E. R. A.; 50 L. J. Ch. 273; 17 Ch. D. 337; 44 L. T. 299 (M.R.); *The Argentino*, [1889] E. R. A.; 58 L. J. P. 1; 13 P. D. 191; 59 L. T. 914; 37 W. R. 210 (C. A.): affirmed, [1890] E. R. A.; 59 L. J. P. 17; 14 App. Cas. 519; 61 L. T. 706 (H.L.).

Winding-up—Companies' Act, 1862, *s.* 158.—*Contingent Claim sounding in Damages—Continuing Breach of Contract—Contract completed by Official Liquidator—Delay—Measure of Damages—Gen. Ord.* 11*th Nov.* 1862, *rule* 25.

COMPANY. DAMAGES.—*A ship-building company, at the time of being wound up, was under a contract with a steam-packet company to do certain repairs to a ship within a given time, and under orders obtained in the matter of the winding-up the official liquidator was authorized to complete the repairs, the rights of all parties being reserved. The repairs not having been completed within the stipulated time, leave was given to the steam-packet company to go in under the winding-up order and prove in respect of any damage that might have accrued from the delay*:—Held, *upon appeal, that they were entitled so to prove, the claim being one for contingent damages within the* 158*th section of the Companies' Act*, 1862, *and that the time for ascertaining the damage was the time when the breach of contract came to an end, and not the date of the winding-up order, and this notwithstanding the* 25*th rule of the Order of the* 11*th of November*, 1862.

Held, *also, varying the order of one of the Vice Chancellors, that the measure of damages was the net profits which the steam-packet company might have made if the contract had been completed in time, but that they were not entitled under the order to prove for damages arising from imperfect workmanship during the delay.*

These were two appeals by the official liquidator of the Trent and Humber Ship-building Company (Limited), one from the order of Vice Chancellor Wood, mentioned in the report of the proceedings in this case in 37 L. J. Ch. 686, and the other from the order of Vice Chancellor Giffard, there reported.

The question was one of damage sustained by the Cambrian Steam Packet Company (Limited) in consequence of the breach and non-performance of a contract entered into by the Trent and Humber Ship-building Company to do certain works and repairs to the steam-ship *Plynlymon*.

By this contract the works and repairs mentioned in the specifications were to be completed within the period of sixteen weeks from the 1st of April, 1865 (subject nevertheless to any delay arising from the lock-out in the iron-trade), for the sum of 1,950*l*., to be paid by the Cambrian Company to the Trent and Humber Company on completion of the work to the satisfaction of the consulting engineer, by acceptances of the company renewable at the cost of the Trent and Humber Company, equal to twelve months' credit from the date of such completion, such acceptances being collaterally secured by a first mortgage of the steamer *Aberystwith*.

On the 21st of July, 1865, the day before the time for the completion of the contract, a petition was presented by a creditor for winding up the Trent and Humber Company, and a winding-up order was made on the 7th of August following. At this time the repairs to be done to the *Plynlymon* had not been completed, but under orders obtained in the matter of the winding-up, the

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official liquidator was authorized to complete the repairs, and by an order dated the 15th of May, 1866, made upon the application of the Cambrian Company, it was by consent ordered that upon completion of the works specified by the contract the official liquidator should deliver the *Plynlymon* to the Cambrian Company on receiving from them a first mortgage of the *Aberystwith* for 1,950*l.*, the price named in the contract, such mortgage to be enforced at such time and for such sum only as should be found to be due under the said contract from the applicants to the official liquidator; but that order was made without prejudice to the respective rights of the official liquidator or the applicants under the contract, at law or in equity, or otherwise in any respect whatsoever."

The *Plynlymon* was delivered on the 17th of May, 1866, and on the 17th of July, 1867, the official liquidator applied to the Court for leave to enforce the mortgage against the *Aberystwith*. The matter came before Vice Chancellor Wood upon summons adjourned from chambers, and on the 24th of July, 1867, his Honour made an order "that the applicants be at liberty to proceed to realize the mortgage debt of 1,950*l.*, after deducting therefrom the amount of a bill of exchange and certain sums for interest, costs and the value of old materials (which by the contract were to be taken in part payment), and that the Cambrian Company be at liberty to go in under the winding-up order of the 7th of August, 1865, and prove in respect of any damage that may have accrued to them from the delay in the completion of the contract, regard being had to the arrangement made by consent of the parties under the order of the 15th of May, 1866."

Under this order the Cambrian Company brought in a claim for 2,000*l.* in respect of damages sustained in consequence of the non-delivery of the *Plynlymon* at the date specified in the contract, viz., the 22nd of July, 1865. This claim was afterwards increased to 7,634*l.* 9*s.* 6*d.*, the additional sums claimed being made up of 2,500*l.* for loss consequent on the depreciation in value of the vessel by reason of her non-delivery, and 3,134*l.* 9*s.* 6*d.* for expenses incurred in surveying and repairing the ship in consequence of damage sustained by deflection in the bottom of the vessel while lying on the slip in the Trent and Humber Company's premises at Gainsborough through the repairs and alterations having been improperly carried out. The deflection was not discovered till after the return of the *Plynlymon* from a voyage on which she was despatched shortly after her delivery, and it was alleged that it could not have been previously discovered.

The matter came before Vice Chancellor Giffard, and by an order made on the 1st of June, 1868, his Honour declared that the Cambrian Company were entitled to go in and prove againse the estate of the Trent and Humber Company for the amount, if any, of the net profits which, under the circumstances, the Cambrian Company might have obtained by chartering the *Plynlymon*, if she had been delivered duly lengthened and repaired, according to the terms of the contract, twenty weeks [1] after the 1st of April, 1866, instead of the 17th of May, 1867; and that the Cambrian Company were entitled to go in and prove against the estate for the amount which it would have cost to have rectified the deflection in the bottom of the vessel at the time she was delivered and before she was sent on any voyage, and an order was made in accordance with this declaration. With regard to the claim for depreciation in value by reason of the non-delivery of the vessel, His Honour though it was inconsistent with the first part of the claim, as well as with the case of *Cory* v. *the Thames Iron Works and Ship-building Company (Limited)* (37 L. J. Q.B. 68; 3 L. R. Q.B. 181), and was inadmissible.

The Lords Justices having, on the application of the official liquidator, enlarged the time for appealing from the order of Vice Chancellor Wood, the matter now came before the Lord Chancellor upon appeal from the order of the 24th of July, 1867, as well as the order of the 1st of June, 1868.

(1) A delay of four weeks was occasioned by a lock-out in the iron trade.

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Mr. Kay and *Mr. J. N. Higgins*, for the appellant.—The damages to which the Cambrian Company are entitled, are such damages as are the natural consequences of the breach of contract, and not the possible amount of profit which might have been made if there had been no breach—*Gee* v. *the Lancashire and Yorkshire Railway Company* (6 Hurls. & N. 211; 30 L. J. Ex. 11); *Hadley* v. *Baxendale* (9 Ex. Rep. 341; 23 L. J. Ex. 179); *Smeed* v. *Foord* (1 El. & El. 602; 28 L. J. Q.B. 178); *The Great Western Railway Company* v. *Redmayne* (1 L. R. C.P. 329); *Cory* v. *the Thames Iron Works and Ship-building Company* (*supra*).

Mr. Druce and *Mr. Babington* were only called on to support the order of Vice Chancellor Giffard so far it declared that the Cambrian Company were entitled to prove in respect of the damage by deflection.

The LORD CHANCELLOR.—I do not think I need trouble you, Mr. Higgins, in reply, upon the only part of the case on which I have called upon the counsel for the respondents.

There are in this case two appeals, from two different orders. I will first address myself to the order of the 24th of July, 1867, made by Vice Chancellor Wood. I have no doubt that the claim which was made by the Cambrian Company is a claim coming within the 158th section of the act of parliament. It is a claim for damages, which are contingent to some extent, because as to part of the claim it could not be predicated, at the time of the winding-up of the company, what it would amount to in the result. Some damage was sustained at the date of the winding-up; but there was at that time a continuing breach of the contract going on, and until that breach came to an end, or was in some manner adjusted, the damages would also continue to run.

It appears to me that the order which has been referred to, the 25th order, does not in any way qualify the effect of the 158th section. If it did qualify it, there would then arise a question whether the 25th order was not open to the observation which has been made on the 26th, that it is *ultra vires*,[2] because the orders were to be orders for regulating the proceedings in winding-up, and were not intended to qualify any of the rights given by the section I have referred to. But the 25th order does no more than this, it says that where there are debts and claims admitted to proof, under the 158th section, they are to be estimated, as far as possible, according to the value at the time of the order to wind up; but if, as I have said, there is a contract broken, for which some damage is to be paid, as at the date of the winding-up, and the damage is a continuing damage, the amount of which you cannot tell, until you know when it will stop, it may not be possible to estimate that value at the date of the winding-up, and then you must estimate it in some other way.

Then the claim, which was the subject of the order of the 24th of July, 1867, is described in the order in this way—"Damage which has accrued to the Cambrian Company from the delay in the completion of the contract of the 6th of April, 1865." It appears to me that to that damage the Cambrian Company were entitled. There was a contract to take the ship into the possession of the Trent and Humber Company, and to repair and alter her for a certain fixed sum. She was to be repaired and altered to the satisfaction of Mr. Grantham, within a period which expires on or very near the 22nd of August, 1865. That contract was beyond all doubt broken; *prima facie*, therefore damages would be recoverable, and the only argument against the right to some sort of damage on the breach of the contract was that which arose out of some sort of correspondence between the official liquidator and the Cambrian Company. The ship was ultimately repaired by the official liquidator, some part of the money being advanced by the Cambrian Company, and she was finally, in the month of May, 1866, delivered over to the Cambrian Company. The effect of that seems to be simply that the damage which I have

(2) *In re The Herefordshire Banking Company* (36 L. J. Ch. 806; 4 L. R. Eq. 250).

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called a continuing damage was in that way put a stop to, but not till the ship was delivered over. If the ship had not been delivered over in May, 1866, the damage would have been running on still, and a larger sum would have been recovered.

There is nothing which led to the finishing the ship which appears to me to prejudice the claim of the Cambrian Company to damages. On the contrary, in the first letter, in which Mr. Crealock consented to the proposal of the official liquidator, he writes thus: "I have yours of the 1st inst., and (without prejudice) write to say that I shall be quite willing to make any affidavit or render any similar assistance which may be necessary to enable the liquidator to get the order made for completing the contract." That he said he would do without prejudice, having in an earlier letter said, "As the delay is a serious loss to us, and we shall have to hold your company responsible for the consequences." That claim had been already made. He said he did not intend in any way to prejudice it by assenting to this proposal made by the official liquidator; and it is to be observed that the order to alter the ship expressly reserved the rights of all parties as to the contract. I therefore think that the order of the Vice Chancellor of the 24th of July, 1867, was warranted by the act of parliament, was warranted by the circumstances of the case, and was not in any way affected or prejudiced by any agreement between the parties.

But that does not deal with the question of the measure of damages, which arises really upon a later stage of the case; and therefore, on the first appeal, I think what I ought to do is to dismiss it, with costs.

Now I come to the order made by Vice Chancellor Giffard on the 1st of June, 1868. I will take the second part of the declaration in the order first. It is this: "It is declared that the Cambrian Steam Packet Company are also entitled to go in and prove against the said estate for the amount which it would have cost to have rectified the deflection in the bottom of the vessel at the time she was delivered to the Cambrian Company, and before she was sent upon any voyage." Now, as to that, the history of the case is a little peculiar. The ship was to be repaired to the satisfaction of Mr. Grantham. She was, as I have already said, delivered in the month of May, 1866. I will assume that Mr. Grantham at that time could not have ascertained by inspection this deflection in the keel which was referred to, and I will assume that he did not, either in writing or otherwise, unequivocally testify his satisfaction with the repairs. However, he seems to have made no specific objection to any part of the work that was done. The ship goes upon her voyage; she comes back to Liverpool; and it has been stated at the bar that the deflection of the keel could not have been ascertained until she was put on to the graving-dock or the gridiron in Liverpool, where I understand she was placed early in the year 1867. Beyond all doubt, at that time Mr. Grantham had a full opportunity of inspecting her. I rather understand he did so; but, whether he did so or not, he had a full opportunity of doing so. In that state of things the agent of the Cambrian Company, Mr. Crealock, made the affidavit of the 8th of July, 1867, which was the foundation of Vice Chancellor Wood's order of the 24th of July, 1867. Now, beyond all doubt, this deflection of the keel was, if it existed at all, as I will assume it did, an imperfection in the work, and not a damage resulting from the delay in the fulfilment of the contract. That is quite a different thing; that means loss to the Cambrian Company because they had not got the ship, and to say that this deflection occurred during the six months of demurrage or delay during which the contract was not completed, and that therefore it is a damage arising from the delay in completing the contract, is to put a meaning upon the word "delay" which is entirely inappropriate. The deflection was the result of imperfect workmanship—imperfect execution of the repairs. Damage from delay means damage from the Cambrian Company not having got their ship back by the time appointed.

The affidavit of Mr. Crealock summed up all the claims which he made in a letter, which is set out in his affidavit, dated the 20th of June, 1866, and

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having set out that letter, which I will refer to in a moment, he goes on to say, "My letter to the said official liquidator, referred to in the immediately preceding paragraph, contains a just statement of the grounds of my claims against the said Trent and Humber Ship Building Company (Limited), and I have prepared a statement of particulars in the way of particulars of set-off, which statement is hereto annexed, and I say that, according to the best of my calculation, knowledge and belief, the said statement contains a just and true account of the damages, interests and costs which I believe myself entitled to have set off." Now that claim in the letter was divided into four heads. The last three heads are altogether out of the question; I need not read them; and there remains, therefore, only this head: "I am entitled, first to have an assessment of damages sustained by the delay in the completion of the work, and which, as you may suppose, have been very serious."

That was the claim which he made to the Court with the full knowledge of all the circumstances which could give him any right to complain; and upon that claim the Court, as I have already said, ordered that this company might go in and prove with respect to any damages which might have accrued to them from the delay in the completion of the contract. That order having been made on the 24th of July, 1867, in the month of December, 1867, two new heads of claim were started. One has been negatived by the Court, and the other is this head with reference to the deflection of the keel of the vessel.

Now, it appears to me to be quite too late in the month of December, 1867, after the affidavit I have read, after the order made by the Court, after the full knowledge or means of knowledge on the part of the company and Mr. Grantham as to the repairs in the vessel, to start a new and fresh head of claim at that time and in that manner. Therefore without expressing, and I do not wish to express any opinion as to the merits of this claim, supposing it to have been made in time, it appears to me that the Court, in the order of the 1st of June, 1868, ought to have sustained that head of claim, and therefore I cannot concur with that part of the Vice Chancellor's order.

It only remains to make an observation which really is mere matter of form. I should have thought that that head of claim being out of the case, and there remaining merely a claim on the score of delay in delivering the ship, and the whole proceedings being in chambers, the order of the 24th of July, 1867, was quite sufficient to work out the rights of the parties. However, I do not want, having made the observation I have, unnecessarily to disturb the order as it is now made, unless the parties desire it. It would be perhaps better to leave the order of the 1st of June, 1868, standing in other respects, although I repeat the observation that I think it is unnecessary, and that it would have been better to have gone on under the old order. But I agree with the measure of damages there pointed out. It runs in this way, "Declare, that the Cambrian Company are entitled to go in and prove against the estate of the said Trent and Humber Ship-building Company for the amount, if any, of the net profits which, under the circumstances the said Cambrian Steam Packet Company might have obtained by chartering the vessel *Plynlymon*, if she had been delivered duly lengthened and repaired according to the terms of the contract, twenty weeks after the 1st of April, 1865." I only wish to say that in estimating these net profits, I consider the question to be entirely open, whether there is not to be taken into account, by way of deduction from the gross profits, that species of wear and tear and depreciation which would have occurred during the weeks that the *Plynlymon* would have been earning these supposed and imaginary profits. I consider that to be quite open, but at present it seems to me that that should be allowed by way of deduction. I hope, however, the parties will be brought to reason, and will be able to settle the claim now that it is reduced to this very narrow compass.

I have dismissed the appeal of the first order with costs. As to the costs of the appeal of the second order, the official liquidator succeeds to some extent,

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and I think he should be allowed his costs out of the estate in the usual way, and I think there should be no costs to the Cambrian Company with respect to the second appeal. I have given them the costs of the first appeal, which was the one in which was disputed the right which I think they are entitled to.

LORD ROMILLY, M.R., Nov. 11, 1868.

SAUNDERS *v.* VAUTIER.

38 L. J. Ch. 42.

Practice—Order to Revive—New Plaintiffs and New Defendants.

PRACTICE.—*The Court will make a single order to revive when the suit has become defective by the transmission of several distinct interests.*

An administration suit by two trustees against their *cestui que trustent* had, after decree, become defective by reason of three transmissions of interest: first, one of the plaintiffs having died and the other having retired, new trustees had been appointed by the Court, on petition; secondly, one of the defendants had died and devised his interest to a lady who conveyed it to the trustees of her marriage settlement; thirdly, another defendant had conveyed her interest to the trustees of her marriage settlement. Some original defendants remained, but no original plaintiff. There was real estate to be sold in the suit.

Mr. Method asked for an order making the new trustees plaintiffs, and adding as defendants the persons in whom the interests of the above-mentioned defendants had become vested. As authority for combining three steps in one order he cited *Noble* v. *Stow* (30 Beav. 512; 31 L. J. Ch. 385).

The MASTER OF THE ROLLS (*Nov.* 14) made the order.

LORD ROMILLY, M.R., June 12, Nov. 24, 1868.

In re THE GENERAL ESTATES COMPANY (LIMITED); *Ex parte* HASTIE.

38 L. J. Ch. 43; L. R. 7 Eq. 3; 20 L. T. 93; 17 W. R. 152: affirmed, [1869] E. R. A.; 38 L. J. Ch. 233; L. R. 4 Ch. 274; 20 L. T. 94; 17 W. R. 302 (L. JJ.).

Contributory—Companies' Act, 1862, *s.* 75.—*Bankruptcy Act*, 1861, *s.* 154. —*Liability of Discharged Bankrupt.*

BANKRUPTCY. COMPANY.—*Where the assignee of a bankrupt shareholder does not take or dispose of his shares, and the company is wound up after the discharge of the bankrupt, the bankrupt is properly placed on the list of contributories.*

Section 154. *of the Bankruptcy Act*, 1861, *does not apply to future calls to be made by a company not in course of winding-up.*

Mr. Hastie was adjudicated bankrupt, on his own petition, on the 27th of April, 1861; he was at that time the holder of 125 shares in the General Estates Company; his assignee refused to take them; the rest of his estate was duly administered; he obtained his discharge in July, 1866.

Shortly afterwards a special resolution was passed to wind the company up voluntarily, and on the 27th of November, 1866, an order was made to continue the winding-up under the supervision of the Court. Mr. Hastie's name was placed on the list of contributories in respect of the 125 shares; he took out a summons to remove his name from the list and place the name of the assignee instead.

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Mr. Jessel and *Mr. Fischer*, for Mr. Hastie, said the intention of the Bankruptcy Act was to set a discharged bankrupt free from all liabilities, and it would therefore be entirely against that intention to make the applicant liable to contribute in respect of the shares, a liability he had no means of getting rid of. If the shares had been worth anything the assignee would have disposed of them. Moreover, the Companies' Act had provided that the liquidator should prove against the estate of the bankrupt as administered in bankruptcy. If anything more came in to that estate the liquidator would get a dividend on the calls. This shewed that it was not intended that this bankrupt should be personally liable. In *Martin's Patent Anchor Company* v. *Morton* (37 L. J. Q.B. 98; 3 L. R. Q.B. 306), there had been a lapse of more than two years from the bankruptcy, during which time Morton might have been able to get rid of his shares.

Mr. Roxburgh and *Mr. Edmund James*, for the liquidator, said this was governed by *Martin's Patent Anchor Company* v. *Morton*, which, they submitted, was right on principle. The assignee had repudiated the shares; the ownership had never been taken out of the bankrupt; the shares could not be annihilated; the ownership could be nowhere but in the bankrupt. If it was not too late to prove in the bankruptcy, in case anything further came in to be administered, the remedies were cumulative, and that did not prevent the enforcement of calls against the bankrupt personally. To shew that the company could not have proved for future calls, they cited *The South Staffordshire Railway Company* v. *Burnside* (5 Ex. Rep. 129; 20 L. J. Ex. 120); *The General Discount Company* v. *Stokes* (17 Com. B. Rep. N.S. 765; 34 L. J. C.P. 25).

Mr. Jessel, replied.—If Mr. Hastie was to be considered as owner, his liability to contribute had been taken away by the bankruptcy, and he was, in the same way as a paid-up shareholder, entitled to have his name taken from the list of contributories.

The MASTER OF THE ROLLS (*Nov.* 24) stated the facts, and said—It is obviously impossible to put the assignee on the list of contributories. He cannot be compelled to take the shares; he has repudiated them, and cannot be made liable for anything in respect of them. Whether the bankrupt, Mr. Hastie, should be put on the list of contributories depends on the question whether he is liable, notwithstanding his bankruptcy and discharge, to pay the calls to be made on these shares. If he is not so liable, then, on the principle which prevents a holder of paid-up shares from being placed on the list of contributories, I think that he ought not to be placed on the list. That this liability to pay the calls is originally a debt due from him cannot be doubted, for the 16th section of the Companies' Act, 1862, makes it a debt exactly as if he had entered into a covenant to pay it; but then arises the question whether, under section 154. of the Bankruptcy Act, 1861, he is not discharged, or if he be not discharged from such liability, under the act of 1861, whether the sections 75. and 77. of the Companies' Act, 1862, do not make it imperative for the company to prove against the estate of the bankrupt for future calls as well as for calls existing at the date of the bankruptcy. The question seems to be in a great measure governed by the case of *Martin's Patent Anchor Company* v. *Morton*. I have carefully considered that case as bearing on the present, to which it seems expressly to apply. In deciding that case Mr. Justice Blackburn says, "it would be a monstrous injustice that when a man remains a shareholder, the assignee not taking his shares, he should be allowed to get rid of his liability to pay calls, on the ground that he had been a bankrupt several years before." But the learned Judge does not seem to have had present in his mind that if the shares are worth anything the assignees will take them and sell them, and that the bankrupt has no possible means of getting rid of them if they are utterly worthless, yet that, though the policy of the Bankruptcy Act is to release him from all liabilities, he will still remain liable for the future calls which may be made. However, this is certain, that inasmuch as his liability is imposed by the 16th section of the Companies' Act, 1862, it follows

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necessarily that he must pay them unless he is relieved by the effect of some act of parliament. The only acts of parliament which relate to this subject are the Bankruptcy Act, 1861, and the Companies' Act 1862. In the first of the statutes the clause specially relied upon is section 154. of the Bankruptcy Act, 1861. [After reading that section, Lord Romilly proceeded:]—It is quite settled that under the prior Bankruptcy Acts the future call was not provable, either as a debt payable *in futuro* or as a debt due on a contingency. I think this act does not carry the matter further than the previous Bankruptcy Acts in respect of making the future calls provable as debts, the value of which is to be ascertained, inasmuch as it is obviously impossible to know whether or not any call will ever be made in the case of a company that is still pending as a working company. The clause was obviously meant for fixed payments in future at any interval of time. It resembles a case where a man has entered into a covenant with a lessor that the lessee shall leave the property leased, at the end of the term, in a proper state of repair; if the covenantor becomes bankrupt and obtains his discharge before the termination of the lease he still remains liable on his covenant with the lessor, who could not by possibility have proved anything under the bankruptcy.

The other statute relied on is the Companies' Act, 1862, sections 75. and 77. Section 75. does provide for proof and payment on valuation where the company is in course of liquidation. The question is, whether this clause extends to a case where the bankruptcy has been wound up and the bankrupt discharged, and the assets administered before the winding-up of the company.

The Judges in *Martin's Patent Anchor Company* v. *Morton* thought that this could not be the construction of the clause, for that an order to prove a debt against the estate of a bankrupt where the bankruptcy had been completely and finally wound up was, on the face of it, a mere mockery, and Mr. Justice Blackburn shews that from the following sections, 76. and 77, and how that section 75. refers to the bankruptcy still pending when the winding-up takes place while the assignees have still assets, and that in such a case the company may prove for the estimated amount of the liability to future calls. But I am inclined to think that this does not apply to every case, and that cases will arise in which it is difficult to say how the clause can be so restricted where an estate comes in unexpectedly to the assignees under an old bankruptcy after the bankrupt's discharge and after the former assets have been administered; and against such property coming to the assignee I presume the call made on the bankrupt after his discharge could be proved. If this be so, the difficulty might be avoided by holding that the true construction of the 75th clause is that the bankrupt is not to be discharged from the call unless it can be shewn that there is something to prove against under the bankruptcy, in this way obviating the objection suggested by Mr. Justice Blackburn, but certainly these words do not carry this meaning with any distinctness; and the difficulty in construing the clause is equally great if it be held that it applies where there are assets remaining unadministered, in which case it absolves the bankrupt and does not apply where all the assets are administered and the bankrupt discharged. At the same time it is to be observed that the unanimous decision of the Queen's Bench is, that, in the latter clause, the clause had no operation. In support of the view of the clause as held by the Court of Queen's Bench, it may be said that it is the duty of the bankrupt, if he wish to free himself from his shares, to sell them, or if he cannot do this to get some person to accept them as transferee; but even then the difficulty is not wholly removed, because as such transferee must be supposed to be a pauper, the directors may refuse to accept the transfer and consider the prospects of the bankrupt, though he be at that time devoid of all property, better than those of a mere pauper transferee. On the whole, the case seems to me to be one of difficulty not foreseen and not provided for by the legislature, and that the true construction of the clauses referred to does not meet the exact point which has occurred. It might be desirable if the legislature, following out the principle already adopted, would declare that in

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all cases where the assignees of the bankrupt refuse to adopt the shares the company should be at liberty to sell them, and that if the company decline or are unable to do so, the bankrupt should be at liberty to surrender them to the company and have them cancelled, and that in default he should remain liable. But the act does not say so, and it is impossible as it stands so to construe it.

Of course if the bankrupt chooses to go on with the speculation and keep the shares he is at liberty to do so; and in the case in the Queen's Bench the bankrupt appears to have kept them for two years and a half after his bankruptcy and before the company was wound up. And the expressions of Mr. Justice Blackburn point to this fact, as if the bankrupt had desired to adopt the shares for his own benefit. In that case no question can arise, but that he must be liable for the call if he has since his bankruptcy been speculating on the receipt of a dividend, or on the shares obtaining a value in the market. In the present case no attempt seems to have been made by Mr. Hastie to get rid of the shares he had taken.

The case seems to me to resolve itself into this: the applicant, who was lately bankrupt, owes a debt to the company, made so by the Companies' Act, 1862; he must remain liable for the debt unless he is released by statute. Section 154. of the Bankruptcy Act, 1861, does not release him. The 75th section of the Companies' Act, 1862, is too obscurely worded as to the point for me to come to the conclusion that it does release him in the events which herein occur. If this does not, no other sections do apply, and he must therefore remain liable unless the assignees are substituted in his place under the 77th section of the Companies' Act, 1862. I think that this does not deprive the assignees of their power of electing whether to take the shares or not, and that if they decline to take them they cannot be compelled to do so; and after this refusal to take the shares, and after they have fully administered the estate of the bankrupt and distributed it amongst the creditors, it would be monstrous that a subsequent failure of the company should make the assignees contributories personally to pay the calls, assignees who have no property of the bankrupt remaining and who have already refused to be mixed up with the affairs of the company. Besides which the clause says that calls are to be paid out of the assets, and that case I am now considering is and arises when all the assets are gone.

In this state of circumstances, and for the reasons I have stated, I am of opinion that the chief clerk has come to a right conclusion in fixing Mr. Hastie on the list of contributories, and that his summons must be dismissed, but without costs.

MALINS, V.C., Nov. 5, 1868.

PARKER v. STONES.

38 L. J. Ch. 46; 19 L. T. 259.

Trust, Declaration of—Voluntary Gift—Retention of Title-Deeds by Donor.

TRUST AND TRUSTEE.—*A testator who had bequeathed two legacies, of 50l. and 200l., afterwards, in order to avoid legacy duty, revoked the legacies, and verbally instructed F, who owed him 300l. secured by a deposit of title-deeds, to pay similar sums to the legatees, adding that one of the donees was to "hold the writings." F. accepted the trust, but the deeds remained in the custody of the donor*:—Held, *notwithstanding the retention of them by the donor, that a valid trust was effectually created in favour of the donees.*

This suit was instituted by the direction of the Court in order to determine a question which arose in the administration of the estate of William Clark, a farmer, as to whether a voluntary trust had been effectually created by him under

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the following circumstances, which it was admitted were correctly set forth in the answer to the present bill.

The defendant, Edward Stones, was for many years the farm-servant of the testator, W. Clark, who, by his will dated the 8th of July, 1862, gave a legacy of 200*l.* to Harriet Elizabeth Stones, the daughter of the defendant Stones, and another of 50*l.* to Stones himself.

In August, 1862, the testator lent a sum of 300*l.* to Edward Foster upon the security of certain title-deeds, which the latter deposited with the testator by way of equitable mortgage.

In the latter part of 1862, shortly before making the codicil hereinafter mentioned, the testator sent for his brother-in-law, and told him that his will wanted altering, as several of the legatees named therein were dead, and that as the defendant Stones and his daughter were no relatives of his, there would be 10*l.* per cent. to pay for legacy duty, and therefore he had determined to give the money in his lifetime, and would have the sum E. Foster owed him applied for that purpose.

On the 9th of January, 1863, he made a codicil to his will revoking the legacies to Stones and his daughter; and shortly after, a few days before his death, he sent for Foster, whom he had previously promised not to distress by calling in the 300*l.* at once, and told him that he (the testator) had arranged about the payment of the 300*l.* which Foster owed him, that "Ted" (meaning the defendant Stones) was "to hold the writings," and Foster was to pay the 300*l.* in the following way: The testator's miller was to have 35*l.*, his blacksmith 15*l.*, if he conducted himself, if not, the miller was to have it as well as the 35*l.*, and the testator left that matter entirely to Foster to do as he thought right. "Ted" (meaning the defendant Stones) was to have 50*l.*, and his eldest girl (meaning Harriet Elizabeth Stones) was to have the remaining 200*l.* Her money was to be paid into a savings bank to her account, as Foster could pay the money from time to time, and in the meanwhile the interest was to be paid to Stones for the bringing up and schooling of the girl. The testator told Foster he had confidence in him, and could trust him to pay the money according to his directions; and as the answer alleged, and it was not denied, "Foster then and there accepted the trust reposed in him by the testator, and undertook and agreed to pay the 300*l.* according to the testator's directions." The testator subsequently informed Stones of the provision he had made for him and his daughter being paid out of the money which Foster owed the testator, adding that he (Stones) was to hold the title-deeds.

The deeds, however, were not handed over to him, but remained in the custody of the testator up to his death. After his decease the testator's widow delivered them to Stones, saying "Ted, these are yours, and you are to take them."

This bill was filed against Stones by the trustees and executors of the testator's will, charging that no valid trust had been created by the testator of the 300*l.* or of the deeds, and praying that the defendant Stones might be ordered to deliver them up, with an injunction against his parting with them or receiving the money secured thereby.

Mr. F. North, for the plaintiff, contended that the testator had not done enough to constitute a complete trust in favour of the defendant Stones and his daughter, urging that the retention of the deeds by the testator must be taken as evidence of the abandonment of his original intention. There was nothing to shew that it was an accidental omission. The test was this, was there a trust in Foster which Stones could have enforced against him by suit in the lifetime of the testator without making the testator a party? Clearly, as the settlor had retained the deeds, and executed no declaration of trust, he would have been a necessary party to such a suit, which he would not if the trust had been perfected—*Reed* v. *O'Brien* (7 Beav. 32); *Donaldson* v. *Donaldson* (Kay, 711; 23 L. J. Ch. 788). The retention of the deeds was a most material fact, because the money could not be received without delivering up the deeds by

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which it was secured. It was essential that the testator should have assigned the debt, or done something definite to constitute himself or Foster a trustee for the claimants. The expression of an intention never acted on was not enough—*Coningham* v. *Plunkett* (2 You. & C. C.C. 245); *Jones* v. *Lock* (35 L. J. Ch. 117; 1 L. R. Ch. Ap. 25). Nor even if partly acted on—*Dipple* v. *Corles* (11 Hare, 183); *Ex parte Pye* (18 Ves. 140).

Mr. Martineau, for the defendant, was not called on.

MALINS, V.C.—This question admits of no doubt whatever. Having ascertained that the legacy duty would be 10*l.* per cent. if he gave the money to the farm-servant and the daughter by his will, the testator made up his mind to do what he purposed, and do it effectually, in his lifetime. Accordingly, he sent to Foster, the debtor from whom the 300*l.* was due, and told him of the arrangement he had made; and I must take it that what passed at the interview is correctly stated in the answer.—[His Honour then referred to the conversation which took place, as stated above, and continued]—Therefore, there is a distinct allegation, uncontradicted, that Foster then and there accepted the trust reposed in him, and undertook to pay the money according to the testator's directions. The argument is that the retention of the title-deeds by the testator has prevented this from being a complete declaration of trust; though it is admitted that if nothing had been said about them, what passed at the interview would have been enough. But the deeds were merely the security for the money, and the accidental omission of the testator to hand them over to Stones is immaterial.

The whole transaction is perfectly clear. The testator must be taken to have declared himself trustee of the deeds as he had declared Foster trustee of the money. There was a valid trust effectually declared in favour of the defendant and his daughter. The suit, therefore, entirely fails, and the bill must be dismissed, with costs.

GIFFARD, V.C., Nov. 5, 1868.

SCOTT *v.* RAYMENT.

38 L. J. Ch. 48; L. R. 7 Eq. 112; 19 L. T. 481.

Distinguished, *Crowley* v. *O'Sullivan*, [1900] 2 I. R. 478 (Q.B. D.).

Specific Performance—Agreement to enter into Partnership—Jurisdiction—Damages—Demurrer.

PARTNERSHIP. SPECIFIC PERFORMANCE.—*As a general rule the Court will not decree specific performance of an agreement to enter into partnership; and it cannot give the plaintiff damages as an alternative when there is no obstacle to his recovering damages for breach of the agreement at law. To a bill asking for specific performance of such an agreement a demurrer was allowed, without prejudice to any action at law.*

The plaintiff, who was at the time engaged in business, entered into negotiations with the defendant with a view to the formation of a partnership between them, which resulted in a document being prepared and signed by both parties, on the 23rd of March, 1868, containing the terms on which they agreed to become partners as from the 1st of August following. This document, after providing that the plaintiff should be liable for all business debts contracted, and be entitled to the profits earned previous to the commencement of the partnership, and that the defendant should bring in a sum equal to the then value of the stock-in-trade, contained a clause stipulating that the defendant should pay the plaintiff 500*l.* "as goodwill for a moiety of the profits of the business during a partnership of ten or twelve years." Then, after stating the manner in which the 500*l.* was to be paid, it was agreed that the plaintiff was

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to be allowed the sum of 300*l.* per annum "for his extra services and management."

The other clauses provided for the introduction of further capital, payment of interest thereon and the division of profits.

The defendant, by letter, dated the 2nd of June, refused to carry out the agreement, on the ground that he had suffered heavy pecuniary losses.

After some correspondence between the parties the plaintiff filed the bill in this suit, praying for specific performance of the said agreement and for a declaration that he was entitled to damages for the defendant's refusal to carry it out in addition to or in substitution for a decree for specific performance.

The defendant demurred.

Mr. Kay and *Mr. Martineau*, for the demurrer.—It is uncertain whether the partnership is to last for ten or twelve years. Who is to decide that? What are the "extra services"? The terms are too vague and uncertain—*Sichel* v. *Mosenthal* (30 Beav. 371; 31 L. J. Ch. 386). But if there were no uncertainty, the Court would not decree specific performance of an agreement to enter into partnership. The remedy for breach of such an agreement is by an action at law—*Ogden* v. *Fossick* (32 L. J. Ch. 73); *Lindley on Partnership*, 796, 1st edit., p. 947, 2nd edit. The case of *England* v. *Curling* (8 Beav. 129), was very different from the present.

Mr. W. M. James and *Mr. A. E. Miller*, for the bill.—There is no uncertainty in the terms. The defendant has his option of ten or twelve years; when he makes his choice the plaintiff is bound to accept it. "Extra services" mean those of the plaintiff as managing partner. The bill is filed on the authority of *England* v. *Curling*, ubi supra. The plaintiff is entitled to a decree that the defendant shall execute a deed of co-partnership, as was decreed in that case. We say that the Court has jurisdiction to make such a decree, but it may be that, in its discretion, under the stat. 21 & 22 Vict. c. 27, it may consider damages the more fitting remedy in the present case. Notwithstanding what is said by Mr. Lindley in his book on *Partnership*, we submit that, as a general rule, the Court will decree specific performance of an agreement to enter into partnership, first, where there is a term for its duration fixed; secondly, where there is an agreement to execute a deed of co-partnership. In the first case, see *Anon.* (2 Ves. sen. 629 (case 218)); *Hibbert* v. *Hibbert* (Collyer on Partnership, 133, 2nd ed.); *Hercy* v. *Birch* (9 Ves. 357). Lord Eldon was not content with his own decision dismissing the bill in the last case. See 1 *Madd. Ch. Pr.* 525, 3rd edit. In the second case see *Stocker* v. *Wedderburn* (3 Kay & J. 393; 26 L. J. Ch. 713). And Mr. Swanston's note on *Crawshay* v. *Maule* (1 Swanst. 513). The Court is not asked to decree that the parties shall do something which the Court is unable to overlook and see carried out; it is merely asked to make the parties execute a deed which brings them into a certain relation to each other from which certain legal effects flow. The deed being executed the agreement would be performed and the Court's work at an end. The Court, then, has jurisdiction to entertain this suit, but if it should think damages the more appropriate remedy it may give the relief in that form, and will not send the plaintiff to the Courts of common law.

GIFFARD, V.C.—As a general rule the Court will not decree specific performance of an agreement to enter into partnership. In *Hibbert* v. *Hibbert* and *England* v. *Curling* there had been part performance, and it was essential to justice that the terms of the agreements which had been partially performed should be ascertained and fixed by a deed. Here—I do not say whether the terms are certain or uncertain—the plaintiff has his full remedy at law without having a deed executed. There is no obstacle which this Court can remove out of his way. The case is very different from that of an agreement to execute a lease where the deed has sometimes to be ante-dated. This not being a case in which I could decree specific performance, there is no jurisdiction to give damages. If the plaintiff is entitled to damages he has his full remedy at law.

Demurrer allowed without prejudice to any action the plaintiff may be advised to bring at law.

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LORDS JUSTICES, Nov. 6, 7, 1868.

In re SMITH, KNIGHT AND CO.; *Ex parte* WESTON.

38 L. J. Ch. 49; L. R. 4 Ch. 20; 19 L. T. 337; 17 W. R. 62: reversing, [1868] E. R. A. 587; 37 L. J. Ch. 559; L. R. 6 Eq. 238 (M.R.).

Distinguished, *In re National Provincial Marine Insurance Co.; Gilbert's case*, [1870] E. R. A.; 39 L. J. Ch. 837; L. R. 5 Ch. 559; 18 W. R. 938 (L. J.). See, *Moffat* v. *Farquhar*, [1878] E. R. A.; 47 L. J. Ch. 355; 7 Ch. D. 591; 38 L. T. 18; 26 W. R. 522 (V.C.); *Ex parte McLaren*, [1881] E. R. A.; 50 L. J. Ch. 203; 16 Ch. D. 534; 44 L. T. 36; 29 W. R. 389 (C. A.); *In re Dry Docks Corporation*, [1889] E. R. A.; 58 L. J. Ch. 33; 39 Ch. D. 306; 59 L. T. 763; 37 W. R. 18 (C. A.); *In re Roundwood Colliery Co.*, [1897] E. R. A.; 66 L. J. Ch. 186; [1897] 1 Ch. 373; 75 L. T. 641; 45 W. R. 324 (C. A.). Applied, *In re Discoverers' Finance Corporation*, [1910] E. R. A.; 79 L. J. Ch. 193; [1910] 1 Ch. 312; 102 L. T. 150 (C. A.).

Company—Powers and Duties of Directors—Winding-up—Commencement of Winding-up under Supervision.

COMPANY.—*Directors of a company have no power to refuse to register transfers of shares made bona fide unless there are special provisions to that effect in the regulations of the company.*

A petition to wind up a company having been presented, stood over in order that the company might pass resolutions for a voluntary winding-up. After such resolutions had been passed, an order was made on the petition to continue the voluntary winding-up under supervision:—Held, *that the commencement of the winding-up under supervision dated from the passing of the confirmatory resolution to wind up voluntarily.*

This was an appeal from the decision of the Master of the Rolls, reported 37 L. J. Ch. 559.

The question was whether the directors of the company had power, under the circumstances stated in the former report, to refuse to register a transfer which had been duly executed by Mr. Weston as transferor and Mr. Birnie as transferee. The ground alleged by the directors for their refusal was that they were unable to ascertain Mr. Birnie's address. It appeared that the company made inquiries at the address given, which was the place of business of a relation of Mr. Birnie, and found that he did not live there, but that he was employed there, though not permanently.

The articles of association contained a provision that the directors might refuse to transfer the shares of any shareholder unless the certificate of the shares was produced; and another provision, that persons becoming entitled to shares otherwise than by transfer might require the company to register the shares in the name of a nominee instead of themselves. Beyond these there was nothing to regulate the registry of transfers of shares.

The transfer in question was, with the certificate of the shares, left for registration on the 19th of June, 1866.

On the 19th of July, 1866, a petition to wind up the company was presented. This was ordered to stand over generally, in order that the company might pass resolutions for a voluntary winding-up. This was afterwards done, the resolution concerning a special resolution to wind up being passed on the 30th of November, 1866.

Afterwards an order to wind up under supervision was made upon the petition.

It appeared that previously to the month of June the company was in difficulties, but was allowed by its creditors to continue to carry on business under a species of inspection on their behalf.

Besides the transfer to Birnie, there was another transfer by Mr. Weston

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of thirty-five shares to a Mr. Harvey. This transfer was sent in for registration on the 19th of August, after the presentation of the petition. The directors did not register this, assigning as one reason that they believed it was not made *bona fide*.

Mr. Roxburgh and *Mr. Marten*, for the appellant, Mr. Weston.—There was here no ground for refusal on the part of the directors to register these transfers. Assume, for the sake of argument, what however is sufficiently disproved, that Mr. Birnie was objectionable as a member of the company on the ground of irresponsibility. We say the directors had still no power to refuse to register. It is well settled that a shareholder may, if he pleases, transfer his shares to a pauper in order to avoid liability, so that the transfer be a *bona fide* parting with all interest in the shares. Of course, where the regulations of the company provide that the directors may exercise their discretion as to transfers, such a case could not occur. But there is no such regulation here, and the law does not, as his Lordship seems to have thought, imply it—*In re the Mexican and South American Company; De Pass's case* (28 L. J. Ch. 769; 4 De Gex & J. 544). The passing the resolution to wind up before the transfer was actually registered does not affect our right, because it ought to have been registered long before—*In re the Joint-Stock Discount Company* (36 L. J. Ch. 32; 2 L. R. Ch. 16); *In re the China Steam Ship Company; Dawe's case* (37 L. J. Ch. 901; 6 L. R. Eq. 232). The winding-up can only date from the day when the second resolution, constituting a special resolution to wind up, is passed: *Hodgkinson* v. *Kelly* (37 L. J. Ch. 837; 6 L. R. Eq. 496). Therefore Mr. Birnie's transfer was left for registration six months before the commencement of the winding-up. As to Mr. Harvey's transfer, the objection on personal grounds is even weaker than in Mr. Birnie's case. Our argument applies equally as to the directors' refusal. And if we are right in our contention as to when the winding-up commenced, Mr. Weston is, as to these shares, also entitled to have his name removed from the register.

Mr. Westlake (*The Solicitor General, Sir R. Baggallay*, with him), for the official liquidator.—This was a proper exercise of the discretion which all directors must possess in regulating the affairs of the company, particularly when it was in difficulties, and, in fact, in a state of *quasi* bankruptcy. The evidence shews that Mr. Birnie had the appearance of being a man of no responsibility. The resolution to wind up, at all events, prevented any order being made upon the motion of Mr. Weston. If he has any rights they must be against Mr. Birnie, but the register of the company cannot now be altered. Mr. Harvey's transfer was not sent in till after the petition had been presented. This case, therefore, though weaker as to the point of Mr. Harvey's position, is stronger on that of time, because when Mr. Harvey's transfer was sent in, the winding-up now in progress had actually commenced, as the winding-up, under the supervision, must date from the presentation of the petition.

He referred to *Sections* 84, 130. *and* 153. *of the Companies' Act*, 1862 (25 & 26 *Vict. c.* 89).

No reply was called for.

Wood, L.J.—As regards the time when the winding-up, under the supervision of the Court, must be considered to have commenced, it is satisfactory to me that I agree with his Lordship, I think it must date from the second, the confirmatory resolution, by which the voluntary winding-up was resolved on. When there has been a petition to wind up presented, and nothing done on it, followed by a resolution to wind up voluntarily, and a subsequent order made on the petition to continue the winding-up under supervision, the reasonable conclusion is, that the commencement of that which is being continued, viz., the voluntary winding-up, is the date of the commencement of the winding-up; this, as I before said, is that of the confirmatory resolution. In this I agree with what the Master of the Rolls has, in a former case, *Hodgkinson* v. *Kelly*, expressed as his opinion. It would be absurd to talk of continuing a thing as from a time when the thing itself had no existence. The natural construction

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of the act is, that the winding-up which is continued is that which began, in accordance with a previous section of the act (the 130th), on the 30th of November, and was continued as from that date. The winding-up, therefore, since it began so long after the transfer was left for registration, cannot affect the question between the parties.

We come next to the main part of the case. Were the directors justified in refusing to complete the transfer of the fifty shares to Mr. Birnie? What was the power, I will not say the duty, of the directors as to registering or not registering this transfer? It is said, at this very time the company were carrying on their business under a species of letter of licence from their creditors, and that therefore they were in such a condition that they ought not, without great precaution as to the character of a proposed shareholder, to admit him upon the register.

The creditors in substance said, "Do not admit on your register any one whose competency to pay calls is at all doubtful." But as they chose to give a letter of licence, and not to take the measure which was open to them of winding-up the company, they must accept the position of the company as being exactly the same as if no such arrangement had been made; and we must consider the question exactly as if that circumstance were entirely out of the case. Had, then, the directors, as part of their ordinary powers, the right to inquire into the position of a proposed transferee of shares and make the registration of the transfer depend upon the result of their inquiries? I feel bound, with great regret, to come to an opposite conclusion to that of the Master of the Rolls with regard to the law on this. He seems to have thought that, not only they were competent, but that it was their duty to do this.—[His Lordship then referred to the judgment of the Master of the Rolls.]—I have always understood that the very working of these companies was this, that many persons entered into them because they were unlike ordinary partnerships, but partnerships from which they could retire at will by transferring their shares. They could sell their shares in the market, and no person, either director, shareholder or creditor, had any right to object, unless, of course, it was otherwise provided by the regulations of the company: the only restriction upon their so freeing themselves from liability being that it must be a *bona fide* transaction, by which I mean an out-and-out disposal of property, they not retaining any interest in the shares disposed of. When it was desired (as was quite possible, if thought fit) to put a restraint upon this unlimited power of disposal there was always inserted in the articles of association a clause for that purpose. Many instances of this kind have been discussed in the Courts; one I think—*Shortridge* v. *Bosanquet*[1]—went to the House of Lords, and there the directors were bound to exercise a discretion. In the absence of such a discretion, however, I think it is plain the statute gives, in the first instance, an absolute power of disposing of shares. The very object of persons entering into these partnerships is to have transferable shares, and it has always been thought that this was the policy of the legislature in making special provisions for joint-stock companies.

The shares then are transferable by statute, and the articles only point out the mode in which they shall be transferred, and the limitation, if any, to which the transfer shall be subject before registration. It was argued that all the shareholders might have excluded any proposed transferee, and what all the shareholders might do the directors might do; but I think the shareholders have no such power unless something is provided by the deed. When we look at this deed we find two sections only which have any relation whatever to this subject. —[His Lordship then read the sections before mentioned.]—But those sections have nothing whatever to enable the directors to approve or disapprove of a transferee. The one gives them the power of asking for the certificate, equivalent to asking for proof of the identity of the transferor; the other enables executors to sell shares without themselves being put upon the registry, which

(1) His Lordship referred to *Bargate* v. *Shortridge* (5 H. L. C. 297; 24 L. J. Ch. 457): affirming *Shortridge* v. *Bosanquet* (16 Beav. 84; 22 L. J. Ch. 48).

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perhaps otherwise might not be allowed. Nothing can be stronger, if anything be wanted, to shew that the directors have no such power as is now contended for.

It would, I think, be a serious thing if a restriction, not found in the articles, not in the statute, were to be implied by law, taking away that which to a great extent constitutes the value of these shares,—their being marketable, and passing from hand to hand. Moreover, I might remark that the duties of directors would become more onerous as duties of trustees for the company than any which usually are imposed upon them. I never heard of their making inquiries as to the address of a shareholder under ordinary circumstances.

We come now to the question whether there was any ground for refusing the transfer.—[His Lordship then commented on the fact, arriving at the conclusion that the transfer was *bona fide* made to Mr. Birnie, and concluded by saying:]—Under all these circumstances, I think that Mr. Weston did all that was necessary to entitle him to get rid of the shares, that they were properly and regularly transferred to Mr. Birnie, and that Mr. Weston was consequently entitled to have his name removed from the register, as having parted with his shares. As to Mr. Harvey's case, what I have said about the commencement of the winding-up disposed of that also.

Lord Justice Selwyn.—With respect to the shares transferred to Mr. Birnie, the view I take of the evidence renders it unnecessary to decide the general question whether the directors had the general power to refuse the transfer. I feel, however, bound to state that, like the Lord Justice, I am unable to concur with the Master of the Rolls in treating the directors as agents of the company, and as such agents having that general and unlimited power. I think there have been a great number of cases in this Court which have proceeded upon the particular definitions and limits put upon acts of the directors with respect to the refusal to transfer. All such discussions would have been unnecessary and many quite irrelevant if there had been, without any expression in the articles of association, from the very constitution of the company, any such power given to the directors. In the present case the matter does not rest there, because we have the general act, an essential part of which is that the shares should be transferable, and the 122nd section merely refers the company to their own articles as to the mode in which that transfer shall be effected, leaving the general right of parties to rest upon the act. When we look at the provisions of these articles, we find two cases in which the directors may refuse to register. I think that this strongly shews that nothing more was intended. Of course, if the directors had reason to think that the transaction was anything like fraudulent or fictitious, they might refuse to transfer; but there is nothing suggested here on this, and in the absence of that they are bound to register.—[His Lordship then examined the circumstances, arriving at the conclusion that even if the directors had the power of refusal, there was nothing in the case which would justify their refusal.]

On the point, as to the commencement of the winding-up, I am entirely in accordance with the opinion of the Master of the Rolls in the case referred to. The 130th section expressly declared that a voluntary winding-up shall commence at the passing of the resolution to wind up. The order of the Court upon which the respondents rely is an order continuing that winding-up. What is directed to be continued? The voluntary winding-up, which certainly commences from the date of the resolution; that and that only is directed to be continued.

I think it is impossible for us to fix any date except that fixed by the 130th section. For these reasons, I agree that Mr. Weston's name must be taken off the register as to both sets of shares.

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MALINS, V.C., Nov. 5, 6, 7, 1868.

WHITE v. THE BRITISH EMPIRE MUTUAL LIFE ASSURANCE COMPANY.

38 L. J. Ch. 53; L. R. 7 Eq. 394; 19 L. T. 306; 17 W. R. 26.

Insurance on Life—Condition in Policy—Suicide—Assignee for Value—Mortgagor and Mortgagee.

INSURANCE.—*Where there is a condition in a life policy that in the event of the assured dying by his own hand, the policy shall be void, except to the extent of any bona fide interest which, at the time of his death, shall be vested in any other person or persons for his or their own benefit, the exception applies as much when that interest is vested in the assurers themselves as when it is vested in a third party.*

Therefore, where W. effected a policy of assurance upon his life with the above condition and exception, and deposited the same with the assurers by way of collateral security for a loan from them to him:—Held, *that, notwithstanding the suicide of the assured, the policy was good to the extent of the debt for which it was held as security, and therefore that the debt was extinguished by the moneys which became payable under the policy.*

The condition avoiding a policy in the event of the assured dying by his own hand applies to all cases of self-destruction, and it is immaterial that at the time of committing the act the assured was of unsound mind.

In the latter part of December, 1862, Horatio White, with the view of obtaining a loan from the British Empire Mutual Life Assurance Company, effected an assurance on his own life in the office of the same company for the sum of 1,000*l.*, payable on his death or on his attaining the age of sixty. The policy was granted by the company subject to the conditions thereon indorsed, amongst which were the following:

"4. In all cases where any sum of money which may fall due in respect of any policy shall, either in the first instance or at any after period, be or become subject to any trust or trusts, mortgage or mortgages, then the receipt or receipts of the trustee or trustees, mortgagee or mortgagees, for the time being, shall be a legal and effectual discharge to the company for all such sum or sums of money notwithstanding any equitable claim or demand whatsoever of the person or persons beneficially interested therein."

"7. Should any person assured separately or jointly die by his or her own hands, by the hands of justice, or by duelling, before the policy shall have been in existence three years, the policy in every such case shall become void, except to the extent of any *bona fide* interest therein which at the time of such death shall be vested in any other person or persons for his, her or their own benefit, for a sufficient pecuniary or other consideration, upon satisfactory proof of the creation and existence and extent of such interest; provided that notice of such assignment shall have been received by the company at least one month previous to the death of the assured."

On the 20th of October, 1863, after some negotiation and correspondence as to the loan, the company advanced to Horatio White, 1,000*l.*, to secure the repayment of which, with interest, he executed a mortgage to the company of certain freehold hereditaments, and at the same time deposited with the company the above-mentioned policy on his life by way of collateral security, the mortgage containing covenants by him for the due payment of the premiums necessary to keep up the policy. These premiums were duly paid up to the time of his death.

In May, 1865, White paid off 300*l.* of the debt, leaving 700*l.* still due to the company.

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On the 24th of June, 1865, White, who had been for some time past in ill health, shot himself with a pistol in a fit of temporary insanity. He survived for two hours after the wound was inflicted, during which time he was conscious, and signed a will prepared on the spot. The coroner's jury found by their verdict that he died from the effects of the wound inflicted on himself as above mentioned while "of unsound mind," and his death was registered in the district where he was buried "Shot himself, temporary insanity."

In November, 1866, administration with the will annexed was granted to White's widow, and questions then arose between the family and the assurance company with regard to the policy and the mortgage-debt, the family contending that the 700*l.* remaining due on the mortgage was satisfied by the sum payable under the policy, while the company insisted that the policy had become void.

In January, 1867, the widow and children filed this bill, which, after charging that the mortgage-debt, principal and interest, had in fact been fully satisfied in manner above mentioned, and that the company were bound to reconvey the mortgaged property free from the mortgage, prayed a declaration that the company were bound to retain in their hands so much of the 1,000*l.* payable under the policy as was sufficient to satisfy the principal and interest remaining due on the mortgage securities, with a decree that the company should pay the balance to the administratrix, and re-convey the mortgaged premises to the persons entitled thereto.

The payment of the balance to the administratrix was asked for upon a charge that the death of Horatio White, if not purely accidental, was caused by an act committed by him during a period of temporary insanity, on which ground it was contended that the condition avoiding the policy in case of suicide did not apply, and in that case the policy was good to the full extent of the 1,000*l.*

Mr. Cole and *Mr. Hallett*, for the plaintiffs.—There is no ground for the contention of the company that the policy has become absolutely void. In the first place, we say it is at least good to the extent of the 700*l.* remaining due. The case is within the exception in the 7th condition, for the effect is just the same as if the policy had been mortgaged to a stranger. The company were "other persons" within the meaning of that section; and the fact that the insurance office itself is the mortgagee does not alter the rights of the parties. There are several decisions upon the effect of a similar exception in the condition, and they are all in favour of the plaintiff's claim—*The Solicitors' and General Life Assurance Company* v. *Lamb* (1 Hem. & M. 716: affirmed on appeal, 2 De Gex, J. & S. 251; 33 L. J. Ch. 426); *Dufaur* v. *the Professional Life Assurance Company* (25 Beav. 599; 27 L. J. Ch. 817); *Jones* v. *the Consolidated Investment and Assurance Company* (26 Beav. 256; 28 L. J. Ch. 66). But, secondly, we say the policy is good to the full extent of the 1,000*l.* for which it was granted, for it never became void at all. The assured's death was not a voluntary act of self-destruction, and therefore he did not "die by his own hand" within the meaning of the 7th condition. That condition does not apply to an act committed by one "of unsound mind." Such was the opinion of some of the Judges in *Borradaile* v. *Hunter* (5 Man. & G. 639; 12 L. J. C.P. 225); and *Clift* v. *Schwabe* (3 Com. B. Rep. 437; 17 L. J. C.P. 2); in the former case upon these very words, "die by his own hand," in the latter on the words "commit suicide"; and the reasonable construction is that where a man kills himself during a period of insanity he does not bring himself within the condition which avoids the policy.

Mr. Glasse and *Mr. Millar*, for the defendants.—As to the question of suicide under temporary insanity, it is clear that the mental condition of the assured makes no difference in the result. The condition equally applies, and the policy is void. The Judges who thought otherwise in the cases cited were in a minority.

[MALINS, V.C. intimated that he desired no further argument from the defendants' counsel upon this point, and the plaintiff's counsel appeared to admit that it could not be maintained.]

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Then, as to the first ground relied on by the plaintiff. The exception in the condition cannot apply where the office itself is the mortgagee; otherwise the assured by simply depositing a policy with the office could take advantage of his own wrong, and render the condition nugatory by committing the very act it was intended to meet. The exception is inserted to save the rights of third parties; to give a title to persons outside the contract, notwithstanding the contingencies which may arise between those within it. It is no more than the proviso introduced in an act of parliament or a conveyance, that a particular enactment or power shall not affect the rights of third parties. In the cases cited the policy was outstanding in third parties, and in their hands it remained valid. But, further, this is not the case of a mortgage of land, with a policy included therein. The mortgage does not comprise the policy, for the company lent upon the security of the land, not upon that of the policy. They took the policy only by way of collateral security or indemnity, but the primary security is the land, and so long as that is sufficient, as it is, to satisfy their debt, the necessity for the indemnity has not arisen, and therefore there is no *bona fide* interest in the policy now vested in any other person whatever. The exception does not apply and the policy is void.

MALINS, V.C.—This case involves a point of considerable importance; but looking at all the circumstances of the case I think the rights of the parties are clear. Mr. White desired to borrow 1,000*l.*, and upon applying to this company, he found them willing to advance it upon his giving proper security and insuring his life in their office, which he accordingly did. There are certain points not now in dispute. It is agreed that the policy would necessarily have been void, in the events which have happened, if there had been no mortgage, because Mr. White committed suicide within three years from the date of the policy. On the other hand, it is also agreed that if the policy had been *bona fide* mortgaged to a third person, notwithstanding that the assured committed suicide, so far as it had been pledged to another person, and to the extent of the interest of such other person, the policy would have been good. But in this case the office which granted the policy took a deposit of it by way of collateral security. The counsel for the defendants properly admitted that the deposit of the policy was as much a mortgage of it as if it had been actually assigned by deed; but the mortgagor is also the assured, and it is therefore the case of a mortgage of a policy to the persons who happen to be the assurers, and the question is whether when the mortgagees are the assurers themselves they are "other persons than the assured," within the exception in the condition, who have acquired an interest in the policy.

With regard to the nature of this condition, which is, I believe, common to all policies, a case, involving an analogous point, arose and was much commented on in *The Solicitors and General Life Assurance Society* v. *Lamb*, before Wood, V.C., whose decision was confirmed, on appeal, by the Lords Justices. In that case a policy was effected, containing a condition to the same effect as this, though not in precisely the same words, avoiding the policy in the event of the assured committing suicide, with an exception similar to the present in favour of the interests of other persons. This policy was mortgaged with other property sufficient to cover the debt to a Mr. Ridgway. The assured committed suicide, and it was admitted that Ridgway had acquired an interest within the meaning of the exception, and the office paid his demand. But thinking that they had some sort of right to be relieved from this payment they filed a bill against the representatives of the assured, claiming, in marshalling the assets, to throw the debt on the mortgaged property so as to leave the policy free. The point was carefully considered by the Vice Chancellor, and he laid down the rule, which I think is the true rule, that this condition is a condition for the benefit of the assured, and not of the office. His words are these (1 Hem. & M. 725): "The object of the condition is to increase the value of the policy to the holder, *i. e.*, in the first place, to the assured. And, if that be so, I do not see how I can hold that, in the absence of fraud, the estate of the assured is

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to be deprived of the benefit intended to be given him by the exception, merely because the mortgagee happens to be fully secured." The same rule was adopted by the Lords Justices, on appeal, who held that the condition is intended for the benefit of the assured in order that he may make his policy an available security.

Now, what was the position of Mr. White? He paid the usual premiums, he took the policy with the usual conditions, neither more nor less favourable; and it is admitted by the counsel for the office that if on the 20th of October, 1863, instead of borrowing the 1,000*l.* from the office, he had borrowed it from a third party, and deposited the policy with such third party, the office must have paid the 700*l.* remaining due at Mr. White's death. But this condition being for the benefit of the assured, what reason is there that Mr. White, or those who claim under him, should be in a less favourable position because he happened to borrow of the office? If the office desired that under these circumstances the assured should be in a less favourable position than if he had borrowed from another person, they should have introduced an express condition to that effect, providing that this particular exception should have no operation whilst they were mortgagees of the policy. There is no suggestion that the other property mortgaged to the office plus the policy was not ample security to have enabled Mr. White to get his money elsewhere. If he had, the other property would have been free from the debt, because the policy would have provided enough for the payment of the debt in full. And if so, I can see no principle upon which he is to be in a less favourable position because the company lend the money, while they have the additional advantage of another insurance with their office. It appears to me that the parties have contracted in such a manner that the office have put themselves in the position of mortgagees, and Mr. White as mortgagor stands in the same position with regard to, and has the same rights against them as he would have stood in or had with regard to or against any other mortgagees; and I am of opinion therefore that the proviso in the condition was in force at the death of Mr. White. The office might have left the policy in his hands, but the moment they agreed to take it as security, they became "persons other than the assured" within the language of the condition, and to the extent of the interest vested in them as such other persons they made the policy good though the assured committed suicide. If so, it is no more than an ordinary case of an office and a mortgagee, and the policy as between the assurers and the assured is valid. The debt of 700*l.* must therefore be considered as extinguished, and the other securities must be re-assigned.

With respect to the argument of the plaintiff's counsel, that the policy was valid to the extent of the whole 1,000*l.*, I did not call further upon the other side, because in the case of *Borradaile* v. *Hunter* it was decided by three Judges against one that suicide under temporary insanity was within the meaning of the condition avoiding the policy; and in *Clift* v. *Schwabe* the same point was decided by five Judges against two. No doubt the three Judges who were in the minority, Tindal, C.J., Pollock, C.B. and Wightman, J., are Judges whose opinions are entitled to the greatest weight; but at the same time the contrary opinion was made law by a majority of Judges of equal eminence, and I myself should have agreed with the majority, that the committal of suicide, notwithstanding insanity, was an act which rendered the policy void.[1] That would have been so in this case if the policy had not been assigned, but as it has been, the condition comes into operation, and makes it valid.

The consequence is that the plaintiffs are entitled to the relief which they ask; there must be a reconveyance of the mortgaged premises, and the office must pay the costs of the suit.

(1) In the absence of any condition, a policy is not vacated by the suicide of the assured while in a state of insanity—*Horn* v. *The Australian, &c., Life Assurance Company* (7 Jur. N.S. 673; 30 L. J. Ch. 511), before Wood, V.C., for there is no principle of public policy upon which the assurance should in that case be void.

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LORD ROMILLY, M.R., Nov. 23, 1868.

In re JAMES WATNEY.

38 L. J. Ch. 57.

Land Registry Act—Indefeasible Title—Commencement of Title.

LAND REGISTRY.—*In* 1857, *in suits in Chancery it had been certified that a good title could be made to certain estates, and the estates were afterwards sold under orders of the Court, subject to a condition that the title should not be required prior to a private act of parliament which had vested the estates in trustees for sale, and which recited the previous certificate of good title made by the Court of Chancery*:—Held, *that the title up to the period for which it had been certified might be accepted without further examination as indefeasible for registration.*

This was an application by Mr. James Watney, on summons adjourned from chambers, that the title to an estate lately purchased by him might be registered as indefeasible under the Transfer of Land Act, 25 & 26 Vict. c. 53.

The 5th section of such act directs an examination of title, and enacts, that "no title shall be accepted for registration as indefeasible, unless it shall appear to be such as a Court of equity would hold to be *a valid marketable title.*"

By section 6, "Any question, doubt or dispute as to any matter of title that may arise in the course of such investigation may be referred to such Judge of the Court of Chancery as the Lord Chancellor shall appoint to hear applications under the act."

In 1857 a private act of parliament was passed for carrying into effect a compromise of the suit of *Carew* v. *Waugh* then pending. Prior to this act the title to the lands in question had been certified by the Court, in the following terms: "A good title can be made to such of the estates as remain unsold (save only that as to parts of those estates the title shewn is not carried back for so long a period as might be required by a purchaser)"; and it was also certified that the preamble of the act, which disclosed a title commencing in 1801 as to all (save the excepted parcels), had been proved in the suits. The act directed the sale of the lands by trustees appointed for the purpose. Mr. Watney was a purchaser from these trustees.

The act empowered the trustees to sell under any ordinary or special conditions of sale. One of the conditions under which the lands in question were sold was as follows:

"That inasmuch as the sale takes place under the powers of Carew's Estate Act, 1857 (preparatory to the passing of which the title was proved on oath to the satisfaction of the House of Lords), and under the sanction of the Court of Chancery, the vendors (the present trustees and mortgagees under the act) are not to shew any title, or produce any evidence of title, other than the Queen's Printer's copy of the act and official copies of subsequent proceedings in Chancery thereunder, and an attested copy of a mortgage-deed enrolled in Chancery; and the purchaser is to accept without objection or requisition the title so shewn. The vendors believe the title to be perfectly marketable, inasmuch as it was not only certified in the year 1857, in the cause of *Carew* v. *Waugh*, to be good, but it has been recently examined and accepted without objection by mortgagees for a very large amount."

Under these circumstances the question stated by the Registrar for the opinion of the Court was, "whether, having regard only to the sufficiency of the act as a root of title such title should be accepted as indefeasible for registration as being a title which a Court of equity would hold to be a valid marketable title, or whether the anterior title must be produced and verified."

Mr. Southgate and *Mr. F. H. Colt* submitted the question to the Court on behalf of the purchaser.

The MASTER OF THE ROLLS said he was satisfied that the title might be held to be a valid marketable title so far as it had been certified by the Court.

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MALINS, V.C., May 26, 28; June 2, 1868.

POTTS *v.* SMITH.

38 L. J. Ch. 58; L. R. 8 Eq. 683; 17 W. R. 1083.

Considered, *In re Metcalfe*, [1903] E. R. A.; 72 L. J. Ch. 786; [1903] 2 Ch. 424; 88 L. T. 727; 51 W. R. 650 (Ch. D.).

Easement—Prescription—Light and Air—Ornamental Garden—Covenant for Quiet Enjoyment—Implied Contract.

EASEMENTS AND PRESCRIPTION.—*The lessee of a house and garden, forming part of a large area of building ground, will not be entitled, under his ordinary covenant for quiet enjoyment, or otherwise in absence of special contract, to restrain the lessor or persons claiming under him from building on the adjoining land so as to obstruct the free access of light and air to the garden.*

It is a rule of law that there can be no prescription for an easement of light and air over open land.

The plaintiff occupied a house and premises abutting south on Cromwell Road, Kensington, held under a lease from the Earl of Harrington, upon the nomination of W. Jackson, the Earl's lessee, for ninety-nine years, from December, 1859, in which year the house was built. The ground at the back of the house (about 60 feet in depth and 36 feet in width) was laid out as an ornamental garden, and surrounded by a wall seven feet high; the house itself being 50 feet in depth and 36 feet in width, with a frontage towards the street of 10 feet in depth.

The defendant, who occupied the ground abutting east on the plaintiff's wall and premises under a building lease from the same Earl of Harrington, but of later date than that of the plaintiff, early in the year 1868 commenced preparations for building a mews.

On the 30th of March, the plaintiff served a notice to the effect that he should apply to the Court for an injunction, if the defendent persisted in his intended building.

The defendant, notwithstanding such notice, on the 13th of April (Easter Monday), with the assistance of a large body of workmen, rapidly built up a wall 23 feet high, immediately overlooking the plaintiff's wall and garden, and, as the plaintiff alleged, obstructing the access of light and air to certain windows at the back of his house.

The plaintiff filed his bill for a mandatory injunction on the 18th of April.

It was admitted that the plaintiff could have no prescriptive right to ancient lights; and the Court held that the injury sustained in respect of the alleged obstruction of light and air to the windows was so trivial that no relief could be granted in that behalf.

The only material question for consideration was, whether the bill could be sustained on the ground of nuisance and injury to the plaintiff's garden, under the ordinary covenant for quiet enjoyment contained in his lease.

This covenant was as follows: "The lessor doth hereby, for himself, his heirs, executors, administrators and assigns, covenant with the lessee, his executors, administrators and assigns, that he and they paying the rent hereby reserved, and performing the covenants and agreements hereinbefore on his and their parts contained, shall peaceably possess and enjoy the hereby demised premises for the term hereby granted, without any interruption by the lessor or his heirs, or his or their assigns, or any other person or persons lawfully claiming by, from, or under them, or any of them."

The defendant's lease, like that of the plaintiff, had been granted by the Earl, upon the nomination of and in pursuance of a certain agreement with Jackson, and the premises demised under both leases respectively formed part of an estate comprising about 46 acres, of which the Earl, as tenant for life,

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had been authorized to grant building leases under the Harrington Estate Act, passed in the year 1854.

It appeared that when the plaintiff took possession of his house and premises, he knew that the ground immediately adjoining his own was to be used for building purposes. The defendant's evidence further went to prove that a plan of the intended buildings, including the mews now threatened to be erected, had been shewn to the plaintiff or his surveyor. This, however, was denied by the plaintiff, who stated that, at the time of taking his lease, he only understood that certain houses were to be built on the adjoining ground, of a size and construction similar to his own, with gardens and premises corresponding.

The motion for an injunction was now treated, by consent, as the hearing of the cause.

Mr. Glasse and *Mr. Walford*, for the plaintiff.—The obstruction caused by the defendant's building constitutes a breach of the covenant for quiet enjoyment of the premises by the plaintiff, "without interruption from the lessor or any person claiming under him." In the present case both the lessor, as superior landlord, and Jackson were well aware how the adjoining land was to be used; and in demising his house and premises to plaintiff, "with all the rights, members, easements and appurtenances thereto belonging," they in effect granted the use of this garden as an easement appertaining to the house. The lessor could not afterwards, in derogation of his own grant, suffer or be privy to any act whereby the plaintiff's enjoyment of his rights would be prejudiced.—[They referred to *Gale on Easements*, 4th edit. pp. 91 *et seq.*, and the cases there considered.]—The right to abridge this easement should have been expressly reserved by the owner of the whole property when the derivative possession through him was severed—*Suffield* v. *Brown* (33 L. J. Ch. 249); *Crossley* v. *Lightowler* (36 L. J. Ch. 584; 2 L. R. Ch. Ap. 478). Such being the rights of the parties, there is evidence of sufficient nuisance and obstruction to justify the interference of the Court by injunction; and the plaintiff is entitled to have the defendant's building pulled down so far as it exceeds in height the plaintiff's garden wall.

[Upon this part of the case the recent decisions in *Clarke* v. *Clark* (35 L. J. Ch. 151; 1 L. R. Ch. Ap. 16); *Dent* v. *the Auction Mart Company* (35 L. J. Ch. 555; 2 L. R. Eq. 238); and *Beadel* v. *Perry* (3 L. R. Eq. 465), were discussed.]

Mr. J. Pearson and *Mr. Langworthy*, for the defendant.—There being in this case no prescriptive right, the plaintiff could not, except by express contract, acquire any right to prevent the building of a house or wall higher than his own on the premises adjoining. The plaintiff, when he took his lease, was fully aware of the fact that this whole area of ground was intended for building purposes; and nothing has been done which was not then in contemplation. If he wished to restrict the lessor or those claiming under him in respect of the height, or position, or character of the buildings to be erected, such restriction should have been made the subject of special stipulation. Then, as to the covenant for quiet enjoyment contained in the lease, that only extends to matters of title, and does not imply any such right or easement as the plaintiff claims in respect of his garden. Moreover, it is not an "easement of necessity," and, upon principle, there can be no easement by prescription in a view over the land of an adjoining owner. This was clearly illustrated in *Roberts* v. *Macord* (1 Moo. & R. 230). The present case is completely covered by the decision of Lord Westbury (overruling the Master of the Rolls) in *Suffield* v. *Brown*. You cannot, except under contract, interfere with the ordinary enjoyment of property; that is the doctrine applicable here, and we ask to have the plaintiff's bill dismissed with costs.

Mr. Glasse was heard in reply.

MALINS, V.C. (*June* 2), after observing that, in his opinion, the plaintiff had failed to shew that the defendant's building caused such a material obstruction

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to any of the windows in his house as would justify the interference of the Court, even if there had been any prescriptive right, continued—The plaintiff, however, being unable to sustain his bill on the ground of interference with ancient lights, rests it upon contract. Now, with regard to the situation of the parties, it is clear from the evidence that the plaintiff knew that Jackson was lessee under the Earl of Harrington of this extensive area of land, and that it was in contemplation, as he himself admits, to cover the ground immediately adjoining his own with very large houses. Whether or not the actual plans were then submitted to him is immaterial, because it is clear that if this particular building had been such a house, instead of being what it is, the plaintiff would have experienced in a much higher degree all the mischief which he now complains of. But he takes a lease not containing a single stipulation with respect to the character of the buildings to be erected.

The defendant, therefore, or any other gentleman occupying this piece of land, side by side with, and of the same depth as the plaintiff's, might have covered it with outbuildings of any size or description. Instead of a flower-garden there might have been a picture-gallery or a billiard-room. If the plaintiff intended to protect himself, all these matters should have been the subject of contract. But though it is admitted that the plaintiff's lease contains nothing in special terms relating to the erection of buildings, the contention before me has been that the erection of this wall is prohibited by the ordinary covenant for quiet enjoyment contained in the lease.—[His Honour read the covenant.]—It was argued that this wall is an "interruption" of the free flow of air and light "by a person claiming under the lessor." Undoubtedly it is so; but this covenant relates only to the plaintiff's land. The words are, "the premises hereby demised." It does not affect any other land or premises. All that is contracted for is that the lessee shall enjoy the premises "hereby demised," without interruption by the lessor, his heirs or assigns. Such a covenant is, in fact, nothing more than would have been implied from the terms of the demise itself.

Then, with respect to the garden: I intimated during the argument that if the case had rested solely on the question of obstruction to the plaintiff's windows, it was so feeble that I should not have called on the defendant's counsel at all; but I was much pressed as to the garden, and I feel for the plaintiff that this wall must be a great annoyance, rendering his garden much less agreeable than it was before. But if he attached so much importance to it, he has only himself to blame for what has happened. He should have taken the precaution when he contracted for the lease to have a stipulation, such as is very commonly inserted in leases, that only buildings of a certain height should be erected on the adjoining land, or that certain parts should be maintained as open spaces, or that the then existing wall of seven feet should remain as it then was, to permit the free access of air and light. But he neglects to have any protective clause whatever, and now he is forced to rely merely upon general rights.

I entirely accede to the argument of the defendant's counsel, that there can be no prescription for open land. If such a prescription were once admitted, the consequence would be that nobody could build to the edge of his own land, because the adjoining owner might object and say, "Although I have never used my land for building purposes, yet I have for many years been accustomed to lay out linen or dry timber upon it, and for such purposes I have acquired a prescriptive right to the uninterrupted flow of air and light over this open space, with which you must not interfere." It would clearly be impossible to sustain such a proposition, and the rule of law is so laid down by Mr. Justice Patteson in the Nisi Prius case which was cited by Mr. Langworthy, *Roberts* v. *Macord*. The effect of that decision is correctly stated in the marginal note of the report, as follows: "The use of an open space of ground in a particular way, requiring light and air, for twenty years, does not give a right to preclude the adjoining owner from building on his land so as to obstruct the light and air." Therefore

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in the present case, however beautiful and agreeable this garden may be, the pleasure derived from the sight or scent of the flowers will not prevent the adjoining owner from erecting on his own land such buildings as he thinks fit. The substance, then, and gravamen of this case being that the defendant's building interferes with the plaintiff's enjoyment of his garden, that is not a ground for the interference of this Court, in the absence of any express or even implied contract. Upon this point I take the decision of Lord Westbury, in *Suffield* v. *Brown*, to be conclusive.—[His Honour referred to the circumstances of that case.]—Here, upon the same principle I say, that Lord Harrington, and those claiming under him, had a right to use the adjoining plots of land for all purposes for which building land could be used, and the plaintiff could only prevent the exercise of that right by contract. Having omitted to do so, his case wholly fails, and the bill must be dismissed. There are circumstances, however, in the case which make me feel dissatisfied with the conduct of the defendant, particularly after the negotiations that appear to have passed between him and the plaintiff upon the subject of this wall. I shall, therefore, dismiss the bill without costs.

GIFFARD, V.C., Nov. 9, 1868.

WOLLASTON *v.* KING.

38 L. J. Ch. 61; L. R. 8 Eq. 165; 20 L. T. 1003; 17 W. R. 641: further proceedings, [1869] E. R. A.; 38 L. J. Ch. 392 (V.C.).

Referred to, *Morgan* v. *Gronow*, [1873] E. R. A.; 42 L. J. Ch. 410; L. R. 16 Eq. 1; 28 L. T. 434 (L. C. for M. R.); *Bate* v. *Willats*, 1877, 37 L. T. 221 (V.C.); *Champney* v. *Davy*, [1879] E. R. A.; 48 L. J. Ch. 268; 11 Ch. D. 949; 40 L. T. 189; 27 W. R. 390 (V.C.); *White* v. *White*, [1883] E. R. A.; 52 L. J. Ch. 232; 22 Ch. D. 555; 48 L. T. 151; 31 W. R. 451 (Ch. D.); *In re Chesham*, [1886] E. R. A.; 55 L. J. Ch. 401; 31 Ch. D. 466; 54 L. T. 154; 34 W. R. 321 (Ch. D.); *In re Handcock's Trusts*, 1888, 23 L. R. Ir. 34 (V.C.): varied, 1888, 23 L. R. Ir. 42 (C. A.). Explained, *In re Abbott*, [1893] E. R. A.; 62 L. J. Ch. 46; [1893] 1 Ch. 54; 67 L. T. 794; 41 W. R. 154 (Ch. D.). Followed, *Tredennick* v. *Tredennick*, [1900] 1 Ir. R. 354 (V.C.). Disapproved, *In re Bradshaw*, [1902] E. R. A.; 71 L. J. Ch. 230; [1902] 1 Ch. 436; 86 L. T. 253 (Ch. D.). Adopted, *In re Oliver's Settlement*, [1905] E. R. A.; 74 L. J. Ch. 62; [1905] 1 Ch. 191; 53 W. R. 215 (Ch. D.). Followed, *In re Beale's Settlement*, [1905] E. R. A.; 74 L. J. Ch. 67; [1905] 1 Ch. 256; 92 L. T. 268; 53 W. R. 216 (Ch. D.).

Power of Appointment; Invalid Exercise of—Rule against Perpetuities.

PERPETUITY.—*A donee of a special power to appoint to children in the usual form, appointed a portion of the trust-funds to a child for life, with remainder as he should by will direct*:—Held, *that the trust funds did not pass under the will of the child.*

Caroline King being, under her marriage settlement, the donee of a power to appoint by will among her children a sum of money thereby settled, bequeathed 5,000*l.*, part thereof, to trustees, upon trust to pay the interest to her son James King for his life, and after his death directed that the trustees should stand possessed of the said sum of 5,000*l.* upon and for such trusts, intents and purposes, and with, under and subject to such powers, provisos and declarations as her son, the said James King, should by will direct or appoint; and in default of such appointment, and so far as no such appointment should extend, upon trust for her three daughters, Catherine, Caroline and Marianne, in equal shares.

James King survived his mother, the said Caroline King, and died in 1866,

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having by his will appointed the said sum of 5,000*l.* among certain of the defendants. The plaintiffs, the trustees of the fund, filed this bill to obtain a declaration as to the rights of all parties.

Mr. Willcock and *Mr. G. N. Colt*, for the plaintiffs.

Mr. W. M. James, *Mr. Kay*, *Mr. Horton Smith* and *Mr. J. N. Higgins*, for the defendants, who took in case the sum of 5,000*l.* did not pass under James King's will.—The appointment by Caroline King, except as regards the life-interest given to James King, contravenes the rule against perpetuities, and is therefore not a valid exercise of the power. No doubt, where a donee of a special power appoints to an object of the power for life, and also gives him an *absolute* power of appointment by will or deed, the whole disposition is valid, because the donee of the second power is regarded as absolute owner, and therefore the rule against perpetuities does not arise; but here the donee of the second power can appoint by will only. *Phipson* v. *Turner* (9 Sim. 227), is not the same case, because there the donee of the second power was in existence at the time of the original settlement, and therefore there was no question of the rule against perpetuities. The principle on which these cases are decided is shewn in *Thornton* v. *Bright* (2 Myl. & Cr. 230; 6 L. J. Ch. 121); *Fry* v. *Capper* (1 Kay, 163); *Rucker* v. *Scholefield* (1 Hem. & M. 36; 32 L. J. Ch. 46); *Churchill* v. *Churchill* (37 L. J. Ch. 92; 5 L. R. Eq. 44); *Armitage* v. *Coates* (35 Beav. 1).

Mr. Druce and *Mr. Chapman Barber*, for the legatees under James King's will.—*Phipson* v. *Turner* is clearly an authority in our favour. The Vice Chancellor in that case did not found his decision on the fact that the donee of the second power was in existence at the date of the original settlement; he did not even refer to it in his judgment.

GIFFARD, V.C. had no doubt that the power of appointment by will only, which Caroline King had attempted to give to James King, was invalid, as contravening the rule against perpetuities; it followed that the legatees under James King's will could not take any part of the 5,000*l.* There must be a decree accordingly.

STUART, V.C., July 18, 20, 1868.

BEAUMONT *v.* OLIVEIRA.

38 L. J. Ch. 62; L. R. 6 Eq. 534; 19 L. T. 330; 17 W. R. 41: varied, [1869] E. R. A.; 38 L. J. Ch. 239; L. R. 4 Ch. 309; 20 L. T. 53; 17 W. R. 269 (L. JJ.).

Will—Charitable Bequest—Royal Societies—Real Estate Abroad—Pure Personalty—Priority—Costs.

CHARITY. WILL.—*A legacy to the Royal Society, the Royal Geographical Society, or the Royal Humane Society is a legacy to a charity.*

Moneys arising from the sale of a testator's real estate abroad are not real assets, but are applicable pari passu with his pure personalty in the payment of his charitable bequests.

A testator bequeathed legacies to each of several charitable institutions, and directed that "all the said charitable legacies should be paid out of his pure personal estate." His pure personal estate being insufficient to pay in full the charitable legatees:—Held, *in a suit to administer his estate, that the direction of the testator exempted his pure personal estate from its ordinary contribution to funeral expenses, debts and costs of suit, and entitled the charitable legatees to the whole pure personalty in priority to all other pecuniary legatees, but that the charitable legatees must bear their own costs.*

In the administration of the estate it became necessary to institute a suit by which a pretended settlement of all the testator's real and personal estate

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was set aside:—Held, *that the costs of the suit must be apportioned rateably between the real estate and the pure and the impure personalty recovered therein.*

Benjamin Oliveira, by his will, dated the 11th of September, 1865, after giving certain specific and pecuniary legacies, bequeathed to the respective treasurers for the time being of the Royal Society, the Royal Geographical Society, the Royal Humane Society, the Marylebone School for Girls, and the Albert Orphan Asylum, the sum of 4,000*l.* each, and directed that "all the said charitable legacies" should be paid out of his pure personal estate; and as to all the rest and residue of his real and personal estate the testator gave, devised and bequeathed the same to his executors for their own absolute use and benefit.

The testator died shortly after the date of his will, and the present suit having been instituted for the administration of his estate, a decree was made therein directing accounts and inquiries.

While this suit was pending, a claim was made under a settlement which the testator in his lifetime purported to have made of his whole real and personal estate, and a suit of *Beaumont* v. *Johnston* was instituted, with leave of the Court, in which a decree was made by his Honour Vice Chancellor Stuart, on the 16th of April last, whereby the alleged settlement was declared null and void.

It appeared that the testator was possessed of pure personal estate to the amount of 6,711*l.* 1*s.* 5*d.*; that he was possessed of certain leasehold property which had realized the sum of 8,045*l.*, and that the only real estate of which the testator was possessed consisted of certain hereditaments in the island of Madeira, which had been sold under the direction of the Court, and had realized the sum of 806*l.*

The pure personalty being thus insufficient to pay in full the legacies to the above-named institutions, the questions now to be disposed of were, whether the Royal Society, the Royal Geographical Society and the Royal Humane Society were charitable institutions; whether the proceeds of the real estate in Madeira were pure personalty; whether the five above-named institutions, or which of them, were entitled to be paid their legacies out of the pure personalty in priority to all other legatees; and how the costs of the present suit and of the suit of *Beaumont* v. *Johnston* were to be provided for.

The Royal Geographical Society was the only one of the above-named institutions which was made a party to the suit, having been selected in order that the questions might be properly raised.

Mr. Bacon and *Mr. Langworthy*, for the plaintiffs.

Mr. J. Pearson and *Mr. Wickens*, for Miss Oliveira, a legatee.

Mr. Dickinson and *Mr. Archibald Smith*, for the Royal Geographical Society.—The Royal Geographical Society, which was founded in 1830, is, as appears from its charter and regulations, an institution established for scientific and not for charitable purposes, its object being to enable persons interested in geographical research to obtain information as to recent discoveries. There is, however, no school attached to it, nor is tuition any part of its scheme. It is a voluntary association in the nature of a club, supported by voluntary contributions, and may cease to exist by reason of the death of all its members. There is, therefore, nothing tending to a perpetuity in its constitution, neither is there any educational trust affecting it; and a gift to this society cannot be considered a gift to a "general public use," as charity has been defined to be—1 *Jarman on Wills*, 192, 3rd ed., nor for "the advancement of education and learning" with *Whicker* v. *Hume* (7 H.L. C. 124; 28 L. J. Ch. 396). This society is, therefore, entitled to be paid its legacy as well out of the mixed as out of the pure personalty.—They also referred to *Weld's History of the Royal Society, by Hooke*, vol. 1, p. 37; *Thompson* v. *Shakespeare* (1 De Gex, F. & J. 399; 29 L. J. Ch. 276); *Carne* v. *Long* (2 De Gex, F. & J. 75; 29 L. J. Ch. 503); *The Attorney General* v. *the Haberdashers' Company* (1 Myl. & K. 420; 2 L. J. Ch. 33); *Morice* v. *the Bishop of Durham* (9 Ves. 399; 10 L. J. Ch. 522).

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Mr. Bagshawe, for the Royal Society.—The legacy to this society is payable out of the mixed as well as the pure personalty, and the act of 9 Geo. 2. c. 36. does not apply. This society is not a charitable institution; it has no endowment, being merely allowed the use of rooms rent-free; and it is, like the Royal Geographical Society, supported by the voluntary subscriptions of its own members. He also contended that these societies were entitled to have the whole personal estate of the testator (in which the proceeds of the real estate in Madeira should be included) applied in payment of their legacies in priority to the residuary legatees, and cited 2 *Jarman on Wills*, 573, 3rd ed.; *Bench* v. *Biles* (4 Mad. 187).

Mr. Greene and *Mr. Alfred Bailey*, for the Marylebone School for Girls and the Albert Orphan Asylum, contended that these were charitable institutions properly so called, and were therefore entitled to be paid out of the pure personalty in priority to the Royal Society and Royal Geographical Society, which were not charitable institutions. They maintained that this was not a case of marshalling, and referred to *The Philanthropic Society* v. *Kemp* (4 Beav. 581; 11 L. J. Ch. 360); *Sturge* v. *Dimsdale* (6 Beav. 642); *Jauncey* v. *the Attorney General* (3 Giff. 308, 319); *Robinson* v. *Geldard* (3 Mac. & G. 735).

Mr. Davey, for the Royal Humane Society, argued that it was not a charitable institution, but that if it was the proceeds of the real estate in Madeira, not being subject to the law of Mortmain, must be considered as pure personalty, and be applied *pari passu* with the pure personalty in payment of the charitable legacies.

[STUART, V.C. said he was clearly of opinion that the Royal Humane Society was a charity, and that the proceeds of the real estate in Madeira were applicable in payment of the charitable bequests.]

Mr. Bacon, in reply.—The proceeds of the Madeira estate are not primarily liable to the payment of the charitable legacies, but they savour of the realty, and must be applied rateably in payment also of the debts, funeral expenses and costs—*Tempest* v. *Tempest* (7 De Gex M. & G. 470; 26 L. J. Ch. 501).

STUART, V.C.—The questions that have been argued in this case are some of them of very great difficulty. The first question is, whether or not the legacies to the Royal Society and the Royal Geographical Society are legacies to institutions which can within the contemplation of this Court be considered charitable, and I am of opinion that they are. It seems to me that the case of *Whicker* v. *Hume*, and the other cases relied upon, have very little application to the present case, and that very little can be derived either from the propositions of law cited or from the judgment in *Whicker* v. *Hume* to assist the decision in the present case. But Sir John Leach, Sir William Grant and Lord Eldon have used expressions that I think entirely govern the present case. Sir John Leach, in the case of *The Attorney General* v. *Heelis* (2 Sim. & S. 67, 76; 2 L. J. Ch. 189), with his usual precision, said, "I am of opinion that funds supplied from the gift of the Crown, or from the gift of the legislature, or from private gifts, for any legal public or general purpose, are charitable funds to be administered by Courts of equity."

Now, the Royal Geographical Society seems to me to be a body of persons having an individual character who have their funds supplied from private gifts for a "legal public or general purpose." I conceive that the Royal Society and the Royal Geographical Society essentially, from their constitution, are composed of individuals associated for a purpose public and general, and assist that purpose by the contribution of their own private funds, and when any other individual gives to the fund of that society, it seems to me that he gives for a public and general purpose within the definition of Sir John Leach. I need not stop to read the observations of Sir William Grant and Lord Eldon in the case of *Morice* v. *the Bishop of Durham*, which are entirely, but less precisely, within the language of Sir John Leach. Therefore my opinion is, that the gifts made to the Royal Geographical Society and the Royal Society

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by the testator must be considered as gifts which, in the contemplation of the law, are for a charitable purpose.

When the testator therefore said that "all the said charitable legacies are to be paid out of my pure personal estate," he gave a direction relating to the next question, which seems to be one of very considerable difficulty and importance. I conceive that his direction to pay these legacies out of his pure personal estate was given for a purpose, and that the testator, by the language he has used, has, just as clearly as the testatrix in *Robinson* v. *Geldard*, manifested an intention to benefit those charitable legatees by this direction. If not, the direction was nugatory, because it said no more than what would have been done by the law, whether it was said or not, because nothing beyond the pure personal estate could be applicable to pay those legacies. Therefore my opinion is, that the pure personal estate is first of all applicable to pay those legatees in priority to all other legatees.

But I go further; I think that the language manifests an intention to pay those legacies in priority to anything else out of the pure personal estate. In *Robinson* v. *Geldard* the language was very nearly the same; and I understand that Lord Truro by his decision in that case, which reversed the decision of Lord Langdale, made a decree which exempted the legacies to charitable purposes from bearing their proportion of any demand in respect of costs of the suit or for debts of the testator. In the case of *Tempest* v. *Tempest* it was different, and Lord Cranworth, who reversed the decree of Wood, V.C., takes care to say that he rests his decision on the ground that the testator had not expressed any intention to release pure personalty from its legal liability.

Now, I think this direction was given with the express purpose of exempting the pure personal estate from its ordinary liability, and that it was intended to give a preference to the charitable legacies. The words in that case were a mere direction that the charitable bequest should be paid in precedence to the other pecuniary legacies. The testatrix had defined the extent of precedence, and defining it to that extent there was, in the opinion of Lord Cranworth (very justly formed, if I may venture to say so) nothing to authorize the Court in that case to exempt the pure personal estate from its ordinary contribution to the costs of the suit, the funeral expenses and the debts. But in this case there is an undefined priority given, in my opinion, to the charity legacies. I find it not confined to giving priority merely to the pecuniary legacies. I think the testator intended that the pure personal estate, out of which alone the charity legacies should be paid should be primarily applied to the purpose of their payment, and until that purpose is satisfied it should be applied for no other testamentary purposes.

The other question as to the real estate in Madeira I have already disposed of. I entertain no doubt whatever in a case where a testator dies entitled to landed property in a foreign country that, in the contemplation of this Court that land is not real assets, and not within the peculiarity of the law of England in the distribution of assets, which favours so much the rights of heirs and devisees as against creditors. I think it must go like the pure personal estate to pay these charity legacies as the purpose to which it is primarily applicable. But then it may be said, if it is personal estate it cannot be considered as pure personal estate, and the utmost that the charity legatees can say is, that they will take their proportions with other legatees. But my opinion is that these proceeds are more in the character of pure personal estate than impure personal estate, because I am not prepared to hold that land in a foreign country which has no character of real estate can be considered as impure personal estate, for this reason: we consider impure personal estate is that (leasehold property for instance) which partakes in some degree of the character of real estate; but, if I am right in my view of the property at Madeira considered as assets upon the distinction between real and personal assets, I can find nothing in it to connect it with the character of real assets, to make me say that it is impure personal estate, or other than personal estate to be administered like the rest.

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Therefore, that is primarily applicable to pay the charity legacies. After the charity legacies, if there is enough to satisfy them, of course what remains must be applied in the ordinary course of administration, for the testator has said nothing else.

As to the costs of the suit which was instituted after the testator's death, to set aside the fraudulent settlement which he had made of his property, I have already indicated my opinion that the property recovered in that suit, whether real or personal, whether pure or impure personalty, being recovered in that suit, must bear the costs which were involved in its recovery; and that there should be an apportionment of the costs of the suit between the property of the different creditors, whatever that may be, so that if there were pure personal estate and impure personal estate recovered in that suit, there should be an apportionment, which should include the pure personal estate in the costs of that suit. His Honour added that that suit having been necessary before the property subject to the settlement could be made assets, the expense of making it assets must be borne rateably by the property which was now found to be assets, otherwise the whole costs of that suit would come out of the pure personal estate and might defeat the charitable legatees. Those legatees must submit to bear that portion of the costs of that suit to which the pure personalty applied.

His Honour also stated that he included the Royal Humane Society among the charitable legatees, and that as such legatees had swept away the whole pure personal estate, and kept it free of the general costs of the present suit, his Honour could give them no costs thereof, and that each of them, whether parties to this suit or not, must bear their own costs.

GIFFARD, V.C., Nov. 20, 1868.

EDWARDS *v.* THOMPSON.

38 L. J. Ch. 65.

Will—Power to Appoint Rents to Wife for Life—Trust for the Benefit of Husband.

POWERS.—*A testator gave real and leasehold property to H. M. E. for life, and empowered him to appoint the rents thereof after his death to his wife for life.*

The testator bequeathed his residuary personalty upon "the like trusts for the benefit of H. M. E. and his issue as were thereinbefore declared concerning the real and leasehold estates":—Held, *that H. M. E. took a power to appoint the income of the residuary personalty to his wife for life.*

TRUST AND TRUSTEE.—*A will authorized investments in "shares of any established railway in full operation":*—Held, *that investments in shares in railways within the United Kingdom, established by act of parliament, were authorized.*

SPECIAL CASE.—Edmund Bushell, by his will, dated the 21st of September, 1853, devised and bequeathed all his real and leasehold estates unto his trustees, their heirs, executors and administrators, upon trust (but as to a portion of the estates, after the expiration of certain life interests) to pay the rents and profits of such estates unto, or permit the same to be received by, the testator's nephew, Henry Martyn Edwards, during his life; and after his death, upon trust for the children or other issue of Henry Martyn Edwards, as the latter should appoint, and in default of appointment, upon trust for the children equally, who being sons should attain twenty-one or die under that age leaving surviving issue, or who being daughters should attain that age or be previously married.

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The will then contained a hotchpot clause in the usual form, and then proceeded as follows: "And I empower my said nephew, by deed or will, to appoint that all or any part of the rents and annual income of the aforesaid trust premises shall immediately from and after his decease be paid to any wife who may survive him, for her life or any less period."

The will then contained, among other provisions, a declaration that if Henry Martyn Edwards should be living at the expiration of eighteen years from the date of the will (which event did not happen), the trusts thereinbefore declared concerning the testator's real and leasehold estates should cease, and Henry Martyn Edwards should become absolutely entitled to such estates.

The testator then bequeathed his residuary personal estate to his trustees, upon trust to get in such parts thereof as should not consist of money, or securities for, or investments of money, and to stand possessed of his personal estate and the investments thereof, upon trust, as to one moiety thereof, to pay a mortgage debt and a bond debt respectively owing by Henry Martyn Edwards, and as to the residue of such moiety to stand possessed thereof upon trusts, which were declared in the following words, viz., "upon the like trusts for the benefit of my said nephew, Henry Martyn Edwards, and his issue as are hereinbefore declared with respect to my real and leasehold estates, and with the like provision for the determination of the trust at the expiration of the said period of eighteen years from the date hereof, and for the absolute assignment and transfer of the same moiety to the said Henry Martyn Edwards if he should be then living."

The will then, among other things, empowered the trustees to invest the moneys arising from the testator's personal estate, which should not be wanted for any of the purposes of his will, in or upon any of the parliamentary stocks or public funds of Great Britain, or at interest upon government or real or leasehold securities in England or Wales, or on the bond or bonds of any corporate body authorized by parliament to raise money on bond, or in the purchase of shares in any established railway in full operation.

The testator died on the 23rd of October, 1856. Henry Martyn Edwards died on the 19th of November, 1866, leaving a will dated the 7th of September, 1863, whereby, in exercise of the powers given to him by the will of Edmund Bushell, he appointed that the rents and annual income of the real and leasehold estates, subject to the trusts of the same will, and also the interest, dividends and annual income of the securities representing so much of the personal estate bequeathed by the same will, as was thereby made subject to trusts for the benefit of himself and his children and other issue and his wife, should be paid to his wife, the plaintiff, Helen Edwards, during her life.

It appeared that the moiety of the residuary personal estate of the testator, Edmund Bushell, bequeathed upon trusts in favour of Henry Martyn Edwards and his children was in part represented by 100 half shares in the Ulster Railway Company, and 50 shares in the Northern Counties Railway Company, both of which railways are situate in Ireland.

The questions were: First, whether under the will of Edmund Bushell, Henry Martyn Edwards had power to appoint by will to the plaintiff a life or any other and what interest in the moiety of the residuary personal estate of the testator, Edmund Bushell, by his will bequeathed upon trust for Henry Martyn Edwards and his children. Secondly, whether under the same will investments of the testator Edmund Bushell's personal estate upon the shares of established railway companies were authorized.

Mr. Kay and *Mr. Martineau*, for the plaintiffs, cited *In re Palmer* (3 Hurls. & N. 26).

Mr. Druce and *Mr. Ferrers*, for the defendants.

GIFFARD, V.C.—It is clear that a power of this kind is for the benefit of the

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legatee. The answer to the first question must be in the affirmative. The Vice Chancellor directed the second question to be amended by confining it to shares of railways in the United Kingdom established by act of parliament, and said that the answer to the question, as amended, would be in the affirmative.

LORDS JUSTICES, July 20, 1868.

SHEPHERD *v.* GILLESPIE.

38 L. J. Ch. 67; L. R. 3 Ch. 764; 19 L. T. 196; 16 W. R. 1133: affirming, [1868] E. R. A. 351; 37 L. J. Ch. 835; L. R. 5 Eq. 293; 17 L. T. 280; 16 W. R. 243 (V.C.).

See, *Cruse* v. *Paine*, [1868] E. R. A. 743; 37 L. J. Ch. 711; L. R. 6 Eq. 641; 19 L. T. 127; 17 W. R. 45 (V.C.): [1869] E. R. A.; 38 L. J. Ch. 225; L. R. 4 Ch. 441; 17 W. R. 1033 (L.C.); *Coles* v. *Bristowe*, [1869] E. R. A. 85; 38 L. J. Ch. 81; L. R. 4 Ch. 3; 19 L. T. 403; 17 W. R. 44 (C. A.); *Crabb* v. *Miller*, [1871] E. R. A.; 24 L. T. 220; 19 W. R. 519: affirmed, 24 L. T. 892; 19 W. R. 882 (C. A.).

Section 35 of the Companies Act, 1862, is now replaced by Companies Act, 1908, (8 Edw. VII. c. 69) s. 32.

Specific Performance—Shares in a Public Company—Acquiescence.

COMPANY. STOCK EXCHANGE.—*A broker on the Stock Exchange, by order of S, sold for the account some shares in a company to another broker, who bought them on the instructions of W. On the settling-day W. instructed his broker that G. was the real purchaser, and directed him to have the shares transferred to G. A transfer to G. was accordingly obtained from S. In fact, the instructions so given to his broker by W. were without G.'s authority; but G. was afterwards informed of the use which had been made of his name, and he was also told that his account with the company, of which both he and W. were directors, had been debited with the price of the shares. G. protested against what had taken place, but did not repudiate the transaction to S. On the contrary, he retained possession of the transfer which had been handed to him, and deposited it with the secretary of the company as a security for the amount which was placed to his debit in the manner above mentioned. He, however, refused, when requested by S, to register the transfer. A suit for specific performance of the contract for purchase was accordingly instituted by S. against G. and W.*:—Held, *that G. was not, under the circumstances, at liberty to deny that he was the purchaser; and as the company was being wound up, he was ordered to indemnify S. against the calls which were being made upon the shares.*

This was an appeal from the decree of Stuart, V.C., reported 37 L. J. Ch. 835. The facts are fully set out in the former report. The following is a summary of such facts. The plaintiff, a registered owner of 250 shares in the Joint-Stock Discount Company (Limited), sold them to a broker on the Stock Exchange in the ordinary manner,—the name of the broker's principal being, as is usual, undisclosed. On the settling-day, the broker informed the plaintiff that his principal was the defendant J. F. Wilkinson, but that J. F. Wilkinson had requested that the shares should not be transferred to him, but to the defendant Gillespie.

The deeds of transfer were accordingly made out in Gillespie's name, and were executed by the plaintiff and delivered to the broker, who paid the plaintiff the agreed price of the shares, viz., 1,750*l.* for 200 of them, and 437*l.* 10*s.* for the remaining 50. The transfers were delivered to Gillespie, who retained them. The evidence was conflicting as to the true relative position of Wilkinson

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and Gillespie; but the plaintiff contended they were both liable to indemnify him from the calls and responsibilities attaching to the ownership of the shares. And, inasmuch as neither had taken any steps to procure a registration of the transfers, and thereby the shares were left standing in the plaintiff's name, the present suit was instituted to compel performance of the contract of purchase, and for indemnity.

The Vice Chancellor having decided that Gillespie was liable to accept the shares and to indemnify the plaintiff, he now appealed.

Mr. Greene and *Mr. Smart*, for the appellant, relied upon the contention that there was no contract between the appellant and the plaintiff and no privity, and that *Pickard* v. *Sears* (6 Ad. & E. 469), did not apply. The order that Gillespie should pay Wilkinson's costs could not, in any view of the case, be supported.

Mr. Bacon and *Mr. J. N. Higgins*, for the respondent the plaintiff; and *Mr. Prendergast* and *Mr. V. Hawkins*, for Wilkinson, were not called upon.

Lord Justice Wood.—We do not think it necessary to call on the other side. There is no doubt that Mr. Wilkinson was, in the first place, the person whose name was given to the plaintiff as the purchaser of these shares; but it is alleged that the defendant Gillespie agreed to adopt the contract, and allowed his name to be given to the plaintiff as the actual purchaser and intended transferee of the shares. The plaintiff also alleges that it was stated to him, and further that it was the fact, that Gillespie was the person who paid the purchase-money; and the prayer of the bill that Gillespie should be held bound by the contract as well as Wilkinson is founded upon these allegations. How do the matters stand upon these points?—[His Lordship examined at great length the evidence as to what took place between Wilkinson and Gillespie, and then continued]—Now, what a strange state of circumstances this is! This gentleman seems to think that he may be informed that his name has been used as a purchaser of shares; that, in fact, a transfer of the shares into his name has been executed; that his account with the company has been debited with the amount of the purchase-money; and yet that he may rest satisfied with saying, "I shall continue to object to your so doing." It is difficult to see his meaning in saying so, because he never informed Mr. Shepherd that he was not the transferee; he never seems even to have informed any of the directors of the company that he repudiated the transaction; on the contrary, he discussed the matter with them as if acquiescing in it, though, perhaps, not expressly doing so. Further than this, he received the transfer, retained it in his possession, and then actually made use of it by pledging it as a security for the very money which had been passed to his debit on account of the purchase. It seems that Shepherd applied to him to register the transfer, to which he made no answer, except promising that he would explain the transaction. Afterwards, in reply to repeated applications, he simply said, "I did not authorize it." Now he must have known, what everybody knows, that a seller of shares wishes, first, to get his purchase-money; and secondly, to have his name taken off the list of shareholders. Nevertheless, he chose to hold on in the manner I have mentioned, without giving the slightest information to Mr. Shepherd, who was obviously very desirous of having his name removed from the register. Under these circumstances, I think it is impossible to say that the decree is wrong in regard to Gillespie. I have been considering whether or not Wilkinson ought to have had his costs; but I do not think it would be proper to interfere with what has been done.

Lord Justice Selwyn.—I think that the appellant has brought upon himself the difficulties under which he now labours by attempting to occupy two inconsistent positions. It may happen to any man, though probably it is a rare occurrence, to have shares purchased in his name and transferred to him without any contract on his part. It may also happen that his banking account may be debited with the amount of the purchase-money. But if he intends to take up

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the position of a perfect stranger to the transaction, he must at once repudiate it, and that by no ambiguous acts. He certainly must not endeavour to take any advantage of the transaction. Mr. Gillespie might possibly have taken this position at the first. But he did not; he took quite an inconsistent position. He endeavoured to deal with these shares. He says he only did so for the benefit of another body,—the company,—to protect them from loss through advancing the money for their purchase. He may have had some anxiety about the amount placed to his debit, and which remained to his debit at the date of the winding-up. But the fact remains that he dealt with the property; and after that it is too late for him to say that he is a mere stranger to the transaction. The appeal must be dismissed with costs.

GIFFARD, V.C., Nov. 13, 16, 24, 1868.

MARSHALL *v.* THE GLAMORGAN IRON AND COAL COMPANY (LIMITED).

38 L. J. Ch. 69; L. R. 7 Eq. 129; 19 L. T. 632; 17 W. R. 435.

Specific Performance—Company—Contributory—Agreement to cancel Shares—Ultra Vires.

COMPANY.—*One of the articles of association of a company formed under the act of* 1862 *provided that no agreement entered into or act done by the directors, to which the assent of the company in general meeting should be given, should be afterwards impeached as being beyond or opposed to the objects of the company. The directors entered into an agreement with a shareholder in the company, to cancel his unpaid-up shares, and the agreement was duly assented to by a general meeting of the company. The company was afterwards, and before the shares were cancelled by the company, ordered to be wound up, and the shareholder was placed on the list of contributories*:—Held, *in a suit by the shareholder against the company, the liquidators and others, for specific performance of the agreement, that the latter was not ultra vires, and that the plaintiff was entitled to have his name removed from the list of contributories.*

The bill in this case was filed, by Charles Brownlow Marshall, against the Glamorgan Iron and Coal Company (Limited), Michael Louisson Levey, Stephen Phillips, George Cannock and John Romanes, and prayed that an agreement entered into between the plaintiff and the company might be specifically performed, one part of such agreement being that the company would cancel all the plaintiff's shares in it on which the full amount was not paid up.

At the date of the agreement next hereinafter mentioned the plaintiff was, under an indenture dated the 13th of July, 1864, the lessee of certain coal and iron mines for a term of sixty years from the 1st of March, 1864. He was also the owner of certain plant, machinery and works used by him in working, and otherwise in connexion with, the mines.

By articles of agreement dated the 7th of June, 1865, and made between the plaintiff of the one part, and seven other persons, including the defendant Michael Louisson Levey, of the other part, it was agreed, among other things, that the parties thereto of the second part should form the defendant company; that the plaintiff should sell to the intended company the mines above mentioned, and the plant, &c. thereon, and that the price to be paid for the mines, plant, &c. should be the sum of 48,976*l.* The agreement also contained a stipulation for the deposit by the plaintiff with the company's bankers, in the event therein mentioned, of the sum of 1,500*l.*, to secure payment of a dividend at the rate of 10*l.* per cent. on certain paid-up shares of the company.

The company was formed in June, 1865, and was incorporated under the act of 1862. The memorandum of association stated that the company was

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established for the purpose, amongst other things, of acquiring and working the plaintiff's mines; for (paragraph 10.) "the making and carrying into effect of arrangements with respect to the union of interests or amalgamation, either in whole or in part, with any other companies or persons"; and for (paragraph 12.) "the performance and doing of all such acts and things as the company deem necessary, incidental or conducive to the above objects, and the doing of all things and the exercise of all powers contained in the articles of association of the company."

The 72nd article of the articles of association was as follows: "Subject to the restrictions herein contained" (which restrictions it is not material to state), "the board of directors shall have power to do all acts and things which they may consider proper or advantageous for accomplishing the objects and for carrying on the business of the company; and for this purpose they may from time to time, and on such terms and conditions as they may think advisable, make and enter into such purchases, sales, leases, loans, contracts and agreements as they may think fit, and may from time to time carry out, vary, modify or abandon such contracts or agreements."

The 73rd article declared what powers as to management should be possessed by the directors. It also, among other things, empowered them to carry into effect the arrangements mentioned in paragraph 10. of the memorandum of association; and "to establish and regulate agencies for the purposes of the company, whether in the United Kingdom or abroad, and to do all other things whatsoever, whether of the like or other sorts, which the directors consider to be in any way incidental to or connected with any of the above objects or conducive to the attainment thereof, or otherwise likely in any respect to be advantageous to the company"; and to borrow for the purposes of the company any sum not exceeding 100,000*l.*

The 74th article was as follows: "No purchase, sale, contract or agreement made or entered into by the directors, or act done by the directors to which the assent of the company in general meeting shall be given, shall be afterwards impeached or objected to by reason that the same is not within or is opposed to the business and objects of the company, or that a dissolution of the company may be thereby rendered necessary, or on any other ground whatsoever."

By an agreement, dated the 15th of July, 1865, and made between the plaintiff and the company, it was agreed, among other things, that the plaintiff should take a transfer of 200 shares in the company immediately after the settlement of the purchase of the mines.

The 48,976*l.* was paid to the plaintiff partly in debentures of the company and bills and cash, and partly in 1,225 fully paid-up shares in the company. The plaintiff, in pursuance of the agreement of the 15th of July, 1865, also took a transfer of 200 shares.

By an indenture, dated the 5th of August, 1865, the plaintiff, in pursuance of, and in accordance with, the agreement of the 7th of June, 1865, demised to the company the premises comprised in the lease of the 13th of July, 1864, for the term of fifty-nine years (wanting two days) from the 1st of March, 1865, reserving the same rent as was reserved by the original lease, and also certain royalties which by the last-mentioned agreement were agreed to be reserved. The under-lease contained a proviso for re-entry in case the company should be wound up.

By another indenture, also dated the 5th of August, 1865, the plaintiff assigned to the company the goodwill of, and the plant, &c. used in, the business carried on at the mines.

By an indenture, dated the 11th of July, 1866, made between the company of the one part, and the defendant Stephen Phillips of the other part, the company mortgaged the mines, plant, &c. to Phillips to secure the repayment by them to him of sums amounting together to 11,000*l.*

The agreement which was the subject of the suit was entered into by an indenture, dated the 6th of December, 1866, made between the plaintiff of the

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first part, the defendant Stephen Phillips of the second part, the defendants George Cannock and John Romanes of the third part, and the company of the fourth part. By this indenture it was, among other things, agreed that the company and Stephen Phillips should surrender to the plaintiff the lease of the 5th of August, 1865, and that the plaintiff should grant to the company a new lease of all the mines therein comprised upon the same terms as those contained in the lease of the 5th of August, 1865, except that in lieu of the rents and royalties by the same lease made payable, there should be payable, (1) a rent of 600*l.* a year, redeemable within three years on payment to the plaintiff of 5,000*l.*; and (2) rents, royalties and sums of money, the same in amount as those made payable by the lease of the 13th of July, 1864; and except that the new lease should not contain any clause avoiding the same in the event of the company being wound up or dissolved.

By the agreement in question, the company released the plaintiff from the performance, on his part, of the stipulations contained in the agreement of the 7th of June, 1865, in relation to the dividend of 10*l.* per cent. on the shares of the defendant company, and other the provisions contained therein, or in the agreement of the 15th of July, 1865, and from all other claims and demands whatsoever; and agreed that the company would also forthwith cancel all shares in the defendant company then standing in the name of the plaintiff upon which the full amount should not have been paid up. It was also agreed that the defendants Cannock and Romanes would indemnify the plaintiff against, among other things, the provisions of the agreements of the 7th of June and the 15th of July, 1865, and all claims of the company against him as a member thereof. It was also agreed that the plaintiff should transfer to the defendant Cannock, among other things, first all his, the plaintiff's, fully paid-up shares in the company; and secondly, debentures for 7,000*l.* issued to him by the company.

This agreement was adopted by the company at an extraordinary general meeting thereof, held on the 21st of January, 1867, and an adjourned extraordinary meeting, held on the 5th of February, 1867; and it was at such meetings resolved that the articles of association should be, and the same were thereby altered and amended so far as might be necessary to give full effect thereto.

The plaintiff had, in pursuance of the agreement, transferred to Cannock all his fully paid-up shares in the company, and also his debentures, which shares and debentures Cannock had accepted. The plaintiff had also done other acts by the agreement required to be done by him.

At a meeting of the company held on the 13th of February, 1867, it was resolved that the company should be wound up voluntarily, subject to the supervision of the Court, and that the defendant Michael Louisson Levey should be appointed liquidator.

The voluntary winding-up was, on the 2nd of March, 1867, ordered to be continued under the supervision of the Court.

At the date of the agreement of the 6th of December, 1866, the plaintiff held in the company 1,425 fully paid-up shares, and 200 shares on which the full amount had not been paid up. After the order to wind-up had been made, the plaintiff discovered that the 200 shares had not been cancelled, and that the transfer of the 1,425 shares had not been registered, and that his name was still on the register in respect of both. The liquidator refused to carry into effect the agreement of the 6th of December, 1866, and he settled the plaintiff on the list of contributories in respect both of the 1,425 shares and the 200 shares.

It appeared that the defendants Phillips and Cannock and Romanes (for whom Phillips was a trustee) had, since the order to wind up the company, obtained a foreclosure decree in respect of the mortgage of July, 1866.

The bill was not filed until the lapse of several months after the order to wind up had been made. It prayed that the agreement of the 6th of December, 1866, might be specifically performed, and that the defendants Cannock and Romanes might be ordered to give such indemnity as was contemplated by

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the agreement, and that the plaintiff's name might be removed from the list of contributories in respect of the 1,425 shares and 200 shares respectively.

The defence set up by the answer of the liquidator was contained in the 21st, 22nd, 23rd and 24th paragraphs thereof, and was, in substance, that the meetings of the company at which the agreement was assented to had not been duly constituted, and were not *bona fide* meetings of the company. It was also objected that the agreement sought to be enforced was *ultra vires*, and that the plaintiff was too late in filing his bill. The plaintiff's evidence went to shew that the meetings of the company had been properly constituted. No cross-bill had been filed to impeach the agreement.

Mr. Druce and *Mr. Solomon*, for the plaintiff.—The agreement was either within or was opposed to the objects of the company. If it was opposed, the objection was cured by the meetings of January and February, at which the articles of association were altered. In either case the thing done was within the power of the company. The case of *Kent* v. *the Freehold Land and Brick-making Company* (37 L. J. Ch. 653; 3 L. R. Ch. Ap. 493), does not strike at this case, as the plaintiff's name was not on the register with his consent, but through the fault of the company. The company ought to have cancelled the shares immediately after passing the resolutions assenting to the agreement, and it was through the default of the company that this was not done. *The Colonial and General Gas Company's case* (2 L. J. Notes of Cases, 118; 2 Weekly Notes, 118), is strongly in favour of the plaintiff. At any rate, the plaintiff was entitled to relief against the defendants Cannock and Romanes in respect of their agreement to indemnify him. They also referred to *Spackman* v. *Evans* (37 L. J. Ch. 752; 3 L. R. E. & I. Ap. 171); *In re the Trent and Humber Ship-Building Company* (37 L. J. Ch. 686; 6 L. R. Eq. 396).

Mr. Fry, for the defendants Phillips, Cannock and Romanes.—The rule as to the liability of shareholders on the register through the default of others is, that if at the date of the order to wind up a shareholder be on the register through the default of a third person, the shareholder is fixed; but if, as in the present case, he be on the register through the default of the company, it is otherwise. The 72nd of the articles of association authorized the company to cancel shares, and such a step was within the scope of the company. The case made by the bill was against the company, and not against the defendants for whom he appeared.

He referred to *Rawlins* v. *Lambert* (1 Jo. & H. 458).

Mr. Higgins, for the liquidator, contended that, even if the agreement was *intra vires*, it was not binding on the company, as the provisions of the articles of association with respect to alterations therein had not been complied with. But the agreement to cancel the shares was *ultra vires*—*Richmond's case* (4 Kay & J. 305). There can be no cancellation of capital without express provisions to that effect. But this bill was filed after the commencement of the winding-up, and the plaintiff's name cannot therefore be removed—*Kent* v. *the Freehold Land Company*. It may be that credit was given to the company by the plaintiff's name remaining on the register. He also referred to the case of *Oakes* v. *Turquand* (36 L. J. Ch. 949; 2 L. R. E. & I. Ap. 325).

Mr. Druce, in reply.—The decision in *Peek* v. *Turquand* does not affect the exercise by the company of any special powers to release constituent members. The answer to any objection as to the regularity of the meetings of the company is the 74th of the articles of association. What was done in this case was done in virtue of the constitution of the company.

GIFFARD, V.C. (*Nov.* 24), after stating the facts, said.—Regard being had to these circumstances and to the allegations in the answer and affidavit, I do not hesitate to say that unless the agreement is bad as being *ultra vires*, no sufficient grounds are alleged for impeaching it. Moreover, whether there were or were not such meetings as were sufficient legally to affect an alteration in the articles of association, the agreement was, in my opinion, assented to in and by

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two general meetings of the company, for the meetings of the 21st of January and the 5th of February, 1867, were duly convened and held.

The questions, therefore, for consideration are, whether under these circumstances the agreement of the 6th of December, 1866, is *ultra vires* in whole or in part, and if not *ultra vires* as regards the 200 shares, then, whether the plaintiff ought or ought not to be in the list of contributors in respect of them. The agreement in question altered the terms of the original arrangement between the plaintiff and the company; it altered the royalties in favour of the company, and put an end to the clause in the under-lease of the 5th of August, 1865, to the effect that in the event of the company being wound up, that underlease should be void. Amongst other provisions contained in it is the following.—[His Honour then read the clause hereinbefore set forth as to the cancellation of shares, and then said]—No one can, in my judgment, have read the memorandum and articles of association and compared the agreement of December, 1866, with the previous arrangement, and reasonably entertain a doubt as to any part of it being *ultra vires* excepting that which provides for the cancellation of the shares standing in the plaintiff's name; that part of the agreement is fairly open to discussion. But while it must be admitted on the one hand that the ordinary powers usually conferred on directors and meetings of shareholders do not authorize the cancellation of shares, it must be equally admitted on the other, that provisions for the forfeiture of shares are usual, and, if duly and *bona fide* called into operation, perfectly legal.

The same also must necessarily be the result and effect of provisions for the cancellation of shares, if provisions there be that authorize anything of the kind. Is then the cancellation of shares authorized by the memorandum of association and articles? To this question I should have great difficulty in giving an affirmative answer if there were no such thing as the 74th article. But when I take into consideration the 10th and 12th paragraphs of the memorandum of association, add to these the 72nd and 73rd of the articles of association, and then bear in mind that the 74th of the articles is this: viz., "that no purchase, sale, contract or agreement made or entered into by the directors, to which the assent of the company in general meeting shall be given, shall be afterwards impeached or objected to by reason that the same is not within or is opposed to the business and objects of the company, or that a dissolution of the company may be thereby rendered necessary, or on any other ground whatsoever," I am at once led to ask, what reason can there be for so limiting the effect of this article as to exclude from its operation that part of the contract of December, 1866, which has to do with the cancellation of shares? Cancellation of shares is no more a reduction of capital than is forfeiture of shares. The objection to the validity of the cancellation is that it is *ultra vires;* but the very object of the 74th article is to provide that the assent of the company in general meeting shall validate that which, but for such assent, might have been invalidated as being *ultra vires*. That assent is to prevent the impeachment of any contract by reason that the same was not within the business and objects of the company, or on any other ground whatever, and that assent has been given to the agreement in question, each and every part of it; and it seems to me to follow as a consequence that each and every part of it has been rendered valid and unimpeachable. This being so, ought or ought not the plaintiff to be on the list of contributories as a present member of the company? The result of the decisions bearing on this point may be simply stated: First, if a man has become a shareholder in such a way that the contract is voidable at his option, but not at the company's; then, if he has not avoided the contract or done what is tantamount to avoiding it before the winding-up, he is held liable as a contributory. Again, if a man, being a shareholder, has sold his shares, he is not relieved from being a contributory if, owing either to his own neglect or that of his transferee, or if, in fact, owing to any cause, except the neglect of the company, his transferee's name has not been substituted for his at the date of the winding-up. If the omission to substitute the name of the transferee is owing entirely to the

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neglect and default of the company he would be relieved. Again, every one, be he shareholder or outside creditor, must be taken to deal with a company according to its constitution as appears from its memorandum and articles of association, and cannot complain of what can be lawfully done pursuant to that constitution however it may affect him. What then is here the case which has to be solved? Simply this: a valid and binding contract, dated the 6th of December, 1866, which provides that the company shall forthwith cancel all shares standing in the name of the plaintiff upon which the amount shall not have been paid up. Secondly, a valid and binding contract which contains a release of the provisions of the agreement of the 5th of July, 1865, being the agreement under which the shares were taken. Thirdly, the assent of the company to the agreement at two meetings, held respectively on the 21st of January and the 5th of February, 1867. Fourthly, a winding-up which must be taken to have commenced on the 13th of February. Fifthly everything done by the plaintiff which ought to have been done by him; but sixthly, his name on the register at the date of the winding-up. Before that period, however, he had legally ceased to be a shareholder, and if anything was not done which ought to have been done, the default was the default of the company. For these reasons, and under these circumstances, I am of opinion that the plaintiff's name ought not to be on the list of contributories in the character of a present member. As, however, he was a member up to and including the 5th of February, 1867, the question is in substance more a question between him and the other shareholders than between him and the creditors, for there scarcely could have been new creditors between the 7th and the winding-up, and no cancellation can affect a past liability. The plaintiff, therefore, is entitled to a decree for specific performance together with the costs of the suit, such costs, however, to be carried in for proof and payment under the winding-up. The plaintiff's name must be taken from the list of contributories as a present member, but without prejudice to any application that may be made to make him a contributory as having been a past member. And then a bond must be executed by the defendants, Cannock and Romanes, to be settled in chambers, if the parties differ. There will be no costs except those which I have directed to be proved under the winding-up.

LORD ROMILLY, M.R., June 9, 1868.

EYTON *v.* THE DENBIGH, RUTHIN AND CORWEN RAILWAY COMPANY; RICKMAN *v.* JOHNS.

38 L. J. Ch. 74; L. R. 6 Eq. 488; 16 W. R. 928: for previous proceedings see, [1868] E. R. A. 700; 37 L. J. Ch. 669; L. R. 6 Eq. 14; 16 W. R. 1005 (M.R.).

Receiver—Leave to Distrain—Lands Clauses Consolidation Act, 1845, *s.* 11. —30 *&* 31 *Vict. c.* 127. *s.* 4.

COMPULSORY PURCHASE. DISTRESS. RAILWAY. RECEIVER. — *Where property over which a person claims a right to distrain is in the hands of a receiver the Court will give leave to distrain, unless it is clear that the property is not within the power of distress.*

The owner of a rentcharge granted under section 10. *of the Lands Clauses Consolidation Act*, 1845, *has no power of distress other than that given by section* 11. *And it does not extend to goods which the company have assigned for the benefit of creditors.* Semble—*By* 30 *&* 31 *Vict. c.* 127. *s.* 4, *the rolling stock of a railway company is protected from such distress.*

Under section 10. of the Lands Clauses Consolidation Act, 1845, the Denbigh and Corwen Railway Company granted rentcharges as the prices of lands taken

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for the purposes of their undertaking; by section 11. of that act such rentcharges are made a charge on the tolls of the railway, and the section provides further for their recovery in the following terms: "And if at any time any such rents be not paid within thirty days after they so become payable, and after demand thereof in writing, the person to whom any such rents shall be payable may either recover the same from the promoters of the undertaking, with costs of suit, by action of debt in any of the superior Courts, or it shall be lawful for him to levy the same by distress of the goods and chattels of the promoters of the undertaking."

The suit of *Eyton* v. *the Denbigh Railway Company* was instituted by the owner of one of the rentcharges, on behalf of herself and the other owners of rentcharges, for payment of the rentcharges and the appointment of a receiver. A receiver was appointed in that suit. In April, 1868, the Master of the Rolls gave leave to the owner of one of the rentcharges to distrain, notwithstanding the appointment of a receiver in that suit.[1] The company, by a deed duly registered as a bill of sale, assigned and conveyed their superfluous land, engines, carriages, waggons, &c., chattels, effects and articles, to trustees, for the benefit of their creditors as therein mentioned. The suit of *Rickman* v. *Johns* was for the administration of the trusts of that deed, and a receiver was appointed in it. This was a motion by Wynne, the owner of a rentcharge, for leave to distrain on any property on the lands which he had conveyed to the company in consideration of his rentcharge. Notwithstanding both suits, a station had been built on the land.

Mr. Bradford (with whom was *Mr. Jessel*), for Wynne, said that leave had been granted in a similar case in the first suit,[1] and would, therefore, be granted also in the second. The power of distress was not ousted by the deed of assignment. If the owner of a rentcharge had not a right to distrain over this property as not being that of the company under section 11. of the Lands Clauses Act, still such owner by common law, or as being the owner of rent issuing out of land, had under 4 Geo. 2. c. 28. s. 5. such power. But if Wynne had no such power, the Court ought not to decide the question now, but should remove the obstacle, owing to the property being in the hands of an officer of the Court.

Mr. Baggallay and *Mr. A. E. Miller*, for the plaintiff in the two suits, and *Mr. Dryden*, for the company, did not oppose the leave being given in the first suit. But they said, the property which had been assigned was clearly not within the only power possessed by the applicant which was under section 11. of the Lands Clauses Act. On grounds of public policy the plant necessary for keeping up the working of the railway would not be interfered with—*Gardner* v. *the London, Chatham and Dover Railway Company* (36 L. J. Ch. 328; L. R. 2 Ch. 201), and it was expressly provided against by statute 30 & 31 Vict. c. 127. s. 4.

Mr. Bradford replied.

The MASTER OF THE ROLLS made the order asked for in the first suit, but refused to give leave in the second. He could not allow the applicant to take the goods conveyed to trustees, or the rolling stock of the company.

GIFFARD, V.C., Nov. 9, 10, 1868.

JACKSON *v.* SPARKS.

38 L. J. Ch. 75.

Will—Construction—"Surviving" read "Other."

WILL.—*Testator directed his trustees to pay one seventh part of his residuary estate, after conversion, to each of his two sons upon their attaining*

(1) Reported 37 L. J. Ch. 669; L. R. 6 Eq. 14.

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twenty-one, and to pay the income of one other seventh part to his daughter E. for her life, and after her death to divide the capital thereof among such children of E. as should attain twenty-one, and as to the other four sevenths upon like trusts for the benefit of his daughters A., B., C. and D. and their children. And the testator directed that in case any of his daughters should die without leaving issue surviving them, then the shares, as well original as accruing, of such daughters should be divided among his surviving sons and daughters, the shares of any daughters to be held upon the trusts therein declared concerning the other shares as accretions thereto:—Held, *that "surviving" was to be read as equivalent to "other."*

This was a SPECIAL CASE.

John Sparks, by his will, dated the 10th of October, 1856, gave his residuary real and personal estate to trustees, upon trust to convert, and, after payment thereout of his debts and certain legacies, then to pay one seventh part of the residue to each of his sons John and Joseph upon their attaining twenty-one; and as to one other seventh part to pay the income thereof to his daughter Elizabeth for her life, and after her death to divide the capital among such children of Elizabeth as should attain twenty-one; and as to the other four sevenths upon like trusts for the benefit of his daughters Esther, Mary, Martha, Margaret and their children; and the testator further directed that in case any one or more of his daughters should die without leaving issue her or them surviving, then the share or shares, as well original as accruing, of any and every such daughters or daughter so dying without issue should go and be divided among his *surviving* sons and daughters, the shares of any daughters to be held upon the trusts therein declared concerning the other shares or other the share, if only one, as an accretion or accretions thereto respectively, and for the equal benefit of such other shares, if more than one.

The testator died in 1862, leaving five daughters and one son surviving; John Sparks the younger having died in his lifetime.

Elizabeth died in 1864, leaving two children.

Mary died in 1867, without having been married.

The question submitted to the Court was whether the children of Elizabeth were entitled to participate in Mary's seventh, *i. e.*, whether the word "surviving" in the accruer clause was to be read "other."

Mr. W. M. James and *Mr. Woodroffe*, for the plaintiffs, the trustees.

Mr. Druce and *Mr. North*, for the children of Elizabeth, relied on *Cole* v. *Sewell* (2 H.L. C. 186); *Smith* v. *Osborne* (6 H.L. C. 375); *Wilmot* v. *Wilmot* (8 Ves. 10); *Holland* v. *Allsop* (29 Beav. 498); *Hodge* v. *Foot* (34 Beav. 349); *Hurry* v. *Morgan* (36 L. J. Ch. 105; L. R. 3 Eq. 152).

Mr. Kay and *Mr. Bardswell*, for the surviving brother and sisters, cited *Ferguson* v. *Dunbar* (3 Bro. C.C. 469, note); *Milsom* v. *Awdry* (5 Ves. 465); *Hawkins* v. *Hamerton* (16 Sim. 410); *Leeming* v. *Sherratt* (11 L. J. Ch. 423; 2 Hare, 14); *In re Corbett's Trusts* (29 L. J. Ch. 458; Johns. 591).

GIFFARD, V.C. said that this case differed in some particulars from all the decided cases. Here the testator had in effect given the share of a daughter dying without issue to his surviving son and to the "shares" of his daughters. Now the original gifts were to the sons absolutely, but to the daughters for life only, with remainders to such of their children as should attain twenty-one; and then came the proviso whereby the share of any daughter dying without issue was to go to the sons absolutely and to the daughters in such a way as to increase their shares. That result could not happen if the word "surviving" were to be construed in its strict literal sense. He therefore held that, looking at the special working of the accruer clause, and the manifest intention of the testator, the word "surviving" must be read as "other," and, as a necessary consequence, the children of Elizabeth would participate in Mary's share.

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GIFFARD, V.C., Nov. 18, 1868.

GREEN v. WYNN.

38 L. J. Ch. 76; 19 L. T. 553; 17 W. R. 72: affirmed, [1869] E. R. A.; 38 L. J. Ch. 220; L. R. 4 Ch. 204; 20 L. T. 131; 17 W. R. 385 (L.C.).

Principal and Surety—Composition-Deed by Principal—Covenant to pay Interest on extinguished Debt—Right of Creditor against Surety not barred.

BANKRUPTCY. DEED AND BOND. PRINCIPAL AND SURETY.—*A debtor executed a deed, under section* 192. *of the Bankruptcy Act*, 1861, *which amounted to a cessio bonorum, and contained a general release from his creditors, followed by a proviso reserving any rights they might have against any other persons in respect of any debt due by the debtor either alone or jointly with any other person*:—Held, *that a surety for interest only on a debt thereby released was not discharged from payment of interest which had accrued due since the date of the release.*

Webb *v.* Hewitt (3 Kay & J. 438) *explained.*

By an indenture, dated the 23rd of April, 1866, and made between Thomas Green of the first part, the plaintiff of the second part, and the defendant of the third part, Thomas Green mortgaged certain leasehold premises to the defendant to secure a sum of 1,000*l.* The deed contained the usual covenant by Thomas Green alone to pay the 1,000*l.*, and a joint and several covenant by Thomas Green and the plaintiff that if the sum of 1,000*l.*, or any part thereof should remain unpaid, they, the said Thomas Green and the plaintiff, or one of them, their or his heirs, executors or administrators, would, so long as the same sum, or any part thereof, remained unpaid, pay to the defendant, his executors, administrators or assigns, interest on the said sum, or so much thereof as should for the time being remain unpaid, at the rate of 10*l.* per cent. per annum, by equal quarterly payments.

On the 31st of December, 1866, Thomas Green executed a deed of assignment under the 192nd section of the Bankruptcy Act, 1861, which was duly registered on the following day, and to which the defendant gave his written assent. By that deed Thomas Green conveyed and assigned all his real and personal estate to a trustee upon trust to convert, and after payment of expenses to pay and divide the residue among the creditors of the debtor, whether such creditors should or should not execute that indenture, rateably and in like manner as if the said debtor had been, on the day of the date thereof, a bankrupt. The deed also contained the following clauses:

"And this indenture witnesseth that, in consideration of the assignment hereinbefore contained, they the said creditors do respectively hereby acquit, release and discharge the said debtor, his heirs, executors and administrators of and from all and singular the debts due to them respectively by the debtor, and all actions, suits, accounts, reckonings, claims and demands whatsoever in respect of the same debts, or any of them, or any part thereof, respectively, or in respect of any matter or thing respectively relating thereto. Provided always, that nothing herein contained shall in any way invalidate, prejudice or affect any mortgage, charge or any specific lien or security held by any creditor of the said debtor, or any right or remedy which any such creditor may have against any other person or persons in respect of any debt due by the said debtor, either alone or jointly with any other person or persons, or any part thereof."

On the 23rd of June, 1868, the defendant in this suit commenced an action at law against the plaintiff in this suit to recover interest which had accrued due on the 1,000*l.* since the date of the composition-deed; whereupon the plaintiff filed this bill, asking for an injunction to restrain the defendant from prosecuting his action.

Mr. Druce and *Mr. Caldecott*, for the plaintiff.—This case comes within the

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decision in *Webb* v. *Hewitt* (3 K. & J. 438). There has been an absolute release of the debt. The debt has been extinguished, and the surety was, under the covenant in the mortgage-deed, liable to pay interest on the debt only so long as it remained unpaid. In all the cases at common law which will be relied on by the other side, there was a debt due from the surety at the time of the release. Here the interest which is claimed has accrued due since the date of the release. The principal has never been liable for it, nor can the surety be liable.

Mr. Kay and *Mr. Whately*, for the defendant, relied on the proviso contained in the deed of release. That deed would be construed, at law, not as an absolute release, but as a covenant not to sue the principal debtor; and a proviso reserving all rights against everybody other than the principal debtor was valid and sufficient to reserve those rights. They cited *Price* v. *Barker* (4 El. & B. 760; 24 L. J. Q.B. 130); *Keyes* v. *Elkins* (5 Best & S. 240; 34 L. J. Q.B. 25); *Andrew* v. *Macklin* (6 Best & S. 201; 34 L. J. Q.B. 89); *Ex parte Carne* (L. R. 3 Ch. 463).

Mr. Druce, in reply.—*Solly* v. *Forbes* (2 Brod. & B. 38); *Nicholson* v. *Revill* (4 Ad. & E. 675; 5 L. J. K.B. 129); *Johnson* v. *Barratt* (L. R. 1 Ex. 65); and *Browne* v. *Carr* (2 Russ. 600), were also referred to in the course of the arguments.

Mr. Druce replied.

GIFFARD, V.C.—The question in this case is whether the plaintiff, who is surety, is released or not. If he is released, of course he is entitled to an injunction; if he is not released, his bill must be dismissed. Now, the first and main authority relied upon on the part of the plaintiff is *Webb* v. *Hewitt*. I have only to say this as to the decision in *Webb* v. *Hewitt*, that it seems to me to proceed entirely upon this view of the transaction, that there had been a contract between the principal debtor and the principal creditor that a certain transaction should amount to payment and to extinguishment; and that being so, it renders it unnecessary to allude to that case further, for it has no application to the present. Then, with regard to all the other cases, what they amount to may be stated in a very few words. From the case of *Solly* v. *Forbes* down to the more recent cases which have been quoted, the rule has always been this, that you may suspend your rights for ever against the principal debtor and yet preserve your rights against the surety; and that even though you put into the deed words which in form are a release, the Court will not give that effect to them, but will take the whole of the deed together, and effectuate that which is the real intention of the parties.

That being so, what is it we have here? We have, I quite agree, a state of things which is not exactly the same as if it had been an ordinary case of two persons jointly and severally liable for the same mortgage debt.—[His Honour referred to the terms of the mortgage-deed and of the composition-deed, and read the proviso at the end of the latter deed. He then proceeded]—Now, is or is not this a right which the creditor has in respect of a debt due by the debtor? If you look in the most minute and technical way to the form of the covenant, it is for payment of interest in respect of this very debt. No doubt there is a difference between the ordinary form of covenant and this form of covenant; but I cannot hold that there is the slightest difference in effect. I cannot have the least doubt but that the intent of the deed of the 31st of December, 1866, was to give a qualified release, or rather suspension of right to proceed, to this extent only, that whenever any creditor had a remedy in respect of any debt against any other person than Thomas Green, then that remedy should be reserved. I think it is clearly so expressed in this proviso at the end of the deed; and that being so, the bill must be dismissed. There may be, and is, a distinction in words between this case and *Solly* v. *Forbes* and that class of cases, but in substance and effect there is neither distinction nor difference of any kind.

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STUART, V.C., Dec. 3, 1868.

In re THE COMPANIES' ACT, 1862; AND *In re* THE CEFN CILCEN MINING COMPANY (LIMITED). (MRS. EDGWORTH'S CLAIM.)

38 L. J. Ch. 78; L. R. 7 Eq. 88; 19 L. T. 593.

Referred to *Waterlow* v. *Sharp*, 1869, L. R. 8 Eq. 501; 20 L. T. 902 (V.C.). Questioned, *Cunliffe Brooks* v. *Blackburn Building Society*, [1885] E. R. A.; 54 L. J. Ch. 376; 9 App. Cas. 857; 52 L. T. 225; 33 W. R. 309 (H.L.).

Company—Winding-up—Bankers of the Company—Overdrawn Account—Debt.

COMPANY.—*By a clause in the articles of association of a company, the directors were prohibited from contracting any loan beyond 500l. without the consent of the company by special resolution*:—Held, *that the clause did not preclude the directors from giving bills to the company's bankers without such consent, to secure the balance of an overdrawn account to a larger amount, and that the excess could be proved as a debt in the winding-up.*

This matter came on to be heard upon a claim of Mrs. Eliza Jane Edgworth, as administratrix with the will annexed of Thomas Edgworth, deceased, to prove as a creditor for a sum of 539*l.* 6*s.* 3*d.* against the above-named company.

The facts of the case were these:

The company was duly registered with articles of association and incorporated as a limited company on the 30th of August, 1860. By the articles it was, among other things, provided, that the regulations in Table A. in the Schedule to the Joint-Stock Companies' Act, 1856, should not apply, and that those articles of association should be substituted for such regulations.

The 7th clause of the articles provided that the North and South Wales Bank at Wrexham should be the bankers of the company.

The 56th clause of the articles provided as follows: "The directors shall not contract any loan beyond the sum of 500*l.* without the consent of the company by special resolution."

The 57th clause provided as follows: "The directors shall not enter into any contract above the value of 100*l.*, except the same be in writing, nor shall they enter into any contract whatever exceeding in value the sum of 300*l.* without the consent of the company by special resolution.

The company commenced its operations soon after it was incorporated, but was not so successful as it was anticipated that it might be.

They employed the North and South Wales Bank as their bankers, and on the 31st of July, 1861, there was a balance due from the company to the bank on their account current of 253*l.* 5*s.* 6*d.* The accounts of the company for that year were, however, duly audited, and adopted at a general meeting of the company on the 30th of August, 1861. The state of the accounts between the company and their bankers for the four ensuing years stood, on the 31st of July in each year as follows:

"1862.—600*l.* due from the company to the bank, secured by bills of exchange; and a balance of 161*l.* 8*s.* 6*d.* on the account current.

"1863.—755*l.* due from the company to the bank, secured by bills of exchange; and a balance of 213*l.* 15*s.* 5*d.* on the account current.

"1864.—755*l.* due from the company to the bank, secured by bills of exchange; and a balance of 186*l.* 12*s.* 4*d.* on the account current.

"1865.—831*l.* 8*s.* 4*d.* due from the company to the bank, secured by bills of exchange; and a balance of 239*l.* 7*s.* 1*d.* on the account current."

The accounts for each of those years had been audited, and subsequently acquiesced in by the company.

On the 24th of November, 1866, Mr. J. Devereux Pugh, a director of the company, drew a bill of exchange on Thomas Edgworth, another director, for

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the sum of 1,122*l.* 10*s.* payable three months after date. That bill was accepted by Thomas Edgworth and indorsed to the North and South Wales Bank to secure the balances then due to the bank from the company in respect of their overdrawn current account. There was no special resolution of the company consenting to the drawing or the accepting and indorsing of that bill, nor was there anything in the minute-books of the company to shew that they were at the time fully or at all aware of the transaction having taken place. It appeared, however, that the money so overdrawn by the company had been applied by the directors in prosecuting the business of it. When the bill arrived at maturity, viz., on the 27th of February, 1867, it was duly presented for payment, but dishonoured.

On the 19th of July, 1867, an order was made to wind up the Cefn Cilcen Company.

In the course of the proceedings under that order the accounts between the bank and the company when examined were found to stand thus:

Bill—J. Devereux Pugh on Thomas Edgworth, due 27th Feb., 1867				£1,122	10 0
Noting ditto					1 6
Interest to 19th of July, at 5 per cent., date of winding-up order					21 16 6
Bill—Edward Cooke on J. H. Murchison					38 3 6
Noting and charges					7 6
				£1,182	19 0
Less—Credit balance of account current, with interest to the 19th of July ...	£116	2	9		
Amount received from C. L. Barnewell, 24th July	27	10	0	143	12 9
				£1,039	6 3

The bank accordingly sent in a claim in the winding-up against the assets of the company for the sum of 1,039*l.* 6*s.* 3*d.* But the chief clerk, being of opinion that the transaction amounted to a loan by the company within the meaning of the 56th clause of its articles, allowed the claim to the extent of 500*l.* only.

Thomas Edgworth had a private account with the North and South Wales Bank, and to secure any overdrawn moneys of his own he had deposited with the bank the title-deeds of some of his private property.

Thomas Edgworth died on the 21st of February, 1868, and administration to his estate with his will annexed was granted to his widow, Mrs. E. J. Edgworth.

After the death of Thomas Edgworth, the bank realized the securities deposited by him with them, as last aforesaid, and thereout reimbursed themselves, not only all overdrawn moneys advanced to him by them on his private account, but also the sum of 539*l.* 6*s.* 3*d.* which had been so disallowed to them by the chief clerk as aforesaid.

A suit of *Riley* v. *Edgworth* had been instituted for the administration of Mr. Edgworth's estate, and on the 13th of June, 1868, an order was made in it that Mrs. Edgworth should be at liberty in her own name, as administratrix of her late husband's estate, or otherwise, to take proceedings for bringing before the Court for further consideration the claim of the North and South Wales Bank carried into the chambers of Vice Chancellor Stuart, as holders of the bill of exchange accepted by Thomas Edgworth against the Cefn Cilcen Mining Company, now in liquidation, and which claim had been disallowed in settling the debts and liabilities of the company, the bank claiming to hold security of the deceased in respect of the amount included in such bill; and it was at the same time ordered that the costs of and incident to the adjournment of the said claim into Court, and of that application, should be costs in the cause.

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Mr. Greene and *Mr. Freeling* supported the claim.—Mr. Edgworth's estate, having paid the sum of 539*l.* 6*s.* 3*d.* to the bank, was clearly to that extent entitled to stand as against the company in the same position as the bank would have been. But they ought to have been allowed to prove for the whole of the 1,039*l.* 6*s.* 3*d.*, as it was not a loan within the 56th clause of the articles, or at all, but simply the balance due from them on an overdrawn account, and therefore an advance, in the nature of a debt—*The German Mining Company* (4 De Gex, M. & G. 19; 22 L. J. Ch. 956).—(They were then stopped by the Court.)

Mr. Dickinson and *Mr. Brooksbank*, for the official liquidator of the company, referred to the 56th and 57th clauses of the articles of association. They insisted that having regard to the circumstances of this transaction, it was merely an advance of so much money by the bank to the company. If so, it was of necessity a loan, because the directors had no other means of getting money for the company than those prescribed by the articles. But then the bank could not be assumed to have been ignorant of the articles, and must therefore have known that any loan to the company above 500*l.*, not properly consented to it by it, could not be recovered. The case referred to decided no more than that money so borrowed ought to be repaid, and did not affect the present question. It was true the directors and the company were partners; and although in private partnerships, where one partner was ordinarily prevented drawing cheques on the partnership funds beyond a certain amount, without notice to, or the concurrence of another, there were cases in which the one partner might bind his co-partners by a cheque drawn to an amount larger than the prescribed one; such a power as that was excluded here by the express provision in the articles. If the bank could not directly claim more than the 500*l.*, neither could Mrs. Edgworth do so indirectly.

STUART, V.C.—In this case two directors of this company incurred an obligation by one of them being the drawer and the other the acceptor of a bill of exchange. The transaction took place under such circumstances as that the company had the money produced by the bill. The bank, who discounted the bill, have been satisfied; and the question is, whether the two directors are entitled to be considered as creditors of this company from the time that those directors, or either of them, paid the bill?

The prohibition in the articles of the company against the directors of it contracting any loan beyond the amount of 500*l.* seems to point, in fact, to a state of things very different from the transaction now in question. Borrowing and lending are matters perfectly well understood; and although procuring money on a bill of exchange is in a sense a borrowing of money, and may to the person who so gets it result in a benefit similar to that of a loan, yet it is impossible, I think, to regard this transaction as a loan within the meaning of the prohibition in the articles of the company. It has been decided that where a company keeps an account at a bank, and overdraws its account, the balance due from the company to the bank is not a loan—is not a borrowing and lending at all: it is a debt due from the company to the bank. The proper order to be made in this case will be to direct that Mrs. Edgworth be admitted to prove as a creditor of this company for the sum of 539*l.* 6*s.* 3*d.*; that is, the amount of the balance beyond the 500*l.* advanced by Mr. Edgworth's estate to the bank in liquidation of their claim to the sum of 1,039*l.* 6*s.* 3*d.* The costs of the official liquidator of the company, must be taxed, and paid out of its estate.

FULL COURT OF APPEAL. Nov. 3, 4, 5; Dec. 5, 1868.

COLES *v.* BRISTOWE.

38 L. J. Ch. 81; L. R. 4 Ch. 3; 19 L. T. 403; 17 W. R. 105: reversing, [1868] E. R. A. 771; 37 L. J. Ch. 737; L. R. 6 Eq. 149; 18 L. T. 459; 16 W. R. 19 (V.C.).

See, *Cruse* v. *Paine*, [1869] E. R. A.; 38 L. J. Ch. 225, and note thereto.

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Referred to, *Royal Bank of India's case*, [1869] E. R. A.; L. R. 4 Ch. 252; 19 L. T. 805; 17 W. R. 359 (L. JJ.); *Street* v. *Morgan*, 1869, 21 L. T. 432 (Ex.); *Allen* v. *Graves*, [1870] E. R. A.; 39 L. J. Q.B. 157; L. R. 5 Q.B. 478 (Q.B.); *Loring* v. *Davis*, [1886] E. R. A.; 55 L. J. Ch. 725; 32 Ch. D. 625; 54 L. T. 899; 34 W. R. 701 (Ch. D.).

Specific Performance—Purchase of Shares in a Joint-Stock Company—Liability of Stock-Jobbers—Rules of the Stock Exchange.

STOCK EXCHANGE.—*The plaintiff, by his brokers, sold to the defendants, who were stock-jobbers, 200 shares, of which he was the registered proprietor, in a limited company. The contract was not in writing, but it was made for the settling-day, and it was agreed on both sides that it was to be interpreted according to the usages and business of the Stock Exchange, according to which the jobber is bound at the settling-day either to take the shares himself or give the name or names of one or more unobjectionable transferee or transferees. The defendants duly named seventeen persons into whose names the shares were to be transferred, and the plaintiff accepted the names and executed the transfers accordingly; and on the settling-day the defendants paid the purchase-money for the shares and received from the plaintiff the certificates. Between the date of the contract and the settling-day the company stopped payment and commenced winding-up, and consequently the transfers could not be registered, and the plaintiff was placed on the list of contributories.*

Upon a bill filed by the plaintiff against the defendants for specific performance and idemnity:—Held, *reversing the decree of one of the Vice Chancellors, that the defendants had duly fulfilled their contract, and that any further liability was with the substituted transferees, and not with them.*

This was an appeal from a decree of Vice Chancellor Malins, reported 37 L. J. Ch. 737.

The facts of the case were fully stated in the former report, as well as in the judgment of their Lordships.

Sir Roundell Palmer, *Mr. Cotton* and *Mr. Whitehorne* appeared for the appellants, and

Mr. Glasse and *Mr. J. N. Higgins* for the respondents.

The cases cited were *Shaw* v. *Fisher* (5 De Gex, M. & G. 596); *Hawkins* v. *Maltby*[1] (37 L. J. Ch. 58; L. R. 3 Ch. Ap. 188); *Sheppard* v. *Murphy* (1 Ir. L. R. Eq. 490; 16 W. R. 914); *Shepherd* v. *Gillespie* (37 L. J. Ch. 335; L. R. 5 Eq. 293); *Evans* v. *Wood* (37 L. J. Ch. 159; L. R. 5 Eq. 9); *Hodgkinson* v. *Kelly* (37 L. J. Ch. 837; L. R. 6 Eq. 496); *Paine* v. *Hutchinson* (36 L. J. Ch. 169; L. R. 3 Eq. 257: affirmed on appeal by the Lords Justices, 37 L. J. Ch. 485; L. R. 3 Ch. Ap. 388); *Grissell* v. *Bristowe* (37 L. J. C.P. 89; L. R. 3 C.P. 112; since reversed in the Exchequer Chamber, 38 L. J. C.P. 10; L. R. 3 C.P. 36); *Bermingham* v. *Sheridan* (33 Beav. 660; 33 L. J. Ch. 571); *Emmerson's case* (36 L. J. Ch. 177; L. R. 1 Ch. Ap. 433); *Cruse* v. *Paine* (37 L. J. Ch. 711; L. R. 6 Eq. 641; *Biederman* v. *Stone* (36 L. J. C.P. 198; L. R. 2 C.P. 504); *Wynne* v. *Price* (3 De Gex & Sm. 310).

The LORD CHANCELLOR (LORD CAIRNS) delivered the judgment of the Court (*Dec.* 5) as follows.—In this case the plaintiff, through the Messrs. Sutton & Co., as his brokers, entered into a contract on the Stock Exchange of the City of London, on the 9th of May, 1866, to sell 200 shares in Overend, Gurney & Co. (Limited) at 12*l.* 7*s.* 6*d.* a share. This contract was not in writing. Both the plaintiff and the defendants agree that it was a contract made and to be interpreted according to the usages and business of the Stock Exchange, with which usages and course of business the plaintiff states he has

(1) In this case, in consequence of what fell from the Lord Chancellor, a new bill was filed and the plaintiff obtained a decree, an appeal from which is still pending.

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been for many years familiar, and of which the defendants must be still more intimately cognizant, for they are members of and jobbers on the Stock Exchange. The contract was made for the "settling-day" following, that is to say for the 15th of May, 1866. Overend, Gurney & Co. (Limited) was a joint-stock company, governed by the provisions of the Joint-Stock Companies' Act, 1862, with a register of members as required by that act. By the articles of the company the transfer of a share was to be executed by transferor and transferee; the transferor was to be deemed the holder until the name of the transferee should be entered on the register, and the directors might refuse to register the transfer unless the transferee was approved by the board. On the 10th of May, 1866, the day following the contract, the company suspended payment and stopped business, and the transfer books were closed, and on the 11th of May, 1866, a petition to wind up the company was presented, which ultimately led to a winding-up order, the winding-up commencing, according to the act, on that day, the 11th of May, 1866. When the settling-day, the 15th of May, 1866, arrived, the defendants gave to the brokers of the plaintiff the names of seventeen persons as transferees of these 200 shares, and the brokers of the plaintiff thereupon prepared seventeen deeds of transfer, transferring the shares to the seventeen persons named. A blank form of one of these transfers was agreed on by the parties, and was as follows:

"I, , in consideration of the sum of paid to by , do hereby bargain, sell, assign and transfer to the said , shares of and in the said undertaking called the . To hold unto the said executors, administrators and assigns, subject to the several conditions on which held the same before the execution hereof; and , the said , do hereby agree to accept and take the said shares, subject to the conditions aforesaid. As witness," &c.

The various names were inserted in the several transfers, and the transfers were otherwise filled up in the usual manner, and were duly executed by the plaintiff, and were then, together with the certificates of the shares, handed to the defendants in return for the agreed price of 12*l.* 7*s.* 6*d.* per share. With regard to these transferees no suggestion is made in the bill, or in the affidavits on behalf of the plaintiff, that the transaction was colourable or other than what it professed to be, or that the transferees were not persons for whom the defendants were authorized to act, and to procure a transfer of and to pay for the shares, or that as between them and the defendants they were not bound by what the defendants did. On the contrary, the bill treats them as persons whom the defendants could oblige to execute the transfers and complete their registration; and the plaintiff in his affidavit alleges further that the company could not have shewn any valid reason or ground for refusing to register them as transferees, and that, in fact, no such reason or ground existed. In addition to this, one of the defendants having, at the suggestion of the Court, been called at the hearing and cross-examined on this point, stated that they had received the names of these transferees in the usual course of business through brokers professing to act for them, who paid the money and received the transfers and certificates in the usual way, and had ever since retained them. In these circumstances, the good faith of the transaction being in no way impugned, but being rather recognized by the plaintiff, we are of opinion that the proper conclusion to draw is that the whole 200 shares and the transfers of them were duly accepted and paid for by the transferees, and that these transferees were in equity as much bound as if they had executed the deeds. The registration of these transfers, however, was prevented by the suspension and winding-up of Overend, Gurney & Co., and the plaintiff, remaining on the register, and liable to the creditors of the company, has filed this bill against the defendants for an indemnity against these liabilities, and this indemnity he has in substance obtained by the decree of the Vice Chancellor. If this were an ordinary case of a purchase and sale of shares, in which the plaintiff was vendor and the defendants purchasers in the usual acceptation of these terms, the right of the

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plaintiff to relief would be clear. The Vice Chancellor has considered the case to be one of that description, and from that view of the case the defendants appeal. The plaintiff in this bill (paragraph 7.) makes this statement as to the custom:

"According to the regular custom and course of business on the said Stock Exchange, the intervention of a jobber or dealer, or of some member of the Exchange acting in such capacity, is necessary in every transaction either of sale or of purchase of shares in companies, and it would be impossible to carry on such business, if the selling broker were always, or as a rule, to insist that the buying dealer, jobber or member should accept and register a transfer of shares in his own name, and not in the name of his nominee or sub-purchaser; but it is, nevertheless, well understood and universally admitted on the Exchange as part of its custom and law, and it is not denied by the defendants as members thereof, and as jobbers and dealers therein, that any jobber, or dealer, or member who enters into a contract for the purchase of shares, is in all respects bound by such contract, and is thereby bound not only to pay the purchase-money of the shares so bought, but (if required by the vendor so to do) to accept and execute a transfer in the name of the purchaser, and to register or procure the registration of the same in the books of the company."

The same statement is repeated in the 7th paragraph of the plaintiff's affidavit. It is difficult to understand the meaning of the latter part of this statement, namely, that the jobber is bound to accept and execute the transfer in the name of the purchaser,—in the name, that is, of another person. But, passing this by, the whole paragraph is of importance, as an admission that in dealings on the Stock Exchange the intervention of a jobber is necessary, and that the selling broker cannot require the jobber to accept and register a transfer in his own name. This admission goes far, in our opinion, to take the case out of the ordinary class, in which there is no intervening jobber (where the vendor can clearly require the purchaser to accept and register a transfer in his own name), and to fix the position of a jobber as an intermediate or third person who undertakes to bring forward a purchaser who will take the shares from the vendor. The question, however, remains,—what is the exact contract or liability of the jobber? It was at one part of the argument of the counsel for the appellants contended that, the dealings of a jobber in shares for any particular settling-day being very large, it was not to be supposed that the jobber intended for the small remuneration he received to assume the liabilities, it might be, of many hundred thousand pounds; and it was suggested that the only undertaking he came under to the seller was that at the settling-day he would pay the price and give a name for the shares, and that thereupon, whether the name was objectionable or unobjectionable, whether the person denoted did or did not accept the shares, the jobber was released from liability. This argument, in our opinion, puts the case of the jobber much too high. Such a contract would be highly unreasonable, if not illusory. It would or might practically absolve the jobber from any liability whatever beyond the payment of the purchase-money; and, in ordinary cases, the mere payment of the purchase-money without any substitution of liability upon the shares would effect only a part, and, in cases like the present, the least important part, of the object of the vendor. Such a limitation of the contract as would involve an immunity of this kind, if it could be maintained on the score of usage or custom, would require to be proved by the clearest evidence; and no such evidence is in this case to be found. There are, besides the defendant Mr. Bristowe, five witnesses who are members of the Stock Exchange, and who speak, and are qualified to speak, as to its rules and usages. None of them have been shaken in their evidence by the plaintiff on cross-examination, and, out of the five, four have been put forward by the plaintiff himself to make affidavits not inconsistent with, but stopping short of, the statements as to custom to which we are about to refer. The accuracy, credibility and knowledge of these witnesses are, therefore, put beyond doubt; and when we add

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that the only evidence which differs from theirs comes from three persons who are not members of the Stock Exchange, and who do not profess to be acquainted with its course of business, it may be said that there is no conflict of evidence in the case. One of these gentlemen, Mr. Pitman, says: "I say that, within my knowledge, it is strictly in accordance with the practice and usage of the Stock Exchange that whenever, in the course of completion of a bargain for the sale of shares in a public company, originally made between any two members of the Stock Exchange, the name of a proposed transferee or proposed transferees has been passed from the purchaser to the vendor, and such name or names has or have been accepted by the vendor and inserted in the deed or deeds of transfer, and such deed or deeds of transfer has or have been duly executed by the transferor and handed to the broker of the transferee, and payment duly made, then and in that case, when the transactions arrive at that stage, the jobber who has been the original purchaser is considered and treated in all respects as discharged from any further obligation or duty in connexion with the purchase." It appears to us that this evidence describes a course of business consistent with, and almost necessarily arising out of that described by the plaintiff himself in the 7th paragraph of his bill, already referred to. According to this, the contract of the jobber is, that at the settling-day he will either take the shares himself, in which case he would, of course, be bound to accept and register a transfer and to indemnify, or he will give the name of one or more transferees' names to which no reasonable objection can be made, and who will accept and pay for the shares. The jobber may perform either alternative; and if electing to perform the latter alternative, he sends in names which are accepted, and to which transfers are executed, and those transfers are taken and paid for by the transferees or their brokers, the jobber is then, and at that stage, relieved from further liability, and the liability to register and indemnify is shifted to the transferees. Applying these observations to the facts of the case before us, we are of opinion that the usage of the Stock Exchange having been acted upon and asquiesced in by all the parties to the transaction, and the defendants having, on the 15th of May, given to the plaintiff the seventeen names for the 200 shares—names admitted to be unobjectionable—and the plaintiff having made no objection to the number or quality of the transferees, but having accepted these names and prepared and executed transfers to them, and these transfers having been accepted and paid for by the transferees, the defendants thereby duly fulfilled their contract, and any further liability was that of the transferees. What the measure of that liability was, or how far it was affected by the suspension or winding-up of Overend, Gurney & Co., does not fall to be considered in this Court. It may be well to repeat, in order to prevent misapprehension, that in our opinion the liability of the defendants continued entire and unbroken until there was an acceptance by the plaintiff, by the preparation and execution of the transfers, of the names sent in by the defendants as purchasers, and until there was an acceptance of the shares by the purchasers through the delivery to their brokers of, and payment by their brokers for the transfers and certificates of the shares. It is difficult to see how this liability can continue after the transfer, as in the present case, of the shares to other persons. If A. be trustee of shares for B, and if he require B, as the beneficial owner, to indemnify him against calls or other liabilities, B. has clearly the right to say that he will assume the whole liability and ownership, legal as well as equitable, and may require A. to transfer to him the shares in respect of which the liability arises. But if such a requisition were made to the plaintiff in this case, he could not comply with it, for he has transferred the shares and handed over the certificate to other persons as purchasers for value. Lord Cranworth's observations in *Shaw* v. *Fisher* (5 De Gex, M. & G. 608) apply forcibly to this part of the case: "The plaintiff cannot make a title to these shares to Mr. Fisher, because he has already assigned them to Mr. Carmichael. Then it is said that Mr. Carmichael has not completed. What does that signify? As far as the plaintiff is concerned he has executed

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the deed, and there is nothing to prevent Mr. Carmichael at any time coming with that deed and registering it. Therefore it is plain that the plaintiff cannot make a title." The evidence of the witnesses to whom I have referred goes on to shew that there are cases on the Stock Exchange more or less numerous, in which a guarantee is given by the jobber that the transferee, after accepting the shares, will register them, and that this is called a guarantee of registration, and that when a jobber gives such a guarantee, the vendor receives less for his shares. This would probably make more emphatic the evidence as to what is the custom in ordinary cases. But even apart from this evidence as to a guarantee, we should have arrived at the conclusion which we have endeavoured to express.

The plaintiff's counsel in their argument relied strongly on the case of *Grissell* v. *Bristowe*, decided by the Court of Common Pleas, and reported in 37 L. J. C.P. 89, an authority which appears to have had much weight with the Vice Chancellor. That was a special case for the opinion of the Court, with power to the Court to draw inferences of fact in the same way as a jury. There were in that special case, and in the reasons for the judgment asigned by the Lord Chief Justice of the Common Pleas, some passages to which we had intended to refer for the purpose of shewing that we could not accept that decision, even supposing it to have remained unreversed, as an authority in favour of the plaintiff in the present case. But as we understand that the judgment has within the last few days been reversed by the Court of Exchequer Chamber (38 L. J. C.P. 10; L. R. 3 C.P. 36), it is unnecessary to do more than to express our satisfaction that the Courts of Appeal in equity and at law have arrived at the same conclusion on this important question. It is unnecessary to comment in detail on the other cases cited in the argument; they were, most of them, cases in which it was held that when, after a contract by a vendor with a jobber or intermediate person, a transfer has been executed by the vendor to and accepted and paid for by a third person, the vendor may file a bill against such third person and oblige him to register and indemnify. From what we have said, it will be seen that in the principle of the cases we concur.

We should, perhaps, notice a statement of the plaintiff in his affidavit, that he told his broker that he insisted on his right to keep the defendants to their contract, and directed him to complete the same with the defendants directly, and to receive the purchase-money from them, and from no other person. Even assuming this statement to be correct, and passing by the observation that no private instructions given to the plaintiff's brokers could limit the general authority which, by employing them as his brokers to sell on the Stock Exchange, he gave them to sell according to the custom of the Exchange, it is clear that these instructions were given after the contract was complete, and could not vary, and indeed did not profess to vary, but to adhere to the contract, whatever that might be. The case of the plaintiff, in our opinion wholly fails, and a decree ought now to be made dismissing the bill, with costs. There will be no costs of the appeal, and the deposit will be returned.

LORD ROMILLY, M.R., July 16, Nov. 9, 1868.

In re THE ALEXANDRA PARK COMPANY, *Ex parte* HART; *In re* BARNED'S BANKING COMPANY, *Ex parte* DELMAR.

38 L. J. Ch. 85; L. R. 6 Eq. 512; 16 W. R. 1033.

Company—Winding-up—Contributories—Infant—Delay—Costs.

COMPANY.—*An infant shareholder who attains majority after having been placed on the list of contributories is entitled to have his name removed from the list of contributories, notwithstanding some delay.*

Such delay disentitles him to the costs of getting his name removed.

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HART'S CASE.

Eliza Hart, an infant, was placed on the list of contributories of the Alexandra Park Company, which was ordered to be wound up in February, 1865. She attained her majority in August, 1865. A call was made in February, 1868, the order for which was served on her. On the 16th of April she appeared to oppose a balance-order which was then made against her. On the 1st of June, 1868, she took out a summons to remove her name from the list of contributories.

Mr. North, for the applicant, said, that apart from delay, there was no question but that she was entitled to have her name removed, but as no loss had been occasioned to any one by the delay that could not affect her rights—*In re the Mexican and South American Company; Ex parte Shewell* (36 L. J. Ch. 353; L. R. 2 Ch. 387).

Mr. Baggallay and *Mr. Baldwin Smith*, for the official liquidator.—An infant must repudiate a contract to take shares within a reasonable time after attaining majority. The applicant had waited a long time, during which it might have turned out that she would have to receive, instead of having to pay, something in respect of her shares in the company. She must, therefore, be considered as having elected to keep the shares. *The Dublin and Wicklow Railway Company* v. *Black* (8 Ex. Rep. 181; 22 L. J. Ex. 94).

The MASTER OF THE ROLLS considered *Shewell's case* was conclusive, and he could not consider the applicant to have waived her right to repudiate the contract. He accordingly ordered her name to be removed from the list of contributories, but without costs.

DELMAR'S CASE.

Delmar was clerk of a stockbroker, and employed by one Evans to purchase shares and hold them for him. A Mr. Longden sold some shares in Barned's Banking Company to Delmar, which were transferred to him and registered in his name. On the winding-up of the company notice was given him that his name would be placed on the list of contributories, and on the 24th of July, 1866, a list, including his name, was made out. He attained twenty-one on the 26th of August, 1867. In March, 1868, a balance-order was served on him; and in April, 1868, he took out a summons to remove his name and place that of Longden on the list of contributories.

Mr. Bagshawe, in support of the summons, relied on *Hart's case*.

Mr. Ince, for Longden, said that, considering the position of Delmar, he must be considered to have adopted the shares—*The Cork and Bandon Railway Company* v. *Cazenove* (10 Q.B. Rep. 935); *The Dublin and Wicklow Railway Company* v. *Black* (8 Ex. Rep. 181; 22 L. J. Ex. 94); *The Birkenhead Railway Company* v. *Pilcher* (6 Rail. Cas. 622; 19 L. J. Ex. 207). In *Hart's case* there was no attempt to place the name of the transferor on the list; and if any one were placed on the list instead of Delmar, Evans ought to be.

Mr. Kekewich, for the official liquidator.

The MASTER OF THE ROLLS placed Mr. Longden's name on the list of contributories in the place of Delmar's without prejudice to any steps he might take to have Evans's name substituted for his own. He refused to give Delmar the costs of the application.

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LORDS JUSTICES, July 31, 1868.

SIMMONDS *v.* THE GREAT EASTERN RAILWAY COMPANY.

38 L. J. Ch. 87; L. R. 3 Ch. 797; 19 L. T. 231; 16 W. R. 1100.

Referred to, *In re Hawkes*, [1898] E. R. A.; 67 L. J. Ch. 284; [1898] 2 Ch. 1; 78 L. T. 336; 46 W. R. 445 (C. A.). See, *In re Rapid Road Transit Co.*, [1909] E. R. A.; 78 L. J. Ch. 132; [1909] 1 Ch. 96; 99 L. T. 774 (Ch. D.).

Attorney and Solicitor—Change of Solicitor—Bankruptcy of Client—Solicitor's Lien.

SOLICITOR.—*After a suit was instituted the plaintiff became bankrupt. His assignees continued the suit, employing a different solicitor. A decree was taken by consent. On drawing up the decree the Registrar required production of certain documents which were referred to in the decree, and which, being in the hands of the solicitor to the original plaintiff, had not been produced at the hearing. The solicitor refused to produce them, claiming a lien for costs:*—Held, *that he was bound to produce them.*

Ross *v.* Laughton (1 Ves. & B. 349) *was not overruled by* Lord *v.* Wormleighton (Jac. 580).

This was an appeal from an order of Vice Chancellor Giffard, ordering a solicitor to produce certain deeds and documents.

The suit was an ordinary suit by a landowner against the defendants, a railway company, and the solicitor in question was the original plaintiff's solicitor.

After the institution of the suit the plaintiff became bankrupt. His assignee revived the suit, employing a different solicitor. By consent, a decree was made, in which the contract and sundry other documents were referred to, which documents were in the possession of the original plaintiff's solicitor, who refused to produce them, claiming a lien upon them for his unpaid bill of costs. The Registrar having refused to pass the decree without their production to him, a motion was made to the Vice Chancellor for an order compelling the solicitor to produce them; and from His Honour's order thereon, which was in accordance with the motion, the solicitor now appealed.

Mr. W. Barber (*Mr. Druce* with him), for the appellant.—There is no reason why the solicitor should be interfered with in his rights arising out of lien. The only case which can be brought against this view is—*Ross* v. *Laughton* (1 Ves. & B. 349). But that case was overruled by *Lord* v. *Wormleighton* (Jac. 580), in which the circumstances were similar. *Clifford* v. *Turrill* (2 De Gex & Sm. 1) is quite different from the present case. There the decree had been properly taken with production of all the documents, and the change of solicitors occurred after the decree had been pronounced.

[SELWYN, L.J., referred to *Bennett* v. *Baxter* (10 Sim. 417; 9 L. J. Ch. 137).

Mr. Swanston, for the respondent, the assignee.—This case is clearly governed by *Ross* v. *Laughton*, which case was not overruled by *Lord* v. *Wormleighton*. It has never been considered to have had that effect—*Pulling on Solicitors*, 580; *Ex parte Underwood* (De Gex, 190).

Mr. Perceval appeared for the company.

Mr. W. Barber, in reply.

WOOD, L.J.—I have a strong opinion that the principle of *Clifford* v. *Turrill* would have governed this case if the facts had been somewhat different, that is, if the documents in question, which were referred to in the proposed decree, had been in evidence, as they ought to have been, when the Court heard the case, because then the Court would not allow its own order to be baffled. In *Clifford* v. *Turrill* the decree was taken before the change of solicitor,

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and the document therefore might be considered as in evidence. Here the decree seems to have been taken by consent and somewhat hurriedly, and the documents were not produced upon which the decree is founded. In order to dispose of the case satisfactorily, therefore, we must consider whether *Ross* v. *Laughton* was overruled by *Lord* v. *Wormleighton*. I am of opinion that it was not. Lord Eldon certainly did not say that he was overruling the former case, which he probably would have said if he thought he was doing so; and, in fact, the cases were distinct, for an executor strictly represents and continues his testator's interest in every respect, whereas an assignee in bankruptcy comes in by a title adverse to the bankrupt; an assignee may elect whether or not he will carry on the suit; if he does so, he is not obliged to employ the same solicitor.

This case is more like that of *Bennett* v. *Baxter*, in which case the Vice Chancellor remarked, that there was no substantial difference between the case of a solicitor who has discharged himself and that of a solicitor whose client, by his own course of conduct, has induced the Court to take from him the conduct of a suit, and to commit it to another party who employs a different solicitor. Here the law has taken away from the plaintiff all interest in the suit, and that by his default. This clearly distinguishes the case from *Lord* v. *Wormleighton;* and, as Lord Eldon did not think fit to overrule *Ross* v. *Laughton*, his decision cannot now be considered as having that effect.

SELWYN, L.J.—I am of the same opinion. If *Ross* v. *Laughton* had not been cited in the argument of *Lord* v. *Wormleighton*, there might have been more strength in the argument before us that the former case was overruled by the latter. I cannot but think, considering the great care and accuracy of Lord Eldon, that if he thought he was overruling the earlier case he would have said so expressly. There are important differences between the position of an executor and assignee in bankruptcy. The case of a leasehold affords an illustration. The position of an executor in respect of a leasehold which devolves is very different from that of an assignee in bankruptcy. The latter may reject it if he considers its possession injurious to the estate, but the former cannot refuse to accept the burden. Here the prosecution of the suit is taken away from the plaintiff by his default in becoming bankrupt; and, the suit being allowed to go on, the assignee seems to be in a position very similar to that of the second creditor who, in *Bennett* v. *Baxter*, took the place of the plaintiff.

LORD ROMILLY, M.R., Nov. 21, 1868.

In re THE ALDBOROUGH HOTEL COMPANY (LIMITED); *Ex parte* SIMPSON.

38 L. J. Ch. 88; 17 W. R. 110: affirmed, [1870] E. R. A.; 39 L. J. Ch. 121; L. R. 4 Ch. 184; 17 W. R. 424 (L. JJ.).

Company—Winding-up—Contributory—Conditional Contract to take Shares.

COMPANY.—*S. offered to take shares in a company provided he got a building contract, and the directors resolved to give him the contract. On the faith of such resolution, he sent a formal application for shares, without condition. Shares were allotted. The contract could not be given to him on account of the winding-up of the company:*—Held, *that there was a contract to take shares by S. only on condition of his getting the building contract, and his name was removed from the list of contributories.*

This was a summons adjourned into Court to remove the name of Simpson from the list of contributories of the above company. He wrote to the directors

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offering to take 300 shares on condition that a contract for building the hotel was given to him. The letter was as follows:

"23rd October, 1865.

"To the Aldborough Hotel Company (Limited).

"Gentlemen,—In consideration of my being secured the contract for carrying out the alteration and additions to the above hotel, and the contract amounting to 9,000*l.*, I hereby agree to subscribe for and take three hundred shares (300 shares) in the said company, and to pay the deposit on the said shares as soon as the secretary of the company shall satisfy me that 1,500 shares, including my 300 shares, have been subscribed for, and that the directors of the company have, by resolution duly confirmed, agreed that I shall carry out the said alterations and additions upon the following express conditions, that is to say, first, my contract shall be paid in cash on the architects' certificate at monthly intervals at the rate of 85*l.* per cent.; secondly, the prices for the several trades shall be affixed by a surveyor appointed by the architects of the company and by a surveyor appointed by me, or their umpire in case of difference; thirdly, that all calls coming due on such of the said 300 shares as I shall not in the mean time have transferred, after payment of the 1*l.* on deposit, including the 1*l.* 10*s.* on allotment, shall be written off the amounts coming to me on the certificates of the architects; fourthly, that I shall have the right of selling any or all of the said 300 shares as soon as the same have been delivered to me.

"I am, Gentlemen, yours obediently,

"Samuel Simpson."

On the 9th of November, 1865, the directors resolved to give Simpson the contract in accordance with his letter, and on his being satisfied of that, he filled up the usual unconditional form of application for 300 shares and paid a deposit of 1*l.* a share. The shares were allotted to him. He was present at two meetings of the shareholders, but took no part in the proceedings. The contract was not carried out because, early in 1867, it was resolved to wind the company up voluntarily, and on the 9th of February, 1867, an order was made to continue the winding-up under the supervision of the Court. Simpson was not required to pay any calls or allotment money, but his name was placed on the register of shareholders, and subsequently on the list of contributories. On his receiving notice of this, he repudiated the allotment.

Mr. Jessel, *Mr. Roxburgh* and *Mr. Kaye*, for Simpson, said: The application was to take shares only on condition that Simpson got a building contract, which condition the directors had been unable to fulfil, and therefore his name ought to be removed from the list of contributories—*In re the Richmond Hill Hotel Company; Ex parte Pellatt* (36 L. J. Ch. 613; 2 L. R. Ch. 527); *In re the Universal Salvage Company; Woodfall's case* (3 De Gex & Sm. 63).

Mr. Swanston and *Mr. Chitty*, for the official liquidator, said: the two contracts were distinct, and the case came within *In re the Richmond Hill Hotel Company; Ex parte Elkington* (36 L. J. Ch. 593; 2 L. R. Ch. 511). If the application was originally conditional Simpson had accepted the allotment unconditionally, and by attending the meetings had precluded himself from any right he had to repudiate the allotment. The directors had complied with the condition by passing the resolution. The shares had been in the power of Simpson, and he could not repudiate his responsibility.

The MASTER OF THE ROLLS.—In the first place, the original letter, in my opinion, is simply a conditional proposal to take 300 shares, provided Mr. Simpson gets a contract. I cannot adopt the view that the words "in consideration of my being secured the contract for doing the alterations" is a distinct formal condition. If I execute a deed and I say "upon condition of my having 1,000*l.* I will convey Whiteacre," how does that differ from my saying "in consideration of my having 1,000*l.* I will convey Whiteacre." The condition was accepted, and upon that condition the contract was expressly

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entered into. It was said the directors had satisfied their part of the contract. They made an entry in the book that Mr. Simpson should have the contract, although, in point of fact, he never had it. Because he puts good faith in the directors and believes that they mean to give him the contract, and in consequence of that he takes 300 shares, and pays the deposit upon them, it is said that that is a separate and distinct contract, not connected with or in any manner mixed up with the contract for the building which he was to erect. These directors, no doubt, had been acting *bona fide;* but suppose they had acted with *mala fides*, how would it have operated? Suppose they had said, "We will get 300 shares taken by Mr. Simpson upon the promise of giving him a contract which we never intend to give him," exactly the same thing would have happened. He would have applied for the shares, although they never intended to give him the contract. They would have known that the entry in the book was false, because if they ever intended there was to be a contract at all, they intended it for some other person. Could it in such a case as that be possibly urged, that he was liable upon the 300 shares taken upon the express faith of their giving him the contract. If it might have been done so, wantonly and for the purpose of defrauding him, how does it vary in the slightest degree when, as events have turned out, they were unable to give him the contract? In point of fact, they have never given him the contract, and are totally unable to carry it into execution. If it were a case for specific performance, how would it be possible to say that Mr. Simpson should pay for his 300 shares and not have what the company agreed to give him in consideration of his taking them?

Let us look at the facts of the case. As I understand them, they amount to nothing. In the first place, they made an entry of his name in the list of shareholders. That was quite right, and very proper if they intended to give him the contract, but if they could not give him the contract what acquiescence was there on his part to become a shareholder? There were no calls made against him. That is to say, four calls were made, as I understand, upon the other shares, but he was never required to pay one of them. In the course of the year 1866 he does nothing whatever. Some negotiations take place at the end of the year, which I do not think it necessary to enter into, because it is evident they were without prejudice, and with the view of getting rid of this very question which has now arisen, but there was no acceptance on his part. It is true he was *dominus* of the shares, and he could have parted with them: he very wisely did not until he was satisfied that he would get the contract completed for building the hotel—but that does not in the slightest degree affect him, because he was never present at any meeting at which he could bind himself. What he says is, that when he was present at any meeting, he was only present because he wanted to take care that his contract was duly performed, and that he should not be deprived of it because of his absence. That explains why he was there with his solicitor. In fact it amounts to this—he gave them time to complete their part of the contract. It is simply the case of a conditional contract not performed by the person who agreed to perform the condition, who therefore cannot insist upon the other person performing his part of it. I am of opinion that it is not a separate and distinct contract, as there was in *Elkington's case*, but it was all one contract, which has been performed by one side and not by the other. Therefore, I think, Mr. Simpson was properly struck off the list of shareholders.

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MALINS, V.C., Nov. 6, 1868.

LIPSCOMB *v.* LIPSCOMB.

38 L. J. Ch. 90; L. R. 7 Eq. 501; 17 W. R. 252.

Followed, *De Rochefort* v. *Dawes*, [1871] E. R. A.; 40 L. J. Ch. 625; L. R. 12 Eq. 540; 25 L. T. 456 (V.C.). Questioned, *Leonino* v. *Leonino*, [1879] E. R. A.; 48 L. J. Ch. 217; 40 L. T. 359; 27 W. R. 388 (M.R.). Referred to, *In re Athill*, [1880] E. R. A.; 49 L. J. Ch. 821; 16 Ch. D. 211; 43 L. T. 153 (V.C.): affirmed, [1881] E. R. A.; 50 L. J. Ch. 123; 16 Ch. D. 220; 43 L. T. 581; 29 W. R. 309 (C. A.).

Mortgage, Merger of Original, in further Security—Real and Personal Estate—Locke King's Act, 17 & 18 *Vict. c.* 113.

EXECUTOR AND ADMINISTRATOR. MORTGAGE.—*L. mortgaged real estate for* 1,500*l. By a subsequent deed, reciting the transfer of the previous mortgage, L. charged the premises subject thereto together with other real and personal estate with the payment of the original debt, and the further sum of* 950*l. in which he was then indebted to the transferee, all the mortgaged property being subject to one proviso for redemption upon payment of the whole debt. Upon the death of L, intestate*:—Held, *as between the heir-at-law and administrator, that the* 950*l. must be apportioned rateably between the real and personal estate comprised in the second deed; but that there was no merger of the first mortgage the real estate comprised therein remaining primarily liable for the* 1,500*l.*

Charles Lipscomb, in 1851, mortgaged certain real estate, of which he was seised in fee, as security for 1,500*l.*

By a subsequent mortgage, in 1861, reciting that the previous mortgage for 1,500*l.* had been transferred to and was then vested in John Christmas, and that Charles Lipscomb, the mortgagor, was indebted to Christmas in the further sum of 950*l.*, it was witnessed that, "in consideration of the sum of 1,500*l.* then due and owing to the said John Christmas on the transfer of the therein recited mortgage security and of the said sum of 950*l.* so due from the said Charles Lipscomb to the said John Christmas as aforesaid, making together the sum of 2,450*l.*," the said Charles Lipscomb granted and conveyed unto the the said J. Christmas, his heirs and assigns *(inter alia)*, the hereditaments and premises comprised in the indenture of mortgage of 1851, to hold the same, subject to a proviso for redemption on payment to the said J. Christmas of the sum of 2,450*l.* with interest as therein mentioned.

By the same deed Lipscomb assigned to Christmas, by way of further security, a policy of assurance for 700*l.* effected on his own life and other personalty, to hold the same, "subject to the proviso for redemption therein-before contained concerning the freehold hereditaments thereinbefore conveyed."

Charles Lipscomb died in August, 1867, intestate, whereupon the question arose between the heir-at-law and the administrator, in what proportions the money due upon the security of 1861, was payable out of the real and personal estate respectively comprised therein.

Christmas had received the money payable on the policy of assurance at Lipscomb's death, and retained the same in part satisfaction of his mortgage debt.

The point in question was brought before the Court upon a special case.

Mr. Joshua Williams and *Mr. Shebbeare*, for the administrator.—First, as to the 1,500*l.* The real estate originally comprised in the mortgage of 1851 remains primarily liable in respect of that sum. The subsequent mortgage of 1861 was not such a substitution for the deed of 1851 as to extinguish or merge the original security or mix the funds in respect of their liability, *Phillips* v.

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Gutteridge (4 De Gex & J. 531); *Brettle* v. *Burdett* (2 De Gex, J. & S. 244). Secondly, the 950*l.* is payable rateably out of all the property comprised in the indenture of 1861, under the provisions of Locke King's Act, 17 & 18 Vict. c. 113, and there must be an apportionment accordingly; unless, thirdly, the Court should be of opinion that the assignment of the policy and other personal estate was merely by way of collateral security, in which case the whole debt would be primarily payable out of the real estate.

[His HONOUR intimated that such a construction of the deed could not be successfully contended for, and the point was abandoned.]

Mr. Glasse and *Mr. Freeman*, for the heir-at-law.—As regards any priority the old mortgage for 1,500*l.* is extinguished. The deed of 1861 created a fresh security for the whole sum of 2,450*l.*; both the real and personal estate are liable for the whole amount of the debt, and the personalty must be exhausted before the realty is resorted to. With regard to the policy the presumption is that the mortgagor contemplated its being first applied towards satisfaction of the debt in the event of his death, and there is no evidence here to the contrary, whereby the administrator can be exonerated at the expense of the heir-at-law.

MALINS, V.C.—Some difficulty as to the 1,500*l.* is created by the second deed. It is clear that if the mortgagor had died before the execution of that deed, in 1861, the real estate comprised in the first mortgage must have been primarily liable for the 1,500*l.* Now, in the subsequent deed that first mortgage is recited and the transfer of it to John Christmas, and the indebtedness of the mortgagor to John Christmas in the further sum of 950*l.*, and then in the operative part the payment of the two sums, making together 2,450*l.*, is secured by a further charge of the premises comprised in the deed of 1851, together with other real estate, and by the assignment of the policy of assurance and other property, the whole being subject to a proviso for redemption upon payment of the mortgage debt in full.

Reference has been made to the provisions of Mr. Locke King's Act, by which, as we all know, the legislature has declared that the lands charged shall, as between the different persons claiming through or under the deceased, be primarily liable to the payment of the mortgage debts charged thereon, every part thereof according to its value bearing a proportionate part of the whole debt. Then there is a proviso that the right of the mortgagee to obtain payment out of the personal estate shall not be affected or diminished thereby. But that proviso is only for the protection of the mortgagee; it does not affect the liability of the different classes of property. Now, the effect of the deed of 1861, as I understand it, was to retain the original mortgage for the 1,500*l.* and to make the premises subject thereto liable, together with other property, to the further charge of 950*l.* What is there in the deed to release or extinguish the original security? The 1,500*l.* remains as it was, with the additional security of the other property comprised in the deed. As in the case of *Phillips* v. *Gutteridge*, the transfer of the old debt leaves the mortgaged estate primarily liable, just as it was before.

Then, as to the 950*l.* The effect of the deed in my opinion is to charge that debt upon the various properties comprised in the security. The result will be that the real estate comprised in the first mortgage is primarily liable for the 1,500*l.*, and the additional charge of 950*l.* must be apportioned rateably between the real and personal estate comprised in the second mortgage. The costs will come out of the personal estate.

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LORD ROMILLY, M.R., Nov. 6, Dec. 3, 1868.

BEIOLEY *v.* CARTER.

38 L. J. Ch. 92; 19 L. T. 472; 17 W. R. 130: reversed, [1869] E. R. A.; 38 L. J. Ch. 283; L. R. 4 Ch. 230; 20 L. T. 381; 17 W. R. 300 (L. JJ.).

Leases and Sales of Settled Estates Act, ss. 17, 18.—*Condition of Sale as to Title—Defect not disclosed.*

SETTLED LAND.—*Under a marriage settlement a remainder in fee simple, after the life estate of the wife, was vested in her heir-at-law as a purchaser:*—Held, *that an order for sale made in the lifetime of the wife, under the Leases and Sales of Settled Estates Act, was invalid, as it could not bind the person who might eventually be her heir-at-law.*

VENDOR AND PURCHASER.—*A condition of sale intended to preclude the purchaser from taking a particular objection to the title must disclose the nature of the objection.*

By the settlement on the marriage of Mr. and Mrs. Heighton, dated the 13th of September, 1837, certain property was vested in a trustee in fee, upon trust during the joint lives of the husband and wife, for the separate use of the wife, without power of anticipation; and after her decease, if she predeceased her husband, for such persons and for such estates as she should by will appoint; and in default of such appointment, upon trust for the person or persons whom she should leave her heirs or co-heirs at-law and the heirs and assigns of such persons; but, in case she should survive her husband, then upon trust for Mrs. Heighton, her heirs, and assigns, or for such person or persons as she should appoint by deed or will; and in default of appointment, upon the trusts which would have taken effect if she had predeceased her husband without having exercised her power of appointment.

By an order of the Court, made on petition under the Leases and Sales of Settled Estates Act, in July, 1858, the property was ordered to be sold, and the plaintiff became the purchaser. In October, 1866, the plaintiff put up the property for sale by auction, subject to the following special condition of sale:

"By indenture of settlement of the 13th day of September, 1837, executed on the marriage of William Bright Heighton and Mary Louisa his wife, the property was settled upon certain trusts for her benefit. The vendor purchased the property under orders of sale made (on the petition of the said Mary Louisa Heighton) under the provisions of the act to facilitate leases and sales of settled estates; and the property was conveyed to the vendor by indenture of the 20th day of January, 1862, which deed was settled and approved by the Judge, as appears by the certificate of his chief clerk written thereon. The conveyance recites the settlement of 1837, and the orders for sale and payment of the purchase-money, and contains a qualified covenant by the trustee of the settlement for its production. The title to the property shall commence, without inquiry into or objection to earlier or other title, with the said indenture of conveyance; but without prejudice to the last stipulation the purchaser, if he so desire, shall be entitled to ask for an inspection of the settlement of 1837 (at his own expense) under the covenant for production above referred to."

The defendant was the highest bidder, and signed a memorandum of agreement to purchase; but he afterwards objected that a good title was not made out, on the ground that the order for sale made in July, 1858, was irregular. The plaintiff thereupon filed the present bill for specific performance, and contended both that the title was good, and that if it were not, the defendant was precluded by the condition from taking the objection.

Mr. Joshua Williams and *Mr. Upton*, for the plaintiff.—Every necessary consent has been given, for the act does not require the consent of persons

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having only contingent interests—sections 17. and 18; and it is now too late to invalidate the sale—section 28.

Mr. Southgate and *Mr. Bristowe*, for the defendant.—The heir of Mr. Heighton could not be served so long as he remained unascertained, and therefore he could not be bound by the order. This was not a settled estate within the act, and no subsequent act extends to such settlements.

The MASTER OF THE ROLLS (*Dec.* 3).—In this case two questions arise: first, whether the objection is valid; secondly, whether, if it be valid, the defendant is precluded from taking it.

On the first, the real point to be determined is, whether the persons who may be the heir or co-heirs of Mrs. Heighton at her death are bound by the order for sale. This, first, is clear, that the person or persons, whoever he or they may be, who shall be the heir or heirs-at-law of Mrs. Heighton at the time of her decease, in default of any appointment made by her take as purchasers and not by descent from Mrs. Heighton. It is equally clear that it is impossible to ascertain till the death of Mrs. Heighton who this person or these persons may be. A third proposition, also, appears to me to be clear, that if the person who ultimately is to become such heir happens to be now alive, no notice to him will bind him, for it is given to him in a different capacity. It cannot be given to him in his character of heir-at-law. In administration suits, it is not sufficient if a man who ought to be a defendant as the legal personal representative of a deceased person is made a party in a different capacity; and the bill is required to be amended for the purpose of bringing him before the Court, also as the legal personal representative of the deceased person. Not sufficiently bearing this principle in mind, the children of Mrs. Heighton were made parties to the order on the petition, but this will not bind that one of them (if there be one) who shall hereafter turn out to be the heir-at-law of Mrs. Heighton. In truth, the appearance of these children on the occasion of the order made on the petition was wholly unnecessary. The consents required are specified in the 17th section.—[His Lordship read the 17th section, and also the 18th.]—I think that the concurrence of Mrs. Heighton's heir-at-law is essential to make the title perfect; that it was and is impossible to obtain the concurrence of the person who will be Mrs. Heighton's heir-at-law in that character, and that consequently his interest when it arises, if it should ever arise, will not be bound by this sale.

I am further of opinion that the defect is not cured by any clause in any subsequent act relating to this subject; indeed, there is no clause that I have found in any subsequent act which touches this point or makes complete an order which was in its inception defective. All the acts proceed on the principle, that the person to concur must be ascertained. I am not now referring to the case of persons under a disability, and whose interests are protected by trustees and by the Court (a case which stands on separate grounds), but in all other cases where an interest exists in a known and specified person his concurrence is required. I am of opinion, therefore, that the objection is a good one, and that the title is defective.

On the second point I am of opinion that the defendant is not precluded by the conditions of sale from taking this objection.—[His Lordship read the condition.]—No doubt the condition was introduced to meet this very point, but in my opinion it does not compel the purchaser to take the title, when the inspection of the settlement there referred to shews that the order of this Court was erroneous, and that it had no power to bind the contingent interests which may hereafter arise on the death of Mrs. Heighton. I entertain this opinion the more strongly, because I have always thought that where the vendor wishes to preclude the purchaser from taking a particular objection to the title which must appear on the documents submitted to him, it is essential that the vendor should, as a matter of good faith, point out, if not the objection itself at least the nature of the objection in the conditions of sale. Here the vendor knows that the person who will be the heir-at-law of Mrs. Heighton at her death is

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not bound by the order, and that if she die without making any appointment he will be entitled to the property. Instead of indicating this fact to the person who may be disposed to become purchaser, he simply assumes that the order of the Court must be correct, and says that there shall be no inquiry into or objection taken to any earlier title than the conveyance of January, 1862. The purchaser naturally supposes that the order of the Court is correct, and that the Court could not be induced to make a fruitless order; but the inquiry made by the purchaser as to the settlement of 1837, which is sanctioned by the conditions of sale, shews that the Court had no power to make such an order without expressly reserving the rights of the heir-at-law of Mrs. Heighton, and that the vendor has no power to give a complete title to the reversion after Mrs. Heighton's death. This, therefore, is in the nature of deception to the purchaser, and does not preclude him from taking the objection of which he had no notice.

On all these grounds, therefore, I am of opinion that the vendor cannot shew a good title to the property, and that the bill must be dismissed, and, of course, with costs.

MALINS, V.C., May 28, June 29, 30, July 1; LORDS JUSTICES, Nov. 23, 24, 1868.

THE ATTORNEY GENERAL *v.* THE CAMBRIDGE CONSUMERS' GAS COMPANY.

38 L. J. Ch. 94; L. R. 6 Eq. 282; 19 L. T. 117; 16 W. R. 1007: reversed, [1869] E. R. A.; 38 L. J. Ch. 106; L. R. 4 Ch. 71; 19 L. T. 508; 17 W. R. 145 (L. JJ.).

Not applied, *Pudsey Coal Gas Co.* v. *Bradford Corporation*, [1873] E. R. A.; 42 L. J. Ch. 293; L. R. 15 Eq. 167; 28 L. T. 11; 21 W. R. 286 (V.C.). Referred to, *Preston Corporation* v. *Fullwood Local Board*, [1886] E. R. A.; 53 L. T. 718; 34 W. R. 196 (Ch. D.). Followed, *Attorney General* v. *Preston Corporation*, 1897, 13 T. L. R. 14 (Ch. D.).

Nuisance—Injunction—Gas Company—Public Streets, Right to break up —Practice—Amendment at Hearing upon Motion for Decree.

GAS AND GASWORKS. NUISANCE.—*This Court has no jurisdiction to restrain by injunction a company or an individual from breaking up the public ways of a town, without parliamentary authority, for the purpose of laying down gas-pipes in the ordinary manner.*

The Attorney General *v.* the Sheffield Gas Consumers' Company (3 De Gex, M. & G. 304; 22 L. J. Ch. 811), *followed.*

By a local act of parliament passed in 1788, *for the better paving, cleansing, and lighting the town of C. and other purposes, Commissioners were empowered, among other things, to provide, from time to time, for the lighting of the streets*:—Held, *that they were enabled to authorize the breaking up of the streets for any improved mode of lighting not then known, such as the laying down of gas-pipes.*

A bill and information were filed to restrain a limited company from breaking up the streets of C. for laying down gas-pipes; the company had no statutory powers, but were acting, at the date of the motion, under contract with and by the authority of the local Commissioners. The motion stood over, and the suit was afterwards brought to a hearing upon motion for decree, the Commissioners having in the mean time rescinded the contract. An affidavit was filed stating the rescission of the contract, but no amendment was made in the pleadings:—Held, *in the Court below, that, the record being defective, the motion for decree must be refused; but leave was granted to amend the bill and information by putting in issue the rescission of the contract and the state of*

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facts consequent thereon; and upon the bill and information being so amended the injunction was granted.

On appeal,—Held *that the circumstances were such that it was not improper to allow the amendment, but that the case made by the amended bill and information, as well as that originally made, failed.*

This was a bill and information filed by and at the relation of the Cambridge University and Town Gaslight Company against the Cambridge Consumers' Gas Company (Limited), and seven of the Cambridge Town Improvement Commissioners (sued by their clerk), praying for an injunction to restrain the defendant company from breaking, digging up, or otherwise disturbing the streets of Cambridge for the purpose of laying down gas-pipes, and from injuring or interfering with any of the pipes and other works belonging to the plaintiff company in the town and neighbourhood of Cambridge, and also to restrain the Commissioners from authorizing or assuming to have the right of authorizing such acts to be done by the defendant company.

The Commissioners, by a local act of 1788 (28 Geo. 3. c. 64.) were empowered, amongst other things, to pave and light the streets of Cambridge, and, from time to time, as occasion should require, to contract with any person or persons for the purposes therein prescribed; the property of the streets, pavement, passages, &c., of the town being vested in the Commissioners for the time being under the act.[1]

In pursuance of these powers the Commissioners had for several years past up to the present time provided for the lighting of the streets by contract with the plaintiff company, which was incorporated by act of parliament in 1834 (4 Will. 4. c. 28), under the name of the Cambridge Gaslight Company.

By the Cambridge University and Town Gas Act, 1867 (with which the Gas Works Clauses Act, 1847, was incorporated), the above-mentioned act of 1834 was repealed, without prejudice to existing rights and liabilities, and the plaintiff company was continued under its present name, with extended powers for raising further capital and enabling it to meet the increasing demand for the supply of gas in the town and neighbourhood of Cambridge; subject to a proviso that the act should not deprive the Commissioners or any other person or persons of any right, power or authority which they then possessed, or interfere with any right, power or authority which they might thereafter acquire of lighting the streets, &c. of the said town, in such manner as they should think proper.

[1] The 58th and 59th clauses of the act provided as follows:

Section 58. "The property of all the present and future pavements, sewers, drains or watercourses in the streets, lanes and other public passages and places within the said town, as well as in the footpaths as carriage-ways, and of all lamps, lamp irons and posts which shall be erected or fixed by virtue of this act, and of all materials, implements and other things, which shall be purchased for the purposes of this act, shall belong to and the same are hereby vested in the said Commissioners."

Section 59. "It shall be lawful for the said Commissioners, or any five or more of them, from time to time and at all times when and so often as they shall think proper, to cause, order and direct all, or any of the present or future pavements in the said streets, lanes, passages and places to be repaved, relaid, repaired, raised, lowered or altered, and also the present sewers, cesspools, drains or watercourses to be altered in such manner as they shall think proper, and to make proper sewers, cesspools, drains or watercourses for the conveyance of water from the surface of the carriage-ways or highways; and also to cause, order and direct the said several streets, lanes, passages and places to be cleansed and lighted, and all annoyances, obstructions, nuisances and encroachments to be removed, and proper sewers, drains, cesspools, sinks, gutters or watercourses to be made for conveying the water off and from the said several streets, lanes, passages and places, and the several houses and other buildings within the said town in such manner as the said Commissioners, or any five or more of them, shall think proper, and the persons to be appointed by them for the purposes aforesaid shall and hereby have full power and authority to do the same."

The 61st clause gave the Commissioners power "from time to time, as occasion should require, to contract with any person or persons for the paving, relaying, raising, lowering, amending, repairing, cleansing and lighting the said streets," &c.

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The information stated that the plaintiff company, in pursuance of their acts, had purchased and acquired possession of divers lands, and erected divers buildings and other works for the purpose of their undertaking, at an expense of about 45,000*l.*; that by lineal measurement the main pipes laid down by them were about twenty miles in extent, with nearly 3,000 private service pipes in connexion therewith, and 660 street lamps.

In October, 1867, the Commissioners, having in view the expiration of their then existing contract with the plaintiff company, which had been entered into for a period of fourteen years from the 1st of June, 1854, issued a public notice that they were willing to enter into a contract for lighting the town with gas for a period not greater than fourteen years, commencing from the 1st of June, 1868, and that tenders might be forwarded to their office for that object.

In pursuance of this notice tenders were sent in both by the plaintiff company and by the defendant company, which had then recently (12th Dec., 1867) been registered as a limited company under the Companies' Act of 1862; its object being, as stated in the memorandum of association, to "supply the town of Cambridge and its vicinity with gas."

The Commissioners accepted the tender of the defendant company, and on the 21st of January, 1868, executed a contract with them for lighting the town upon the terms therein specified for a period of fourteen years from the 1st of June, 1868; the company being thereby empowered to break up any street for the purpose of carrying their contract into effect.

The defendant company thereupon issued a prospectus announcing, among other things that they "had determined to supply the colleges and private consumers, and had obtained the contract for lighting the public lamps," and immediately commenced the construction of their works.

Under these circumstances the plaintiff company, on the 5th of March, filed the present bill and information, charging that it was illegal for the Commissioners to authorize the breaking up of the streets by the defendant company; that it would be impossible for the defendants to construct their intended works, or lay down the pipes and other necessary apparatus for lighting the town without disturbing and interfering with the works and apparatus already constructed by the plaintiff company; and praying for an injunction against the defendant company and the Commissioners, as stated above.

The motion was brought on upon the 28th of May. The evidence produced in support of the motion went to shew that, in the opinion of the deponents (many of whom were influential residents in the town and University), great inconvenience had been caused to the inhabitants of the town by the opening of the streets and other works already commenced by the defendant company, and that their operations, if allowed to continue, would cause unnecessary interference with the traffic of the town and be a constant annoyance to the public.

There was also evidence to shew that the defendant company was not in a position to fulfil their contract, their system of works for lighting the town being then only partially completed. It appeared that out of 5,000 shares of 5*l.* each, representing a nominal capital of 25,000*l.*, only 280 shares had been taken up.

Upon the hearing of the motion,

Sir Roundell Palmer (*Mr. Osborne* and *Mr. Locock Webb* with him), for the Attorney General and the plaintiff company, argued that the Commissioners' authority was subject to the rights of the plaintiff company as provided by their acts, and that the 59th section of the original act of 1788 did not authorize the Commissioners to break up the streets for the purpose of lighting (but only for the particular purposes therein prescribed), and that such an operation could not have been in the contemplation of the legislature at that time, before the mode of lighting by gas was discovered.

[Upon this point the Vice Chancellor referred to the cases of *Dand* v.

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Kingscote (6 Mee. & W. 174; 9 L. J. Ex. 279); *Bishop* v. *North* (11 Mee. & W. 418; 12 L. J. Ex. 362.]

Sir R. Palmer.—But the distinction here is, that the change of user and the more extended exercise of the right creates additional nuisance to the public, and the same doctrine is applicable as in the case of an easement—*Baxendale* v. *M'Murray* (2 L. R. Ch. 790).

MALINS, V.C., before the conclusion of the argument for the plaintiffs, suggested that the motion should stand over till the hearing, and that the cause should be heard on an early day in the Sittings after Trinity Term.

After some considerable discussion and a strenuous resistance on the part of the defendant company, his Honour's suggestion was acceded to, the plaintiff company undertaking in the meantime to supply the town with gas upon the terms of their contract of 1854.

June 28.—The cause was now brought on for hearing as upon motion for decree. In the meantime, in consequence of the defendant company having failed to carry out their contract, their works being still incomplete, the Commissioners, on the 2nd of June, had formally rescinded their contract, and an affidavit had been filed stating this fact, but no amendment was made in the pleadings.

Further evidence was produced on the part of the defendant company, the deponents (comprising more than twenty residents in the town with the engineer and the contractor of the company) stating that great advantage would ensue to the inhabitants from the competition of a second company in respect of the price and quality of the gas supplied to them; also, that no material inconvenience to the public or injury to the property of the plaintiffs had been or would necessarily be caused by the prosecution of their works.

Sir R. Palmer, Mr. Osborne and *Mr. Locock Webb*, for the plaintiff company.—The rescission of the contract since the motion has altered the position of the defendant company in respect of the illegality of their proceedings. They can no longer pretend to justify their breaking up of the streets under the authority of the Commissioners, even if that authority was sufficient, which we do not admit; at all events it could only extend to the public lighting of the streets, and could not give any right to open the streets for the purpose of laying down private service-pipes, as they threaten to do—*The Queen* v. *the Longton Gas Company* (29 L. J. M.C. 118). The obstruction of the streets and interference with the traffic caused by their works is a public nuisance, and the jurisdiction of the Court in respect of such cases has long been established—*The Attorney General* v. *Forbes* (2 Myl. & Cr. 123). We submit that the decision in the case of *The Attorney General* v. *the Sheffield Gas Consumers' Company* (3 De Gex, M. & G. 304; 22 L. J. Ch. 811), which appears to be a strong authority against us, has been entirely superseded by subsequent decisions. If the cases of *Ellis* v. *the Sheffield Gas Consumers' Company* (2 El. & B. 767; 23 L. J. Q.B. 42), and *The Queen* v. *the Longton Gas Company* (29 L. J. M.C. 118), had then been decided in the Queen's Bench, establishing the indictable character of such a nuisance at common law, it is probable that Lord Cranworth and Lord Justice Turner would have concurred with Lord Justice Knight Bruce in their view of *The Sheffield Gas case*.

They also referred to *The Queen* v. *the United Kingdom Electric Telegraph Company* (2 Best & S. 647, note; 31 L. J. M.C. 166); *The Queen* v. *Train* (2 Best & S. 640; 31 L. J. M.C. 169); *The Attorney General* v. *the United Kingdom Electric Telegraph Company* (30 Beav. 287; 31 L. J. Ch. 329).

[The argument of the learned counsel for the plaintiffs upon this view of the case was adopted by the Vice Chancellor, and will be found fully set forth in his Honour's judgment.]

In the present case, not only is there nuisance to the public, but it is obviously impossible for the defendant company to prosecute their works without interfering with and injuring the existing works and apparatus of the plaintiff company.

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[MALINS, V.C. intimated that in respect of injury to the property of the plaintiffs, there was not, in his opinion, a sufficient case made out to sustain the bill.]

As to the defective state of the pleadings, the Court will allow the information and bill to be amended, if necessary, by stating the rescission of the contract by the Commissioners—*Lord Darnley* v. *the London, Chatham and Dover Railway Company* (33 L. J. Ch. 9; 1 De Gex, J. & S. 204); or else will treat the issue as sufficiently raised by affidavit, and deal with the case as if the amendment had been made.

Mr. Cotton and *Mr. Fry*, for the Cambridge Town Commissioners, submitted that the whole proceeding on their part had been *bona fide* for the interest, as they believed, of the town, without any collusion with the defendant company. There being no longer any question before the Court as to the power of the Commissioners to authorize the acts of the defendant company, they did not wish to take part in the argument.

Mr. Cole and *Mr. Rigby*, for the defendant company.—We claim to have this information and bill dismissed. First, as to the main question at issue, we rely on the case of *The Attorney General* v. *the Sheffield Gas Company* (ubi supra), as completely covering the present case. That decision of the Court of Appeal is always cited as applicable to questions of this kind, and its authority has never been impugned. Both Lord Cranworth, in *Broadbent* v. *the Imperial Gas Company* (7 De Gex, M. & G. 436, 461; 26 L. J. Ch. 276), and Lord Justice Turner, in *Goldsmid* v. *the Tunbridge Wells Improvement Commissioners* (35 L. J. Ch. 382; L. R. 1 Ch. Ap. 349), have expressed their adherence to the principle of their decision in the *Sheffield case;* and the same doctrine was acted upon by Vice Chancellor Wood in the recent case of *Cooke* v. *Forbes* (L. R. 5 Eq. 166; 37 L. J. Ch. 178). The decisions cited from the Queen's Bench only concern the legal right, and do not affect the doctrine of this Court as to its interference by injunction. The case before the Master of the Rolls,—*The Attorney General* v. *the United Kingdom Electric Telegraph Company* (ubi supra),—never in fact came to a hearing, and is no authority. It does not follow that because a plaintiff can succeed in an action for nuisance at law, therefore a Court of equity will grant an injunction. The legal remedy is sufficient. Either the nuisance, if any, is so trivial that any number of indictments would only result in nominal penalties; or it is so serious that a proportionate penalty once inflicted will put a stop to the proceedings complained of, and prevent the recurrence of the nuisance. Secondly, upon the facts, the plaintiffs' allegation as to the inconvenience already caused to the public by our works is contradicted by our evidence, and the Court cannot assume that any serious nuisance will ever be caused; we produce evidence to the contrary, so that both the fact and the degree of nuisance are mere matters of speculation. The real object of this suit is to secure a monopoly to the plaintiffs, their claim being in effect to have the exclusive right of supplying gas to the town and neighbourhood of Cambridge. Thirdly, the case of the plaintiffs, as made out by the pleadings, proceeds upon a state of facts which was now terminated. All that we had to shew was that the Commissioners authorized, and had power to authorize, our proceedings. Upon that the Court is not now called upon to decide, except so far as it may affect the question of costs; but the withdrawal of their authority alters the whole position of the parties, and the present issue is essentially distinct from and contradictory to that raised by the information. This is not, therefore, a case for amendment at the hearing; the issue now attempted to be raised can only be properly brought before the Court by a new suit. *Watts* v. *Hyde* (2 Ph. 406; 17 L. J. Ch. 39); *Lord Darnley* v. *the London, Chatham and Dover Railway Company* (ubi supra); *Firth* v. *Ridley* (33 Beav. 516; 33 L. J. Ch. 598). It is not sufficient to refuse the motion for decree with costs, as was done in *Thomas* v. *Bernard* (5 Jur. N.S. 31), and *Warde* v. *Dixon* (28 L. J. Ch. 315), but the information and bill must be dismissed, with costs.

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Mr. Osborne, in reply, upon the question of amendment, referred to 15 & 16 Vict. c. 86. ss. 16. and 53, and the case of *Walker* v. *Armstrong* (8 De Gex, M. & G. 531; 25 L. J. Ch. 738).

MALINS, V.C.—This is a bill and information filed on the 5th of March last, by Her Majesty's Attorney General, at the relation of the Cambridge University and Town Gas-Light Company. No application was made to the Court until the 28th of May, when an injunction was moved for to restrain the defendants, the Cambridge Consumers' Gas Company (Limited) and the commissioners, who are sued by their clerk Mr. Barlow, from breaking up the streets of Cambridge for the purpose of laying down gas-pipes by the defendant company, who, it is admitted, have no parliamentary powers for doing so. But at that time the defendants had the authority of the commissioners for paving and lighting the town of Cambridge under the act of parliament of 1788, and the point then relied upon in argument was, that, inasmuch as that act was passed before gas was known, the powers given by it for the purpose of breaking up the streets for lighting, would not extend to a particular mode of lighting which was unknown at the time and for many years after the act passed. Upon the matter being partially opened, it occurred to me that it would be far better that the cause should be heard; and, after strenuous resistance on the part of the defendants, I ordered the case to stand over; and the cause now comes on upon motion for decree, upon affidavits filed both before and since the motion. The main point which has been argued—a point of the highest importance—is the general question whether an individual, or an association of individuals called a company, limited or unlimited, can break up the streets and public ways of a town for the purpose of laying down gas-pipes, waterpipes, or pipes for any other purpose, when they are not authorized by act of parliament? Now there can be no doubt that the preservation of public streets and highways in a town is of sufficient importance to every inhabitant or frequenter of the town. The breaking up of a street, whenever it takes place, whether it be for the purpose of water, gas, sewers, or whatever it may be, is always an annoyance amounting to a nuisance. But it is an annoyance to which it is the common interest to submit when done under proper authority and restriction; and accordingly, in all Gas Acts and in the general Gas Act, which regulates all gas companies established by act of parliament, there are contained restrictions greatly for the benefit of the public, who, on the one hand, are bound to submit to the inconvenience of having the public ways broken up, yet also, on the other hand, have this protection, that those who break them up must cause the injury to cease as soon as possible, and are liable to very heavy fines and penalties if they do not do so. There is no doubt that if it is a company authorized by act of parliament, the general act limits a time for all these things and imposes the penalties; but if the streets of Cambridge or any other town are liable to be broken up by an individual or an unauthorized company like this, what is the time within which they are to be laid down? What is the protection to the public? I do not find that it has been doubted by any Judge that the breaking up of public streets under such circumstances is a nuisance. In the case which has been so much relied upon, *The Sheffield Gas Consumers' Company's case*, Turner, L.J. and Cranworth, L.C. both expressly stated that it was a nuisance, but they thought that there was not such an extent of nuisance as called for or would justify the interference of this Court. That decision was opposed to the very strong opinion of Knight Bruce, L.J.; and, as I have repeatedly said in the course of the argument, the judgment of Knight Bruce, L.J. has my entire and cordial assent, while from the judgments of Cranworth, L.C., and Turner, L.J., I wholly dissent. [His Honour read passages from the judgment of Knight Bruce, L.J., and continued:] On those grounds Knight Bruce, L.J. was strongly of opinion that it was a case for the interference of the Court, but the two other learned and distinguished Judges were of an opposite opinion. I confess the more I have read these judgments (and I believe I am not wrong in saying that, upon an average, this case of the Sheffield Gas Company is

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cited before me at least every fortnight, not with reference to cases precisely like this which is now before me, but for the general rules laid down) the more I am surprised that two learned Judges, with whose views I generally entirely concur, should have come to the conclusion that the unlimited licence exercised by an unauthorized company to break up the streets of a great town like Sheffield was not such a nuisance as imperatively called for the interference of this Court. My opinion is, that it is one of the greatest nuisances to which the public in general, and the inhabitants of a town in particular, can be exposed. It is a nuisance to which they never ought to be exposed, except under due authority, where those who are exposed to it can exercise some control, and see that the power is exercised within due limits; however, that was the opinion of those two learned Judges,—not that they did not think it was a nuisance, but they did not know whether it would be decided at law to be a nuisance. Yet the proceedings in that very case were afterwards, upon an indictment, decided by the Court of Queen's Bench to be a nuisance, and I cannot help thinking that if the Court of Appeal, instead of deciding the case before the action had been tried, had waited, as is the usual practice of the Court, until after it had been tried, those two learned Judges would have concurred with their learned Brother in considering that that which was a nuisance at law, as it was decided to be, and which in its nature must necessarily be continually recurring, was that kind of nuisance which it was the duty of this Court to stay by injunction. On these grounds, therefore, unless I find that, in accordance with the subsequent authorities, this case of *The Attorney General* v. *the Sheffield Gas Company* is *now* the law of the Court, applicable to the particular circumstances now existing, it is so wholly opposed to my own judgment that I shall not follow it unless I find myself absolutely obliged to do so. And I am very glad to have had the opportunity (and I trust other Judges will concur with me) of expressing my total dissent from the doctrine that anybody, any individual or any association of individuals, be it a company or otherwise, is to have an unlimited authority to break up the public ways of a town, having no restriction by act of parliament or statutory power whatever. But I am happy to say, although I felt pressed for some time by the authority of these two learned Judges, I cannot help thinking that I am totally liberated by subsequent decisions; because it would be indeed a lamentable thing if, upon such a subject as this, the Courts of law and equity were at variance.

Now, I entirely subscribe to the doctrine which has been urged, that it does not follow because you can maintain and succeed in an action at law, you, therefore, can obtain an injunction in equity. I have myself, on many occasions during the short period I have sat here, acted on that principle, and refused to grant injunctions where I have been satisfied that the injury was not material, although possibly on an action at law being brought a verdict and judgment would be obtained. But where the injury is plainly of an obvious and serious character, then I think it becomes the duty of this Court here, to prevent either the necessity of those who are affected by the nuisance being obliged to bring frequent actions, prefer frequent indictments, or take any other proceedings, repeatedly calling upon them to be in litigation. Now, that this opening of the public streets is not allowable, I think cannot be more strongly decided than it was in the *Longton case*, which has been so much referred to and commented upon. That case is a remarkably strong one, for this reason: There existed an act of parliament, authorizing the Commissioners to open all the streets in Longton for the purpose of lighting the town; but they had no authority whatever to make communications from their main pipes for the purpose of lighting private dwelling-houses. Having therefore no parliamentary power for the purpose of lighting private dwelling-houses, they took a course which might well have been thought very reasonable. They opened up communications by means of trenches from their main pipes, which I assume to be in the centre of the street, to the dwelling-houses, which, of course, bounded the streets. They were indicted. The matter was tried in the Court

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of Queen's Bench, and decided, Cockburn, C.J., giving the judgment of the Court, which, as I shall shew in the case I am about to refer to in a moment, was the well-considered and mature judgment of that Court. Now bearing in mind the very extraordinary circumstances under which the case was brought before the Court by indictment, Cockburn, C.J., having stated the circumstance that they had the power for public purposes, but that they had none for private purposes, said that the question was whether this was an indictable offence. Did that Court concur with Cranworth, L.C. and Turner, L.J. that, as a general proposition, opening the public streets, breaking up the public ways of a town, is a nuisance, so trivial and unimportant—" infinitesimal " as it is called by Lord Cranworth—that this Court cannot interfere and ought not to interfere against it? The Court of Queen's Bench, by the mouth of Cockburn, C.J., says, " The case is not one " (that is, the case of opening these trenches) " of absolute necessity either for the party or for the public, as in the case of a hoarding required during the repairing of a house to protect the public, or as in the case of putting a ladder against a house to clean windows, or to escape in the case of fire. General convenience is greatly against the allowing private persons or companies, without parliamentary powers, to interfere from time to time with the public streets. The making such openings from time to time for water, gas, sewerage and other purposes, and the opening of the streets for repairs and alterations are a serious inconvenience, even when done under the restrictions such as an act of parliament puts upon the persons clothed with parliamentary authority so to act, and it would be difficult to see how far the annoyance might extend if unauthorized dealings of this nature with the highways were allowed to every private person. " Is every private person,"—in the case before me it is a joint-stock company, with its capital unsubscribed for, a little money paid up; and I am at a loss to see on what principle, if this joint-stock company is entitled to do it, there may not be ten other joint-stock companies in Cambridge claiming to exercise the same right—" Is every private person," says the Lord Chief Justice, " to be at liberty to open the streets for laying down a pipe to any gasworks, or to any conduit of water, or to any well or fountain in a market-place? How far is such a right to extend, if everybody may lay down such a pipe from the nearest water or gas—how great would be the inconvenience from the continual opening of the streets for the first laying down and for the constantly recurring purpose of repairing! Were such private rights, as to gas, sewerage and water-pipes, to be allowed, the highways would be in a constant state of obstruction. The present is an exceptional case, where it happens, from the fact of the mains being laid for public purposes, that it is more easy to get at the supply of gas than in ordinary cases; but this ought not to affect the principle. The case does not seem to us to fall within what may be called the ordinary incidents and rights, which, in common sense and from common use, are understood to appertain to the enjoyment of property. On the contrary, such a right as is here claimed, of interfering with the streets, is never exercised except under the authority of acts of parliament, conferring special powers, with great care and under proper control, in the case of gas, by placing the companies supplying it under the provisions of the General Gas Works' Clauses Act, according to which the parties are subjected to wholesome restrictions, and to the control of the magistrates. We think, therefore, that the obstructions in question are indictable, and that the conviction was right, and the verdict must be entered accordingly."

Now, with regard to the opinion of Lord Cranworth, in the case of the Sheffield Gas Company, I cannot help thinking that that must be considered as considerably modified by what he said in the somewhat analogous case of *Broadbent* v. *the Imperial Gas Company*. There, the object of the bill was to prevent a nuisance by a gas company, not caused by an unauthorized opening of the mains, but sending forth noisome effluvia which destroyed the vegetation in the plaintiff's garden near the Thames, somewhere in the neighbourhood of Battersea. The plaintiff had brought an action; the action had been referred

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to an arbitrator; the arbitrator had made an award in favour of the plaintiff, namely, that he did sustain damage. The matter came before Lord Cranworth, when Lord Chancellor, in 1857, that is, four years after the *Sheffield Gas case*, and he speaks of the *Sheffield Gas case* in this way: "It was argued before me, as it had been before Wood, V.C., that the plaintiff was not entitled to any relief, independently of that clause, upon the ground that this Court is not bound to issue an injunction, and that, in issuing an injunction, whether interlocutory, or, at the hearing of the cause, perpetually, it will take into account, to some extent at least, the comparative injury that would result to the parties respectively from issuing or withholding the injunction. Now, I gave full attention to this argument, and I considered it as it was going on, and afterwards, with a view to satisfy myself as to the state of the law upon that subject, and particularly with reference to the case of *The Attorney General* v. *the Sheffield Gas Consumers' Company*, in which this Court had acted upon that principle where clearly a nuisance was perpetrated by the gas company. There the Court refused to interfere by injunction. I have used the expression 'clearly a nuisance' as the ground of the judgment proceeded upon that assumption, although undoubtedly some members of the Court, myself and, I believe Lord Justice Turner, did throw out a doubt whether it could be considered a nuisance, inasmuch as, though the company had no legal authority to take up the soil in order to put their pipes down, yet, as they were lawfully constituted a company, and the legislature had contemplated the possibility of such a company existing lawfully without an act of parliament, their works, from the nature of things, could not be carried on without taking up the soil of the road or street for a short time; and we had some doubt therefore whether the legislature might not be considered as sanctioning such a use of the public highway. Those doubts," he says, "have since been entirely removed by a decision of the Queen's Bench, upon the trial of that case, when it was determined that there was no authority in anybody, without an express act of parliament, to take up or interfere with the pavement of a street, or the soil of a road, and that the company by so doing were necessarily guilty of a nuisance, and might be proceeded against." Now, I read that as an admission by Lord Cranworth that if the case had been before him and his learned Brother Turner, L.J., after it was decided to be a nuisance, their decision would have been the other way; and I read it therefore as an admission by him that it was only because it was not then decided to be a nuisance that their judgments were as they stood. He proceeds: "But whether that be so or not, it is quite clear the judgment of this Court proceeded upon the assumption that there was a nuisance, though it would not interfere by injunction where the evil was so infinitesimal to the persons complaining." Then, a little lower down, on page 462, he says, "Now, attending to the principles laid down in that case, I cannot come to the conclusion that there was anything there decided to warrant this Court in withholding the relief of an injunction to a person seriously and constantly injured by unlawful acts. If it should turn out that the company had no right so to manufacture gas as to damage the plaintiff's market-garden, I have come to the conclusion that I cannot enter into any question of how far it might be convenient for the public that the gas manufacture should go on." There he is speaking as to the plaintiff being obliged to bring frequent actions, and it was agreed he might from time to time bring actions for the nuisance. He says: "But unless the company had such a right, I think the present is not a case in which this Court can go into the question of convenience or inconvenience, and say where a party is substantially damaged that he can only be compensated by bringing an action *toties quoties*. That would be a disgraceful state of the law, and I quite agree with the Vice Chancellor in holding that in such a case as this the Court must issue an injunction, whatever may be the consequences with regard to the lighting of the parishes and districts which this company supplies with gas." Now, there Lord Cranworth puts it very much on the ground that if the plaintiff did not get an injunction, he would have to bring an action *toties quoties*. The same

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principle, I say, is perfectly clear to me from the decision of the Court of Queen's Bench. In every case in which this limited company proceeds to open the pavements or the highways of the public streets of Cambridge they would be liable to an indictment, which indictment, according to the decision of the *Longton case*, must be successful; and upon the principle of which Lord Cranworth decided that the plaintiff in the *Broadbent case* should be protected against having to bring frequent actions. I say it is also the duty of this Court to protect these parties from being obliged to prefer frequent indictments to restrain a nuisance in the town of which they are inhabitants, or in which they are interested. The principle of the *Longton case* came again under the consideration of the Court of Queen's Bench in the case of *The Queen* v. *Train*. Mr. Train was a person who suggested a plan of laying down public tramways in the streets of London, or the roads adjoining London, and for running a particular kind of omnibus, which precluded the public from using that part of the road. He was indicted for it; the indictment was successful, and the indictment led to the necessity of his abandoning these tramroads. Crompton, J., in delivering the judgment of the Court of Queen's Bench, says: "The case is like that of *The Queen* v. *the United Kingdom Electric Telegraph Company (Limited)*, which we have just disposed of, and others of a similar nature. It also falls within *The Queen* v. *the Longton Gas Company*, with which we took a good deal of pains, where a gas company, without being authorized by statute, opened trenches in the streets of a town for the purpose of laying down gas-pipes, and this was adjudged a nuisance. If persons,"—now this paragraph is material to the decision, because it matters not whether it is persons or an association called a limited company—"if persons wish for power to act as the defendants acted here, they must take the usual regular and constitutional course of getting the protection of the legislature." The only direct authority upon this branch of the case, which has been suggested to be of any importance, is the case before the Master of the Rolls (30 Beav. 287; 31 L. J. Ch. 329). That is a case in which the Electric Telegraph Company, without any parliamentary or other authority, thought fit to take possession of a portion of the soil by the side of a turnpike road. Then they erected posts for their telegraphic lines, and for that an information was filed. I take it to be perfectly clear, if the Master of the Rolls had thought that the *Sheffield Gas case* was a final authority upon the subject, he would have decided that the putting up these posts, not in the centre of the road or where they could interfere with the traffic, but, as appears from the statement of the case, on the ground adjoining the road, was a nuisance of so trivial a character that the interference of the Court was not necessary. But what course did the Master of the Rolls take? He ordered it to stand over in order that the legal right might be ascertained; that is, by an indictment. Accordingly he says, "The case depends on the legal right, which must be established to the satisfaction of the Court, before the equity can be administered; without it, it would be impossible to say that either the acts of the company or the works amounted to a nuisance. The one side insists that the works cause an obstruction; and on the other side persons are found to say they do not; but no tribunal is so fit to try this question of fact as a jury, who will have the assistance of a Judge to direct them as to the law." The matter stood over; it was tried, and found to be a nuisance. Crompton, J., in the passage which I have just read, speaks of it as the case which they had just disposed of. Now I concur in the observations of Mr. Cole, that it does not necessarily follow that because the matter stands over in order that the legal right may be decided, when the legal right is decided the Court will grant an injunction. It only goes to this extent: if the legal right is not established, the bill will be dismissed; it does not necessarily follow, if it is established, that the injunction will be granted. But I take it to be perfectly clear that in *The Electric Telegraph Company's case*, the Master of the Rolls intended to grant an injunction if the result of the legal proceedings was that it should be found to be a nuisance. It was shewn at law to be a nuisance, and it was never again brought before the Court of equity,

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because I see the note in *Best & Smith* states that the Electric Telegraph Company, finding themselves thus embarrassed, it being impossible for them to carry on their business, while every individual had the power of bringing an indictment against them, thought fit to obtain an act of parliament; and that, as I understand, terminated the litigation. I say if this limited company were to attempt to act as was done in that case, it is my deliberate opinion that it would be impossible for them to carry out the scheme of lighting the town of Cambridge without parliamentary powers, because they are liable at every step they take to an indictment being preferred against them. On these grounds I come to the conclusion on the general question, which has been argued before me fully and ably on both sides, that the breaking up of the public streets by an unauthorized company like this defendant company is illegal. It is a nuisance of so serious and important a character, and a nuisance which must in the very nature of things be so frequently repeated, that it is my duty in the present state of the law to give my decision against the company, to hold that they are doing wrong, and must be enjoined by this Court from opening any other part of the streets than those which have been already opened. I stated in the course of the argument that I could not give a mandatory injunction to remove those pipes which have been put down. It is not at all necessary to do that, because being down and once covered it will not in the slightest degree interfere with the traffic until they re-open the streets to take them up: that is to say, to order them to take them up again would be to order a repetition of the nuisance, which, I think, is not to be tolerated.

Now, I have so far proceeded as if this case had come on the record fully raising these questions, and as if I were now in a situation to decide this question; but now comes a very important circumstance, which I am not at liberty to overlook: that the information and bill was filed on the 5th of March last, and that when the motion came before me on the 28th of May, this body had the authority of the Commissioners of the town of Cambridge by act of parliament for what they were doing. The act of 1788, which has been so frequently referred to, is an act for the better paving, cleansing and lighting the town of Cambridge, for removing and preventing obstructions and nuisances, and for widening the streets, lanes and other passages within the said town. The 58th and 59th sections of this act were relied upon, and it was argued by the counsel for the Attorney General and the plaintiffs that what the defendants were doing was illegal, because the act could not authorize the breaking up of the streets for the purpose of lighting with gas, because gas was unknown at the time the act was passed. Now, I referred to the case of *Dand* v. *Kingscote* (6 Mee. & W. 174; 9 L. J. Ex. 279), where a right of way was reserved to a mine for carts, waggons, carriages, and so forth. It was a very old reservation, long before locomotive engines were known. It was there argued that there could be no right of using this right of way for the purpose of locomotive engines, because they were not known at the time when the reservation was made. It was held that the right was a right of way for all improvements in carriages and waggons, and that it would not be a reasonable construction to say because old and ill-constructed waggons were in use when the reservation was made, therefore, that those in whose favour it was made were bound in all times to use ill-constructed waggons. On the same principle I shall hold, in this case, that the right of breaking up the streets for lighting, is a right of breaking up for every improved mode of lighting, and therefore, that those who had the power of taking up the pavements for the purpose of lighting may break up the pavements for the purpose of the best mode of lighting which exists.

Now, it turns entirely on the 58th and 59th sections.—[His Honour read the sections, and continued:]—I find from my notes that Sir Roundell Palmer, when the motion was on, argued that there was no power under these sections to break up the pavements for the purpose of lighting. No doubt, the power is not given in express language, because nothing but oil-lamps being known at that time, it would only be necessary to break up the pavements for the purpose

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of putting the lamp-posts in; but as there is a general power to break up the pavements for cleansing, lighting and watering, I hold the proper construction to be that the Commissioners have power to break up for the purpose of lighting and of communicating light in a manner which was unknown at that time by means of pipes communicating with the main gas-pipes, the object of the legislaturebeing to give them power to break up the roads and pavements for any purpose contemplated by the act. They are therefore, in my opinion, authorized by this act to open the pavements and break up the ways for the improved mode of lighting brought in by gas. On that point, therefore, I am against the plaintiffs.

The result is, that if this information had been brought on upon the state of things existing on the 28th of May, it would have been my duty to dismiss it, because not only had the Commissioners the power of doing this under the act of parliament, but the contract which was then in force and remained in force until the 2nd of June contained this provision: "For the purpose of carrying into effect this contract the company may break up any street." When the motion was made before me on the 28th of May, this limited company were armed with the authority of the Commissioners, who had the power to give it to them, and so far from their acting without a legal authority, they were acting under legal authority, and if it had not been for the revocation of that authority by the resolution of the 2nd of June, it would have been my duty to dismiss this information, and I must have dismissed it with costs. But on the 2nd of June a meeting of the Commissioners took place and passed the resolution to rescind the contract, upon the ground that the limited company have not performed their part of it. On the 1st of June, when they ought to have been illuminating the town with gas, they had not a single pipe ready. Therefore it is not to be wondered at that under the circumstances the Commissioners declared the contract to be rescinded, and gave formal notice of its rescission to the defendant company, and until the contrary is shewn, seeing as I do, and as it is admitted, that the defendant company is in default, I must assume that the notice to determine the contract was a valid notice.

This introduces a totally new state of things. Up to the 2nd of June these defendants were right in proceeding with their works, as it was sworn they intended to do, and as they avow they intend to do. Since the 2nd of June they have been entirely wrong according to my judgment. But this fact of their being wrong is not stated upon the record. Under these circumstances what is to be done? Am I to dismiss the bill without prejudice to another being filed, or am I to take the course which I am happy to find was adopted by my learned predecessor, Vice Chancellor Kindersley, under similar circumstances, of giving leave to amend the bill? The great advantage of amending the bill is this: If the bill is dismissed, all the evidence that has been taken in this suit will be unavoidable in another. If I give leave to amend by stating the rescision of the contract of the 2nd of June, and relying upon the illegal acts of the defendants since that day, the evidence which has been given will be available in the new case. I should have thought the better course would have been for both parties to agree to the suggestion I made, namely, that the bill should be now considered as amended by alleging that the contract has been rescinded, and that the defendant company should be considered as putting in an answer denying that it has been rescinded. However, that has not been acceded to, and therefore I am not able to proceed on the assumption that that has been done. But I shall act on the principle adopted by Vice Chancellor Kindersley in *Thomas* v. *Bernard*, where upon motion for decree the Vice Chancellor held that, the case having failed as it was then presented, the motion might be dismissed and liberty given to amend the bill, and to bring on the cause again in a regular way as upon an amended record. That seems to have been deliberately done by him, and I do not find that it has ever been in the slightest degree questioned or impugned before any superior Court. Therefore I assume that the rule is there correctly laid down. Then, upon the general question of amending, the case of *Lord*

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Darnley v. *the London, Chatham and Dover Railway Company* is most important. It has been read again and again by the counsel on both sides, and the circumstances of the amendment in that case have been stated and are well known. I only refer to one passage in the judgment of Lord Justice Turner, where he concludes by expressing his opinion that there must be liberty to amend the bill. He says, "Upon the circumstances of the present case, I think that leave to amend should be given, but I think the leave should be confined to putting in issue claims founded upon the agreement or matters arising thereout or connected therewith, and such facts and circumstances as may be necessary or proper for bringing forward and supporting such claims, and I think it more just that the costs should be reserved than that they should be dealt with as in *Biedermann* v. *Seymour*." Therefore in that case the Lords Justices did not dispose of the costs at the time, but reserved them.

The same course was followed also to a very great extent in the case of *Walker* v. *Armstrong*, in which the Lords Justices gave leave to amend the bill in such a manner as wholly to alter the case. It is stated not to have been strongly opposed, but clearly it was not done by consent, and I take it that however strongly opposed it might have been, the result would have been the same. There the Lords Justices, upon the same principle, seeing that the case was brought forward in a manner which would have worked very great hardships, gave leave to amend. Not only therefore upon the principle of *Thomas* v. *Bernard*, but, as I conceive, in exact conformity with the Lords Justices' decision in *Darnley* v. *the London, Chatham and Dover Railway Company* and in *Walker* v. *Armstrong*, I think myself at liberty to give leave to amend so as to bring forward the case of the wrong-doing by these defendants since the authority of the Commissioners was withdrawn. That, I believe, disposes of the whole case.

I desire to be understood now, that I have decided the main points in this case as if the bill had been amended, because it has been most fully argued before me, and I decide it in favour of the plaintiffs. If the bill is amended, I do not desire, nor will I allow any further argument before me. It may go to another tribunal, and I will give every facility for that. In my opinion this is a nuisance so great and so intolerable that it is the duty of this Court to stop it by injunction. The nuisance is now going on as threatened since the withdrawal of the authority of the Commissioners of the 2nd of June. Therefore I treat the case as if the information and bill had been filed on the 3rd of June, and as if the affidavits had been filed since that time. On these grounds I give liberty to amend, and all these affidavits will be available in the future state of the cause. The plaintiffs must pay the costs up to the 2nd of June, because up to the 2nd of June the defendants had lawful authority and were in the right. From that time they have been in the wrong. The amendment must be so framed as to put in issue the fact that the defendant company have now no authority from the Commissioners for disturbing the public ways of Cambridge. If they amend the bill on that point and give proper notice of motion, I shall grant the injunction as a matter of course. Then as to the subsequent costs, the best way will be to reserve them. I do not see any use in keeping the Commissioners here. As against them, the information and bill will be dismissed, without costs.

July 29.—The information and bill having been amended in accordance with his Honour's decision, by putting in issue the revocation of the Commissioners' authority by the rescision of the contract, and other matters connected therewith.

Mr. Osborne and *Mr. Locock Webb* now moved for an injunction to restrain the defendant company from breaking, digging up or disturbing, for the purpose of laying down gas-pipes, any of the public streets or highways, lanes, pavements, &c., or strips of land adjoining thereto within the limits prescribed by the Cambridge Town and University Gas Act, 1867.

Mr. Cole and *Mr. Rigby* objected, upon the authority of

The Attorney General v. *the Portreeve, &c. of Avon* (3 Beav. 67; 33 L. J. Ch. 172), that the plaintiffs having had no right of suit when the litigation com-

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menced, no relief could now be granted merely in respect of the new state of facts set forth by the amendments.

MALINS, V.C. overruled the objection and granted the injunction.

The case now (*Nov.* 23, 24) came on upon appeal from the decisions of the Vice Chancellor: the defendants appealing from the order made on the motion for decree giving leave to amend, and from the order made on the second motion for injunction.

Mr. Cole and *Mr. Rigby*, for appellants.

Sir Roundell Palmer, Mr. Osborne and Mr. Locock Webb, for the respondent, the Attorney General.

The arguments and cases cited were to a great extent similar to those urged in the Court below. Such further arguments as were pressed upon the Court are indicated in the judgments of their Lordships.

Upon the question as to the necessity for the interference of the Court in cases of nuisance, the following additional cases were cited or referred to: *Crossley* v. *Lightowler* (36 L. J. Ch. 584; L. R. 3 Eq. 279); *St. Helen's Smelting Company* v. *Tipping* (35 L. J. Q.B. 66); *Rickett* v. *the Metropolitan Railway Company* (36 L. J. Q.B. 205; L. R. 2 E. & I. Ap. 175).

WOOD, L.J.—We are asked to overrule the case of *The Attorney-General* v. *the Sheffield Gas Consumers' Company*. The Vice Chancellor does not seem seriously to have attempted to distinguish the cases, and certainly if there be any distinction between the cases it is that there was a stronger reason in the former than in the present for an injunction. The question there arose, as here, between rival gas companies, and there it related to the town of Sheffield, a town of vast traffic and of greater importance in that respect than Cambridge. The defendants there were contemplating works extending a distance of seventy miles, of which about six miles had been laid; a fact which Lord Justice Turner notices in his judgment. It explains the view he took when he said that the interference was only for two days, in laying down the pipes. He assumes, of course, that this will be about the duration of the interference at any particular spot. The points of difference between the two cases are exceedingly few, and none of any substance. It has been strongly contended that the law was unsettled at that time, that it was doubtful then whether the proceedings of the defendants would be regarded at law as a nuisance when all the circumstances should be taken into consideration. It is true that Lord Cranworth and also Lord Justice Turner threw out some doubt as to how far, under the circumstances, there was a nuisance at law. But it is equally clear, as the former Judge has himself remarked in *Broadbent's case*, that the course adopted did not depend upon any hesitation or mistaken notion as to whether the act complained of would be a nuisance at law. For if the case had rested upon that; the bill, instead of being dismissed, would have been retained, as was done by the Master of the Rolls in the case of *The Queen* v. *the United Kingdom Electric Telegraph Company*, in order that it might be ascertained whether the act complained of was a nuisance at law. The Court thought no such step necessary, and therefore their decision does not rest upon any such doubt. This being so, there is really no distinction between the two cases, because all the facts were stronger there than in the present case, and though the extent and aggravation of the nuisance has been more strongly commented upon at law since that case was decided, yet the decision that, according to the ordinary rules of this Court, it will not interfere by injunction, having regard to the circumstances, remains, I think, unaffected. Now if I felt much more inclined than I do to doubt the propriety of that decision, I think that it would not be right, after fifteen years have elapsed since it was pronounced by the full Court, and observing that during that interval the case has been wholly unquestioned, to treat it as one which ought to be overruled without its being considered by a higher tribunal than that over which we now preside. There has never been an intimation that the case is considered doubtful in point of law, certainly no

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case has been decided in opposition to it. The reason why I say I do not entertain so great doubt as was expressed by the Vice Chancellor, and why I do not concur in the views entertained by the learned Lord Justice who differed from the other two Judges, is not that a company has acquired rights, as Mr. Cole argued, through expenditure incurred upon the faith of that case, although no such rights have been conferred by the legislature. I conceive that no such claim as this, that they may safely defy all proceedings at law because a Court of equity has refused to interfere by injunction, has ever been established, and nothing that we now do, nor any sanction we now give to the former case, is in the least contrary to the decision of the Court of Queen's Bench in the Magistrates' case (*The Queen* v. *the Longton Gas Company*), which held, upon grounds in which I entirely acquiesce, that persons taking up pavement for the purpose of laying down, either on their own behalf as individuals, or on behalf of a company, communications with the main gas-pipes of another company or the main water-pipes of another company would subject them to an indictment. To hold otherwise would be to create entire confusion and discomfort to the inhabitants of a town. I quite agree that the case of *The Attorney General* v. *the Sheffield Gas Consumers' Company* must be taken upon its own circumstances, for so must every other case. But there is a principle well established, which I think the facts of that case bear out. The principle is, that where this Court interferes by way of injunction in the shape of prevention, rather than allow an injury to be inflicted, in cases where there is a legal remedy, these cases are of one of two kinds of a different character: one where the injury would be, in the eye of the law, irreparable, as where a tree is cut down which cannot be restored, though it may be paid for; and the other where the damage is continuous, and so continuous that the Court acting upon the same principle on which it acted in the olden times with reference to bills of peace, by restraining acts after repeated trials at law, so it now will restrain repeated acts which can only end in incessant actions being brought, on account of the continuous character of the wrong, which continuous character in itself makes the injury to be grievous, and so far, in the eye of the Court, irreparable. As an illustration of this, I may refer to the bell case before Vice Chancellor Kindersley—*Soltau* v. *De Held* (2 Sim. N.S. 133; 21 L. J. Ch. 153). No one would dream of coming to this Court to restrain his neighbour from tolling a bell once or twice, or eight or ten times, but when his neighbour declared that he intended to toll his bell regularly, the Court thought it was a case to justify interference. The injury was in itself slight, but continuous, and on the ground of its continuity the Court, *brevi manu*, arrested the nuisance, so as to save the party complaining from future annoyance. In this case if it had been made out, which it has not been any more than in the *Sheffield case*, that there was an injury to the public traversing the highway, as distinguished from the owner of the houses in the street, a continuous injury for which the only redress was an injunction, in this Court an injunction would be granted.

We must, therefore, look anxiously, as the Judges in the *Sheffield case* appear to have done, at the amount of evidence of continuous injury which is likely to be inflicted by the alleged wrong. The Judges in the *Sheffield case* arrived at their conclusion in what I have already said was a much stronger case than the present. There they said, Although you are going to take up 70 miles of road yet it will be done by steps, and no part will be interfered with for more than a couple of days. To do that may be an indictable offence, but is not a ground for interference by this Court. No doubt there might be cases where the Court would interfere if the thing were only to be done for one day; for instance, if the keeper of a shop in a crowded thoroughfare like Regent Street were to come and say, that a proposed interference with the traffic which might keep his customers away for a single day, would divert his custom elsewhere, and so that custom be lost, that might be a ground for the interference of the Court, although the shopkeeper might be unable to inform the Court of the amount of the damage, because it was not calculable.

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But here we have exactly the same circumstances as in the *Sheffield case*. The information is not filed by the Attorney General *ex officio* as gathering up the complaints and injuries of a whole district. Nor is any other person interested in the matter. It is at the relation of a rival gas company, which, of course, has reasons of its own for desiring to put an end to the operations of the company in question. That company are also plaintiffs. The Vice Chancellor has decided that the plaintiffs have received no injury, and we agree with him, and therefore they can receive no special relief. Then, as to the inhabitants. Not one single inhabitant has come forward to say that, though five miles of the pipes have been laid, he has suffered any injury whatever. There is evidence on the part of learned heads of colleges as to what they think will be injury, but no evidence of actual injury; and this is again exactly parallel to the *Sheffield case*, where, though six miles of pipes had been laid, not a single act of injury was proved.

As to the injury contemplated or actual we were much pressed by Sir R. Palmer, who argued it with great vigour. He referred to the Gas Companies' Act, 1847, which prohibits acts of the kind here complained of unless done with observance of a large number of restrictions. That was an argument pressed in the *Sheffield case* by Mr. Rolt, who contended that as the legislature thought these restrictions necessary for the protection of the inhabitants of a town where a corporate body was entrusted with large powers, it was impossible that persons acting of their own will and without any special power should be at liberty to do the very acts which were so prohibited unless under the sanction of authority. The answer to this is, that where the acts are legalized, they are placed under immediate control, so that when large powers are given special means of remedy for abuses are provided. But when no such powers are conferred upon other companies they are left to the ordinary control of the law. The ordinary operations of law will be sufficient as to them.

But there is an observation not unworthy of notice made by Lord Cranworth on the subject, and I think Lord Justice Turner made the same observation. Where you find an act[2] for the purpose of incorporating bodies for certain works, and certain companies are not allowed to avail themselves of that act, railway companies being amongst the number, whilst gas companies and others are allowed so to do, if any inference is to be drawn about the intention of the legislature it is that the legislature contemplated that a company could not proceed *ex mero motu* to dig up the soil of a town in which their works were to be constructed, and they must be taken to know that there would be companies, as happens in the particular case before us, who would find persons competent to authorize them. In other cases they might find a whole town willing that the works should be done. I can conceive a case where A, being the owner of a field, might have a bill of peace and a perpetual injunction to restrain people from making perpetual trespasses upon it, whereas B. might find it convenient to sanction those trespasses if he kept a public-house or anything of that kind. So here, the whole town have it in their power, and every member of the town has it in his power, to proceed by way of indictment; and if such a case had been brought before us as that the Attorney General, proceeding at the instance of a large number, by way of indictment, there would have to be a succession of perpetual indictments, that might take the case out of the *Sheffield case*. But here is a point which exists in quite as strong a degree, I should say stronger, that in this town there is a body who seem to have been incorporated from a very early period, 1788, consisting of the heads of all the colleges, persons who are now saying they anticipate great mischief and evil. There are besides the representatives of the borough in parliament, the magistrates and certain other persons incorporated as Commissioners by that act of parliament, with powers of the largest description, not only over the soil of the carriageway, but the pathway which is vested in them. Every stone

(2) The act alluded to by Lord Cranworth was 7 & 8 Vict. c. 110.

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that is dug out is a trespass committed by those who take it. Every foot of pavement that is taken up is a trespass upon their property. All those injuries are such that if this body think it proper and right, as representing the whole town, they may take action in the matter. But the case is quite different. The whole town acquiesces, and nobody takes any part, although, as I have said, there is a body competent to represent the town. We find that the information is filed at the instigation of a rival gas company. That, beyond all question, weighed in the decision come to by the learned Judges to whom I have referred, in their judgment upon the interlocutory motion.

Then, in the subsequent judgment, what Lord Justice Knight Bruce says with regard to public questions is a consideration not to be forgotten. He says: "I agree that motives are often very immaterial with reference to the manner of disposing of a suit. It has been said by an eminent Judge that if you were to look into the motives of suitors, Courts of justice would not sit above a month in the year, and would have little to do. Of course, there are, in numerous instances, motives for litigation which, if they could be looked into, would prevent a Court of justice from interfering. But generally I agree that it is not the rule so to regard them. Where, however, the public interest purports to be asserted, it is not wholly immaterial, at least upon an interlocutory application, to look into the motives from which, or under which, the matter is brought forward. Now, in the present case, though the Attorney General's name is used, it is impossible not to see that the suit has been instituted more from regard to private than to public good. If the public interest clearly required the immediate interposition of the Court, that might not be material. But we find as a fact that the majority of the Town Council is in favour of what the defendants are proposing to do; and, on a question of discretion, it is impossible, with reference to a community of this description, not to look with some degree of attention at what the governing body of the borough think on the subject. It is said that many of the members of the Town Council are interested in favour of the defendants' undertaking. I dare say that is so; still they are members of the governing body, and the opinion of the majority is as I have stated." That has much greater weight, no doubt, upon an interlocutory application; and that learned Judge, upon the subsequent hearing, thought he was justified in differing from the other Judges. But they say, You must show us an injury of a durable and continuing character. I quite agree in what the learned Judges have said at law; namely, that having for a day, we will say, small inconvenience, if it does not involve such a case as I have before referred to,—loss of custom, or the like,—the simple fact of that *per se* is not a matter which impresses the mind of the Court very strongly, when it finds that not one single inhabitant is brought forward to say, though five miles of work have been done, that there has been any inconvenience. No single passenger along the Queen's highway says he has been impeded. There is existing a body who might take up all these cases on behalf of the town, and effectively come here, as representing the town, and insist upon stopping what was going to be a continued infraction of the law; and they might say they wished to be protected in the nature of a bill of peace against having to bring perpetual actions. But here there exist none of those *criteria* any more than they existed in the *Sheffield Gas Company's case*. Unless, therefore, we are prepared to overrule that case, which I should not feel myself disposed to do, regard being had to all the circumstances before us, we cannot concur in the decision of the Vice Chancellor. This is a very much weaker case than was the *Sheffield case*.

SELWYN, L.J.—With respect to that part of the decree which gave the plaintiffs liberty to amend, it has been argued that the Vice Chancellor proceeded in a manner inconsistent with that class of cases of which *Pilkington* v. *Wignall* (2 Mad. 240, 244) may be treated as an example. There the original bill was filed to redeem a mortgage, and it was held that the bill could not properly be amended by stating the subsequent acquisition of title. In all the other cases which have been cited there was an original defect in the

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plaintiff's title, which it was sought to cure by the introduction of statements of facts which occurred after the bill was filed. But in the present case the title of the Attorney General does not in any degree depend upon the contract between the Commissioners and the defendants. He sues as representing the public by an original independent title, namely, as protector of the rights of the public against a nuisance to the public highway. Then it is said that the contract in question is alleged in the information and bill, and that the informant's and plaintiff's title to relief depends upon acts done in pursuance of that contract. If the defendants' case had been that this right to interfere with the streets depended upon the existence of the contract, and that they had never done or threatened, or intended to do anything except in pursuance of and under that contract, there would have been more substance in their contention. But it appears from the prospectus which was issued that they were formed, as almost all these gas companies are formed, not merely for supplying the lamps in the public streets, but in private houses, and they state in their own affidavits that they desire to do this, and intend to supply private houses, especially the poorer houses in the town, with gas. And they now contend that up to the time of the appeal they were and are entitled to continue their operations for that purpose. I think, therefore, neither the informant's nor the plaintiffs' title in any way depends upon the contract. But the contract may, I think, with more propriety, be said to constitute a portion of the defendants' case, and although there may be some objection to the precise terms in which the liberty to amend is given by the decree, and which terms, I think, are in one sense very unfavourable to the plaintiffs, it is not necessary to consider the effect of those terms. But as so much argument was addressed to us on this part of the case, I think it right to say that, in my judgment, the case was one in which, according to the principles and rules of the Court, an amendment of the bill was properly allowed at the hearing. With respect to that which is the substance of the case, I think we have in allowing this appeal, merely acted upon the principle which has been so clearly established and so often recognized in former decisions, namely, that this Court will not interfere by way of injunction where the injury is proved to be temporary and passing, as it was expressed by Lord Cottenham in *Elmhirst* v. *Spencer* (2 Mac. & G. 45). The plaintiff, before he can ask for an injunction, must prove that he has sustained such a substantial injury by the acts of the defendant as would entitle him to a verdict at law in an action for damages. Each case must, of course, depend upon its own circumstances. It may often be very difficult to define on which side of a dividing line the case falls. But when we find the particular point to have been already decided by the Court of Appeal, in a case brought before it, and a case is brought before the same Court which turns out to be, as I think this does, very much weaker than the case so decided, we should be introducing the greatest uncertainty, and consequently the greatest inconvenience, if we were to come to a different conclusion. That this case is very much weaker than the *Sheffield Gas Company's case* is apparent, I think, from a consideration of the affidavits upon which the informant principally relies—[His Lordship here examined some of the evidence].—I agree with what the Lord Justice has said as to the existing law and principles as laid down in the *Sheffield Gas Company's case*; but I entirely dissent from the proposition that that case has established any such result as has been contended for, namely, a general right for every gas company, without the authority of parliament, to interfere as they think fit with the streets and public ways of a town; and a gas company that undertakes so to proceed without the authority of parliament is exposed to a great number of perils; and I agree that there are many instances in which, having tried to proceed without such parliamentary authority, they have afterwards found themselves compelled to apply for and obtain such powers. They are, of course, subject to the rights of the owners of the soil in which their pipes are placed, and although they may obtain the authority of the persons in whom the pavement is vested, still they are not at any time subject to

the rights which the owners of the soil have to interfere with their pipes unless they have obtained parliamentary sanction. But although they are exposed to those dangers, they are, nevertheless, like all other persons, entitled to insist upon the principle on which this Court has always acted, namely, to say that no such serious or permanent injury has been proved as would justify the interference of the Court by way of injunction. They are certainly not the less entitled to set up this case if, as in the present case, the information is filed, not at the instance of the inhabitants of the town or any public body representing them, but of a rival company engaged in the same trade or business. In my judgment, no such case as is requisite to establish a case for an injunction has been proved, and therefore I think the bill must be dismissed, with costs.

MALINS, V.C., Nov. 12, 19, 1868.

NEWLING *v.* DOBELL.

38 L. J. Ch. 111; 19 L. T. 408.

Distinguished, *Allen* v. *Taylor*, [1871] E. R. A.; 19 W. R. 35 (L.C.): further proceedings, [1871] E. R. A.; 19 W. R. 556 (M.R.). Referred to, *Smith* v. *Hancock*, [1894] E. R. A.; 63 L. J. Ch. 201; [1894] 1 Ch. 209; 70 L. T. 163 (Ch. D.): affirmed, [1894] E. R. A.; 63 L. J. Ch. 477; [1894] 2 Ch. 377; 70 L. T. 578; 42 W. R. 465 (C. A.).

Injunction—Sale of Business—Breach of Covenant not to Carry on a Trade.

GOODWILL.—*A tailor, having sold the goodwill of his business, covenanted with the purchaser not to "carry on or be concerned or interested in" the business of a tailor within a fixed distance from his former shop. He then engaged himself, as a journeyman tailor, to his nephew, who carried on the same trade and under the same name within the prescribed limits. Upon bill filed by the purchaser*:—Held, *that this was a breach of the covenant, and injunction granted accordingly.*

Thomas Dobell, the defendant in this case, having for some years carried on the business of a tailor in High Holborn, sold the goodwill of his business to the plaintiff; and, by the assignment executed upon the occasion of that sale, the defendant covenanted with the plaintiff that he would not "carry on or be concerned or interested in the business of a tailor" within a fixed distance from his former place of business in High Holborn.

The defendant had recently taken an engagement in the shop of his nephew, T. P. Dobell, who carried on the same trade of a tailor, within a quarter of a mile of his former shop in Holborn. Accordingly, the plaintiff filed this bill against him to restrain him from continuing with his nephew, charging that the defendant's proceedings were in direct violation of his covenant; and an injunction was now moved for accordingly.

The plaintiff's allegation was, that the defendant was employed as foreman at a salary of 2*l.* 5*s.* a week; but the defendant denied that he occupied the situation of foreman, insisting that he was nothing more than a journeyman tailor, and therefore in no way "interested in" the business.

Mr. W. W. Cooper, for the motion referred to *Rolfe* v. *Rolfe* (15 Sim. 88).

Mr. K. Parker, for the defendant, submitted that the defendant's hiring himself as journeyman tailor to a relation who happened to bear the same name was no breach of the covenant, which only applied to the interest of a principal or partner in business. *Rolfe* v. *Rolfe* was decided on the words "engage in"; and as the defendant in that case had engaged with another party in carrying on the business, there was a breach of the covenant. But in the present case

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there could be no breach unless the defendant was carrying on the business on his own account, as was held in *Rawlinson* v. *Clarke* (14 Mee. & W. 187; 14 L. J. Ex. 364). The covenant should have prohibited his carrying on business "either as master or servant," as in *Proctor* v. *Sargent* (2 Man. & G. 20; 10 L. J. C.P. 34); *Benwell* v. *Inns* (24 Beav. 307; 26 L. J. Ch. 663).

MALINS, V.C.—It is admitted that the defendant has engaged himself as shopman or foreman to his nephew, who bears the same name as himself, and that not a quarter of a mile from his former place of business. The only question is, whether he is not "concerned or interested in the trade or business of a tailor" within the meaning of the covenant? I think that he is not interested in such a way that he could have been declared a bankrupt as a trader under the old Bankruptcy Laws. But every journeyman or workman is interested in the condition of his master's business. The same name as that in High Holborn appears over the nephew's door; and anyone who knew the defendant formerly can go to the nephew's shop and see him actually engaged in the business; and it is not likely that they would know in what capacity he was there. And I should conjecture, though there is no proof of the fact, that if an old customer were to find that the defendant had gone to his nephew's shop, he would probably be told by the defendant that if the customer came there too, he, the defendant, would "cut out" for him as he used to do formerly. It cannot be said that this is not a breach of the covenant. The defendant, in his present position, has the opportunity, and it is only natural that he should take advantage of it, of withdrawing the plaintiff's customers and inducing them to follow him. In *Rolfe* v. *Rolfe*, Shadwell, V.C. decided that being a foreman and not a principal was a breach of a similar covenant; and I see no distinction between that case and this. Therefore, upon principle and the meaning of the words, and fortified by the decision of Shadwell, V.C., I am satisfied that the defendant has brought himself both within the spirit and the letter of the covenant, and there must be an injunction against him. I should be very glad, under the circumstances of the case, if any reasonable arrangement could be made which would avoid depriving the defendant of his present means of livelihood; but I can only decide that there has been a breach of the covenant, and grant the injunction accordingly.

LORD ROMILLY, M.R., Dec. 10, 14, 1868.

DAW *v.* ELEY.

38 L. J. Ch. 113; L. R. 7 Eq. 49; 17 W. R. 245.

Referred to, *In re Cheltenham and Swansea Carriage and Wagon Co.*, [1869] E. R. A.; 38 L. J. Ch. 330; L. R. 8 Eq. 585; 20 L. T. 169; 17 W. R. 463 (V.C.); *Brodribb* v. *Brodribb & Wall*, [1886] E. R. A.; 55 L. J. P. 47; 11 P.D. 66; 56 L. T. 672; 34 W. R. 580 (P.D.).

Contempt of Court—Publication of Matter relating to Question in Issue—Solicitor.

CONTEMPT OF COURT.—*The solicitor of a defendant wrote anonymous letters to a newspaper, impeaching the novelty and usefulness of a patent claimed by the plaintiff, and the subject of the suit. It was ordered that the solicitor should be committed for contempt of Court: the order not to be enforced in case he inserted an apology in the newspaper and paid the costs of the motion*:—Semble, *By publishing controversial letters in reply, or by delay, the plaintiff would have lost his right to complain.*

On the 19th of September, 1868, pending the above suit, an article appeared in the *Volunteer Service Gazette*, headed "The Cartridge of the New Military

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Rifle," which contained the following passage: "We think that enough is stated in the report to shew that at present neither the Boxer nor the Daw Cartridge sufficiently satisfy the primary conditions of a cartridge,—viz., absolute safety, —for, singularly enough, this very first element in a cartridge was not expressly named, but was taken to pass under the head of general serviceability; and, under this head the committee state, that as the anvils in both cap-chambers rest on the percussion powder in the caps, therefore, both cartridges are equally liable to accidental explosion."

In the following number, published on the 26th of September, a letter appeared in that journal, signed "Copper Cap," relating to the same matter, the material parts of which are as follows: "The cartridge submitted by Mr. Daw to the committee was, as to its case, made of thin brass folded on a mandril, having the edges (one overlapping the other) soldered. Metal cases brazed, soldered, overlapping in coils or drawn, had all been in public use before Mr. Daw's patent of March, 1867. A M. Rochatte, of Paris, in January, 1867, obtained provisional protection for a patent in England for the very same soldered case as submitted by Mr. Daw to the committee, except that M. Rochatte lined his case with paper. This patent, however, was allowed to lapse. It is a brass tube soldered transversely up the side. The object of the lining is to protect the metal from the corrosive action of the powder. This is done in the Boxer by a coating of shellac. Now, as to the safety the (so-called) Daw cartridge when new acts admirably. But let them be kept in store for any considerable time, and the powder will eat into the metal and render the discharge really dangerous in some breech-loaders, and I may name the Government Snider in particular. I have seen the experiment tried, and every single cartridge burst that was taken from a box that had been in stock several months, whereas only one burst of an equal number of cartridges just purchased of Mr. Daw, and which were fixed for the same rifle. This disadvantage attends all metal cartridges which have no lining. But, independently of this, the principle on which the present Boxer service cartridge is made renders it impossible for the present cartridge-case to burst in the discharge."—"I wish it to be understood that I do not desire to raise the question of invention, but of the relative safety of the cartridges named, those who have studied the question must admit that the present Boxer service cartridge is by far the best cartridge for breech-loading rifles in Europe, and the government committee very properly so decided."

Other letters appeared in the *Volunteer Service Gazette* on the same subject, some from a Mr. Walker advocating the use of the Daw Cartridge, and Mr. Daw sent the following letter to the editor of that newspaper:

"Sir,—Every honest man feels repulsion in noticing anonymous letters, and the public generally are not prone to place much reliance in their contents. The communications from 'Copper Cap,' in your paper of the 26th ult., may have been written by some rival cartridge-manufacturer, some interested official, or it may be some unscrupulous lawyer or agent. It is certainly not likely to have been penned by any disinterested authority, as the subject shews a strong bias in a particular direction. Under the constant condition of attack to which my interests are subjected in a certain few of the London journals whose sympathies appear to be always adverse to my welfare, it will be quite sufficient for me on the present occasion to state that the asseverations of 'Copper Cap' as to the superiority of the Boxer cartridge as to safety are, like his other detrimental statements, without foundation; and I refer your readers, as I do all the world, to the report of the Ordnance Select Breech-loading Committee for their admissions of the perfect endurance of my cartridges sent into the War Office competition. With respect to the alleged matter of M. Rochatte's pretended patent, that will be elucidated by the proceedings taken by me against Messrs. Ely Brothers when the case comes for hearing in November next before the Master of the Rolls. So oft repeated as these injurious statements have been permitted, I can only hope that the press will

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hereafter do the justice of exercising a legitimate control over unsigned letters having no other object than to create prejudice."

The editor declined to insert that letter, either in the body of the paper or as an advertisement, but a leading article appeared in the issue of the 24th of October, 1868, on the subject.

In the same number there was another letter signed "Copper Cap," of which the following are the material facts:

"At this time Mr. Daw was the proprietor of the Schneider patent (September, 1861) and made cardboard cartridges only with the same base anvil, &c. as is now used. Some months after the issue of the government circular, 'an eminent engineer' gave it as his decided opinion through the public press that the metal cases used by Colonel Boxer were absurdly useless, and spoke in the highest praise of the Daw paper cases for military purposes, and boldly stated that the government could save at least 100,000*l.* per annum by the use of the Daw paper cartridge. He considered Mr. Daw as one of the 'perishing in the cold, neglected and unrewarded inventors,' because government did not adopt Mr. Daw's paper-cased cartridges. Mr. Daw could then have had no idea of any other cartridge. In January, 1867, however, a M. Rochatte (a Frenchman) obtained provisional protection for a metal-cased cartridge, lined with paper, with the overlapping joining closed with solder. Early in February, 1867, M. Rochatte shewed and left with Mr. Daw samples of his metal-soldered cartridges (see his letter in the *Army and Navy Gazette*, April 25th last, p. 263). In March, 1867, Mr. Daw applied for a patent for a metal cartridge-case with the overlapping edges soldered in the same manner as Rochatte's, but without the paper lining, and he used the Schneider base and anvil."—"So that Mr. Daw appears to have sent for competition a cartridge of which the base was entirely Schneider's, the brass-soldered case Rochatte's, the projectile and method of fixing it Colonel Boxer's; and being the only competitor besides Colonel Boxer, he took the 400*l.* prize. *Palmam qui meruit ferat.*"

Mr. Daw sent the letter which had been rejected by the *Volunteer Service Gazette* to the *Cosmopolitan* newspaper, when it was inserted, and some comments made on the subject.

On the 7th of November, 1868, a letter appeared in the *Cosmopolitan* from Mr. Walker, stating that he had been informed that Mr. Collette, the solicitor of the defendant in *Daw* v. *Eley*, was the author of the letter signed "Copper Cap."

Correspondence then took place between Mr. Daw's solicitor and Mr. Collette, who refused to apologize in the newspapers, on the ground that his letters were fair comments on a public matter in answer to an article in the *Volunteer Service Gazette*.

Mr. Daw now moved to commit Mr. Collette for contempt of Court.

Mr. Jessel and *Mr. Russell Roberts*, for the motion, said the letters complained of impeached the novelty and usefulness of the plaintiff's invention, the very matters in question in the suit, the result of which were calculated to prejudice, more especially from their being written anonymously as if by a disinterested person. They relied on *In re St. James's Evening Post* (2 Atk. 469); *Farley's case* (2 Ves. sen. 520); *Lechmere Charlton's case* (2 Myl. & Cr. 316; 6 L. J. Ch. 185); *Tichborne* v. *Mostyn* (2 L. J. Notes of Cases, 249; 15 W. R. 1072).

Mr. Southgate and *Mr. Langley*, for Mr. Collette, said the letters complained of were fair comments on public matter, strictly in reply to other articles in the newspaper. They contained no information obtained by means of the suit. Mr. Daw had himself written to the newspapers, and had allowed the matter to proceed after he might have known who was the author of the letters, and had therefore lost whatever right he had in the matter against Mr. Collette.

The MASTER OF THE ROLLS said—I will read the letters before I dispose of the matter finally. But as it strikes me at present, I think the conduct of Mr. Collette cannot be defended. The principle is quite established that no

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person must do anything with a view to pervert the sources or the proper flow of justice. In fact, no one ought to make any publications or to write anything which would induce the Court or which might possibly induce the Court, or the jury, whichever tribunal will have to try the cause, to come to a conclusion other than that which is to be derived from the evidence in that cause, and certainly no one ought to prejudice the minds of the public beforehand by mentioning circumstances relating to the case.

Now, if that is done with the intention of perverting the ends of justice, there is no question that the Court could stop it, and very often it will judge for itself what are the fair inferences to be derived from the publications which appear. But it must also go beyond this. It must stop the publication of these things where the evident result would be to affect the administration of justice, though that might not have been the direct intention of the person who did it.

In this case the main question is, whether Mr. Collette was justified in writing his letter of the 26th of September, which is the first letter on the subject. There is a leading article before that upon the subject, but the leading article does not say a word as to the priority of any invention. It does not say anything with respect to the validity of Mr. Daw's patent, whether in fact he had been forestalled by any one before him; it does not mention anything relating to it. But Mr. Collette's letter treats of little else, as it appears to me, with the exception of this thing at the beginning: "The writer of the article in your last issue, under the heading 'The Cartridge of the New Military Rifle,' can have scarcely given the subject a practical consideration when he places the Daw cartridge in comparison with the present Boxer service cartridge, particularly when he says that the Daw cartridge approaches the first essential more nearly than the Boxer, the first essential being safety." If it had stopped there (and I am not now considering the position Mr. Collette filled), and it had been nothing more than this, or an enlargement upon it, it might have been said that it was a fair discussion of a public question of the merits between two particular patents.—[The Master of the Rolls read extracts from the first letter, and proceeded]—These are things expressly stated in the letters to shew that Daw's patent cannot be original; and the writer of the letter seems to feel that very strongly, for at the end of it he makes this observation: "I wish it to be understood that I do not raise the question of invention, but of relative *safety* of the cartridges named. Those who have studied the question must admit that the present Boxer service cartridge is by far the best." Can anybody doubt, if I were persuaded that the whole of that statement was true, that it would very seriously affect the validity and the originality of Mr. Daw's patent? Then, it is to be observed that this letter is put in, not by a mere stranger, who might say that he really knew nothing at all about the suit, but it is put in by the solicitor of the gentleman who is opposed to Mr. Daw. Surely that is a very strong feature in the case. He must wish that his client should succeed, and I venture to say that there is no solicitor in the Court who would not in the same position feel the same thing; and it is impossible that a solicitor can safely act in a matter of this description in writing an article in a paper which, if believed, must have a beneficial effect upon his client, and afterwards say, "I had no intention of influencing the result however much I may wish for it." It must be regarded as an endeavour to interfere with the due administration of justice. Where is the line to be drawn? It is highly important that the Court should not allow steps of this sort to be taken by the officers of the Court in causes in which they are engaged which possibly may have an effect favourable to their client or unfavourable to the other side; and I may further say that if the Court is to go minutely into every sentence of a letter which is written in a public newspaper, to say this is questionable, and that is doubtful, and the like, a task and a duty will be imposed upon the Court which it will be impossible to perform. There is one distinct line drawn, which is this, that gentlemen who are concerned for contending clients in this Court, whether solicitors or counsel, should abstain entirely from discussing the merits of those

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questions in public print. If they do it at all they ought to put their names to their communications; but to let the public suppose that it is merely done by a person who takes a great interest in matters of this description and has great knowledge of the subject, and that he discusses the question from a public point of view, when if the facts were known, he is the solicitor of the defendant and has the strongest possible interest in his success, appears to me conclusive upon this point.

The other point upon which I wish to read these papers is this: Unquestionably, if a person submits to have the matter discussed in the public papers and enters into the arena of public discussion, he cannot afterwards complain that this has been done. The Court will say to him, "As you have thought fit to discuss it there you have accepted another tribunal."

I want to look at the affidavits and the papers to see how far Mr. Daw really has accepted that tribunal and transferred the discussion to another Court; and for that purpose I should like to know how soon Mr. Daw was aware that Mr. Collette had been the author of these letters.

Dec. 14.—The MASTER OF THE ROLLS said: I have little to add in addition to what I stated on Friday when I explained the reasons which induced me to take the course which I now intend to take.

The perusal of the articles confirms me in the view I have taken; and it must be admitted by everybody to be an extremely improper thing for the solicitor in the cause to write an article in a paper which may either directly or indirectly be believed, and which may influence the suit upon which he is engaged. I do not believe it was done with any improper motive, but it was done with great want of judgment.

My opinion, from reading these papers and the comments and remarks in the anonymous publications in the *Volunteer Service Gazette* is that they have a direct tendency to influence the suit, and therefore I am obliged to make the order that I have been obliged to make on former occasions, and which was made by the present Lord Chancellor in the *Titchborne case*. I shall make the same order as before, but I shall direct that it shall not be acted upon for a fortnight, in order that Mr. Collette may take the opinion of a superior tribunal upon the subject, or he may make an apology and pay the costs of the motion. It appears to me, to say the least of it, to be a serious error of judgment on the part of Mr. Collette, and it is necessary that the Court should interfere, and I must make the order which I make generally. The order is, that Mr. Collette stands committed for contempt of this Court, and I desire that the parties will understand that it is my desire that the order shall not be enforced for a fortnight, in order to enable Mr. Collette to take an opinion of a superior tribunal if he should be so advised, or in case he should desire to make an apology for the error which he has committed in publishing these things, then he would pay the costs of the motion, and for that reason I desire that the order may not be enforced for a fortnight. I am obliged to say a fortnight; I would have given a longer time, but there is not a longer time before Christmas.

GIFFARD, V.C., Nov. 11, 12, 14, 1868.

FLANAGAN *v.* THE GREAT WESTERN RAILWAY COMPANY.

38 L. J. Ch. 117; L. R. 7 Eq. 116; 19 L. T. 345.

Agreement for Lease—Specific Performance—Contract by Director of a Company for his own Benefit.

COMPANY.—*In* 1840, *a railway company, by instrument under seal, agreed*

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to grant to G. and P., their executors, administrators or nominees, a lease of an hotel at one of their stations for a term of ninety-nine years; and by the same instrument it was agreed between the parties that the said G. and P. should have the occupation of the refreshment-rooms at the same station, subject to the same restrictions and provisions as related to the carrying on the business of the hotel, both as regarded the quality and price of provisions and the management thereof. The lease of the hotel was executed: it made no mention of the refreshment-rooms, which, however, were occupied by G. & P. The plaintiff was the assignee of G. & P. of the lease, and all their interest under the agreement of 1840, *and occupied the refreshment-rooms*:—Held, *that he was entitled to have a deed executed by the company granting him the occupation of the refreshment-rooms, subject to the restrictions and provisions in the agreement mentioned.*

S., a director of a railway company, had entered into an agreement with the company for the occupation by a firm, of which he was a member, of premises belonging to the company, and had assigned his interest under the agreement to the plaintiff:—Held, *that the plaintiff was in the same position as S.; and therefore could not maintain a bill for specific performance of the agreement.*

By an agreement, under the seal of the company, made in the year 1840, the defendants, the Great Western Railway Company, agreed to grant to Thomas Grissell and Samuel Morton Peto, their executors, administrators or their nominees, a building lease of some land situate near their station at Reading, for a term of ninety-nine years, Messrs. Grissell & Peto undertaking to build an hotel thereon. It was, amongst other usual conditions, stipulated by the agreement that in the lease should be contained a proviso, that if at any time or times during the term the business of an hotel should not be carried on upon the premises, or if the same should not be carried on, managed or conducted to the satisfaction of the railway company, then it should be lawful to and for the said company by notice in writing under their corporate seal, or under the hands of any three or more directors of the said company, of such default or mismanagement, and if the same should not be remedied in three months, that then the London board of directors should have the power wholly to determine and put an end to the lease. The last clause of this agreement was in the following words: "It is further agreed between the said parties that the said Thomas Grissell and S. M. Peto shall have the occupation of the refreshment-rooms at the Reading Station, subject to the same restrictions and provisions as relate to the carrying on the business of the hotel, both as regards the quality and prices of provisions and management thereof."

Messrs. Grissell & Peto were let into possession of the premises comprised in the agreement, including the refreshment-rooms (which, for the sake of distinction, are called the upper refreshment-rooms); and, in 1842, a lease was in pursuance of the agreement granted them of the hotel, but the lease did not include the upper refreshment-rooms.

In 1860, the hotel and other premises comprised in the lease of 1842, and all the estate and interest of the assignors of and in the refreshment-rooms at the Reading Station, under or by virtue of the agreement of 1840, or otherwise howsoever, together with the full benefit of the agreement, were assigned to the Messrs. Simonds, of Reading, who had been for some time under-tenants of the hotel and the upper refreshment-rooms.

In the year 1849, the Messrs. Simonds, at an expense of 200*l.*, erected other refreshment-rooms at the Reading Station (called the lower refreshment-rooms), and the plaintiff alleged in the bill that it was agreed between the Messrs. Simonds and the railway company that the Messrs. Simonds should have a lease thereof, at the yearly rent of 6*l.*, for a term co-extensive with that for which the hotel and refreshment-rooms at the upper station were held.

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The following minute appeared in the books of the company in reference to this transaction:

"6th December, 1849.

"A ground-rent of 6*l.* per annum was ordered to be fixed for the new refreshment-room, built by the lessees at the Down Station in Reading.

(Signed)

"C. Russell, Chairman."

At this time Mr. Henry Simonds (a member of the firm above-mentioned of Messrs. Simonds) was a director of the railway company, and was present at the meeting of the board, at which the above resolution was passed.

In 1860, the Messrs. Simonds assigned to the plaintiff all their estate and interest of and in the upper and lower refreshment-rooms, under or by virtue of any of the above-mentioned instruments.

The company had, before the filing of the bill, completed a new and enlarged station at Reading, in which they included new refreshment-rooms; and by a letter, dated the 1st of November, 1867, they gave the plaintiff notice that, owing to their arrangements with respect to the new station, the tenancy of the existing refreshment-rooms must come to an end. And advertisements had been recently issued by the company for tenders for the tenancy of the new refreshment-rooms.

Under these circumstances the plaintiff filed his bill, and thereby prayed for a declaration that by virtue of the said articles of agreement of 1840, and the said board minute, and under the circumstances, the plaintiff was entitled to a lease of the refreshment-rooms at the Reading Station for a term co-extensive with that for which a lease of the hotel was granted by the company, and for an injunction restraining the company from granting any lease of the refreshment-rooms at the said station, or any part thereof, to any person other than the plaintiff, and from permitting any person other than the plaintiff to occupy or use such refreshment-rooms or any of them.

Mr. Druce and *Mr. Kekewich*, for the plaintiff.—We are clearly entitled to specific performance of the agreement of 1840, with regard to the upper refreshment-rooms. Our case with regard to the lower refreshment-rooms stands on a different basis. It will be objected that there is no contract under the seal of the railway company: but that is not necessary. The providing refreshment accommodation for their passengers is necessary for the commercial success of the company; any arrangement, therefore, with regard to it is valid although not under seal. *The South of Ireland Colliery Company* v. *Waddle* (37 L. J. C.P. 211; L. R. 3 C.P. 463). Besides, there has been part-performance of the contract; for on the faith of it our assignors expended 200*l.* in building.

Mr. Wickens (*Mr. Kay* with him), for the railway company.—The upper refreshment-rooms are not a part of the hotel, and so do not necessarily go with it. The tenure of the hotel is, according to the terms of the agreement of 1840, quite different from that of the upper refreshment-rooms. The hotel was to be demised to Messrs. Grissell & Peto, their executors, administrators or nominees; the agreement with regard to the upper refreshment-rooms was merely personal to Messrs. Grissell & Peto; in the last clause of the agreement, which refers to the upper refreshment-rooms, the words "executors, administrators or nominees" are omitted. When in an agreement carefully drawn, as this is, different words are used, it is fair to infer that the intention of the parties was also different. Besides, the parties have put their own construction on the agreement; the lease of the hotel has been executed: the refreshment-rooms were not mentioned. With regard to the lower refreshment-roms, there is no agreement which this Court can enforce; the so-called agreement mentions nothing as to terms, except the amount of rent; it is not under seal, and that is essential.

[GIFFARD, V.C.—That part of the case rests on parol-agreement and part-performance.]

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Moreover, it was an agreement by a director with the railway company for the benefit of his own firm, and is therefore void both on general principles—*The Aberdeen Railway Company* v. *Blakie* (1 Macq. 461), and under the special provisions of the Great Western Railway Act (5 & 6 Will. 4. c. 107. s. 132). The bill makes no case with regard to the new refreshment-rooms, and must, so far as it relates to them, be dismissed, with costs.

Mr. Druce, in reply.

GIFFARD, V.C.—There is part of this case which I can dispose of now, and there is part of it as to which I must necessarily reserve my judgment.

The bill undoubtedly goes to the new refreshment-rooms as well as to the old; that is quite clear. Very properly, any relief as to the new refreshment-rooms was waived at the bar, and therefore as to that the bill must, undoubtedly, be dismissed.

Then, as regards the lower refreshment-rooms, I think that case is very plain. First of all, the main evidence brought forward is a minute, which minute does not contain in itself sufficient terms for this Court to act upon, or, in fact, the complete terms of the agreement. In addition to that we have the affidavit of Mr. Simonds, in which he states, singularly enough, that he was a director of the railway company. He says first of all, "I was a member of the board of directors. About that time it was contemplated to erect refreshment-rooms at the lower station at Reading, and it was agreed between me on behalf of my said firm, and the board on behalf of the said company, that if we erected at our own expense a refreshment-room at the lower station we should have a lease thereof at the yearly rent of 6*l*., for a term co-extensive with that for which Messrs. Grissell & Peto held the hotel and the refreshment-rooms at the upper station." In my opinion, Messrs Grissell & Peto did not hold the refreshment-rooms for any term at all, therefore it would be very difficult to gather any very definite arrangement from that. In my opinion, whatever the rights may be with reference to the upper refreshment-rooms, they certainly were not the rights of tenants. That, of course, would throw great difficulty in the way of specifically performing any agreement, even although there was the outlay of this 200*l*. after this agreement was entered into. But we must recollect this, that this outlay was by Simonds, or by Simonds and his firm; that the plaintiff had nothing to do with the matter until long after Mr. Simonds's outlay; and the plaintiff is here to enforce the agreement which Simonds entered into with the company, and is therefore in the same situation as if Simonds was here as plaintiff seeking to enforce this agreement. I have no hesitation in saying that Simonds, having been at the date of the agreement a director of the company, whether we look at the 132nd section of the act referred to or the case of *The Aberdeen Railway Company* v. *Blakie*, could not come here to have an agreement of that description enforced. Therefore, as to that part of the case, the bill must clearly be dismissed.

GIFFARD, V.C. (*Nov.* 14.)—At the end of the argument in this case, I dismissed with costs so much of the bill as relates to the new refreshment-rooms, and to the lower refreshment-rooms, but I reserved my judgment as to the upper refreshment-rooms, not being satisfied at that time as to what the effect of the agreement of the 16th of March, 1840, may be, so far as it relates to the upper refreshment-rooms. Those refreshment-rooms existed at its date, and the agreement applies to no other, and there has been possession of them under the agreement in conjunction with the hotel for, I believe, twenty-nine years. The agreement in question is under the seal of the company, but is nevertheless an executory agreement in every part of it. In 1842 a lease of the hotel, pursuant to the first part of the agreement, was granted. That lease does not in any way refer to the refreshment-rooms. That fact, however, in my opinion, is no reason why relief should be refused to the plaintiff, or why, if a deed ought to be executed under the last part of the agreement with reference to the refreshment-rooms, it should not now be so executed. It was argued

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that the provision as to the refreshment-rooms was confined to Messrs. Grissell & Peto personally, and that in point of fact it merely gave them an occupation which the company could terminate at any time, or, as was said, that Messrs. Grissell & Peto were to have "the first turn." This, in my opinion, is not the true effect and construction of the agreement. One consideration runs through the whole of the agreement, and applies to every part of it. The earlier part of the agreement, speaking in general terms, is an agreement to let the hotel for a definite period, at a definite rent, and it is provided that the company, on certain things being done, shall grant to Messrs. Grissell & Peto, their executors, administrators or their nominee or nominees, a lease, and then the covenants are specified into which the lessees are to enter, and there is this provision.—[His Honour read the clauses of the agreement above stated, and continued:]—Now, as I have already stated, the agreement is, in my opinion, executory in every part. The whole must be fairly looked to, and if the whole be looked to, though I quite agree that the tenants of the hotel were not in the technical sense to be tenants of the refreshment-rooms, I can have no doubt but that the tenancy of the hotel and the occupation of the refreshment-rooms were intended to be connected; and though it certainly was not intended that the tenants of the hotel should be bound to occupy the refreshment-rooms, it was, I think, intended that they should have the option of doing so. Has, then, the true construction of the last provision of the agreement, treating it as executory, this effect? In my opinion it has, for it incorporates these provisions (that is, of course, the provisions which I have just now read), and these provisions so incorporated extend to Messrs. Grissell & Peto, their assigns and nominees. And looking to them, it cannot be that the occupation was to be terminated simply at the will of the company, for a three months' notice of termination was to be given; nor can it be that Grissell & Peto were to be sole occupants, for the provisions referred to extend to nominees and assigns. Who, then, were to be the occupants, as is necessarily to be inferred from the agreement? To that question I answer, Messrs. Grissell & Peto, their assigns and nominees, being tenants of the hotel under the lease. A deed granting an occupation in these terms would not be revocable at the mere option of the company. If such a deed had been executed at the date of the lease, in 1842, the plaintiff could have sustained no proceedings in this Court; and though the bill asks a great deal more than this, and much that is different from this, I think there is enough on the pleadings to justify me in saying that the proper decree is to declare that the plaintiff is entitled to have the agreement carried into effect by having a deed executed to him as assign of Grissell & Peto by the defendants, with all proper provisions granting the right of occupation of the upper refreshment-rooms by himself and servants, to him, his assigns and nominees, being tenants of the hotel under that lease, but of course subject to the restrictions and provisions in the agreement mentioned, and otherwise as is thereby provided; and of course it should be referred to chambers to settle a deed accordingly. Besides this, the plaintiff ought not to be disturbed by proceedings at law, or otherwise, until such a deed as I have referred to has been settled and executed. This should be provided for. Beyond this the plaintiff is entitled to no relief. Regard being had to the case made by the bill, I can give the plaintiff no costs, and he must pay the costs of so much of the suit as I have dismissed. The deed must be at the plaintiff's expense.

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FULL COURT OF APPEAL. Nov. 5, 6, 1868.

In re THE EAST OF ENGLAND BANKING COMPANY; *Ex parte* THE OFFICIAL LIQUIDATOR; AND *Ex parte* THE PROVINCIAL BANKING CORPORATION.

38 L. J. Ch. 121; L. R. 4 Ch. 14; 19 L. T. 299; 17 W. R. 18: varying, [1868] E. R. A.; L. R. 6 Eq. 368; 18 L. T. 550; 16 W. R. 840 (V.C.).

Distinguished, *In re Bank of South Australia*, [1895] E. R. A.; 64 L. J. Ch. 397; [1895] 1 Ch. 578; 72 L. T. 273; 43 W. R. 359 (C. A.).

Banking Company—Winding-up—Payment of Debts in full—Notes Payable on Demand—Interest, from what Time Payable—Rate of Interest—26th Order of 11th of November, 1862.

BANKER AND BANKING COMPANY.—*A banking company stopped payment, and was voluntarily wound up. The debts being paid in full*:—Held, *that interest at 5l. per cent. was payable on all promissory notes, drafts and other negotiable instruments current at the time of the stoppage, not from the time of the stoppage, but from the respective times of the claims in respect thereof being sent in to the liquidators; the stoppage of the bank not operating to dispense with the necessity of making a demand.*

COMPANY.—Semble—*The 26th Order of the 11th of November*, 1862, *professing to be made in pursuance of the 170th section of the Companies' Act*, 1862, *is ultra vires.*

This was an appeal by the liquidators from an order by Vice Chancellor Malins, made upon an adjourned summons in the voluntary winding-up of the East of England Bank, upon the application of the liquidators, to consider the rate of interest (all the creditors having been paid their principal debts in full) to be paid to the several creditors on the amounts of the debts due to them respectively in respect, first, of deposit accounts, and secondly, of promissory-notes, drafts and other negotiable instruments current at the time of the stoppage of the bank, on the 19th of June, 1864.

Upon deposit accounts above 500*l.* interest was claimed at the rate of 4*l.* 10*s.* per cent., and under that amount at 4*l.* per cent., and upon promissory-notes in circulation at the time of the stoppage 4*l.* per cent.

The ground upon which the above rate of interest was claimed upon deposit accounts was the following resolution, passed by the directors on the 6th of July, thirteen days before the stoppage of the bank:

"In consequence of the general advance in the rate of interest allowed on deposit and other banks in the district, it is resolved that the present rate to be allowed by this bank on deposits remaining three months be 4*l.* 10*s.* per cent. on sums amounting to 500*l.* and upwards, and 4*l.* per cent. on sums below 500*l.*"

There was no evidence to shew that this resolution was communicated to the depositors; but in a correspondence between the liquidators and the Provincial Banking Corporation, who were the holders of deposit-notes to a considerable amount, it was stated by the former that interest would be allowed on the basis of the resolution.

The claim in respect of the promissory-notes, drafts and other negotiable instruments current at the time of the stoppage of the bank, was based upon the 26th Order under the Companies' Act, 1862, directing interest to be allowed to creditors whose debts do not carry interest at the rate of 4*l.* per cent. per annum from the date of the winding-up order; or if the 26th Order were *ultra vires*, as was thought by Lord Westbury in the case of *The Hatfield Patent Cask Company* (9 Jur. N.S. 997), and held by Lord Romilly in *In re the Herefordshire Banking Company* (36 L. J. Ch. 806; L. R. 4 Eq. 250), then interest was payable according to the law merchant.

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This was resisted by the liquidators, on the ground that interest could only run from the time of making the demand for payment, and no such demand had been made after the stoppage.

The Vice Chancellor by his order declared that the holders of notes and drafts of the bank current at the time of the stoppage were entitled to interest at 4*l.* per cent. per annum from that event, and that creditors for deposit accounts at agreed rates of interest were entitled to be allowed interest at the rates agreed upon, and that creditors for deposit accounts for money deposited in the bank at fluctuating rates of interest were entitled to be allowed interest on their deposits at the rate of 4*l.* per cent. per annum from the time of the stoppage of the bank.

The liquidators appealed from so much of the order as declared that the holders of notes and drafts were entitled to interest at 4*l.* per cent. per annum from the stoppage of the bank; and also from so much as declared that creditors for deposit accounts for money deposited at fluctuating rates of interest were entitled to interest at 4*l.* per cent.; contending that the first class of creditors were not entitled to be allowed any interest, and the second class were only entitled to interest at 3*l.* per cent.

Mr. Wickens and *Mr. Cozens Hardy*, for the appellants.—No interest is payable on the promissory-notes payable on demand, because there has been no demand. It is said that the necessity for demand is dispensed with by the stoppage of the bank, but it has never been held that stoppage is sufficient to start the claim for interest without any demand for payment—*Byles on Bills* (296, 9th ed.); *Sands* v. *Clarke* (8 Com. B. Rep. 751; 19 L. J. C.P. 84); *Bowes* v. *Howe* (5 Taunt. 30); *The Hull and Selby Railway Company* v. *the North-Eastern Railway Company* (5 De Gex, M. & G. 872; 24 L. J. Ch. 109). And if interest is not payable by the law merchant it is clearly not payable under the 26th Order of the 11th of November, 1862, as that order was *ultra vires*.—*In re the Hatfield Patent Cask Company*, ubi supra; *In re the Herefordshire Banking Company*, ubi supra.

The Lord Chancellor having intimated an opinion that interest at the rate of 5*l.* per cent. was payable on these notes, not from the date of the resolution to wind up, but from the time when the claims were sent in to the liquidators,—

Mr. Glasse and *Mr. J. N. Higgins*, who appeared for the respondents, expressed themselves satisfied on this part of the case, and proceeded to argue as to the amount of interest to be allowed on the deposits, which, they contended, should be at the rate fixed by the resolution of the 6th of July.

The Lord Chancellor (Lord Cairns).—On one of the questions raised by this appeal, the question with regard to the sums standing upon deposit, it appears that the evidence is not in that state which will enable us satisfactorily to deal with it. If I could accept the argument last addressed to us, namely, that, putting aside the contract as to interest before the winding-up, a new contract was entered into, in consideration of forbearance, by the liquidators, at the rates mentioned in the letter of the voluntary liquidator which has been referred to, we might be saved the necessity of any further inquiry; but I am unable to accept that argument. The liquidator in this case did not carry on, and was not authorized to carry on, the business of the company. The company ceased. The only business and duty of the liquidator was to wind up its affairs. He was bound by act of parliament to apply its assets in discharge of its liabilities as he found them already created. It was, as it seems to me, entirely beyond his power to have made these depositors a new contract as regards their rate of interest; and if he expressed himself in the letter written after the resolution to wind up in a manner inconsistent with what were their rights at the time of that resolution, it appears to me that that letter had in that respect no operation. I, therefore, think that the only course we can take as to the claim upon deposits is to refer the matter back again to the chambers from which it comes, in order to inquire and ascertain whether any and what sum in respect

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of interest has ever been paid or credited in the books of the bank upon the various deposits now represented by Mr. Glasse's clients. And I may go further and say, although the matter is not ripe for expressing it in the form of an order, that if it shall appear that upon any of these deposits any rate of interest was actually paid or credited in the books, it appears to me that the rate to be allowed upon that particular deposit will be the last rate so paid or credited. Then I pass to the other and more important matters of appeal, namely, the circulating notes of the bank payable on demand. Now, as to that, I am of opinion that there is nothing whatever in the circumstance of a resolution to wind up a bank voluntarily which should operate to prevent the holder of a note, payable on demand, making a demand for payment of the note. If the note, upon the face of it, requires the demand to be made in a particular place, the demand must be made at that place, unless there is some reason to excuse the making of it. The person to receive the demand will, in all probability, be the liquidator who at that place is liquidating the affairs of the company; and the notes in this case bear upon the face of them that the demand is to be made either at the London and Westminster Bank, or at Norwich, and we find upon the evidence that the liquidation of the bank was proceeding at Norwich, that the liquidator was there, and that therefore he was the person to answer any demand or claim made in that place. It then becomes a question of fact, whether any such demand was made by the holders of the notes in this case. Now, what was done was this: A letter was addressed by the clients of Mr. Glasse, holding a large amount of these notes, to the voluntary liquidator at Norwich, making certain inquiries as to the rate of interest, with the view of drawing out a formal claim against the bank. That letter was answered, and the result was that there is no controversy, upon the statement of the agent of Mr. Glasse's clients that, at certain days which he specifies in a schedule to his affidavit, he sent in a formal and usual claim upon the liquidator for the amount of notes which, at those different dates, were in the possession of his principals, and that along with that claim he sent in the notes themselves. It is said that that is not a demand according to the law merchant. I am not aware that the law merchant attaches any particular signification to the term "demand." The demand of a note payable on demand is, I apprehend, something which is an intimation to the person to whom it is addressed that the holder of the note expects and wishes to be paid the amount of the note; and it seems to me that, even resorting to the primary and literal signification of the word "claim," a claim upon a note, sending in the note along with the claim, is an asking for, or demand of payment of that note. It may be that in the case of liquidation an application of that kind addressed to the official liquidator must be accompanied with the knowledge in the mind of the person who makes it, that the payment will only come in the ordinary course of the distribution of the assets of the company; but that circumstance does not the less make it an asking for, or demand for, payment of the note. It appears to me, therefore, that upon those various dates a proper and sufficient demand was made for payment of these notes, and from those dates interest would run, and the interest will be according to the rate which would be recoverable in an action at law, namely, 5*l.* per cent.

I have said nothing, and it appears to me absolutely unnecessary to decide anything, as to the effect and operation of the general order which was referred to in the argument, the 26th Order made in pursuance of the 170th section in the act of 1862, authorizing the Judges of the Court of Chancery to make orders; but although we have not heard Mr. Glasse upon the subject, and it was unnecessary to do so, I am bound to say, and it is perhaps better to say it, as it is a matter that can be remedied before it creates further misapprehension, that, as at present advised, it seems to me that that order was *ultra vires*, and beyond the power given by the act of parliament. It appears to me that the act of parliament contemplates that calls shall be made upon the shareholders of these companies for the purpose of paying those liabilities which are the actual and

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legal liabilities of the company; and for the purpose of paying costs; that the Court of Chancery is not armed with any power of extracting from the contributories any sum except for those purposes; and that it is, therefore, beyond the power of that order to create a new liability, not previously existing, as against the shareholders of the company. That, however, I merely state as my impression; it may, nor may not, be necessary hereafter to consider it. I think that the alteration which must be made in the order of the Vice Chancellor is so substantial, and by reason of that alteration, and also from the encouragement given by his Honour—in fact, I may almost say the instructions given by his Honour—to the official liquidator to appeal, that the costs of the appeal ought to come out of the estate of the company.

WOOD, L.J., said—I agree in the view expressed by the Lord Chancellor upon the various points that have been argued before us. It appears to me as regards the first point, as to the deposit, that it is impossible to stand on the last resolution of the 5th of July, made shortly before the stoppage, with reference to the payment of interest, because it is clear, not only that there was no evidence of any communication of that resolution to the persons with whom it is supposed that a new credit was created by virtue of it, but one may safely assume that such evidence would have been given, and that if it were in existence it would have been produced. I think, therefore, that there is every possible ground for saying that there was no such communication, because it was the interest of those parties to make the larger claim, and have the larger interest in respect of it, to inform us of the fact of their having relied on such a communication. No such evidence has been brought forward, and the only evidence we have is this—that in the parlour of the company a certain resolution is come to, that resolution is communicated to the agents of the company, and there appears to have been some direction that a public notification of that resolution should be made and exposed in some part or other of the bank; but there is no evidence whatever that that part of the resolution was carried into effect, and no person appears before us of those who were affected by that resolution, upon whom benefit was to be conferred by the resolution, to say that they ever heard one word upon the subject. I think, therefore, that we are quite safe in saying that it is clear that no such communication was ever made, and therefore the whole matter is reduced simply to what had been the course of dealing between these parties, which the inquiry suggested by the Lord Chancellor will bring out.

Then, as to the claim of interest upon the promissory-note, the interest would run from demand, and the only question is whether or not a demand has been made. It would be extremely singular if we were to hold that a demand made on a person who has the assets of the company in his charge, and for the purpose of discharging the debts of the company, made at the place where by the tenor of the note it is to be made, namely, at the banking house at Norwich, where the liquidator then was, is not a sufficient demand, according to the law merchant, to indicate the intention of the holder of the instrument that he desired payment then and there, and, in consequence of the payment not being made, would become entitled, according to the same law merchant, to interest as from that date. It comes to this, in short: that the effect of the winding-up order and of the Winding-up Acts is, that demands which would be substantiated by action—except for the intervention of the statute with regard to winding-up—must now be brought forward in the shape of claims, and will not be allowed to be proceeded with by way of action, unless the Court shall give leave to that effect. The Court would not, of course, be disposed to give leave to people to bring a number of actions for the mere purpose of effectuating the claim of the parties where that claim is more proper to be disposed of in the course of the winding-up. Accordingly, therefore, the Court says, "You must make and assert your claim, not by way of action, but by bringing it in the form and mode which we have prescribed." It also happens that place is necessary as well as demand, and the claim happens happily to be made in the place

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where it ought to be made; and being made where it ought to be made, and in this form—and it seems to me a reasonable and proper form under the circumstances of the case—there has been a demand in respect of the note; the demand fixes the time from which, by the law merchant, the interest is to run, and that same interest is, by the same law merchant, to be 5*l.* per cent. Therefore, the directions given with reference to the allowance of interest, will take the form which has been suggested by the Lord Chancellor.

I quite agree also in the propriety of awarding the costs out of the estate.

SELWYN, L.J., said—On the question of the interest on the deposit notes, I think it is scarcely possible to conceive that the course of dealing between the bank and its customers by way of deposit was, that it should be at the arbitrary will of the bank to make from time to time alterations in the rate of interest without communication of those alterations to the creditors. I think, therefore, that if reliance is placed on either side on the resolution of the directors, when this matter comes before the Court again, evidence should be adduced, shewing what was the course of dealing between the bank and the persons making deposits, and what was the mode by which, if at all, the variations of the rate of interest, or the resolution of the directors, were communicated to the depositors.

Upon the question of interest upon the promissory-notes, I think it is impossible to accede to the argument that liquidation *per se*, liquidation of any kind, is sufficient to render it impossible for the holder of a promissory note, payable on demand, to make such a demand as would create the right to interest. A voluntary liquidation may be the result of internal disputes in the company; it may result from a desire to alter the amount of shares in the company, and may have no reference whatever to any actual or probable insolvency; and in the case of a voluntary liquidation irrespective of insolvency, it would be contrary to the first principles of justice to hold that such a voluntary arrangement should deprive the creditors holding promissory notes payable on demand of the power to make such a demand as would give a right to interest.

I also think, as at present advised, that the 26th Order was beyond the powers of the Judges of this Court as conferred by the act of parliament; and it may be observed that the order itself draws on the face of it a distinction between claims by law carrying interest and interest which is created for the first time by that order. But as that question may possibly become the subject of discussion between the Lord Chancellor and such of the Judges of the Court as he may think fit to call in, to advise him upon the subject, I abstain from saying anything further than that in my judgment that order is not sufficient to support the order now under appeal.

Vary so much of the order of the 1st of June, 1868, as declares that the holders of notes and drafts of the East of England Bank current at the time of the stoppage of the said bank are entitled to interest at the rate of 4*l.* per cent. per annum from that event, and instead thereof declare that they are entitled to interest at the rate of 5*l.* per cent. per annum from the respective times of their demands on the said liquidators; and, without prejudice, discharge so much more of the said order as declared that creditors for deposit accounts at fluctuating rates of interest were entitled to be allowed interest at the rate of 4*l.* per cent. per annum from the time of the stoppage of the bank, and inquire whether any sum in respect of interest has been paid or credited in the books of the said East of England Bank on any of the deposits in respect of which any of the creditors of the said bank are now claiming, and, if any, what was the last rate of interest.

Costs of the appellants out of the estate.

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MALINS, V.C., Dec. 18, 1868.

In re LONG'S SETTLEMENT.

38 L. J. Ch. 125; 19 L. T. 672; 17 W. R. 218.

Advancement for Benefit of Children—Passage and Outfit of Children and Parents for Residence in Foreign Country for the Sake of Health—Change of Trustees—22 & 23 Vict. c. 35. s. 30.—Trustees out of the Judisdiction.

TRUST AND TRUSTEE.—*Trustees having a power of advancement for the benefit of children, were authorized by the Court to make an advancement for the passage and outfit of the children with their parents to New Zealand, for the sake of their health, each child's share contributing equally to the passage and outfit of the parents.*

The Court declined to sanction the transfer of the trust funds to new trustees resident in New Zealand.

By the settlement made upon the marriage of Mr. and Mrs. Long, in 1847, trustees were directed to raise a sum of 5,000*l.* out of the wife's property, and pay the income to her separate use for life, and after her decease to her husband for life, if he should survive; and after the death of the husband and wife, to hold the same in trust for the children of the marriage, in equal shares, upon their attaining the age of twenty-one or marriage.

The settlement contained a power for the trustees, at any time or times after the decease of the husband and wife, or with their consent if living, "to raise any part or parts of the then expectant and presumptive or vested share or shares of any child or children of the intended marriage, under the trusts therein declared, not exceeding for any such one child the amount of its presumptive or vested share, and to apply the same for his, or her, or their preferment, advancement or benefit, in such manner as the trustees should think proper."

There were now living three children of the marriage; namely, one son, of the age of eighteen years, and two daughters, aged respectively twenty-one and sixteen. A fourth child had died of consumption, under age and unmarried. The parents were desirous, for the sake of their children's health, to leave England and reside permanently in New Zealand, but were unable to provide the necessary means for their passage and outfit.

Under these circumstances, the trustees, by petition under the act, 22 & 23 Vict. c. 35, asked for the advice and opinion of the Court as to whether they might advance out of the presumptive share of each child the sum of 320*l.*, being 220*l.* for the passage and outfit of each child, and a contribution of 100*l.* each towards the passage and outfit of their parents.

The petition further asked the Court to sanction the advance of 1,000*l.* out of the son's share, to enable him, when in New Zealand, to set up in a farming business jointly with his father; also to permit the trustees to transfer the residue of the trust fund to certain new trustees resident in New Zealand, with a view to investment upon real security in that country.

Medical evidence was produced to shew that a change of climate was necessary for all the family, the children as well as the mother being in very weak health and consumptive; also that some out-door occupation was requisite for the health of the son, who had recently been obliged, from ill health, to give up his apprenticeship as civil engineer in this country. It was stated that the family had several friends of influence and respectability resident in New Zealand, two of whom had consented to act in the trust if the Court would allow the transfer of the fund to be made.

Mr. Maidlow appeared in support of the petition.

Mr. A. Smith, in behalf of the parties interested.

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MALINS, V.C., was of opinion that the above-mentioned sum of 320*l.* might properly be advanced out of the share of each child for the passage and outfit of the children and their parents,—such an advancement being for the benefit of the children within the terms of the power. But his Honour refused to sanction the advance of 1,000*l.* to the son, or the transfer of the funds to new trustees resident in a foreign country; there being no evidence that the son was competent, either with or without his father's assistance, to carry on a farming business with any prospect of success, or that the trust estate would be benefited by the proposed change of investment.

STUART, V.C., Nov. 20, Dec. 4, 5, 1868.

HOLT *v.* SINDREY.

38 L. J. Ch. 126; L. R. 7 Eq. 170; 19 L. T. 669; 17 W. R. 249.

Referred to, *Crook* v. *Hill*, [1869] E. R. A.; 38 L. J. Ch. 579 (V.C.): reversed, [1871] E. R. A.; 40 L. J. Ch. 216; L. R. 6 Ch. 311; 24 L. T. 488; 19 W. R. 649 (L. JJ.): the latter decision affirmed, [1873] E. R. A.; 42 L. J. Ch. 702; L. R. 6 H.L. 265; 22 W. R. 137; *Occleston* v. *Fullalove*, [1873] E. R. A.; 28 L. T. 615; 21 W. R. 783 (V.C.): reversed, [1874] E. R. A.; 43 L. J. Ch. 297; L. R. 9 Ch. 147; 29 L. T. 785; 22 W. R. 305 (L.C. & L. JJ.). Discussed, *In re Du Bochet*, [1901] E. R. A.; 70 L. J. Ch. 647; [1901] 2 Ch. 441; 84 L. T. 710; 49 W. R. 588 (Ch. D.). Referred to, *In re Pearce*, [1914] E. R. A.; 83 L. J. Ch. 266; [1914] 1 Ch. 254 (Ch. D. & C. A.).

Will Annuity—Bequest—Construction—"Children of my said daughter M. L. begotten or to be begotten"—Illegitimate Children entitled.

WILL.—*A testator bequeathed an annuity to trustees, upon trust during the life of his "daughter M, the wife of J. L," for her life for her separate use; and after her death, for "all and every the child and children of his said daughter M. L, begotten or to be begotten." The testator was not aware when he made his will that his daughter M. L. was not the wife of J. L.; and that four children then borne by her to J. L. were illegitimate. The testator had always treated his said daughter and J. L. and their children as if the parents had been married and their children lawfully begotten. After the date of the testator's will M. L. bore three other children to J. L, which also were illegitimate. A sum of* 703*l.* 13*s.* 1*d.* *Bank* 3*l. per cent. annuities had been appropriated to answer the bequest to M. L. and her children. M. L. died without having had any other than the aforesaid seven children*:—Held, *that the four children born before the date of the will were, although illegitimate, sufficiently described in it as legatees of, and therefore entitled to, the fund in Court.*

This cause came on to be heard, upon a petition praying that a sum of 703*l.* 13*s.* 1*d.* Bank 3*l.* per cent. annuities, standing in Court in trust in the cause, to an account entitled "The Legacy of Mary Latimer, her Children and their Incumbrancers, and otherwise," might be sold; and that out of the proceeds of such sale, and any dividends which might accrue thereon previously to the sale thereof, the costs of the petition (when taxed) might be paid; and that the residue of such proceeds and cash, remaining after such payment thereout, might be divided and distributed between and paid to the several persons entitled thereto.

The facts of the case were shortly these: Mary Holt, spinster, the daughter of William Holt, the testator in the suit, married on the 4th of May, 1817, one John Christopher Flenly. That marriage was wholly unknown to the testator. The parties to it separated on the day of, and soon after, the cere-

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mony. They never met again, and there was no issue of the marriage. On the 31st of January, 1818, Mary Holt, otherwise Mary Flenly, went through the ceremony of marriage with John Dowling Latimer, by whom she afterwards had seven children.

The testator, William Holt, by his will, dated the 1st day of September, 1827, appointed his wife, Sarah Holt, so long as she should continue his widow, his son George Holt and John Oliver, executors thereof; and after making certain specific and pecuniary bequests gave and bequeathed a leasehold tenement therein mentioned, and all and every his stocks, funds, moneys, mortgages and securities for money, and all and singular his goods, chattels, debts and personal estate and effects not thereinbefore specifically bequeathed or disposed of, unto the said George Holt and John Oliver, their executors, administrators and assigns, upon trust to sell and convert the same (except the said leasehold tenement) as therein mentioned, and subject to the payment of his debts, funeral and testamentary expenses, and the particular legacies therein mentioned, upon trust to invest the moneys produced by such sale and conversion in the purchase of the stocks, funds or securities therein mentioned, and out of the dividends, interest and annual proceeds thereof to pay to the testator's said wife or her assigns during her life or widowhood an annuity of 120*l*., and subject thereto to accumulate the same dividends, interest and annual proceeds until the decease or second marriage of his said wife, in manner therein mentioned; and from and after the decease or second marriage of his said wife the testator directed his executors to stand possessed of the said trust moneys, stocks, funds or other securities and the accumulations thereof, upon the trusts thereby declared, and in particular as to so much and such part or share of and in the same as by the dividends, interest and annual proceeds thereof would produce the yearly sum of 35*l*., upon trust "from time to time, during the life of the testator's said daughter Mary, the wife of John Latimer, to receive and take the dividends, interest and annual produce of the same part or share, and stand possessed thereof for the sole use of his said daughter Mary Latimer, separate and apart and exclusive of her present or any future husband, and in like manner and in all respects as aforesaid; and from and after the decease of his said daughter Mary Latimer, as to, for and concerning the said last-mentioned part or share of and in the said trust moneys, stocks, funds or other securities and the accumulations thereof, upon trust to pay, assign or transfer the same unto and amongst all and every the child and children of his said daughter Mary Latimer, begotten or to be begotten, in equal shares and proportions if more than one; and if there should be but one such child, then the whole to be in trust for such one child, and to be vested in the same children respectively when and as they respectively attained the age of twenty-one years, or died under that age leaving issue living at his, her or their death or respective deaths. And in case there should not be any such children of his said daughter Mary Latimer, or in case all such children, if any, should depart this life under the age of twenty-one and without leaving issue, then the said last-mentioned part or share of and in the said trust moneys, stocks, funds or other securities, and the accumulations thereof, should be in trust for such of his other children—the said (1) George Holt and (2) William Holt, (3) Benjamin Holt, (4) Eliza (the wife of William Sindrey), (5) Sarah (the wife of William Bull), (6) Ann (the wife of John Sayer), and (7) Sophia (the wife of John Cormey)—as should *then* be living, and the issue of such of them as should be then dead leaving issue lawfully begotten, in equal shares and proportions; nevertheless the issue of such of his said children as should have died leaving issue to take the part or share, parts or shares, only which the deceased parent or parents would have done in case he, she or they had been then living." And the testator by his will directed that all such residuary, accruing and contingent or other beneficial interests as his said daughters respectively should become entitled to under his said will should be for their own sole and separate use, and that their respective separate receipts should be good discharges for the same respectively.

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The testator died in the year 1828, and his will was duly proved by the said George Holt and John Oliver.

The testator left his widow, his said daughter Mary Latimer and his seven other children named in his will, him surviving. The testator's widow died in 1831. John Christopher Flenly died in the month of July, 1850. John Dowling Latimer died in the month of October, 1850.

This suit was instituted in January, 1857, for the administration of the testator's estate, and by an order in the suit, dated the 20th of July, 1858, it was, *inter alia*, ordered that the residue (after providing for certain expenses thereout) of a sum of 4,939*l.* 13*s.* 6*d.* Bank 3*l.* per cent. annuities should be apportioned between and in respect of the legacies or provisions by the will of the testator bequeathed to or in favour of (among other persons) the said Mary Latimer and her children, and the dividends of the apportioned share of Mary Latimer and her children, paid to her for her life. A sum of 703*l.* 13*s.* 1*d.* was, in pursuance of that order, apportioned to Mary Latimer and her children, and carried over to the account entitled "The Legacy of Mary Latimer, her Children, their Incumbrancers and otherwise."

Of the testator's seven children other than Mary Latimer, it appeared that Ann Sayer, after the death of her first husband, married again, had three children, and died in 1844. Sophia Cormey, after the death of her first husband, married again, had one child, and died in 1854. Sarah Bull had issue two children, and died in 1857. John Everett Chapman married a daughter of Mrs. Bull. William Holt died without issue in 1858. Benjamin Holt had issue ten children, and died on the 30th of April, 1868. George Holt and Mrs. Sindrey were still living.

Mary Latimer received all the dividends that were due to her up to the time of her death, and she died on the 29th of August, 1868. She never had any other than the seven children, of whom John Dowling Latimer was the father. Of those seven, four were born before the date of the testator's will and three after it, but all during the lifetime of John Christopher Flenly. The evidence shewed that the testator was well acquainted with the four eldest children of his said daughter Mary; that she and John Dowling Latimer were treated by him in the most kind and affectionate manner, and that his conduct towards his said daughter Mary, and John Dowling Latimer and those four children of theirs was in all respects similar to that which he exhibited towards his other children and grandchildren.

The petition was presented by the said George Holt and John Everett Chapman, the present trustees of the testator's will, and by Sarah, the wife of the said Everett Chapman, and Mrs. Sindrey. The petitioners submitted that under the circumstances aforesaid, the 703*l.* 13*s.* 1*d.* Bank 3*l.* per cent. annuities, had become divisible among the persons by virtue of the said will entitled thereto, in default of children of the said Mary Latimer. Those persons claimed the fund in the following proportions: The petitioners, George Holt and Eliza Sindrey, claimed each one-fifth of it; the petitioner John Everett Chapman and Sarah his wife, in her right, another fifth; the children of Benjamin Holt living at the death of Mary Latimer another fifth; and Frederick Aldrich and Sophia Sarah, his wife (a daughter of Mrs. Cormey), in her right, the remaining fifth.

The seven children of Mary Latimer, in the first instance, claimed the fund equally among them.

The grandchildren of Mrs. Sayer contended that the fund was divisible into sixths; and that they as "issue of the said Ann Sayer, within the meaning of the testator's will," were entitled to one-sixth of the fund.

Mr. Green (*Nov.* 20) appeared for the petitioners, and opened the petition.

STUART, V.C. expressed it as his opinion that grandchildren of the testator might take under the word "issue" in the will; though not in competition with his children. The point, however, was not fully argued; and at the request of some of the parties, the petition stood over.

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Mr. J. Hinde Palmer (*Dec.* 4) appeared for the children of Mary Latimer, but at the outset admitted that the three born after the date of the testator's will could not claim any part of the fund. With respect to the other four, the words of the bequest were clear. Those children were, in fact, the children of Mary Latimer. They were known to the testator, and recognized by him as the children of his daughter Mary and John Dowling Latimer; and his intention to give them the annuity or the funds on which it was secured was manifest. Moreover, although *de facto*, and in the eye of the law, illegitimate, they were sufficiently described as legatees in the will. There were no legitimate children of Mary Latimer in existence to compete with them.—He then cited *Wilkinson* v. *Adam* (1 Ves. & B. 422); *Howarth* v. *Mills* (L. R. 2 Eq. 389).

Lastly, the testator knew nothing of the marriage of his daughter with John Christopher Flenly. That marriage was never consummated, and though not actually void, was voidable. Moreover, the testator believed his daughter to be the wife of John Dowling Latimer; and on the whole case, therefore, their four eldest children were entitled to the fund.

Mr. Greene and *Mr. Renshawe*, for the petitioners.—Although in point of fact, there were no legitimate children of Mary Latimer to compete with these four, still at the time when the testator made his will it was competent to his daughter Mary to have had children born in wedlock. Cohabitation might have taken place between her and J. C. Flenly, or she might have married after his death. In either case there might have been lawful issue, and if there had been, these four children could not have claimed the fund. Legitimate and illegitimate children could not take together as a class; and wherever the word "children," without more, was used in a will, it was always intended of "lawfully begotten" children. Then again, the mere fact of the personal recognition of those children by the testator was not enough; they must be recognized on the face of the will as the children of the person of whom they were supposed by the testator to be the lawful issue, otherwise they could not take as "children." 2 *Jarman on Wills*, 207 (last edit.); *In re Davenport's Trust* (1 Sm. & Giff. 126); *Harris* v. *Lloyd* (1 Turn. & R. 310); *In re Overhill's Trusts* (1 Sm. & Giff. 362; 22 L. J. Ch. 485). Lastly, the mode in which the testator had settled the share of Mary Latimer on her for life, and in which he had given it to her children after her death was identical with that in which he had settled and bequeathed the shares of his other married daughters and their children. But he plainly intended the legitimate children of those daughters; and therefore he must, in the absence of any express words in the will to point to the illegitimate children of his daughter Mary, to be taken to have meant her legitimate children only (if any), and these four were excluded.

Mr. Bagshawe appeared for Mr. and Mrs. Aldrich, and supported the views of the petitioners.—This was the case of a bequest to the children of a particular person "as a class." Where such a bequest was made, it was essential that the testator should know all the facts relating to the objects of his bounty. Here, however, the testator did not know the truth with respect to them. He cited *In re Wells's Estate* (37 L. J. Ch. 553; L. R. 6 Eq. 599); *Pratt* v. *Mathew* (22 Beav. 328; 25 L. J. Ch. 409); *In re Herbert's Trust* (1 Jo. & H. 121; 29 L. J. Ch. 870); *Hawkins on Wills*, p. 83.

Mr. Fischer, for other parties in the same interest with those last mentioned, cited 1 *Jarman on Wills*, 31; *Godfrey* v. *Davis* (6 Ves. 43); *Kenebel* v. *Scrafton* (2 East, 530); *Warner* v. *Warner* (20 L. J. Ch. 273; 15 Jur. 141).

Mr. Langley, for other parties in the same interest, commented on the expression in the will "begotten or to be begotten," and contended that by analogy to the construction placed in deeds on the words "*procreatis vel procreandis*," they could only mean "lawfully begotten" or "to be lawfully begotten." He cited *Co. Lit.* 20 *b.*; *Owen* v. *Bryant* (2 De Gex, M. & G. 697; 21 L. J. Ch. 860).

STUART, V.C.—In order that any legatee, whether a single legatee or a

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class of individuals, may take, it is necessary that the person or the class should be clearly described. When a gift is made to a child, or to children as a class, the natural and proper meaning of the word " child " or " children " is legitimate child or legitimate children; but, if the object of a gift is clearly described and clearly ascertainable from the words of the will, it matters nothing whether that object be legitimate or illegitimate. An illegitimate child, or a number of illegitimate children as a class, may, if properly described, as well be legatees as legitimate children. In the construction of a will, the primary and proper signification of every word is to be attributed to it. It was said that, in the present case, the testator must be taken to have meant legitimate children only; and that, there being no legitimate children to answer the description, this gift must altogether fail. I think it is perfectly clear, upon the face of this will, that the testator appears from it to have understood that his daughter Mary Latimer was the wife of John Latimer. That appears upon the face of the will; and it is to be inferred from that that he believed her to be the lawful wife of John Dowling Latimer. It also appears upon the face of the will, from his referring to children begotten, that he knew that there were in existence children born of the body of his daughter; and born, and known as, children of that marriage. The fact, that from an unknown circumstance that marriage was not a lawful marriage, though believed by the testator to be a lawful one, and the fact, that from that unknown circumstance the children begotten of Mary Latimer were, although the testator did not know it, illegitimate, seems to me to have nothing to do with the question whether they are, or are not, sufficiently described in his will. I stated during the argument that, if there had been any legitimate children, begotten of the body of Mary Latimer, the description in the will would properly have applied to those children. But when it is an ascertained fact, that there were no other children but the children begotten by the supposed marriage with Latimer; when it is certain on the face of the will that children begotten of the testator's daughter were the objects of his bounty, then there are none other to answer the description but the children of that supposed marriage. I cannot say that those children are not clearly and properly described, on the face of this will, as the objects of the testator's bounty. I say that, because it appears to me that the words of the will are, in themselves, intelligible, when construed in their natural sense by reference to what it is certain the testator knew. It is clear to my mind, that he intended the children begotten of the marriage which he believed had been contracted by his daughter with Latimer.

In arguing cases of this description, a fallacy is sometimes produced by the use of two words, the proper construction of which requires a very accurate attention. Those words are " children " and " class." It is said, for instance, in some of the reports, that legitimate and illegitimate children cannot take together as a class. That is true in one sense, but it is wholly untrue in another. If properly described, although members of a class, there is no rule of law which says that legitimate and illegitimate children should not take together. On the contrary, one and the same principle, properly considered and understood, runs through all the cases, except that of *Beechcroft* v. *Beechcroft* (1 Madd. 430), in which Sir Thomas Plumer made a slip, and the case of *Fraser* v. *Pigott* (1 Yo. Ex. Rep. 354), in which Lord Lyndhurst obviously misapprehended the interpretation of the will then before him. The cases relied on by those who object to the validity of this gift as a gift to the children begotten of this lady by her presumed marriage with Latimer, when properly understood and carefully read, are authorities in favour of its being a gift to persons clearly ascertained and correctly described as " the children begotten of his daughter," although those children were not legitimate. Take the words of Sir William Grant in *Godfrey* v. *Davis*. In that case, the eldest of some illegitimate children, a daughter, claimed as the person intended by the description of " the eldest child." Sir William Grant was of opinion that there was not sufficient to entitle an illegitimate child to claim; for, whatever the real inten-

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tion of the testator might be, and though it could hardly be supposed he had not some children then existing in his contemplation, yet as the words were "the eldest child," such persons only could be intended who could entitle themselves as children by the strict rule of law; and he added this: "No illegitimate child can claim under the description" (that is, under the description of children) "unless particularly pointed out by the testator, and manifestly and incontrovertibly intended, although in point of law not standing in that character." Now, why cannot an illegitimate child so claim? Simply because in the proper sense of the word "child," an illegitimate child is not a child. But if there is no other child than illegitimate one to answer the description, and as Sir William Grant says, "If there is a manifest and incontrovertible intention shewn to give to an illegitimate child," or a class of illegitimate children, by the description of "child" or "children," they must take, although in point of law they do not stand in the character of children. That consideration seems to me to shew clearly and satisfactorily that this is a valid gift by the description of the children begotten in the lifetime of the testator, of the marriage of his daughter with Latimer, although that marriage was not a lawful marriage. The law has long been established to this effect, and it is founded upon the principle which lies at the root of the construction of all instruments, viz., that the language used must be interpreted in its ordinary sense, unless there be something in the context to shew with certainty that another sense is intended. A child, if mentioned in a will, must be intended to be a lawful child. As to the case of *Pratt* v. *Mathew*, that is an authority against the proposition for which it was cited; because if a testator gives a legacy to his children, he must mean his lawful children, unless there is something to shew the contrary. The fact that he was married at the time to a person who could not be his lawful wife, is not in itself enough to shew the contrary. It may be that a testator may have meant to shew a contrary intention; but the Court cannot presume it, unless there is on the face of the will enough to justify it. The old law was the same. According to that, it was said in the case of *Counden* v. *Clerke*,[1] "So one may take by the name of 'son' or 'daughter,' if he be so known, although there were no marriage between the father and mother." Why is he to take as a son? Because he is known by that description. Why are the children of Mary Latimer begotten at the date of this will to take in this case? Because they were known to the testator as the children of his daughter, and properly described by him as the children begotten of his daughter.

As to the rest of the gift to the children "to be begotten." Every gift to an illegitimate child, the begetting of which is a thing contemplated, must fail. It is against the policy of the law to permit any provision for unbegotten illegitimate children; but it is not against the policy of the law to permit a provision or gift to an illegitimate child begotten, but unborn. I apprehend there is no doubt that a gift to the child of which a woman is *enceinte* at the time of the gift, is a valid gift, although that child be an illegitimate child. It is a valid gift, because there can be no doubt about the object intended to be benefited. There was, however, a part of this will which did for a moment excite a doubt in my mind. That was the use of the word "such" in the subsequent part of the will. But now, on looking at the whole context of it, it seems to me that that doubt and uncertainty disappears. The gift to the children of Mary Latimer is this: "Unto and amongst all and every the child and children of my said daughter, Mary Latimer"—there she is not mentioned as the wife of John Latimer—"begotten or to be begotten, in equal shares and proportions, if more than one; and if there shall be but one such child, then the whole to be in trust for such one child." I think the word "such" there creates no uncertainty whatever with reference to the existence of the children begotten at that time. But in the subsequent part of the will there is the recurrence of the word "such." The testator having said the interest of the

(1) Hobart, edit. of 1724, pp. 29, 32.

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child or children to which I have just alluded was to be "vested in the same children respectively when and as they respectively attain the age of twenty-one years, or die under that age leaving issue," goes on to add this, "and in case there shall not be any such child of my said daughter Mary Latimer"—that is, in case there should not be any child of Mary Latimer who should so attain a vested interest—"or in case all such children, if any, shall depart this life under the age of twenty-one years, and without leaving issue," then he gives the part or share over to others. Now, if, in this case, none of the class, which is sufficiently described, had attained the age of twenty-one years, or fulfilled the other conditions annexed to the gift, the gift must have failed. In other words, if the event had happened, or if the contingency contemplated in the clause where the word "such" is used, had arisen, the gift over would have taken effect, and the previous one would have failed, because the interests under it were to vest only on a child attaining twenty-one or dying under that age leaving issue. But upon the whole case I cannot say that I entertain any real doubt as to the proper construction of this will. It is just as good a gift to the illegitimate children of Mary Latimer begotten in the lifetime of the testator, as it would have failed and been wholly invalid if there had been any claim on the part of a child afterwards lawfully begotten on the body of that lady.

The minutes of the order indorsed on the petitioner's brief were as follows: "Declare that the four children of Mary Latimer (naming those living at the date of the will) are entitled to the fund; the costs of all parties (those of the trustees as between solicitor and client, and to include charges and expenses, if any, properly incurred by them) to be taxed and paid out of the fund in Court; the residue of the fund after the payment of the costs to be paid to the four children. Affidavits of no settlements to be produced as to the shares of such as are married ladies."

MALINS, V.C., Nov. 10, 11, 1868.

THE BRITISH EQUITABLE INSURANCE COMPANY *v.* THE GREAT WESTERN RAILWAY COMPANY.

38 L. J. Ch. 133; 19 L. T. 476; 17 W. R. 43: affirmed, [1869] E. R. A.: 38 L. J. Ch. 314; 20 L. T. 422; 17 W. R. 561 (L. JJ.).

Insurance on Life—Misrepresentation by Assured—Voidance of Policy—Assignee for Value—30 & 31 *Vict. c.* 144.

INSURANCE.—*In July*, 1863, *B. negotiated for the insurance of his life in the plaintiff's office, and signed a declaration as to his health and habits of life, with a reference to his usual medical attendant, who certified that he was in good health. After examination by the medical officer of the company, he was accepted as a first-class life, but at an advanced rate of premium on account of his excessive corpulence. In August, pending the completion of the contract, B. went to consult a physician, who discovered that he was in a dangerous state of health and suffering from disease of the kidneys, and warned him that care and abstinence from stimulants were necessary. B. never communicated this circumstance to the office. In September the premium was paid, and the policy effected. Eight months afterwards B. died suddenly from the effects of his disease. The declaration signed by B. in July required him, amongst other things, to name "his latest, if other than his usual, medical attendant":*—Held, *that such declaration was continuing up to the date of the completion of the contract, and that the non-communication of his visit to the physician in the interval vitiated the policy.*

Assignees for value of a life policy hold subject to the equities affecting the same: 30 & 31 *Vict. c.* 144. *has not altered their position in this respect.*

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This was a suit to restrain an action at law commenced, against the above-named insurance company, by the Great Western Railway Company, for the recovery of 500*l.* in respect of a policy effected upon the life of John Bird, of which policy they were assignees for value.

The claim was contested by the insurance company, on the ground of misrepresentation by the assured as to the state of his health.

The negotiations for the policy took place in June and July, 1863.

Bird, who was a small colliery proprietor and shopkeeper, then residing at Aberdare, being solicited by the company's agent to insure his life in their office, applied for a policy in the usual form, and upon such application signed a declaration in answer to certain inquiries (which were of an unusually stringent character) about his health and habits of life, accompanied by a reference to Mr. William Davies as his "usual medical attendant"; the declaration required him, amongst other things, to name "his *latest*, if other than his usual, medical attendant."

On the 20th of July, Bird was examined by the medical officer of the company, and reported to be a "first-class life," and, with the exception of his "full habit," in every respect healthy. On the 5th of August his medical attendant, Mr. Davies, certified him to be in good health and a good life for insurance. He was accordingly accepted, "subject to the usual conditions," as a "good life"; but at an advanced rate of insurance (seven years added) in consequence of his excessive corpulence.

The notice of his acceptance by the company, which was sent to Bird on the 19th of August, stated that the premium was payable to their agent on or before the 9th of September, and that until the premium was actually paid the company would not hold itself liable for any risk, and that any alteration in his health in the meantime would render the policy invalid, unless the same were disclosed in writing to the manager of the company and the receipt of the premium subsequently authorized by him.

On the 8th of September Bird paid the premium, and shortly afterwards received the policy, dated the 11th of September, 1863. The receipt for the premium was expressed to be subject to the conditions thereon indorsed, one of which conditions was, "If any variation shall have taken place in the health of the assured since the date of the medical examination, and before actual payment of the amount within expressed to be received, this receipt shall be void."

On the 17th of August, during the interval between the medical examination and the payment of the premium, Bird feeling "uneasy" about his health, in consequence of his increasing corpulency and constant drowsiness, went expressly to consult Dr. White, a well-known physician at Cardiff. Dr. White pronounced him then to be in a dangerous state of health, and suffering, as the fact was, from "Bright's disease," and he sent a letter to that effect, inclosing a prescription, to Mr. Davies. It did not appear whether Dr. White actually informed Bird of the nature of his disease further than warning him to take great care of himself and abstain from stimulants. Bird never communicated to the assurance company the fact of his having consulted Dr. White.

On the 17th of November, 1863, Bird assigned his policy for value to the Vale of Neath (afterwards amalgamated with the Great Western) Railway Company, and on the 19th of November the railway company gave notice of the assignment to the plaintiffs.

In May, 1864, Bird died suddenly from fatty degeneration of the heart. It was in evidence that his widow, Mary Bird, stated on oath at the coroner's inquest that her husband had suffered from heart disease and dropsy for the last two years of his life.

The defendants having commenced an action at law for the recovery of the policy in the name of the widow as administratrix, the plaintiffs filed their

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bill in this Court praying that the proceedings at law might be stayed and the policy declared void, and delivered up to be cancelled.

Mr. Glasse and *Mr. Shebbeare*, for the assurance company.—The declaration signed by Bird, on the 19th of June, must be treated as a continuing declaration up to the time of the completion of the contract in September. By that declaration he was in express terms bound to give true answers to the inquiries made in behalf of the company with respect to his health, and to withhold no material information. Even if the representations then made by him were true, or being untrue were the result of ignorance or innocent error, yet he was bound to communicate to the company the circumstance of his subsequent visit to Dr. White, and his non-communication of such a material fact pending the contract vitiated the policy *ab initio*. The case is stronger than *Traill* v. *Baring* (4 Giff. 485; 33 L. J. Ch. 521), and is completely governed by that decision. They also cited *Reynell* v. *Sprye* (1 De Gex, M. & G. 660; 21 L. J. Ch. 633); *Anderson* v. *Fitzgerald* (4 H.L. Cas. 484). Upon the question of jurisdiction, they referred to *Dalglish* v. *Jarvie* (2 Mac. & G. 231, 243; 20 L. J. Ch. 475); *The India and London Life Assurance Company* v. *Dalby* (4 De Gex & Sm. 462); *Thornton* v. *Knight* (16 Sim. 509); *Barker* v. *Walters* (8 Beav. 92, 96; 14 L. J. Ch. 37).

Mr. Rowcliffe, for the widow and administratrix, took no part in the argument.

Mr. J. Pearson and *Mr. Stevens*, for the railway company.—This is not a case for the exercise of the concurrent jurisdiction of this Court—*Slim* v. *Croucher* (1 De Gex, F. & J. 518; 29 L. J. Ch. 273). The remedy is at law. In *Traill* v. *Baring* (*ubi supra*) there was an open contract, and no conditions were specified with reference to the voidance of the contract. But here, upon the principle that *expressum facit cessare tacitum*, the assurance company contracted themselves out of the equitable rights which they otherwise might have been entitled to. Having chosen to protect themselves by certain specified requisitions, they virtually disclaimed the protection of this Court in respect of any further information which the parties might as a general rule have been bound to volunteer. All that the Court has to look to here is, whether the requisitions actually made were fairly and honestly complied with, upon the principle laid down by Mr. Justice Cresswell in *Jones* v. *the Provincial Insurance Company* (3 Com. B. Rep. N.S. 65; 26 L. J. C.P. 272). Was there any wilful or designed misrepresentation?—*Fowkes* v. *the Manchester and London Life Assurance Company* (3 Best & S. 917; 32 L. J. Q.B. 153). It is clear that the company satisfied themselves of Bird's health by the testimony of his usual medical attendant to whom he referred them, as well as of their own medical officer who examined him; and it has not been shewn that any part of the declaration made by Bird was knowingly false, or that there was in fact any subsequent variation in his health before the completion of the contract. The symptoms of his disease he carried about with him in the most demonstrative form, and in consequence of his excessive corpulency a higher rate of premium was charged. That very circumstance might well have produced some anxiety about himself, and led to his going to consult Dr. White. But even assuming the policy to be void as against Bird or his personal representative, that will not prejudice his assignees for value. By the recent act, 30 & 31 Vict. c. 144, life policies are made negotiable, and the assignees are not in the same position as assignees of other choses in action.

[His Honour intimated that the object of the act was to enable the assignee to sue in his own name, but it did not in any other way improve the position of the assignee. The 2nd section expressly provided for the reservation of all equities affecting the policy.]

If the policy is declared void as against the defendants, there must be a return of the premium already paid—*The Prince of Wales, &c. Association Company* v. *Palmer* (25 Beav. 605).

Malins, V.C. (without calling for a reply) said—In this case I think if the simple question had been whether or not the formal inquiries made by the

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plaintiff company as to the health and habits of the deceased had been so answered as to comply with the demands of truth and honesty, I must upon the whole have decided that they were so answered; and therefore if the risk had been incurred by the plaintiffs on or before the 16th of August, 1863, I should have held the policy good. But upon the 17th of August the position of the parties was entirely changed by the fact, about which there is no question, that on that day Bird went to Cardiff to consult a physician whom he had never before consulted, and his friend who accompanied him states in evidence that Bird was induced to go because he "felt uneasy about his health"; a fact, indeed, which is sufficiently indicated by the circumstance of his making an express journey for the purpose. Now, the evidence as to Dr. White's opinion is very explicit; and although it is said that Mr. Davies reassured Bird by telling him his complaint was only temporary, and that with care he would soon be better, there can be no doubt that Dr. White formed a more correct opinion as to the serious nature of the disease.—(His Honour referred at length to this part of the evidence, and continued)—Now, without going into the question whether or not in fact any variation had then taken place in Bird's health since the time of his examination by the medical officer of the company, or since the date of Mr. Davies's certificate on the 5th of August, I have no doubt upon this point of the case that the declaration signed by Bird, requiring him to state "his latest, if other than his usual, medical attendant," though made on the 19th of June, must be treated as a continuing declaration up to the time of his payment of the premium; and therefore in my opinion he was bound to mention the circumstance of his having since been to consult Dr. White. Whether or not he communicated the result of the interview may be immaterial, so long as he gave the office the opportunity of making such further inquiry as they might think fit; but knowing that the plaintiffs were acting upon the assumption that the declaration was true, it was incumbent upon him to give them notice of this circumstance, so materially affecting the accuracy of the statements therein contained.

The principle upon which this Court acts is clear and well established. In all matters of contract it is the duty of either one of two contracting parties to communicate to the other all material facts within his knowledge relating to the subject-matter of the contract; and if any such material facts be concealed, the opposite party will not be bound. The decision in *Traill* v. *Baring* appears to me to be conclusive upon the present case. For what was the importance of the fact there, the non-communication of which was held to vitiate the contract, compared with the importance of the fact which was not communicated here? Here the man whose life was to be insured is told that he is dangerously ill, and that without abstinence from stimulating liquors he will not recover. Clearly he was bound to tell the office that he had consulted another medical man, though I do not say that he was bound to inform them what the opinion of that medical man was. Such a communication would probably have influenced the conduct of the plaintiffs most materially; because if upon inquiry they had ascertained from Dr. White the state of Bird's health, it is not likely that they would ever have granted the policy. Upon this ground therefore I think that the contract is vitiated; and, as I have already intimated in the course of the argument, I do not think that it can be contended that the defendants, as assignees of this chose in action, can be in any better condition than Bird himself, or his legal personal representative, would have been if there had been no assignment. In my opinion, therefore, they are not entitled to recover on the policy.

With regard to the argument that this is a case exclusively for the decision of a jury at law, I fully admit the great inconvenience of dealing with such questions in this Court, without the advantage of seeing the witnesses and observing their demeanour; but it is clear, from the decision in *Traill* v. *Baring*, and many other cases of a similar kind, that this Court is bound to pronounce upon the validity of such contracts, and I am not at liberty to decline the

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jurisdiction. All the authorities cited upon this point go to the same effect: that any contract affected, as this is, with fraud is cognizable in this Court, although it may also be cognizable in the Court of law. Here there was the suppression of a fact which ought to have been disclosed; and, in deciding the case, I adopt the rule laid down by Mr. Justice Cresswell in the case of *Jones* v. *the Provincial Insurance Company*, with reference to the misrepresentation there alleged.

I think it is to be regretted that the plaintiffs should have disputed this policy, since it appears upon the evidence that it was at the instigation of their own agent that Bird insured his life, and upon the recommendation of their own medical man that they issued the policy: there can, however, be no question but that I am bound, upon the general doctrine of this Court, to declare the policy void *ab initio*, and it must be delivered up to be cancelled.

With regard to the costs, I at first thought that the decree should be without costs, having regard to the negligent conduct of the plaintiffs' officers, but after the decision in *Traill* v. *Baring*, which, in my opinion, completely covers this case, I think the defendants were bound to know that the suppression of such a material fact was fatal to the contract, and they should have held their hand and proceeded no further. Having, however, chosen to persevere in litigation, they must pay the costs. Each party must pay their own costs of the action at law. The defendants must be credited with the money which the plaintiffs have received by way of premium, together with interest. Mrs. Bird will get her costs from the plaintiffs, and they must recover them over from the defendants.

MALINS, V.C., Nov. 25, 1868.

FENTON *v.* THE QUEEN'S FERRY WIRE ROPE COMPANY.

38 L. J. Ch. 137; L. R. 7 Eq. 267; 17 W. R. 155: further proceedings, [1869] E. R. A.; 38 L. J. Ch. 263; 17 W. R. 583 (V.C.).

Solicitor and Client—Bill filed without Client's Authority—Creditors' Deed under Bankruptcy Act, 1861, *Effect of—Pleading—Parties—Costs.*

BANKRUPTCY.—*An assignment for the benefit of creditors under the Bankruptcy Act*, 1861, *vests the property of the assignor in the trustees of the deed, as completely as his actual bankruptcy would have vested it in his assignees.*

Therefore such assignor is an unnecessary party to a suit for the specific performance of a contract entered into by him before the assignment. And, though the execution of the assignment amounts to an implied authority to the assignee to use the assignor's name for all necessary purposes, yet where the solicitor of the assignee unnecessarily joined the assignor as co-plaintiff with the assignee in such a suit as above mentioned, an application to remove his name was acceded to, and the solicitor was ordered to pay the costs.

This was a motion by one of three members of a firm to strike out his name as a plaintiff, on the ground that he had been made such without his authority, and that the solicitor might pay the costs of the motion.

The suit was instituted by Mr. Blease, against the defendant company, for the specific performance of a contract entered into by the firm with the defendants. Subsequently to the contract the firm executed a trust deed for the benefit of their creditors in the form given in Schedule D. to the Bankruptcy Act, 1861, Blease being the assignee under such deed. The three members of the firm had been made co-plaintiffs with the assignee.

The present motion was made on behalf of Mr. Holden, one of the three members of the firm, who objected to his being made a party to the bill: first, on the ground that it was done without his authority; and, secondly, because it was wholly unnecessary.

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Mr. Glasse and *Mr. Mounsey* contended, upon the evidence, that there was clearly no express authority given to use Mr. Holden's name, and certainly none could be implied where the use of it was unnecessary.

Mr. Freeling, for the solicitor and the other plaintiffs, insisted that the effect of the trust deed was not the same as that of an absolute bankruptcy, because it left an interest in the assignor, in the surplus, after payment of creditors. He was still, therefore, a necessary party to the suit, and even if there were no express authority, the execution of the deed amounted to an implied authority to the assignee to use his name for all purposes connected with the trust estate.

Mr. Jackson, for the defendants.

MALINS, V.C.—I am satisfied, upon the evidence, that Holden, the present mover, intended all proceedings to be taken that should be necessary to get in the trust estate; and if the use of his name had been necessary in this case, I should have held that the execution of the assignment was an implied authority to the assignee and his solicitor to make use of Mr. Holden's name; for I think that the assignment carried with it the right to use the name of the assignor. But I am also satisfied that such a deed as this, under the Bankruptcy Act, 1861, vests all the property of the assignor in the assignee under the deed as completely as it would be vested, if the assignor had actually been a bankrupt, in his assignees in bankruptcy; and therefore the assignees can sue in their own name in this case as much as in the other. I take it to be clear that this is the effect of the act of 1861. And, indeed, it would be unfortunate if it were otherwise, for the consequence of the proposition now contended for would be that it would be necessary to use the assignor's name in every case in which proceedings have to be taken; notwithstanding that the act says, in section 197, that the "trustees of any such deed and the creditors under the same, shall as between themselves respectively, and as between themselves and the debtor and against third persons, have the same powers, rights and remedies with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed, or may be used or exercised by assignees or creditors with respect to the bankrupt or his acts, estate and effects in bankruptcy."

I am, therefore, of opinion that the assignee was as competent to enforce this contract in his own name as if the contract had been originally entered into with the assignee himself, and consequently that the assignors were unnecessary parties to this suit. Now, there must be either express or implied authority to make a man plaintiff in a suit. The execution of the trust deed could only amount to an implied authority to do what was necessary for the recovery of property under that deed; and as this co-plaintiff is not a necessary party to the suit, the use of his name was unnecessary, and there could be no implied authority to use it in the present case. And if there is no implied authority, the use of the name can only be justified by express authority; but it is clear, upon the evidence, that there was none. Therefore the name was improperly used, and the motion must be acceded to. At the same time, it cannot be of much importance to Mr. Holden whether his name remains on the record or not. An offer to indemnify him against all liability therefrom was made at the bar; and if it had been made earlier, this motion would never have been made. But for some reason or other that offer was withheld; and, for the reasons I have mentioned, I am obliged to come to the conclusion that Mr. Holden is right in his motion, and though it is somewhat frivolous, I can see no principle upon which I can refuse him the costs; and therefore the solicitor must pay them. It would be inconvenient to remove the name from the record, and therefore it must remain there, Mr. Holden being indemnified from all harm.

Upon the only important question in the case, I desire to be understood as being distinctly of opinion that the effect of an assignment by deed under the Bankruptcy Act, 1861, upon the property of the assignor is precisely the same as that of an actual bankruptcy upon the estate of the bankrupt.

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GIFFARD, V.C., Nov. 10, 1868.

NELSON *v.* PAGE.

38 L. J. Ch. 138; L. R. 7 Eq. 25; 19 L. T. 447; 17 W. R. 27.

Referred to, *Gall* v. *Fenwick*, [1874] E. R. A.; 43 L. J. Ch. 178; 29 L. T. 822; 22 W. R. 211 (M.R.); *Buckley* v. *Buckley*, 1887, 19 L. R. Ir. 544 (M.R.).

Demurrer—Locke, King's Act, 17 *&* 18 *Vict. c.* 112.—*Amendment Act*, 30 *&* 31 *Vict. c.* 69.—*Mortgage—Heir—Exoneration.*

EXECUTOR AND ADMINISTRATOR.—*J. N., by his will, made in* 1835, *directed payment of his debts by his executors. He afterwards purchased lands which he mortgaged, and as to which, in* 1868, *he died intestate. The mortgage was subsisting at his death*:—Held, *that the heir was not entitled to have the mortgage debt paid out of the personal estate.*

John Nelson made his will, dated the 13th of August, 1835, and he thereby directed payment of his debts in the following words: "I direct that all my just debts, funeral and testamentary expenses, shall be paid by my executors hereinafter named as soon as conveniently may be after my decease." The testator then, after making certain devises and bequests, gave, devised and bequeathed unto his mother Ann Nelson certain property in the will particularly mentioned, and all the rest, residue and remainder of his estate and effects, to hold the same to her, her heirs, executors, administrators and assigns, according to the nature, tenure and quality thereof respectively, for her and their own use and benefit absolutely. The testator then appointed his mother Ann Nelson, his brother George Nelson, and his friend Robert Plant, executrix and executors of his will.

Ann Nelson, George Nelson and Robert Plant all died in the lifetime of the testator.

The testator died on the 23rd of July, 1868, and administration with the will annexed was granted to the defendant, Rebecca Page.

The testator, in the year 1842, after the date of his will, purchased certain freehold and copyhold property, which was duly conveyed to him in the same year. In the year 1848 he mortgaged this property to the Earl of Wicklow to secure 2,500*l.* and interest, and this mortgage was subsisting at the death of the testator.

The testator left the plaintiff his heir-at-law and customary heir, according to the custom of the manor of which the copyholds were holden.

The bill stated, among other things, that the defendants had possessed themselves of personal estate of the testator sufficient to pay his debts, including mortgage debts, and prayed for a declaration that the plaintiff, as the heir-at-law and customary heir of the testator, was entitled to have the mortgage debt discharged out of the personal estate, and for a decree accordingly. The defendants demurred.

The question turned upon the construction of 17 & 18 Vict. c. 113. (Locke King's Act), and the Amendment Act, 30 & 31 Vict. c. 69. By the 1st section of the former act it is enacted, that "when any person shall, after the 31st day of December, 1854, die seised of or entitled to any estate or interest in any land or hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised, shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased persons, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part

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thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof;" . . . "provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed or document already made or to be made before the 1st day of January, 1855."

And by the Amendment Act it is enacted, that "in the construction of the will of any person who may die after the 31st day of December, 1867, a general direction that the debts or all the debts of the testator shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said act, unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate."

Mr. Hastings, for the demurrer.—As the plaintiff claims as heir of the testator, he claims *against* and not *under* the will, and is not, therefore, within the proviso at the end of the 1st section of the 17 & 18 Vict. c. 113. Since the Amendment Act, which alters the law as laid down in *Eno* v. *Tatam* (4 Giff. 181; 32 L. J. Ch. 159); *Moore* v. *Moore* (1 De Gex, J. & S. 602; 32 L. J. Ch. 605); a mere general direction for payment of debts out of personalty is not a sufficient declaration of a contrary intention within the first act.

Mr. Dauney, for the bill.—The will directs payment of the testator's debts out of his personal estate. Under this direction the plaintiff claims to have the estate exonerated out of the personalty; he comes, therefore, within the proviso at the end of the 1st section of the first act. The Amendment Act has reference only to wills coming within the operation of the original act, and is not intended to repeal the proviso at the end of the 1st section of that act.

GIFFARD, V.C. said, that there was no doubt that under the old law the plaintiff would have been entitled to exoneration. Heirs and devisees are both within Locke King's Act; but the proviso in that act enacts that no devisee of a mortgaged estate could be charged unless he claimed under a will made since 1855. But the plaintiff claims as heir, and not being mentioned in the exception, he is within the scope of the act. The question remains whether the act of 1867 applies to this case, and controls the effect of the direction to pay debts. The meaning of the act of 1867 is, that in order to exonerate an estate in mortgage from payment of the debt, the direction for payment of debts must apply unmistakably to the mortgage debt, if not *eo nomine*, at least in such a way as clearly to specify it. That is not the case here, and the demurrer must be allowed.

MALINS, V.C., Nov. 24, 1868.

MATHIESON *v.* HARROD.

38 L. J. Ch. 139; L. R. 7 Eq. 270; 19 L. T. 629; 17 W. R. 99.

Explained, *Page* v. *Wisden*, [1869] E. R. A.; 20 L. T. 435; 17 W. R. 483 (V.C.). Distinguished, *Cox* v. *Land and Water Journal*, [1870] E. R. A.; 39 L. J. Ch. 152; L. R. 9 Eq. 324; 21 L. T. 548; 18 W. R. 286 (V.C.). Followed, *Collingridge* v. *Emmott*, 1888, 57 L. T. 864 (Ch. D.).

Copyright—Registration—Time of First Publication—Incomplete Entry at Stationers' Hall—5 & 6 Vict. c. 45.

COPYRIGHT.—*The registration of a book at Stationers' Hall, under the Copyright Act, 5 & 6 Vict. c. 45, is not good unless the entry state the day on which the first publication took place, as well as the month and year.*

Therefore, where a plaintiff sued to restrain an infringement of his copyright in a book, having registered the month and year of first publication, but without specifying the day, his bill was dismissed with costs.

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This bill was filed for an injunction to restrain the infringement of the plaintiff's copyright in a Directory for the town of Brighton and its suburbs.

Upon the cause coming on for hearing a preliminary objection was taken by the defendant to the manner in which the plaintiff's book had been registered under the Copyright Act of 5 & 6 Vict. c. 45.

The 13th section of the act provides that "it shall be lawful for the proprietor of the copyright in any book to make entry in the registry book of the Stationers' Company of the title of such book, *the time of the first publication thereof*, the name and place of abode of the publisher thereof, and the name and place of abode of the proprietor of the copyright of the said book, or of any portion of such copyright, in the form in that behalf given in the schedule to the act annexed," upon payment of the fixed fee. And the 24th section enacts, "That no proprietor of copyright in any book, which shall be first published after the passing of that act, shall maintain any action or suit at law or in equity, or any summary proceeding in respect of any infringement of such copyright unless he shall, before commencing such action, suit or proceeding, have caused an entry to be made in the book of registry of the Stationers' Company of such book pursuant to the act."

The form given in the schedule for the "original entry of proprietorship of copyright in a book," and to be filled up accordingly, contains in parallel columns the time of making the entry, the title of the book, the name of the publisher and place of publication, the name and place of abode of the proprietor of the copyright, and the last column is headed thus, "*Date* of first publication."

The plaintiff had inserted in the last column, "December, 1866," without specifying the day of the month as well. No objection was made to the way in which the other columns were filled up, but it was contended that "December, 1866," was not a sufficient statement of the time of date of first publication; in which case the plaintiff was, by virtue of the 24th section, not entitled to sue.

Mr. Glasse and *Mr. Langworthy*, for the plaintiff, said that there was no case to be found directly bearing on the point; but they referred to *Low* v. *Routledge*, 33 L. J. Ch. 717: affirmed 35 L. J. Ch. 114; L. R. 1 Ch. Ap. 42; on appeal in the House of Lords, 37 L. J. Ch. 454; L. R. 3 E. & I. Ap. 100; in which case the date inserted was wrong, the entry being the 25th of May, 1864, while in fact it should have been the 23rd and *Wood* v. *Boosey* (36 L. J. Q.B. 103; L. R. 2 Q.B. 340), in which the entry was "1850" without any day or month. But that case was under a different statute, the International Copyright Act of 7 Vict. c. 12. s. 6, requiring entry of "the time and place of the first publication" in the foreign country in which it occurred, and the act itself throughout required more particularity of detail than the one now under consideration. Here the word used in the act was "time," while in the schedule it was "date," shewing that the act only required such a degree of certainty as would give notice to the public of the determination of the monopoly. And the only effect of the plaintiff's omission to state the day of the month would be that the entry would be taken most strongly against him, and construed to mean the first day of the month. At any rate, as the defendant was the wrongdoer, the bill would be dismissed, if at all, without costs.—They also cited *Kelly* v. *Morris*, 35 L. J. Ch. 423; L. R. 1 Eq. 697.

Mr. Shapter and *Mr. Fischer*, for the defendant, were not called on, but they had previously referred to *Sayer* v. *Dicey* (3 Wils. 60), an action, under the statute 8 Geo. 2. c. 13. s. 1, requiring the proprietor of a print to engrave and print thereon "his name and the day of the first publishing thereof," which not having been done, the plaintiff was nonsuited.

MALINS, V.C.—This is a very technical objection, and I should much have preferred to have decided the case upon the merits. But the legislature has said that copyright shall be enjoyed only upon certain conditions, and it is therefore upon compliance with those conditions alone that a person can acquire the full right to the benefits which copyright confers. I am glad, however, to find that the difficulty here can be got over by registration, for the 24th section provides,

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"That the omission to make such entry shall not affect the copyright in any book, but only the right to sue or proceed in respect of the infringement thereof," and the question therefore is one which only affects the plaintiff in this particular suit. Now, one of the conditions which must necessarily be complied with by the plaintiff before he can maintain his suit is, that he should state in the entry to be made at Stationers' Hall the time or date of first publication. Section 13. uses the word "time," while the schedule uses the word "date"; but "time" and "date" mean precisely the same thing. In the case of *Sayer* v. *Dicey* the day was required expressly by the act, and it appears to me that whether the act mentioned the time, the date, or the day of first publication it would be just the same, the thing which the act intended to require being precision in point of time. If the statement of the month alone were sufficiently precise, there is no reason apparently why a bare statement of the year should not be so as well; and yet it is clear, I think, that the statement of the year alone would not meet the requirements of the act. There is, of course, no difficulty whatever in stating the day of the month, and the omission to do so is therefore mere negligence. But without this the plaintiff has not complied with the act of parliament, and until he has complied with it he has no title to sue. I admit that in *Low* v. *Routledge* there was an insertion of a wrong date, but the opinion of Vice Chancellor Kindersley, so far as it is expressed, is against the plaintiff in this case. And in *Wood* v. *Boosey*, Blackburn, J. said distinctly, that the day ought to have been stated. I am of opinion then, on the authority of both these cases, that when a date is so expressly required as it is by this act, such date is not stated unless the day of the month as well as the month and year be given. I must therefore dismiss this bill, and having regard to the express terms of the 24th section of the act, I cannot do otherwise than dismiss it with costs.

MALINS, V.C., Dec. 7, 1868.

THE MAYOR AND CORPORATION OF LONDON *v.* SOUTHGATE.

38 L. J. Ch. 141.

Pleading—Demurrer—Specific Performance—Contract to build and accept Lease—Waiver—Damages.

SPECIFIC PERFORMANCE.—*The defendant agreed with the plaintiffs by a certain day to pull down an old house and build a new one on the site, agreeably to plans to be submitted by the plaintiffs' contractor, and under the inspection and to the satisfaction of their architect; and the plaintiffs agreed, when the new building should be completed, to grant a lease of the premises for a certain term at a fixed rent, the defendant agreeing to accept such lease when required.*

A demurrer to a bill praying specific performance and damages was overruled on the ground that the plaintiffs, waiving the specific performance of that part of the agreement which related to the building of the house, might be entitled to damages for the breach thereof, and to specific performance of the other part, viz., the contract to accept the lease:—Held, *also, that such waiver might be made at the bar, and need not be offered by the bill.*

Semble—*that though the contract did not in terms so provide, the lease which the plaintiffs were entitled to call on the defendant to accept might contain covenants to build in accordance with the spirit of the contract.*

Observations on Brace *v.* Wehnert (25 Beav. 348; 27 L. J. Ch. 572).

This was a bill for the specific performance of an agreement, dated the 27th of December, 1866, and made between the agent of the plaintiffs, of the one part, and the defendant Charles Southgate, of the other part, whereby

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the defendant agreed before a fixed day, at his own expense and risk, and in a good and workmanlike manner, to take down all the erections and buildings then standing on the premises described in the agreement, and within the time therein mentioned, and to the satisfaction in all respects of the architect for the time being of the plaintiffs, to remove and clear away the materials of the old buildings and leave the ground free. And the defendant was, within a space of time also fixed by the agreement, in a good, husbandlike and proper manner, and to such satisfaction as was hereinbefore mentioned, to erect upon the said ground a good and substantial brick building, agreeably to an elevation and plans to be submitted by the contractor, and to be approved by the committee appointed by the Court of Common Council for letting the property of the plaintiffs commonly called the City Lands Committee, and to deposit copies of the plans at the office of the said architect. And the defendant covenanted at his cost and charges to erect the building under the inspection and to the approbation of the said architect, or in strict conformity with the plans so to be deposited as aforesaid, and agreeably to the specification contained in the schedule to the agreement. And the plaintiffs' agent covenanted that when the said building should be completed, or so soon after the same should be covered in as the said committee should approve of, a lease of the premises should be granted by the plaintiffs to the defendant (subject to the rights of light of the adjoining premises) for the term of eighty years, from the 25th of December, 1866, at the yearly rent of 125*l*., payable quarterly, which lease should contain such covenants and conditions as were contained in a printed form of lease deposited at the office of the plaintiffs' comptroller. And the defendant covenanted that he would accept such lease and execute a counterpart thereof when prepared, without requiring the production of the lessor's title; and that in the meantime the defendant would pay the rent of 125*l*. for an occupation rent as if the lease had been actually granted.

The defendant entered into possession immediately after signing the agreement, but never pulled down or commenced pulling down the said erections and buildings, nor had he paid any rent or observed any of the covenants and conditions in the agreement.

The bill alleged that the plaintiffs had frequently applied to the defendant to perform his part of the agreement but without avail, the defendant alleging that he had not sufficient means to complete the contract; and it prayed that the defendant might be decreed specifically to perform the agreement, and that in addition to the specific performance thereof, he might be ordered to pay to the plaintiffs such a sum by way of damages for the loss occasioned to them by his delay and refusal to perform the agreement as the Court should think fit.

The defendant demurred for want of equity, on the ground that a contract of this nature, namely, to build to the satisfaction of a third party, was not a contract of which the Court could enforce specific performance. The plaintiffs, on the other hand, contended that if they waived the building of the house, as they now at the bar offered to do, and took damages in lieu thereof, they were entitled to specific performance of the other part of the agreement, namely, to compel the defendant to accept a lease.

Mr. Rogers, for the demurrer, in support of his contention that this was not such a contract as the Court could specifically enforce, cited *Brace* v. *Wehnert* (25 Beav. 348; 27 L. J. Ch. 572), in which it was held that a contract to build a house according to a plan to be agreed upon could not be carried into effect in this Court when neither plan nor specifications had been under the consideration of the parties.

Mr. A. E. Miller, in support of the bill, relied on *Soames* v. *Edge* (Johns. 669), in which the agreement was exactly like the present, the only difference being that in that case the defendant had pulled down the old house, while here he had not done as much. There the plaintiff waived the building of the new house, and it was held that he was entitled to damages for the default in building the house, and to specific performance of the contract to accept the lease. So

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here, if the plaintiffs were willing to waive, as they did, the building of the new house, they might have damages instead, and the Court would give them specific performance of the other part of the agreement by compelling the defendant to accept the lease. The agreement was of two distinct parts, and if the plaintiffs were entitled to relief in respect of either part, the demurrer must fail. *Brace* v. *Wehnert* was before Lord Cairns's Act (21 & 22 Vict. c. 27. s. 2), and would be decided differently now. This is not like the case of *Stocker* v. *Wedderburn* (3 Kay & J. 393; 26 L. J. Ch. 713), in which the plaintiff was unable and could not be forced to carry out his part of the contract, nor that of *Peto* v. *the Brighton, &c. Railway Company* (1 Hem. & M. 468; 32 L. J. Ch. 677), in which the plaintiff was met by the same difficulty, the contract being to construct a railway, which the Court could not enforce on the plaintiff's side. There was no objection of that sort here; and the plaintiffs waiving the only part of the contract which the Court could not specifically enforce, they were entitled to specific performance of the other part.

Mr. Rogers, in reply, argued that *Soames* v. *Edge* depended wholly on the fact that the plaintiff by his bill waived that part of the contract which the Court could not perform. It would not do for the plaintiffs to waive it now at the bar. They must offer such waiver by their bill—*Norris* v. *Jackson* (1 Jo. & H. 319, 327).

[MALINS, V.C.—The defendant has contracted to erect a certain house: why cannot the plaintiffs call upon him to execute a lease containing covenants to build according to the contract?]

It was no part of the agreement that the lease should contain any such covenants; and as the plaintiffs had no right to require such covenants of the defendant, surely the Court would not compel him to accept a lease with such covenants in it.

MALINS, V.C.—If there is any part of the relief sought by this bill to which the plaintiffs can establish their right, the defendant's demurrer must fail. It would be a hard case if the plaintiffs failed, for the defendant has entered into an agreement with them to take a lease of their premises and pay a certain rent, and to pull down the buildings now standing on the ground, and build thereon another house under the inspection of the plaintiffs or their agents; and according to the allegations in the bill he has had possession since the date of the agreement, but has not paid any rent, nor performed any part of his covenants. If I am to allow the demurrer, the plaintiffs would have no remedy against the defendant, though he is in possession under the agreement, and has had possession ever since it was executed, but an action for damages at law. In the case of *Stocker* v. *Wedderburn* there were certain things to be done by the plaintiff of which the Court could not enforce specific performance. But here there is nothing to be done on their part but to grant a lease, which the defendant on his part has contracted to accept. And although the plaintiffs cannot through the intervention of this Court call upon the defendant to build according to the terms of the contract, I see nothing to prevent the plaintiffs from calling on him to execute a lease containing covenants to do that which he has contracted to do. Those covenants are incident to the contract, and it is not necessary that the word covenant should be expressly used in the agreement in order to entitle the plaintiffs to have such relief as will enable them to sue the defendant at law upon covenants under seal. *Brace* v. *Wehnert* would have put some difficulty in the plaintiffs' way if it were still the law of this Court: but it was decided before the passing of Lord Cairns's Act, and I think it is allowed on both sides now, that it would not at the present day have been decided in the same way. In *Soames* v. *Edge*, Wood, V.C. overruled the demurrer upon the same grounds upon which I intend to overrule the demurrer here. It was urged upon me that the decision turned wholly upon the fact that the waiver was there offered by the bill. But I do not think that was so. It was no doubt a circumstance in the case, but the decision is not rested upon it. It proceeded upon the ground that where there is some part of the relief to

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which the plaintiff may be entitled, the Court may give him damages for that part which it cannot enforce him to perform. And therefore the Court made the defendant Edge take a lease, and gave the plaintiff damages for the non-building of the house. So here, if the corporation say, as they now do, that they are willing to waive the building of the house, the Court can award them damages for the breach of that part of the contract, and can decree them specific performance of the remainder, by compelling the defendant to accept the lease. It appears to me that this case falls within the principle of the decision in *Soames* v. *Edge*, and therefore I overrule the demurrer.[1]

GIFFARD, V.C., Dec. 17, 1868.

VAUGHAN v. MOFFAT.

38 L. J. Ch. 144.

Principal and Agent—Factors' Acts—5 & 6 Vict. c. 39. s. 4.—Pledge by Commission Agent—Possession of Goods obtained by Fraud.

PRINCIPAL AND AGENT.—*M, a merchant and factor, of London, employed by V, a merchant, in Holland, to negotiate sales as a commission agent, obtained and transmitted to V. an offer from L. & F. to purchase a quantity of oil. V. accepted the offer, and subsequently shipped a parcel of oil in pursuance of the contract, and sent the bill of lading, specially indorsed to L. & F, to M. in order that it might be exchanged for L. & F.'s acceptance of V.'s draft. Before this M, without any authority from V, had agreed to cancel the contract with L. & F, and when the bill of lading arrived M. procured L. & F. to indorse it in blank, and deliver it to him, by falsely representing that the special indorsement had been made by mistake. M. then caused the oil to be warehoused in his own name, and immediately pledged it to the plaintiffs as security for an advance of 350l.*:—Held, *that the pledge was not protected by the Factors' Acts.*

In the year 1867, Ericus Gerhardus Verkade, a merchant, of Zaandam, authorized one Moffat, who carried on business in London as a merchant and factor, to negotiate sales of refined oil. Moffat had no general authority to act for Verkade, but was merely empowered to transmit offers and to act in the ordinary course of business as a commission-agent having specific instructions.

In the beginning of December, 1867, Moffat effected a sale for Verkade to Mr. Lambe, who carried on business under the firm of Lambe & Ffarmer, of forty tons of refined rape oil, at 39*l.* a ton, twenty tons to be delivered in the course of each of the months of May and June, 1868. Some months before any of the oil became deliverable, Moffat, without any authority from Verkade, and without his knowledge, agreed with Lambe and Ffarmer to cancel the contract. On the 16th of May, Verkade, in pursuance of the contract, shipped twenty-three casks of oil. Concerning these no questions arose in the suit.

On the 26th of May, 1868, Verkade in further fulfilment of his contract shipped, at Amsterdam, twenty-five casks of oil, per steam-ship *Diana*. The bill of lading, which was drawn in favour of Verkade or order, was by him specially indorsed in favour of Messrs. Lambe & Ffarmer or order, and sent to Moffat, together with a bill of exchange for 390*l.*, drawn upon Lambe & Ffarmer. In the ordinary course of business, Moffat on receiving these documents ought to have procured Lambe & Ffarmer's acceptance of the bill of exchange, and to have handed them the bill of lading on receiving from them such acceptance.

About the 30th of May, 1868, the *Diana*, having the twenty-five casks on board, arrived in the Thames, and Moffat thereupon took the bill of lading,

(1) See also *Kay* v. *Johnson* (2 Hem. & M. 118); *Middleton* v. *Greenwood* (2 De Gex, J. & S. 142).

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which was indorsed, "Deliver to Messrs. Lambe & Ffarmer or order, E. G. Verkade," to Mr. Lambe, and told him that the indorsement was made by mistake, and requested him to indorse the bill of lading in order that the goods might be entered at the Custom House. Mr. Lambe, believing Moffat's statement, indorsed the bill generally in the name of his firm. Moffat afterwards handed it to Messrs. Richardson & Perry, the proprietors of Sharpe's Wharf, with instructions to them to land the twenty-five casks of oil on his account. On the same day Moffat obtained from the plaintiffs, who were oil and seed brokers, an advance of 350*l.* on the security of the twenty-five casks, and gave them a delivery order for the same. This order was lodged with the wharfingers and entered in their books.

Verkade subsequently claimed the twenty-five casks, and the wharfingers having in consequence refused to deliver them to the plaintiffs, the bill was filed asking a declaration that the plaintiffs were entitled to a charge on the oil and an injunction to restrain the wharfingers from parting with it to any other persons than the plaintiffs. On a motion for an injunction being made, it was arranged that the oil should be sold, and the proceeds deposited in a bank till the right to them was decided. The motion was not brought on again, and by consent the hearing of the motion was treated as the hearing of the cause.

The sole question was, whether the pledge by Moffat to the plaintiffs was valid against Verkade by virtue of the Factors' Acts.

Mr. Druce and *Mr. Graham Hastings*, for the plaintiffs.—This case is governed by *Baines* v. *Swainson* (4 Best & S. 270; 32 L. J. Q.B. 281), which was approved of in *Fuentes* v. *Montis* (37 L. J. C.P. 137; L. R. 3 C.P. 268). The principle deducible from *Baines* v. *Swainson* is, that an agent whose ordinary employment it is to sell, however limited his authority may be as between himself and his principal, yet is a person capable of making a good title to third persons under the Factor's Acts. In order to do this, he must have the possession of the goods, and also in the eyes of the world at large the property in them; and in the present case these requisites are satisfied; for at the time when the pledge was made Moffat had possession by virtue of the entry in the wharfingers' books and apparent property by virtue of the bill of lading. Verkade was, in fact, Moffat's principal throughout, and 5 & 6 Vict. c. 39. s. 4. applies.

Mr. James and *Mr. Marten*, for the defendant Verkade, were not called upon.

Moffat did not appear.

GIFFARD, V.C.—I perfectly agree with the cases which Mr. Druce has cited. If Moffat had become apparently entitled without the act of any third person, it may be that he would been able to bind his principal Verkade. But in fact Verkade took a very prudent and proper course. Moffat was merely employed to negotiate a contract. The bill of lading Verkade specially indorsed to Messrs. Lambe & Ffarmer. With their subsequent act in indorsing the bill he had nothing to do, and it was this, not any act of his, which put the goods in the power of Moffat. The result is, that the bill must be dismissed, and as it is a dry question of law, with costs.

HATHERLEY, L.C. and SELWYN, L.J., Nov. 20, 21, 23, Dec. 19, 1868.

NEWTON v. NEWTON.

38 L. J. Ch. 145; L. R. 4 Ch. 143; 19 L. T. 588; 17 W. R. 238: reversing, [1868] E. R. A. 737; 37 L. J. Ch. 705; L. R. 6 Eq. 135 (M.R.).

Referred to, *Heath* v. *Crealock*, [1874] E. R. A.; 43 L. J. Ch. 169; L. R. 18 Eq. 215; 29 L. T. 763 (V.C.); *Taylor* v. *Russell*, [1890] E. R. A.; 59 L. J. Ch. 756; 62 L. T. 922; 38 W. R. 663 (Ch. D.): reversed, [1891] E. R. A.; 60 L. J. Ch. 1; [1891] 1 Ch. 8; 63 L. T. 593; 39 W. R. 81 (C. A.): latter decision

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affirmed, [1892] E. R. A.; 61 L. J. Ch. 657; [1892] A. C. 244; 66 L. T. 585; 41 W. R. 43 (H.L.).

Trust—Mortgage—Deposit of Title-Deeds.

MORTGAGE. TRUST AND ACCOUNT.—*A trustee sold out trust stock, and subsequently advanced money to one of his cestuis que trust for the purchase of an estate, which was when purchased mortgaged to the trustee for the advance. He afterwards deposited the deeds with his bankers to secure a debt due from himself. Certain of the cestuis que trust instituted a suit for the delivery up of the deeds, on the ground that the money advanced on mortgage was trust money; and the trustee, by his answer in the suit, admitted a promise by himself to execute a declaration of trust of the mortgage in favour of his cestuis que trust The Court of Appeal held that the admission by the trustee that the money advanced by him for the purchase of the estate was trust money, was not evidence as against the bankers; and, being of opinion on the evidence that the estate had not been shown to have been purchased with trust money, on this ground reversed the decree by the* Master of the Rolls *granting the relief prayed by the bill.*

The hearing before the Master of the Rolls is reported 37 L. J. Ch. 705. The Court of Appeal formed a different conclusion on the evidence to that which the Master of the Rolls came to. It referred to, but did not decide, the point of law raised at the hearing in the Court below. The facts on which the decision of the Court of Appeal is based are stated fully in the judgment. They may be briefly recapitulated as follows.

Mr. H. G. Robinson, being sole trustee of a sum of consols, sold it out. He afterwards advanced a sum of money to the defendant, Mr. Newton, one of the *cestuis que trust*, with which the latter purchased an estate. This estate the purchaser mortgaged to Robinson for the advance. Advances having been made to Robinson himself by the London and Westminster Bank, he deposited the deeds relating to the mortgage with the bank. It was alleged that the money lent by Robinson was the fund of which he was trustee, and the *cestuis que trust*, except Mr. Newton, viz., Mrs. Newton and their five infant children, consequently filed a bill asking for an account against Robinson, a declaration that the bank had no interest in the mortgage, and an order that the bank should deliver up the deeds. It was alleged that Robinson had promised to execute a declaration of trust of the mortgage, and by his answer he admitted this. The bank had no notice of the trust. The Master of the Rolls held the *cestuis que trust* entitled to the delivery up of the deeds, and to priority over the bank. The bank appealed.

A similar mortgage had been executed by Robinson in favour of another of his private creditors, Mr. Benjamin Webster, and the decree made by the Master of the Rolls applied to that as well as to the London and Westminster Bank's mortgage. But Mr. Webster had not appealed.

The hearing of the appeal by the bank took place before the Lords Justices; but judgment was delivered after Sir W. Page Wood had accepted the Great Seal.

Mr. Jessel and *Mr. Langworthy*, for the London and Westminster Bank, cited *Wallwyn* v. *Lee* (9 Ves. 24); *Manningford* v. *Toleman* (1 Coll. C.C. 670: 14 L. J. Ch. 160); *Eyre* v. *Burmester* (10 H.L. Cas. 90; 33 L. J. Ch. 652); *Joyce* v. *De Moleyns* (2 Jo. & Lat. 374); *Ex parte Cawthorne; In re Foot* (1 Glyn. & J. 240); *Fagg* v. *James* (8 L. T. 5); *Thorndike* v. *Hunt* (3 De Gex & J. 563; 28 L. J. Ch. 417); *Colyer* v. *Finch* (5 H.L. Cas. 905, 921; 19 Beav. 500; 26 L. J. Ch. 65).

Mr. Southgate and *Mr. Everitt*, for the plaintiffs, cited *Dodds* v. *Hills* (2 Hem. & M. 424); *Benbow* v. *Townsend* (1 Myl. & K. 506; 2 L. J. Ch. 215); *Phillips* v. *Phillips* (3 Giff. 200; 31 L. J. Ch. 321); *The Attorney General* v. *Wilkins* (17 Beav. 285, 292; 22 L. J. Ch. 830); *Frazer* v. *Jones* (5 Hare, 475; 17

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L. J. Ch. 353); *Allen v. Knight* (5 Hare, 272; 15 L. J. Ch. 430; 16 L. J. Ch. 370); *Parker* v. *Whyte* (1 Hem. & M. 167; 32 L. J. Ch. 520); *Ogilvie* v. *Jeaffreson* (2 Giff. 353; 29 L. J. Ch. 905).

Mr. Langworthy, in reply, referred to 1 *Seton on Decrees*, 385.

The LORD CHANCELLOR (*Dec.* 19).—This case was heard before Lord Justice Selwyn and myself, sitting as Lords Justices, and the judgment which I am now about to read is the judgment of the Court. In this case the London and Westminster Bank, who are defendants to the suit, by their public officer, have appealed from a decision of the Master of the Rolls, whereby the public officer has been directed to deliver up a certain indenture of mortgage, dated the 25th day of September, 1862, and all other documents of title relating to the premises therein comprised, and further to pay to the plaintiffs so much of the costs of this suit as have been occasioned by the claim of the bank to an equitable charge, or to the benefit of the above-mentioned mortgage security, under an alleged deposit with them by the defendant Henry George Robinson. The circumstances of the case, so far as it affects the appellants, are as follow. The plaintiff, Mrs. Newton, and her husband, the defendant, Augustus Newton, allege that, by a post-nuptial settlement, dated the 12th of November, 1856, a sum of 4,361*l.* 2*s.* 2*d.* 3*l.* per cent. consols, to which Mrs. Newton was entitled for her separate use, was assigned to the defendant Henry George Robinson and one Edwin Kingsford, upon trust, subject to certain other limitations which have determined, to raise a sum not exceeding 300*l.*, to be disposed of as Mrs. Newton should approve; and subject thereto, upon trust to pay the income to Mrs. Newton to her separate use without power of anticipation, and on her decease to pay the income to her husband for life, and after the death of the survivor, upon certain trusts for the benefit of children and grandchildren. There has been issue of the marriage, some of whom are still infants. Kingsford died without having acted in the trusts, and the fund was transferred into the name of Robinson alone on the 17th of February, 1860. Some question has been raised by the appellants whether this settlement was in fact ever executed. The Master of the Rolls came to the conclusion that there was sufficient evidence of it, and sufficient evidence of its contents. We agree with him in that conclusion. Newton swears positively to a copy made by him of the draft of a settlement. The moneys, corresponding to the amount mentioned in the draft, came to Robinson's hands under some trusts, and no other trust is suggested. The fund was dealt with by Robinson as a trustee in raising the 300*l.*, and also in the transactions afterwards referred to in respect of the property bought of Mr. Marshall; and by the deed of the 24th of December, 1863, Robinson recognizes the trust as an existing trust under a deed of the 12th of November, 1856.

It appears that very soon after Robinson had obtained possession of the fund it was tampered with by him, at the request and for the benefit of the defendant Augustus Newton. One of the earliest sums sold out appears to have been sold for the purpose of paying a debt of Mr. Newton's due to one Gibbs, and as to this no question is now raised. In August, 1860, Robinson, at Newton's request, bought an estate in Sussex of a Mr. Marshall for 2,000*l.*, and the purchase-money was raised by sale of the remaining portions of the trust fund then in Robinson's name, for the last sales of stock appear to have been the sale of 1,800*l.* stock on the 1st of August and 960*l.* 17*s.* 3*d.* on the 6th of August, 1860. By indenture of that date the property was conveyed to the usual uses to bar dower, and subject thereto to Mr. Newton in fee. An indenture however was executed, dated the next day, made between Newton of the first part, George F. Robinson of the second part, and the defendant Robinson of the third part, by which it is recited that Newton had borrowed the 2,000*l.* of Robinson on the agreement that it should be laid out in buying the estate of Marshall, and that Newton should mortgage the land so bought to Robinson in fee; and Newton accordingly conveys the estate to Robinson to secure the 2,000*l.* and interest; and by the same deed Newton covenants with

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Robinson that certain other property should be charged with the repayment of the said 2,000*l.* and interest. Subsequently, by a deed, dated the 24th of December, 1860, and made between the plaintiff Mrs. Newton of the first part, Mr. Newton of the second part, and Robinson of the third part, after reciting the settlement and reciting that Mr. and Mrs. Newton, in pursuance thereof, had directed Robinson to sell a sufficient part of the trust funds to raise the 2,000*l.*, and to invest it on mortgage of a freehold estate about to be conveyed to Newton, and reciting the last-mentioned mortgage-deed, Robinson acknowledged that he stood possessed of the mortgage as part of the funds and securities subject to the settlement. Robinson subsequently deposited this mortgage-deed with Webster, one of the defendants to the suit, as a security for 1,000*l.* advanced by him to Robinson, without giving notice of the declaration of trust. On the 6th of August, 1860, as has been observed, the whole trust fund had been sold out and exhausted, but several other advances of money seem to have been made from time to time by Robinson to Newton. On the 8th of May, 1861, by an indenture of that date, another property in Sussex was conveyed to Newton in fee, in consideration of 1,100*l.*, by Wingrove and Budds. By an indenture, dated the 25th of September, 1862, and made between Newton of the first part, George Frederick Robinson of the second part, and the defendant Robinson of the third part, after reciting the purchase-deed of May, 1861, and reciting that Newton since the date of the conveyance had expended a considerable sum in improving the property, and that the defendant Robinson had, for the purposes of such improvements and for other purposes, at different times, advanced various sums of money to Newton, amounting in the whole to 1,100*l.*, for which he required security, Newton conveyed all the property bought of Wingrove and Budds, and all the improvements thereon, to the defendant Robinson, by way of mortgage to secure the payment of 1,100*l.* and interest by the 25th of September, 1863. In November, 1862, Robinson, wishing to obtain assistance from the bank of the appellants, proposed to deposit with them the mortgage-deed of the Wingrove property as a security for future advances. They caused the title and value of the property to be investigated, and were advised that the mortgage would be a good security for 600*l.* He accordingly deposited the mortgage-deed and the title-deeds on the 8th of November, 1862, when the bank advanced him 600*l.*; and they have since made further advances. The bank had no direct notice of any trust affecting the property.

The bill alleges that this 1,100*l.* was part of the trust funds; but of this there is no proof, nor is it easy to see how such could be the case. The fund in specie had been wholly disposed of by Robinson in August, 1860, nine months before the purchase by Newton in May, 1861, and still longer of course before he could have made the improvements alleged. The account of Robinson with the London and Westminster Bank appears to have been overdrawn, until Webster's advance made on the deposit by Robinson of the previous purchase-deeds had turned the balance.

There is no trace therein of the produce of the trust fund. It appears that there were many money transactions between Newton and Robinson. This appears by Newton's deposition on behalf of the plaintiffs. He admits that he furnished an account to Robinson shewing that he had received from Robinson 5,232*l.*; but this he says relates also to other property, and it is suggested that many of Robinson's payments were in respect of other moneys received by him as Newton's agent. Robinson himself is abroad. He has put in an answer through the solicitor of the plaintiffs, but he has not been examined as a witness. The plaintiffs aver that they cannot compel him, residing as he does abroad, to be examined, and that he declines to do more than answer. In that answer he states, that in September, 1862, Newton was desirous of buying a property adjoining that purchased by him of Marshall, and applied to him to make a further advance out of the trust funds. He states the mortgage of Wingrove's property to him, and says, that the 1,100*l.* mentioned in the mortgage-deed was

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part of the trust funds comprised in the settlement. He says further, that he, out of his own moneys, advanced considerable sums to Newton for the purpose of improving the property, and that he had laid out the sums so advanced by him in improving the property accordingly. He says he has advanced to Newton very large sums of money, far beyond the amount of the trust funds.

No mere admissions by Robinson in his answer can affect the appellants; but is is clear, on the face of his statements, that Robinson must have a very imperfect recollection of the facts. He states that Newton was desirous of purchasing the property in September, 1862, whereas it had been bought and paid for in May, 1861. It is for the plaintiffs to prove that Wingrove's estate was bought with trust moneys, or otherwise affected by the trusts of the settlement. The very facts proved shew that there could have been no trust money with which it was purchased, and the deeds, on the face of them, deal with the property as bought by Newton, and with the advance by Robinson to Newton of 1,100*l.* as an advance for the purpose of enabling Newton to improve the property. The Master of the Rolls appears to have been struck with the apparent improbability of Robinson's making the purchase with any fund of his own; but Robinson had, as appears from the evidence in this cause, fraudulently obtained a large sum of money from Webster by deposit of the title deeds of the Marshall purchase, as to which he had executed a declaration of trust.

But, then, no doubt a declaration of trust may be made by parol of a sum secured by mortgage, and both Mr. and Mrs. Newton depose to such a declaration. Now I will refer to the evidence, which I think may be very briefly stated. Mrs. Newton says, in the first place, "My father died on the 7th of May, 1859. Mr. Robinson used after that occasionally to send me the dividends for the consols, and sometimes I went to him for them. I never had an objection made by anyone as to my receiving the dividends for my life. Mr. Robinson told me that 500*l.* had been sold out of the consols to pay Mr. Blome, and I believed it. I asked the defendant Robinson myself to advance the 1,500*l.* to buy Marshall's property. He said if I did not like he would not buy it. I told him that it would be for my advantage that he should buy that property out of the trust funds. I asked the defendant Robinson personally to buy Wingrove's property. I told him it would increase our income. I have never had any dividends since Mr. Robinson left. I signed Exhibit No. 4 at South Hill. I knew this related to Marshall's property. The defendant Robinson promised us a similar one in Wingrove's property, but we never got it. I was present when my husband executed the 1,100*l.* mortgage to the defendant Robinson. I then asked the defendant Robinson to give us a declaration of trust in respect of it, and he promised to do so. I never heard till after Mr. Robinson had left that he had deposited either of the mortgages with anyone." Then, when cross-examined, she says, "I ceased to receive the dividends from Mr. Robinson at the beginning of 1861." Then Mr. Newton states this: He says he was not personally indebted in 1,100*l.* Then he says, "I daresay Mr. Robinson was three months in negotiating the purchase by our instructions," that is, the Wingrove purchase. "Mr. Robinson and Mr. Budd, solicitor to Mr. Wingrove, settled the purchase between them. I and my wife wrote to Mr. Robinson requesting him to purchase the Wingrove property out of the trust funds." (I may say there is no such letter produced.) "I believe Mr. Robinson banked at the London and Westminster Bank." That I think is, in truth, nearly the whole of what he says about the Wingrove property. He does say in the earlier part this: "He afterwards advanced to me out of the trust funds 1,100*l.* to buy a property adjoining that belonging to Mr. Wingrove, making altogether an advance of 3,100*l.* out of the trust funds. He agreed to advance this money out of the trust funds. On both properties I executed a mortgage in trust to Mr. Robinson. I have never received from Mr. Robinson any cash account of the moneys I so received from him. I made out a cash account which I

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furnished to Mr. Robinson." Then he mentions that his account amounted to 5,232*l*. Then he produces the declaration of trust as to Marshall's property; and he says, "This relates to Marshall's property, and he promised me one with regard to Wingrove's, but he never gave it to me. I signed the mortgage of Wingrove's property upon the faith that the document was to be given to me." I can only say upon that, there is no letter produced shewing the request to buy it out of the trust funds; and, as I have already shewn, no such trust funds existed.

Now, it would be highly dangerous to allow a trust to be created contrary to all the written documents in the case solely on the statements of the persons claiming the benefit of the trust, unless such evidence were very strongly corroborated by other testimony, or by the facts and circumstances of the case. As regards the land bought of Marshall, the trust fund was sold out at the date of the purchase; the mortgage by Newton was executed on the next day to that of the conveyance to him, and a formal declaration of trust was, about four or five months afterwards, executed by Robinson. But as regards the purchase from Wingrove and Budd, there was no trust fund wherewith to purchase it, nor any money standing to Robinson's credit which could be traced back to the produce of any trust fund. The mortgage to Robinson was not made till nearly a year and a half after the purchase in May, 1861, viz., in September, 1862. It purports to be made for money advanced by Robinson to Newton, not indeed as purchase money, but to enable Newton to improve the property, which exactly agrees with Robinson's statement in his answer that he made advances out of his own moneys for that purpose; and Robinson never executed any declaration of trust of this mortgage. It is said by Mr. and Mrs. Newton that they asked him so to do, and that promised to accede to their request; but, in fact, he never did execute any such deed, and there is no evidence of any subsequent application to him on the subject. Mrs. Newton (in her depositions) says that she ceased to receive dividends from Robinson in the beginning of 1861; and he deposited the mortgage from Newton with the appellants in November, 1862, and did not leave England till the 5th of December, 1863; so that, although the purchase of the estate in question was made more than two and a half years before he left England, not a trace remains of any trust beyond the evidence of Mr. and Mrs. Newton themselves, and the admission of Robinson in his answer. But, as has been observed, this admission cannot be read as evidence against the appellants, and it is a strong circumstance that the plaintiffs, on whom the burden of proof lies, have not examined Robinson as a witness, though they have procured his answer.

The facts of the case shew that Newton was indebted to Robinson on his private account, and being so indebted he executed a mortgage to Robinson for 1,100*l*. Robinson would have a right to apply that mortgage as he thought fit to the private debt, or to the trust debt in the absence of any stipulation to the contrary on the part of Newton, and the circumstances of the case do not satisfy as that he never agreed to declare, much less that he did declare, himself to be a trustee of the mortgage so made to him by Newton. If so, the appellants are entitled to the benefit of their lien on the mortgage-deed to the extent of the moneys due to Robinson thereon; and, as no offer is made by the bill to redeem them, we think that, as against them, the bill should have been, and must now be, dismissed with costs.

The conclusion at which we have arrived, upon the facts of this case, and the failure on the part of the plaintiffs to establish in evidence the case alleged by them as against the appellants, render it unnecessary for us to decide the question of law which was raised on behalf of the appellants. It was argued, on behalf of the appellants, that as the defendant Robinson was the legal owner of the indenture of the 25th of September, 1862, and as that deed had been delivered to the appellants as purchasers for value without notice of the plaintiffs' rights, a Court of equity ought not to interfere with the possession of the deed so acquired by them; and that the decree, even if it could be supported,

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so far as it related to the estate, was, at all events, erroneous in so far as it ordered the appellants to deliver up the deed. The cases of *Wallwyn* v. *Lee* and *Joyce* v. *De Moleyns* were referred to as authorities in support of that contention. Although we have decided this case upon another point, we think it right to observe that in *Wallwyn* v. *Lee* the sole object of the suit was the recovery of the title-deeds; and the Court there refused to give assistance against a purchaser for valuable consideration without notice. Lord Eldon referred to the principle that this Court will not stir against a purchaser for valuable consideration without notice. There appears to us to be a material distinction between such a case as *Wallwyn* v. *Lee* and cases in which either in consequence of the fund being in Court, as in *Stackhouse* v. *the Countess of Jersey* (1 Jo. & H. 721; 30 L. J. Ch. 421), or in consequence of the legal estate being outstanding in a trustee, and the beneficial interest being claimed by several adverse but equally innocent purchasers for value without notice, the Court is called upon to declare and does declare the right to the fund or estate in question. In such cases the Court is necessarily called upon to make, and does make, a decree against some one or more of such purchasers for value; but as in the language of Lord St. Leonard's, in *Smith* v. *Chichester* (2 Dr. & W. 42), " it is clearly settled that the right to the estate confers the right to the possession of the title-deeds," such a decree would be obviously incomplete in a material particular if, while declaring the plaintiff to be absolutely entitled to the whole beneficial interest in the estate, it left the title-deeds in the possession of one of the defendants, claiming to hold them under an adverse title which the same decree declared to have no valid foundation. In *Joyce* v. *De Moleyns* Lord St. Leonards expressly states that the very point which he was then called upon to decide in that case had been decided in *Wallwyn* v. *Lee*, and in the same judgment he mentions and recognizes the case of *Smith* v. *Chichester*, to which we have already referred. These authorities have been reviewed by the Master of the Rolls in the present case; and as his Lordship found that the legal estate was still outstanding in the trustee Robinson, and as his Lordship decided that, upon his view of the evidence, the plaintiffs were entitled to a declaration confirming their equitable title to the estate, he has also by the decree ordered the appellants to deliver up the mortgage-deed and the other documents of title relating to the premises therein comprised. Although we have arrived at a different conclusion upon the evidence in this case, we wish to be understood as not entertaining any opinion adverse to that expressed by the Master of the Rolls upon this question of law. The appeal must, we think, be allowed, and the bill dismissed, with costs as against the appellants. There will be no costs of the appeal. The deposit will be returned.

LORD ROMILLY, M.R., Dec. 22, 1868.

In re THE GENERAL ROLLING STOCK COMPANY; *Ex parte* THE ALLIANCE BANK.

38 L. J. Ch. 151; 17 W. R. 248: affirmed, [1869] E. R. A.; 38 L. J. Ch. 714; L. R. 4 Ch. 423; 20 L. T. 685; 17 W. R. 631 (L. JJ.).

Bill of Exchange—Collateral Securities—Appropriation.

BILLS OF EXCHANGE.—*Shares were deposited to secure a debt, and bills were given as a collateral security. The bills were renewed and the new bills discounted. Both debtor and creditor became insolvent*:—Held, *that the holders of the bills were not entitled to the shares as a specific security.*

Ex parte Waring (19 Ves. 345) *and* Powles *v.* Hargreaves (3 De Gex, M. & G. 430; 23 L. J. Ch. 1) *distinguished.*

In March, 1863, the General Rolling Stock Company agreed with Mr. Lamie

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Murray, the concessionnaire and contractor for the Turin and Savona Railway, to advance him 12,000*l.*, for nine months, at 6*l.* per cent. per annum. Mr. Murray was to pay the company a bonus of 2,000*l.*, and to give his acceptances at nine months to the company for these sums of 12,000*l.* and 2,000*l.*, and to deposit with the company, as collateral security for the same sums, certain shares in the Turin and Savona Railway, and certain shares in the Hainault and Flanders Railway. The company was to provide all the rails for the Turin and Savona Railway; and if this part of the agreement were broken (an event which happened), Mr. Murray was to pay a further bonus of 3,000*l.* All this was done; but, in accordance with a subsequent agreement, the period of nine months was extended, and the bills were to be renewed from time to time.

Four sets of bills were thus accepted, and the three earlier sets were duly retired; the fourth set was for 21,000*l.*, the amount having been increased in order to cover further bonuses. Of this set, bills for 16,000*l.* were discounted by the Alliance Bank, and bills for 5,000*l.* by Mr. Green. When they became due, a fifth set was issued, and the company retired those held by Mr. Green with bills of the new set to the amount of 5,000*l.*; but the remaining bills of the new set were discounted by the company for their own benefit, leaving overdue bills of the fourth set, to the amount of 16,000*l.*, in the hands of the Alliance Bank. These bills, when presented by the bank, were dishonoured. The company was now being wound up, and the present summons was taken out by the Alliance Bank in the course of the winding-up.

Mr. Murray died insolvent in 1867. Some of the shares deposited with the company had been sold by persons to whom the company had given them as security for a debt, and the surplus, after satisfying that debt, was 2,835*l.* 7*s.* 4*d.* This sum, and fifty shares in the Turin and Savona Railway remaining unsold, were now claimed by the Alliance Bank as a specific security; and the same claim was made by the holders of the fifth set of bills, who asserted a right in priority to that of the Alliance Bank. The question, however, between the bank and the holders of the fifth set of bills was one of evidence, which need not be reported. The claims were all opposed on the same grounds by the official liquidator of the General Rolling Stock Company.

Sir R. Baggallay and *Mr. Eddis*, for the Alliance Bank.—The case is decided by the rule in *Ex parte Waring* (19 Ves. 345); and the rule is not confined to cases of bankruptcy—*Powles* v. *Hargreaves* (3 De Gex, M. & G. 430; 23 L. J. Ch. 1).

[The MASTER OF THE ROLLS.—*Ex parte Waring* does nothing more than settle the equities between two estates.]

Mr. Eddis.—I admit that we have no right to the security *per se:* but, inasmuch as Mr. Murray had the right to have the security established in favour of his estate, the holders of the bills are entitled to it—*Loder's case* (37 L. J. Ch. 846; L. R. 6 Eq. 491).

Mr. Jessel and *Mr. Winterbotham*, *Mr. Wickens* and *Mr. Davey*, and *Mr. Jason Smith*, for different holders of the bills of the fifth set, cited also *Ex parte Stephens* (3 Ch. Ap. 753); *Hickie & Co.'s case* (36 L. J. Ch. 809; L. R. 4 Eq. 226).

Mr. Southgate and *Mr. Bagshawe*, for the official liquidator of the company, were not called upon.

The MASTER OF THE ROLLS.—The rule laid down in *Ex parte Waring*, in one sense, does apply to this case; but, in another sense, it does not; for it does not give any security to the holders of bills. The distinction is obvious. If a person advances a sum of money upon a mortgage of an estate (it is exactly the same thing if the security consists of railway shares, or the like), he takes the mortgage as a security for the sum which he advances. He may also take another security. He may take a judgment; he may take a bill; he may take any sort of other collateral securities. These are securities for the money which is advanced. But when a security is given for a bill, no money passes between

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the parties. The mortgage is given as a security that the person who gets the money upon the bill will meet it at maturity. Then, if he does, the security is at an end, and there is no further transaction between the parties. That was the case in *Ex parte Waring* and in *Powles* v. *Hargreaves;* and, in fact, that is the usual case on which the equity has arisen. When I said that *Ex parte Waring,* in one sense, applies, I meant this. In that case Lord Eldon lays down that, when there are two insolvent estates, it is the duty of the Court to settle the equities between them, and the billholders undoubtedly get the advantage of settling the equities between the two estates.

Now, in the present instance, suppose there had been no dealings whatever except between Mr. Murray and the company. The company advance 12,000*l.* on security to Mr. Murray, upon certain conditions under which the mortgage debt is raised to 21,000*l.* As security for that, he deposits a certain number of shares in an Italian railway and in a Belgian railway. That is the mortgage. As an additional security, he gives bills for 21,000*l.* Now, I am not going into the question of the first, second, third, fourth and fifth sets of bills. I am merely pointing out that he gives bills for the amount of 21,000*l.* to secure what is due upon the mortgage. Then, as between Mr. Murray and the company, Mr. Murray owes the company 21,000*l.*, and has given bills to that amount; and he has also given mortgage securities for the same amount. When these bills become due, he renews them; that is to say, he gives bills for 21,000*l.* more to meet the bills which are out. The company, instead of taking up all the bills which are out, leave 16,000*l.* of them out and discount the other 21,000*l.*; the consequence of which is, that there are bills of Mr. Murray to the amount of 37,000*l.* to secure a debt of 21,000*l.*, and, in addition to this, railway securities are deposited. If both parties were solvent, the matter would be very simple, Mr. Murray would pay the 21,000*l.* and get back his securities; and, in addition to that, he would compel the company either to take up or to pay these bills to the amount of 16,000*l.* In point of fact, those are the rights now existing between the two estates. The 36,000*l.* being proved against Mr. Murray's estate, Mr. Murray's executor is entitled to have the deposits returned from the company, and to have the bills for 16,000*l.*, which have been charged against his estate, charged against the company. Those equities must, in my opinion, be set right now upon the principle of *Ex parte Waring,* in taking the accounts between the two estates. But that does not give the holders of the bills any right to any security whatever. It is a question between the two estates, which must be settled wholly regardless of the persons who are the holders of the bills, although these persons may undoubtedly get the advantage of one estate being made a little larger, or the disadvantage of the other estate being made a little less.

The summons, therefore, must be dismissed.

MALINS, V.C., Nov. 19, 1868.

BROWN *v.* BROWN.

38 L. J. Ch. 153; L. R. 7 Eq. 185; 19 L. T. 594; 17 W. R. 98.

Referred to, *Hood* v. *North-Eastern Railway,* [1871] E. R. A.; 40 L. J. Ch. 17; L. R. 11 Eq. 116; 23 L. T. 433; 19 W. R. 266 (V.C.).

Injunction—Motion to restrain Suit in Divorce Court—Jurisdiction—Separation Deed—Fraud—Plaintiff not coming "with clean Hands"—Pleading—Cross-Bill.

HUSBAND AND WIFE.—*A separation deed executed by a husband and wife contained a covenant that neither party should take proceedings against the other in respect of any cause of complaint which had arisen before the date of the deed, every offence then committed by either party being thereby condoned.*

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The husband executed this deed upon the faith of his wife's protestations of her innocence, but he shortly afterwards discovered that she had previously to the execution of the deed been guilty of adultery, and he instituted, on the ground of fraudulent concealment, a suit in the Divorce Court for a dissolution of the marriage. The wife then filed a bill to restrain that suit, as being a violation of the covenant in the deed, but did not deny the adultery and misrepresentation. Upon motion for injunction:—Held, *that the plaintiff could have no relief in equity, first, because the deed could be well pleaded in the Divorce Court; and secondly, because the plaintiff did not "come with clean hands"; and motion dismissed, with costs.*

Where a defendant seeks to impeach for fraud a deed which is pleaded against him, he may set up the fraud by his answer without filing a cross-bill.

This was a motion on behalf of Louisa Marie, the wife of David Brown, a Colonel in the Indian army, and her trustees under a separation deed, to restrain Colonel Brown, the defendant, from prosecuting a suit in the Divorce Court for the dissolution of his marriage with the plaintiff, his wife, upon the ground that such proceedings were in violation of a covenant on his part contained in the separation deed.

The defendant and his wife were married in India in July, 1861, and had two children, but unhappy differences arose between them in consequence of the improper conduct of the wife, and in February, 1865, Mrs. Brown left her husband and came to England. In April, 1868, however, Colonel Brown joined his wife in England, and resumed cohabitation with her, but in the following June they again separated, and after another short cohabitation, a final separation took place, and on the 13th of July, 1868, a separation deed was executed by them and by two trustees for Mrs. Brown, whereby mutual covenants were entered into on both sides for the observance of the terms and conditions of the deed, which after providing that the wife should live separate from her husband, without any attempt on his part to compel her to return to cohabitation, and that she on her part should not sue for restitution of conjugal rights, contained the following clause:

11. "If the said David Brown and Louisa Marie Brown shall be reconciled to each other and return to cohabitation, or if their marriage shall be dissolved by a Court of competent jurisdiction in respect of anything done, committed or suffered by either party after the date of these presents, then and in either of such cases the covenants, agreements and stipulations hereinbefore contained shall forthwith become wholly void except in respect of proceedings for a breach thereof previously committed; but no proceedings shall be commenced or prosecuted by or on behalf of either party against the other in respect of any cause of complaint which now exists or has arisen before the date of these presents, and every offence (if any) which has been committed or permitted by either party against the other shall be considered as and the same is hereby forgiven and condoned; and in case either party shall hereafter commence or prosecute any proceedings against the other in respect of any cause of complaint which may hereafter arise, no offence or misconduct which has been committed or permitted before the execution of these presents, and no act, deed, neglect or default of either party in relation to any such offence or misconduct shall be pleaded or alleged by either party or be admissible in evidence."

On the 31st of August, 1868, however, Colonel Brown commenced a suit and presented his petition in the Divorce Court for the dissolution of his marriage with Mrs. Brown, charging by the 5th paragraph of his petition that in the year 1867, whilst his wife "was residing at Edinburgh and divers other places in Scotland and England, she had committed adultery with some man unknown, and that in the month of December, 1867, she had a miscarriage in Edinburgh." The petition then alleged that at the time when Colonel Brown resumed cohabitation, in 1868, he was ignorant that she had been guilty of adultery,

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and that he remained in ignorance until after the deed of separation had been executed.

The present bill was filed by Mrs. Brown (by her next friend) and the two trustees of the separation deed against Colonel Brown, charging that the institution of the suit in the Divorce Court was a violation of the covenants in the deed, and a breach of faith on his part; and it prayed an injunction to restrain the Colonel from prosecuting his suit and from commencing any other proceedings to obtain a dissolution of his marriage, upon any of the grounds alleged in the 5th paragraph of his petition; and it further asked that, if necessary and proper, the trusts of the deed might be executed and the covenants performed under the decree and direction of the Court.

The defendant by his answer stated that he believed his wife to have been unfaithful to him in India, though he was never in a position to prove it. But he asserted positively that when the separation deed was executed he had no reason to suppose that she had committed adultery after she left India, and that he executed the deed in the belief that whatever might have happened in India, since that time she had done nothing whatever which would enable him to obtain a divorce or judicial separation. He charged her with concealing from him the fact of her miscarriage, and asserted that she frequently protested that she had always been faithful to him, adding that it was only upon the discovery of the miscarriage that he repudiated the deed, and commenced proceedings in the Divorce Court; and under the circumstances he asserted that he was induced to execute the deed in ignorance of a material fact, and by the fraud of his wife. He also objected to the jurisdiction, insisting that the matters in question were properly triable in the Divorce Court, and not in equity, claiming the same benefit as if he had demurred to the bill.

An injunction was now moved for in the terms of the prayer of the bill.

Numerous letters which had passed between the defendant and his wife were put in evidence, wherein she repeatedly assured him of her innocence of the charges made against her. These are more particularly alluded to in the judgment.

Mr. Cotton and *Mr. Ferrers*, for the motion cited *Rowley* v. *Rowley* (35 L. J. Prob. & M. 110; L. R. 1 Scotch & Div. Ap. Ca. 63), in which, after the compromise of a divorce suit and an undertaking by the wife not to institute other proceedings in the Divorce Court, it was held that the wife was precluded from suing on any facts anterior to the compromise. Even if this deed can be pleaded in bar in the Divorce Court, that is no reason why the plaintiffs should not come here; for this Court will interfere to stop a breach of the contract in a separation deed—*Hunt* v. *Hunt* (31 Beav. 89; 31 L. J. Ch. 161).[1] *Rowley* v. *Rowley* establishes that there is nothing contrary to public policy in a covenant not to sue for the dissolution of a marriage; while *Hunt* v. *Hunt* establishes that there is nothing contrary to public policy in covenants such as are contained in the present deed, and the plaintiffs are entitled to ask the Court to restrain the breach of them. The defendant admits that he knew his wife had committed adultery in India, and condoned it. He executed the deed, therefore, knowing that he had condoned everything that took place in India, and therefore the 11th clause of the deed can only apply to acts committed in England and not then already condoned. It can have no meaning unless it be intended to avert the very proceedings now instituted by the defendant. It was intended to apply to facts which had taken place, but of which the husband was ignorant; otherwise it is a nullity. But further, the defendant cannot avail himself of his defence of fraud and misrepresentation by his answer. He must impeach the deed, if at all, by a cross-bill—*Eddleston* v. *Collins* (3 De Gex, M. & G. 1; 22 L. J. Ch. 480).

Mr. Glasse and *Mr. Lindley*, for the defendant.—The plaintiffs are seeking

(1) It was stated in the course of this argument that *Hunt* v. *Hunt* was appealed to the House of Lords, and their Lordships, upon hearing the appeal, seemed to be disposed to overrule Lord Westbury's decision; but Mrs. Hunt, the plaintiff, died, and no judgment was delivered.

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to transfer to this Court the jurisdiction of the Divorce Court. The deed of separation may well be pleaded in bar in the Divorce Court, as is shewn by the case of *Rowley* v. *Rowley*. A release is a good plea in any Court. But this is a case of admitted fraud. The bill is not amended to meet the defendant's charges, and there is no denial of the miscarriage. The fraud clearly may be set up by answer, without the necessity of a cross-bill. You may even plead fraud to a decree though it has not been set aside—per Willes, J., in *The Queen* v. *the Sadlers' Company* (10 H.L. C. 431; 32 L. J. Q.B. 337); and there is no reason for compelling the defendant to set aside the deed first. We submit that there is no equity in this bill whatever. If the deed can be well pleaded at law, as it clearly can be—*Lyall* v. *Edwards* (6 Hurls. & N. 337; 30 L. J. Ex. 193), the plaintiffs have no right to come here—*Hardinge* v. *Webster* (1 Dr. & Sm. 106, per Kindersley, V.C.,; 29 L. J. Ch. 161); and the very point now in question was dealt with by the Divorce Court in *Dempster* v. *Dempster* (2 Sw. & Tr. 438; 31 L. J. Pr. M. & A. 20), which case shews that condonation is not binding if made in ignorance of the offence condoned. The Divorce Court, therefore, is the proper tribunal to try the questions at issue here. But, above all, if the plaintiff comes into equity at all, she must come with clean hands, and it is sufficient for us to say that, as she comes charged with fraud, which she does not deign to deny, she can get no relief here.

Mr. Cotton, in reply.—Condonation is forgiveness of acts known at the time; but that is not this case. The deed was intended to prevent further investigation, and applies to acts known or unknown alike. But a deed of this nature is not recognized in the Divorce Court, and the plaintiff herself is incapable of giving evidence there. Therefore, in that Court she will be without defence.

MALINS, V.C.—This case is rested upon a deed of separation, executed on the 13th of July, 1868. The husband and wife, having married in 1861, led a life of great discomfort, which resulted in the husband sending his wife home from India in 1865. Letters have been read which passed between them from 1865 to 1868, in which latter year he returned to England, and these shew that during her absence from him in England her conduct raised the greatest suspicions in the mind of her husband, from communications made to him by her own friends. But he seems to have received letters from her which satisfied him that no criminal act had taken place after she left him in India; and amongst the letters which have been read is one written by her from Edinburgh on Christmas-day, 1867, which, in fact, tells him that she was very unwell, but leads him to believe that her illness was of an ordinary character. He comes home in the following April and resumes cohabitation with her; but again becomes dissatisfied with her conduct, and in June they separate again. Further correspondence then takes place, and on the 16th of June she writes to her husband, giving him the most solemn assurance that she has never been guilty of adultery. Upon the faith of that assurance, he resumed cohabitation with her on the 17th of June; but her conduct was again, I assume, unsatisfactory, for they again separated; and finally, on the 13th of July, this deed of separation is executed, which contains the contract not to sue now relied on. Notwithstanding the formal language of that deed, about six weeks after its execution Colonel Brown commenced a suit, and will, unless restrained by this Court, continue to prosecute it, for the purpose of obtaining a dissolution of his marriage; and the bill is filed to restrain him from committing this alleged violation of the express terms of the deed. The husband swears that he executed the deed on the faith of the truth of her statement that she had never been guilty of adultery; but information was conveyed to him, subsequently to the execution of the deed, which led him to make inquiries; and it turns out that this lady, who had so solemnly pledged her word that she had never been guilty of adultery, had, on the 29th of December, 1867, four days only after she wrote the letter to him of Christmas-day, had a miscarriage,—he having been more than three years away in India. It is therefore not attempted to be

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denied that, at the very time she gave her husband those solemn assurances of her innocence, she well knew that she had been guilty of adultery; and, in giving him those assurances, she was guilty of making as fraudulent a representation as one human being ever made to another.

Now, under those circumstances, it is said that this deed nevertheless is conclusive; and so conclusive that I, sitting in a Court of equity, am bound to restrain any proceedings of the husband with a view of obtaining a divorce from a wife, who has not only been guilty of adultery but has given him such solemn assurance of her innocence, because, forsooth, to permit him to go on with these proceedings would be to allow him to commit a violation of his express contract. The first point which I suggested to the counsel for this lady was that, if this deed is a binding deed, it can be pleaded in the Divorce Court. I have always understood, and continue to understand, that in all proceedings by a husband to obtain a divorce from his wife on the ground of adultery, if it can be shewn that condonation has taken place, there is an end of the proceedings of the husband. But it must be a condonation of a known fact, and therefore the act of the husband, which would have amounted to condonation had he been aware of the adultery, can have no operation when he was in total ignorance of it. Now, if this husband had been aware of his wife's adultery, it can admit of no shadow of doubt in my mind that if that be shewn to the Court, this deed which he has executed is a complete and final bar against his taking any proceedings in that Court, because he has contracted with her that "every offence which has been committed or permitted by either party against the other shall be considered as, and the same hereby is, forgiven and condoned." The deed, therefore, is perfectly conclusive in the Divorce Court, if it is a binding deed. I was at first somewhat inclined to take the view, and I so stated the difficulty I felt, that probably this deed must stand until it was set aside, and that it would be necessary for the husband to file a bill to set aside this deed as having been obtained by fraud or misrepresentation. For there was more than suppression here. The husband swears that but for her assertion of her innocence he never would have executed the deed, and therefore this is a deed into which he was induced to enter by positive misrepresentation and false statements on the part of the wife. But, at any rate, if this is a deed which is binding, it clearly can be pleaded in the Divorce Court.

With regard to the propriety of this Court interfering to restrain proceedings in the Divorce Court the counsel for the plaintiffs rely upon the case of *Hunt* v. *Hunt*, in which Lord Westbury, overruling the Master of the Rolls, decided that where parties have entered into a contract to do or not to do certain things, and they proceed to act in contravention of those stipulations by taking proceedings in the Divorce Court, this Court will interfere to stop them by injunction. Whatever my private opinion may be, of course I must take the law from the Lord Chancellor, although I may concur with the Master of the Rolls, whose decision was overruled, but I am told as a matter of fact that there was an appeal to the House of Lords, and I am informed (I presume correctly) that no judgment was ever given in consequence of the death of Mrs. Hunt. I cannot tell what the House of Lords might have done, though I am told that, as far as opinions may be collected, the probability is that the Lord Chancellor's decision would have been overruled. But I will assume for the purpose of my present decision, that it is within the jurisdiction of this Court to restrain proceedings in the Divorce Court in contravention of the terms of a deed of separation. Nevertheless, I can see no propriety in adopting such a course here, where all that is necessary may be made use of as a defence in that Court. I quite accede to the argument that, if a man proceeds to recover a debt at law which has been released, it is not necessary to come to this Court to prevent him from suing at law in contravention of his release, because the release can be used in the Court of law. Acting upon that principle, Sir Richard Kindersley refused to interfere in the case of *Hardinge* v. *Webster*. Whether that case was cited in the case I am now referring to I know not, but I have a distinct recollection of a case in

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which an application was made to me with regard to Colonel Berkeley's debts,[2] the application being that I should stay proceedings in the Bankruptcy Court, upon the ground that a deed had been executed which released the defendant's debt. The question in that case was a very important one involving an enormous amount of debt, 700,000*l*., and therefore I may assume it was a case in which, if the parties had thought there was any hope of altering my decision on appeal, they would not have omitted the attempt, and as there has been no appeal I must assume that my decision was correct. The view which I took was that it was unnecessary for this Court to interfere, because if the deed was a release it could be put in as a defence in the Bankruptcy Court, and therefore I dismissed the motion. So, in this case, if this deed can be used as a defence in the Divorce Court, it will be a conclusive answer to the application of the husband for the divorce which he seeks.

But then it has been said that in the Divorce Court the validity of this deed cannot be entered upon. It appears to me to be perfectly plain that in order to constitute a condonation the offence condoned must be a known fact, for there can be no condonation of an unknown fact. The case of *Dempster* v. *Dempster* goes exactly to the point. In that case, where the wife was suing her husband for dissolution of marriage on the ground of cruelty and adultery, it was said that she had condoned both, and it turned out that she had condoned the cruelty, which was a thing she must have been aware of, because it was cruelty practised towards herself, but of the adultery she was in ignorance; and although she had condoned the cruelty that was no condonation of the adultery, of which she was ignorant. Condonation may be shewn by various circumstances. It may be shewn by conduct, such as resuming cohabitation, and various other acts; but you cannot have a more solemn condonation than under the hand and seal of the party, where it is expressly agreed that everything shall be "forgiven and condoned." But if that condonation has taken place in ignorance of the real facts (which will be the reply of the husband), why should not that circumstance of ignorance under which the condonation took place be just as much open to inquiry in the Divorce Court in this case as it was in the case of *Dempster* v. *Dempster*, where it was held to be no answer to the application of the wife? So in the case of *Rowley* v. *Rowley*, the whole question was investigated in the Divorce Court, as I am satisfied it can be investigated in the present case. It is not an unimportant circumstance to which I have called the attention of counsel, that this bill, having been filed in September is answered on the 7th of November, and that in his answer the husband swears that his wife has been guilty of adultery; that he was ignorant of that fact when he executed the deed, and that if he had known it he would not have executed the deed at all. This notice of motion was given two days after the answer was put in, and, I am satisfied, with the knowledge that the answer had been filed: and yet there is no amendment of the bill to negative those charges; and indeed the case comes on with the admission that this lady has been guilty of adultery, and that she had given her husband the most solemn assurances to the contrary.

Therefore I am of opinion, first, that this deed can be used as a defence in the Divorce Court; and, secondly, that a party coming into this Court to ask for its interference to prevent legal proceedings, whether they be proceedings to recover a debt by an action at law, or to enforce any right in the Court of Divorce, must come here with clean hands, and with a case entitling him to call upon a Court of equity to interfere; but this lady, coming here as she does, upon the admission of her own counsel that she obtained the execution of this deed by the grossest misrepresentations, does not come into this Court under circumstances which can justify me in interfering in any way on her behalf. Upon that ground also, as well as the first ground, the motion must be refused.

Now, it has been strongly urged by Mr. Cotton that this gentleman must be considered as having known that his wife had been guilty of adultery, and the

(2) *Berkeley* v. *Dicker* (16 L. T. 556).

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topic which has been most strongly pressed upon me is that he had such suspicions that she had committed adultery in India as almost to amount to certainty; and that, in fact, he believed it. I will assume that he knew that she had committed adultery in India, and with that knowledge he resumed cohabitation with her on his return from India. That was an absolute and conclusive condonation of all that had taken place before. But if he did condone that adultery of which he was aware in India, is that any licence to her to commit adultery after he resumes cohabitation? Certainly not. If, therefore, taking a merciful view of her conduct, he condoned her adultery when he resumed cohabitation with her in April last, believing that she had been guilty of adultery in India, is that any pardon or forgiveness of her having done the same thing in England? My own opinion is, that he might have had strong suspicions that she had committed adultery in India, but those suspicions were removed by her positive assurances; and although she had been guilty of so much levity, yet when in that sacred confidence which ought to subsist between husband and wife she assured him that she had not been guilty of adultery, he was entitled to believe her, and I think he did believe that she had not been guilty of adultery even in India; but even if he did believe that she had been, that can afford her no excuse for her adultery in England. I am satisfied upon the evidence of her own letters that this deed was executed in the belief of the truth of her solemn assurance that not only not in India but during no part of her married life had she been guilty of any impropriety. In the belief of that solemn assurance of her innocence he executed this deed, and upon every principle of this Court I am bound to come to the conclusion that a deed executed under such misrepresentation of facts cannot stand, and certainly can give the party who has been guilty of that misrepresentation no title to come and ask for the assistance of this Court.

In my opinion, therefore, upon every ground this motion entirely fails, and must be dismissed with costs.

MALINS, V.C., Jan. 16, 1859.

In re BEASNEY'S TRUST.

38 L. J. Ch. 159; L. R. 7 Eq. 498; 19 L. T. 630.

Referred to, *In re Phene's Trusts*, [1870] E. R. A.; 39 L. J. Ch. 316; L. R. 5 Ch. 139; 22 L. T. 111; 18 W. R. 303 (L. J.).

Evidence—Presumption of Death—Evidence of Particular Time—Intermission of Accustomed Act.

EVIDENCE.—*A man of loose and drunken habits had for many years lived on friendly terms and in constant communication with his relatives, by whom he was chiefly supported, his only other source of income being the dividends of* 1,000*l.*, *to which he was entitled for life, and the half-yearly payment of which he regularly demanded so soon as they became due. He was last seen on the* 12*th of August*, 1860, *being then in an abject and almost dying condition, and had never since been heard of*:—Held, *that his non-application for the half-yearly dividend, which became payable in October*, 1860, *taken in conjunction with the other circumstances of the case, was sufficient evidence to raise the presumption of his death before the* 14*th of November in that year.*

This was a petition by the administratrix of Emma Elizabeth Beasney for payment out of Court of a sum of 1,000*l.*, which had been paid in under the Trustee Relief Act, and to which the petitioner claimed to be entitled, on the presumption that William Beasney, who had a life interest in the fund, but had not been seen or heard of since the 12th of August, 1860, pre-deceased the said Emma Elizabeth Beasney (his half-sister), who died on the 14th of November, in that year.

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The petitioner's affidavit, in support of the petition stated, that William Beasney, her step-son, was a man of loose and drunken habits; that he had from time to time earned a precarious living as a tailor, to which business he had been apprenticed in early life; but that he was chiefly supported by the assistance of the petitioner and other relatives, with whom he lived on affectionate terms; that after he became entitled, in 1857, to the income of the fund in question, he always looked forward to the regular half-yearly payment of the dividends, and punctually applied for the same, squandering the money in drink and dissipation as soon as he received it; that he received his last payment in April, 1860, but that no application was ever made by him, or on his behalf, for the October or any subsequent dividend—(this was corroborated by the production of letters received by the petitioner from the trustee of the fund in answer to her inquiries); that when he was last seen by the petitioner in August of that year, he was in a miserably emaciated and abject condition, poorly clad, and suffering from severe pulmonary disease, and spoke of himself as not expecting to live long; that something was then said by him about going over to New York for his health, and returning in time to receive his October dividend; but that he had no means to enable him to pay for the voyage; that nothing had even been heard of him since; that inquiries had been from time to time instituted, and particularly in 1867, the petitioner had published advertisements in the *Times* and other papers offering 10*l.* for a certificate of his death, or any intelligence respecting him, but without effect.

Under these circumstances the Court was asked to presume that his death took place before the 14th of November, 1860, in which event his half-sister Emma Elizabeth became solely entitled to the fund.

Mr. Glasse and *Mr. Daly*, for the petitioner, referred to the cases of—*Doe* v. *Nepean* (5 B. & Ad. 86; 2 L. J. K.B. 150) and *Benham's Trust* (36 L. J. Ch. 502; L. R. 4 Eq. 416), upon the general principle, and contended that there was sufficient evidence in the present case to fix the particular period within which the deceased must have died.

They cited—*In re Henderson's Trusts* (unreported), before the Master of the Rolls, in July, 1868, in which case the Court presumed that Frances Emerson, an annuitant, died in 1841, on the ground of her having never received or applied for the dividends of certain trust-funds since July in that year, there being evidence to shew that she was chiefly dependent on them for her livelihood, and had regularly received them for many years previously, but had never been seen or heard of since August, 1841.

Mr. G. O. Morgan, for parties entitled in the event of William Beasney's having survived the 14th of November, 1860.—The presumption of law relates only to the fact of death, which we do not dispute; the particular time must be the subject of distinct proof, and the onus is on the petitioner—*Thomas* v. *Thomas* (2 Dr. & Sm. 298).—The petitioner's case rests solely on her own testimony, and that is quite insufficient to induce the Court to assume that the death took place either before the October dividend was payable, or within the five weeks intervening between that time and the 14th of November. The period is unreasonably short in the absence of any positive proof. He may have gone over to America and lived on for many months without being heard of. The Court in such a case will adhere to its ordinary rule, and presume death only at the expiration of the seven years.

MALINS, V.C. (without calling for a reply), after stating the general rule as laid down by Lord Denman in *Doe* v. *Nepean*, and followed by himself in *In re Benham's Trusts*, continued—The legal presumption of death at the expiration of seven years is adopted for convenience, to enable parties to settle their rights; but those who assert that the death took place at any particular time within that period have thrown upon them the burthen of proof, not necessarily positive proof, but that which is considered sufficient proof in the eye of the law, as deduced from the facts in evidence. In this case William Beasney was last

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seen and heard of on the 12th of August, 1860. The presumption of his death arises now, not on any contest between the parties as to the fact, but as to the particular time of his death, which becomes material by reason of the death of his half-sister on the 14th of November, in that same year, there being no dispute that if she survived him, she took the fund as sole next-of-kin, whereas, if he survived her, other parties became his next-of-kin, and are now entitled. The question therefore is, whether he can be presumed to have died between the 12th of August and the 14th of November, 1860. A case has been cited which recently came before the Master of the Rolls, where an annuitant who had for many years been in the habit of demanding her half-yearly payment of income failed to apply for it after a certain date, and was never afterwards heard of. That was held sufficient to raise the presumption of her having died previously to the next half-yearly day of payment. That appears to me to be a sound principle, and quite applicable to the present case. This young man lived, as it seems, on good terms and in constant communication with his relations up to the 12th of August, 1860, when he was last seen by the petitioner in such a condition that his death might not unreasonably be expected to take place at any hour. There is nothing to impugn her testimony upon this point, and his state of health is sufficiently accounted for by his drunken and dissolute habits of life. Evidently he was then in almost a dying state. But latterly the great event of his life, and that to which he was always looking forward, was the half-yearly receipt of the dividend upon this fund. He had received his April dividend as usual. How then can we account for his never applying in October except on the supposition that he was dead? Even had he gone to America, he must have borrowed or applied to some of his friends for the means to go, and when there he could easily have communicated with them as to the payment of his dividend. But there is no evidence whatever that he did go, and I cannot presume that which under the circumstances is in the highest degree improbable. The only mode by which his non-appearance and his non-application for his dividend can reasonably be accounted for is, by presuming that he died very shortly after that 12th of August. I feel satisfied that if living he would not have allowed a day to elapse after his dividend became payable; still more so, that he would not have allowed a space of four or five weeks to intervene after that time without making some application for the money. I think, therefore, that the particular, circumstances of this case justify the Court in presuming that the death took place, if not actually before the dividend was due in October, at all events before the 14th of November, which is the day upon which the present question turns. This fund then having been limited over upon his death to his next-of-kin, passed to his half-sister, who was then living, and the petitioner is now entitled as her legal representative. There must be an order for payment out of court accordingly. Costs out of the fund.

MALINS, V.C., Nov. 14, 16, 1868.

BEATY v. CURSON.

38 L. J. Ch. 161; L. R. 7 Eq. 194; 20 L. T. 61; 17 W. R. 132.

Trustee and Cestuis que Trust—Payment into Court—Trustees' Costs, Charges and Expenses—Deduction by Trustee.

TRUST AND TRUSTEE.—*Where a trustee's claim for costs, charges and expenses is contested, he is not entitled to retain the amount of such claim and pay the balance of the trust fund into Court; but should pay the whole fund into Court and leave it for the Court to award the proper amount to which he is entitled in respect of his claim.*

The point raised by this suit was whether or not a trustee is justified, before

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paying trust funds into Court, in deducting therefrom the costs, charges and personal expenses claimed by himself on account of the trust, where a dispute has arisen in respect of the amount of such claim.

The defendant, John Curson, had, since the death of his co-trustee in 1858, acted as sole trustee of a fund of 1,065*l.* 1*s.* 9*d.* consols, the income of which was payable to the plaintiffs as tenants for life.

In 1863, Curson, being then seventy-four years of age, was desirous of retiring, and arrangements were made for the appointment of two new trustees. Disputes, however, ensued, and the fund was never transferred into their names; Curson insisting upon the execution by his *cestuis que trust* of a release, to which (as advised by his counsel) he was not strictly entitled, and also claiming the right to retain out of the fund the sum of 56*l.* for his own costs and personal expenses. This demand was resisted by the proposed new trustees on behalf of the plaintiff, as being excessive, whereupon Curson sold out sufficient stock to answer his claim for costs, &c., and paid the balance of the fund into Court, under the Trustee Relief Act.

In 1866 the plaintiffs filed the present bill for an account of the whole fund, alleging that the amount of costs and expenses claimed by the defendant was excessive, and related to matters other than the payment into Court; that he had no right to deduct the sum in dispute, and that the payment into Court was vexatious and oppressive.

Mr. Bevir, for the plaintiffs.

Mr. Phear, for the defendant, contended that the refusal of the plaintiffs to execute the release and the other circumstances of the case justified the payment into Court, and that if the plaintiffs were dissatisfied at the sum retained by their trustee for his costs and expenses, their simple remedy was taxation, to which the defendant was willing to submit.

MALINS, V.C., in the course of his judgment, said he wished it to be understood as a general rule that, in his opinion, the proper course for a trustee to pursue under circumstances like the present, where the amount of his claim for costs and expenses was in dispute, was to pay the whole fund into Court, leaving it for the Court to award such costs and other expenses as upon inquiry he should be found entitled to. Such inquiry would always properly arise under the petition for payment out of Court, upon which the trustee would appear and ask for his costs, &c., but no trustee was entitled to be the absolute assessor of his own costs. In the present case his Honour thought the proceedings vexatious and arbitrary. The defendant having taken the law into his own hands must make good the whole fund as prayed by the bill; then on taking the accounts he would be allowed all proper costs, charges and expenses. The defendant to pay the costs of the suit.

LORDS JUSTICES, June 9, 1869.

EARL BEAUCHAMP *v.* THE GREAT WESTERN RAILWAY COMPANY.

38 L. J. Ch. 162; L. R. 3 Ch. 745; 19 L. T. 189; 16 W. R. 1155: reversing, [1868] E. R. A. 79; 37 L. J. Ch. 74; L. R. 3 Ch. 745 (V.C.).

Referred to, *May* v. *Great Western Railway*, [1872] E. R. A.; 41 L. J. Q.B. 104; L. R. 7 Q.B. 364; 26 L. T. 17; 20 W. R. 328 (Q.B.): affirmed, [1873] E. R. A.; 42 L. J. Q.B. 6; L. R. 8 Q.B. 26; 27 L. T. 620; 21 W. R. 295 (Ex. Ch.): and [1874] E. R. A.; 43 L. J. Q.B. 233; L. R. 7 H.L. 283; 31 L. T. 137; 23 W. R. 141 (H.L.): *Wilkinson* v. *Hull Railway*, [1882] E. R. A.; 51 L. J. Ch. 788; 20 Ch. D. 323; 46 L. T. 455; 30 W. R. 617 (C. A.): *Dowling* v. *Pontypool Railway*, [1874] E. R. A.; 43 L. J. Ch. 761; L. R. 18 Eq. 714 (V.C.): *Hobbs* v. *Midland Railway*, [1882] E. R. A.; 51 L. J. Ch. 320; 20 Ch. D. 418; 46 L. T. 270; 30 W. R. 516 (Ch. D.): *Clyde Navigation* v.

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Blantyre, [1893] A.C. 703 (H.L.). Not applied, *Macfie* v. *Callander Railway*, 1897, 24 Rettie 1156 (Court of Session): affirmed, [1898] E. R. A.; 67 L. J. P.C. 58; [1898] A.C. 270; 78 L. T. 598 (H.L.).

Railway Company—Lands Clauses Consolidation Act, 1845—*Pre-emption of Superflous Lands.*

COMPULSORY PURCHASE.—*A railway company took from A. a small piece of land. On part of this they constructed the embankment of their railway, and over the remainder they made a road for the accommodation of an adjoining owner, the parts of whose land they had severed*:—Held, *reversing the decision of one of the Vice Chancellors, that they were entitled to make this use of the remainder, and a bill by A. to establish his right of pre-emption was dismissed*:—Held, *also, that if the case had been otherwise as to the company's right of so using the land in question, the plaintiff would not have been defeated, on the ground that the period mentioned in section* 127. *of the Lands Clauses Consolidation Act has not expired.*

This was an appeal from the decision of Vice Chancellor Stuart, reported 37 L. J. Ch. 74.

The facts are fully stated in the former report, and a short summary of them will here suffice.

The defendants had purchased compulsorily from the plaintiff a small piece of land forming the corner of a field, the two adjacent sides of which were about equally inclined to their railway. On each of these sides there was land belonging to the trustees of the Clerkenwell Charity, the communication between which was cut off by the line of railway, which crossed a part of the piece taken from the plaintiff.

The defendant, in order to restore this communication, and as an accommodation work which they were bound to make for the charity, made a road over part of the land taken from the plaintiff not occupied by their railway; the original plan for which had been slightly altered.

The bill was filed for the purpose of requiring the defendants to re-sell the land thus made use of, as being superfluous land not required for the railway.

The Vice Chancellor having made a decree in accordance with the prayer of the bill, the defendants appealed.

Mr. Bacon and *Mr. Stevens*, for the appellants.—The company are bound to make accommodation works for the charity trustees; therefore to use the land in question for that purpose is to apply it to the purposes of the railway; consequently the land in no sense is superfluous land. They referred to the discussion in *The Earl of Darnley* v. *the London, Chatham and Dover Railway Company* (11 Jur. N.S. 520; 13 W. R. 824); *The Railways Clauses Act*, 1845, *ss.* 16, 45, 68. Very likely it might be that the land would be wanted for the actual railway, supposing it became necessary to widen the embankment. At all events the bill was premature, as the legislature allows the company ten years before it is obliged to sell superfluous lands.—They cited *Astley* v. *the Manchester &c. Railway Company* (2 De Gex & J. 453; 27 L. J. Ch. 478); *The York and North Midland Railway Company* v. *Milner* (3 Rail. Cas. 773); *Rangeley* v. *the Midland Railway Company* (37 L. J. Ch. 313; L. R. 3 Ch. 306).

Mr. Walford, for the respondent, the plaintiff, repeated the arguments which had been pressed in the Court below, contending that the case, as regards the right to sue now, was governed by *Lord Carrington* v. *the Wycombe Railway Company* (37 L. J. Ch. 213; L. R. 3 Ch. 377). The other cases referred to by him were *The Queen* v. *the Wycombe Railway Company* (36 L. J. Q.B. 121; L. R. 2 Q.B. 310, 320); *Eversfield* v. *the Mid Sussex Railway Company* (1 Giff. 153; 3 De Gex, & J. 286; 28 L. J. Ch. 107); *Dodd* v. *the Salisbury Railway Company* (1 Giff. 158); *Simpson* v. *the South Staffordshire Waterworks Company* (34 L. J. Ch. 380); *Flower* v. *the London, Brighton and South Coast*

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Railway Company (2 Dr. & Sm. 330; 34 L. J. Ch. 540); *Bostock* v. *the North Staffordshire Railway Company* (3 Sm. & G. 283; 25 L. J. Ch. 325).

WOOD, L.J.—We think this bill ought to have been dismissed.

The question is not whether the company being under an obligation to make accommodation works for a landowner whose land they have injuriously affected, may take compulsorily for that purpose land belonging to a neighbouring owner. The land purchased from the plaintiff was taken, in the first instance, in order to make the embankment for the railway, and if the railway had been made according to the original design the whole of it would have been used for that purpose, but in consequence of an alteration in the level of the railway a part of it only was required for the actual embankment. But this embankment has the effect of stopping all communication between the northern and southern parts of the lands of the Clerkenwell Charities lying on the eastern side of the railway. The trustees have a right to require a communication to be made. The company accordingly use the part of the plaintiff's land not occupied by the embankment for the purpose of a road to form the required communication. It would be a strong thing to say that when the land had been properly taken for the embankment the company could not appropriate part of it for this purpose. The case may, however, be put upon higher ground by looking at the whole scope of the special act and the general acts incorporated with it. By the special act the company is incorporated for the purpose of making and maintaining the railway and "all proper works and conveniences belonging thereto, according to the provisions of this act and the acts incorporated herewith." Those acts are the Lands Clauses Consolidation Act, the Railways Clauses Consolidation Act, and the Companies Clauses Consolidation Act. In another section of the special act we find that, subject to the usual powers of deviation, the railway is to be made in the lines and on the levels delineated upon the deposited plans, and "subject to the provisions in this and the recited acts contained, it shall be lawful for the company to enter upon, take and use such of the lands as may be necessary for the purposes thereof." Whether the word "thereof" refers to the company or the acts is indifferent.

What duties, then, are imposed upon the company by the general acts? These acts give certain powers and impose certain duties in connexion with making the railway. The section of the Railways Clauses Act (section 16.) which governed the case of *Rangeley* v. *the Midland Railway Company* and *The Queen* v. *the Wycombe Railway Company* is not the section applicable to the case before us. The 68th section of that act is the one which makes it obligatory on the company to make such accommodation works as are in question in this case.—[His Lordship read the section.]—A case might be easily imagined, not in substance much different from the present case, where there might be two fields on one side of the railway constituting the whole possession of their owner, and having as their only connexion a neck of land, and the company took this strip of land for the purpose of their act, thus blocking up the communication. The company in such a case would be compelled to find accommodation for the owner, and if they could not acquire the land from a third person they would be brought to a stand-still, or at least would have to make an expensive and inconvenient communication by means of archways under the line. Would that be a reasonable construction of the acts? All cases must, no doubt, be judged by the test of *bona fides*, but if a company be acting *bona fide* they must be left to their own judgment as to what land they require for the purposes of their works. Then the question is whether making the accommodation works which the company are compelled to make is one of the purposes of their act. I think it is plain that what they are compelled to do must be considered so. It may perhaps be well argued that works for their own accommodation are not of this character, and therefore they ought not to have the power of compulsorily taking land for such works; and, indeed, this seems to be the case, for though section 45. of the Railways Clauses Act allows them to purchase land for extraordinary works, this must be done by agree-

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ment, and not under their compulsory powers. Mr. Walford contended that the act provided that if the company neglected to make accommodation works the landowner might make them himself at the company's expense, and he asked—could this be done on a third person's land? I think the owner might say to the company, "There is a piece of land convenient for my purpose, and without it only an extremely inconvenient communication can be made; so you must acquire it, and make me a proper communication." The Railways Clauses Act provides for making the accommodation by the side of, or over or under the railway, and this must consequently be done. This seems to agree with the view adopted by the Court in *Rangeley* v. *the Midland Railway Company*, where it was held that to form a new path in place of an old public path was one of the purposes of the railway, and that, under the 16th section, the company being authorized or compelled to make the work, they might purchase land for the purpose. Here, under the 68th section, they are compellable to do certain things, and I think they can purchase land compulsorily for those purposes.

As to the point raised that this bill is premature, I agree with the Vice Chancellor that a landowner may come to the Court as soon as the railway company have clearly shewn that the property is not wanted for the purposes of the act, though the period referred to in section 127. of the Lands Clauses Act may not have expired. Where a company is selling land, this is of course the most conclusive proof of their not so requiring it, and accordingly in the recent case which I have just mentioned it was held that the landowner might come as soon as the company sold the land to some one else. Here, if the road to which this land was dedicated had not been one of the purposes of the act, the company would by making it be shewing that the land was not so required for these purposes; and so the landowner need not wait till the expiration of the period within which superfluous lands are to be sold. Since, however, the road falls within the meaning of the purposes of the act, the bill must be dismissed with costs.

SELWYN, L.J.—I am of the same opinion. The first and main question is, whether the company are limited in taking land to such as is actually required for the railway itself, or whether accommodation works are within the purposes of the act. That the limit I have mentioned does not exist was decided by *Rangeley* v. *the Midland Railway Company*, which case established that land might be taken for substituting a highway for the accommodation of the public in place of another which had been interfered with. Whether this is to be extended to private accommodation works is now the question. It has been argued not only that land cannot for such purposes be compulsorily taken, but that when it has been acquired it cannot be retained. Is there any distinction in the acts between public and private works? I think not, for under the 16th section of the Railways Clauses Act all accommodation works are classed together. The remaining question, one of fact, is, whether this particular work which has been made is an accommodation work connected with the railway. There cannot be any doubt that it is of a proper and reasonable character, and immediately connected with the railway. The case of the plaintiff on these points wholly fails.

As to the argument that the bill is premature, that is covered by *Rangeley* v. *the Midland Railway Company*. The appellants are inconsistent in their arguments on this point, because if the company have for a valuable consideration agreed with the charity to give a permanent right of user of this road, they have in fact to that extent given the charity an equitable estate in the land. This equitable estate is in fact sold to the charity trustees, or, in other words, they have sold a permanent interest in the land to a stranger, and this Lord Beauchamp is entitled to come at once to prevent as an interference with his right of pre-emption.

As, however, we are of opinion that, this land being used for the purposes of the act, there is no such right of pre-emption, the bill must be dismissed with costs.

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GIFFARD, V.C., Dec. 7, 14, 1868.

In re THE AGRA AND MASTERMAN'S BANK (LIMITED); *Ex parte* CANNAN.

38 L. J. Ch. 165; L. R. 7 Eq. 102; 19 L. T. 519; 17 W. R. 223.

Company—Winding-up—Remuneration of Official Liquidator—Companies' Act, 1862, *s.* 93.—*Regulation of May*, 1868.

COMPANY.—*In fixing the amount of remuneration to be paid to the official liquidator of a banking company, of which the winding-up had been suspended before May*, 1868, *the Court adopted the principles laid down in the regulation of that date, and estimated the remuneration by the number of hours devoted by the liquidator and his clerks to the liquidation, refusing to adopt a basis of per-centage under the circumstances of the case, and having regard to the nature and amount of the bank's assets and dividends.*

The amount of an official liquidator's remuneration is not influenced by any profit or loss resulting from his dealings with the assets.

Adjourned summons for the purpose of determining the amount of remuneration to be paid to Mr. Cannan as the official liquidator of the above-named bank.

In June, 1866, the bank suspended payment; a voluntary winding-up was commenced, and Mr. Cannan was appointed liquidator. By an order dated the 23rd of June, 1866, the voluntary winding-up was continued under the supervision of the Court, Mr. Cannan being continued as liquidator. On the 18th of December, 1866, an order was made sanctioning an arrangement for the resuscitation of the bank as the Agra Bank (Limited). Under this arrangement and subsequent orders of the Court the assets of the old bank were, subject to certain provisions for the liquidation of the old bank and payment of its creditors, handed over to the new bank. Mr. Cannan, under this arrangement, continued to be employed in the liquidation of the old bank, down to the end of May, 1868. No arrangement had at any time been made as to the amount of his remuneration. The debts and assets of the old bank were enormous, and the business of liquidation was of a very onerous character, involving financial and commercial transactions to the extent of 15,000,000*l.*, and necessitating the employment of a very large staff of clerks. Mr. Cannan collected assets to the amount of 3,700,000*l.*, and paid a dividend of 5*s.* in the pound, amounting to 1,800,000*l.*, in September, 1866, and but for the resuscitating order, would have paid another dividend of 6*s.* 8*d.* in the pound.

In February, 1867, Mr. Cannan sent in a claim for 25,000*l.* as his remuneration to the end of January, 1867, which sum was to include the salaries of clerks and others paid by him. As a reason for allowing the claim he alleged that large profits had been made, of which the bank had reaped the benefit by his management of their concerns. The directors proposed 7,000*l.* as a fair amount of remuneration to Mr. Cannan, but the shareholders resolved to give him only 5,000*l.* The number of hours for which Mr. Cannan and his assistants were employed and the other material facts of the case will be found stated in the judgment.

In May, 1868, a regulation as to the mode of remunerating official liquidators was adopted by the Master of the Rolls and the Vice Chancellors, and sanctioned and approved by the Lord Chancellor. By such regulation "every application by an official liquidator for remuneration must be supported by an affidavit shewing the number of hours devoted by him and his clerks respectively to the business of the liquidation." In fixing the amount of the remuneration, the Judge was to be guided by a scale of remuneration for a day of eight hours, graduated according to the amount of assets divisible among the unsecured creditors. According to that scale, where, as here, such assets were over 500,000*l.*, the

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remuneration of the liquidator was to be 12*l.* per day of eight hours, and that, of his clerks of the first, second and third classes, 3*s.* 6*d.*, 2*s.* 6*d.*, and 1*s.* respectively per hour. But if it should appear to the Judge that in the special circumstances of any liquidation it was proper to add or deduct from the amount of remuneration provided by the scale, he was to make such addition or deduction accordingly.

Sir R. Palmer and *Mr. Westlake*, for the committee of shareholders.

Mr. Amphlett, for the directors of the old bank.

Mr. Druce and *Mr. Fooks*, for Mr. Cannan.

GIFFARD, V.C.—I have to determine in this case the amount of reemuneration to which Mr. Cannan is entitled, as having been the liquidator of the Agra & Masterman's Bank (Limited).

The head office of the bank, when it stopped in June, 1866, was in Nicholas Lane, London. It had branches and agencies at five different places in the East Indies; at Hong Kong and Shanghai, in China; and at Sydney and Melbourne, in Australia; as well as at Edinburgh, I believe, and Paris. Its debts and credits were to be reckoned by millions, its creditors by thousands. The amount of assets collected by the liquidator was about 3,700,000*l.* A dividend of 5*s.* in the pound was paid by the liquidator in September, 1866; this amounted to 1,800,000*l.*, and he would have paid another dividend of 6*s.* 8*d.* in the pound, in January, 1867, but for the order made by the Court approving of an arrangement for the resuscitation of the bank.

The winding-up was a voluntary winding-up, under the supervision of the Court. It was conducted principally by Mr. Cannan; but he had the assistance of his partners and of a confidential clerk of his and theirs, named Gardiner. The clerks of his firm were also engaged in the matter, and there were retained and engaged in this country several of the bank clerks, and abroad several of the bank clerks and agents. Mr. Barnes was also employed abroad, with the approval of this Court. The salaries of the bank clerks in this country, and of the bank clerks and agents abroad, including Mr. Barnes, were paid out of the assets of the company. The clerks in this country were dismissed, soon after the stoppage, on the usual three months' notice and payment. This course was adopted in the cases of those who were re-employed, as well as in the cases of those whose services were entirely dispensed with. The liquidation was conducted with care, attention, judgment and diligence. The liquidator lent money on the security of consols, and invested largely in consols; they rose in value. There was a considerable profit, of which the bank had the benefit, owing principally, first, to the rise in the value of consols; secondly, to the rise in the price of cotton, the liquidator having realized favourably; and thirdly, to the rise in the value of Egyptian bonds. The cotton and bonds were held by the liquidator for some months. An arrangement might have been come to as to the liquidator's remuneration when he was appointed; this was not done, nor do I find before or during the liquidation any trace of any mention by or to the liquidator of any arrangement or agreement as to the basis or principles on which he should be remunerated. The 93rd section of the Winding-up Act of 1862 speaks of the Court fixing a remuneration by way of per-centage or otherwise. Mr. Cannan claims 25,000*l.*, and says that that sum does not amount to more than 12*s.* 6*d.* per cent. on the moneys realized and received during his liquidation. There has been no decision in any contested case which throws any light on the subject; but it has been much considered, and in May, 1868, after the date of the transactions with which I have to deal, an Order was approved by the Lord Chancellor, and adopted by the Master of the Rolls and the Vice Chancellors, laying down the principles on which, and the mode in which, a liquidator's remuneration ought to be adjusted, taking as its basis, according to a given scale, first, the amount of assets divisible among the unsecured creditors; and secondly, the number of hours devoted to the business by the liquidator and by his clerks respectively, dividing the clerks employed into classes, and then, in the special circumstances

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of any liquidation, the Judge, if he thinks it proper, may add to or deduct from the amount of remuneration provided by the scale.

In this state of things, and before going further, I may observe, that three ingredients were referred to as being amongst others proper to be taken into consideration in settling the liquidator's remuneration, no one of which in my opinion ought to be adopted. These are, first, per-centage; secondly, profits made by investing and holding and realizing the assets; thirdly, the time of the clerks and others who had been in the service of the bank, and who were re-employed, or whose services were retained, and all of whom were paid out of the assets of the bank. First, payment by per-centage is not and never was imperative on the Court. The liquidator never had a right to expect that he would be paid by per-centage, and it is a mode of remuneration which, having regard to the circumstances under which this bank stopped, and the nature and enormous amount of the assets and dividends, is not admissible. Secondly, if the remuneration is to be increased simply because there have been profits, there ought to have been a diminution if there had been losses. It so happened that prices in the markets rose. Adverse prices and markets, if such had been the result, would have caused much greater anxiety and labour to the liquidator than favourable ones. Neither rise nor depression was or could be in any way legitimately caused by him, and if the time and labour expended ought to be the main ingredients to be taken into consideration, as I think they ought, it follows that the profits ought not. Thirdly, as to the time of the bank clerks and others, this question ought not to be in any way affected by the dismissal and payment for dismissal, and re-employment at salaries to be paid out of the assets of the bank. It was felt to be impossible to claim anything for the bank clerks and others employed abroad, yet there is just as much reason for making a claim for their time as for making a claim for the time of those who were in England. Both the order referred to and the reason of the thing apply plainly to the time of the liquidator and of his clerks, or the clerks of his firm, of whose services his other business is for the time deprived, and not to those who were paid, not by him, but out of the assets of the bank, and who were exclusively the bank's clerks and servants.

This disposes of the claim based on per-centage, the claim as depending on profits, and the claim for the bank clerks' time. I may dispose in the same way of what is alleged by the committee of shareholders in the 3rd paragraph of their affidavit of the 14th of June, 1867; they there say that the liquidation may be divided into three periods. First, from the stoppage of the bank on the 7th of June, 1866, to the 18th of October, 1866, the date of the meeting of shareholders when the resuscitation arrangements were unanimously approved of. Secondly, from the 18th of October, 1866, to the 11th of January, 1867, when possession of the assets was handed over by the liquidator to the Agra Bank (Limited), under the resuscitation agreement. Thirdly, subsequently to the 11th of January, 1867. And they suggest that the rate of remuneration should be less during the second period than the first, and during the third period than the second. No valid reasons for any such difference have been brought forward. Mr. Cannan's time and labour, and that of his partners and clerks, were just as valuable at the one time as at the others, and I am unable to arrive at any fair criteria which I can justly apply to the estimation of Mr. Cannan's remuneration, excepting those mentioned in the Order of May, 1868. These his counsel did not at the bar adopt, but it is worthy of observation that they were unable to suggest, and did not suggest, any theory or scheme of their own or his, and in substance threw on the Court the whole onus of arriving at a conclusion on such grounds as it might think just and reasonable. In saying this I do not omit to recollect that the 25,000*l*., the amount of the claim, appears to be calculated, at all events in some measure, on the amount of moneys realized during the liquidation; nor in adopting and applying the criteria mentioned in the Order of May, 1868, do I forget the date of the order as compared with the dates of the transactions with which I have to deal, or the

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provision "that if it shall appear to the Judge that in the special circumstances of any liquidation it is proper to add to or deduct from the amount of remuneration provided by the scale, he will make such addition or deduction accordingly," and therefore it is that I take the number of hours employed from the evidence before me, and, though asked to do so, decline to direct any further inquiry on the subject, though I probably should have done so if the Order of May, 1868, had been of an earlier date. From the evidence it appears that between the 8th of June, 1866, and the 31st of January, 1867, the services of the liquidator, his partners and clerks were as follows:

(1.) Mr. Cannan and his partners ... ... 3,377 hours.
(2.) Mr. Gardiner, his confidential clerk ... 1,763 ,,
(3.) General clerks ... ... 11,254 ,,

And from the 31st of January, 1867, to the 30th of May, 1868, Mr. Cannan was employed 725 hours, and his clerks 4,835 hours."

Mr. Cannan states that there is due to his solicitors for costs about 8,000*l*. These costs will of course be properly investigated and provided for by the bank. I do not understand that they enter into the amount of the claim.

The amount of remuneration has been taken into consideration by the directors of the bank, and by them submitted to the shareholders. The directors suggested that 7,000*l*. was a proper sum to offer by way of remuneration; the shareholders declined to offer more than 5,000*l*. It appears from the evidence that the salary of the directors was 5,700*l*. a year; the salary of the London manager and secretary, 5,000*l*.

If I take the time of the liquidator and his partners and clerks as follows, viz.—

Liquidator & Partners—The highest scale in the Order,—			
3,377 hours at 30/-		£5,065	10 0
725 ,, ...		1,087	10 0
		6,153	0 0
Gardiner—1,1763 hours at 3/6		308	10 6
Clerks—11,254 hours:			
$\frac{2}{3}$ = 7,502$\frac{2}{3}$ hours at 2/6	£937 16 8		
$\frac{1}{3}$ = 3,751$\frac{1}{3}$,, 1/-	187 11 4		
		1,125	8 0
Clerks—4,835 hours:			
$\frac{2}{3}$ = 3,223$\frac{2}{3}$ hours at 2/6	402 18 4		
$\frac{1}{3}$ = 1,611$\frac{1}{3}$,, 1/-	80 11 8		
		483	10 0
the result is		£8,070	8 6

I have already stated that the liquidation was conducted with care, attention, judgment and diligence. Mr. Cannan's conduct, as might have been expected, was in every respect what it ought to have been; his duties were onerous, the amounts he had to deal with exceptionally large; and though I think his claim much beyond what I can allow, I do not forget that he was willing to refer it to an impartial person. Therefore, regard being had to all the circumstances I have mentioned, the date of the Order of May 1868 as compared with those of the transactions referred to, and the liberty given by the Order to add to the amount of remuneration provided by the scale, I consider myself justified in arriving at the sum of 8,070*l*. as I have done, and in making the total amount up to 9,000*l*., to which will be added Mr. Cannan's costs and expenses of making out his claim. This, under the circumstances, together with the costs and expenses, is a fair, I may add a liberal, sum to allow, and more probably than will be allowed in cases happening subsequently to the Order I have referred to.

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LORD ROMILLY, M.R., Jan. 26, 1869.

In re THE GENERAL BANK FOR THE PROMOTION OF AGRICULTURE AND PUBLIC WORKS (LIMITED AND REDUCED).

38 L. J. Ch. 168; 17 W. R. 304.

Company—Reduction of Capital—Notice to Creditors—General Orders of March 21, 1868.

COMPANY.—*Notice to creditors under the General Orders of March* 21, 1868, *may, if the creditors are unknown, be given by advertisement.*

At extraordinary general meetings of this company resolutions had been passed for the reduction of their capital.

The General Orders of March 21, 1868, by rule 6, direct the company on making such reduction to file an affidavit, verifying a list containing the names and addresses of the creditors, and by rule 9, require the company, within seven days after the filing of such affidavit, or such further time as the Judge may allow, to send a notice to each creditor whose name is entered on the list.

Debentures payable to bearer had been issued by the General Bank, and the bank had also become guarantee for others of the same nature issued by the Société Cotonnière de St. Etienne du Rouvray; and since it was not known by whom these debentures were held, it was impossible to comply strictly with the directions of the General Order.

Under these circumstances,

Mr. Jessel (*Mr. Davey* with him) suggested that notice should be given to the debenture-holders by advertisement, and that the time should be extended for the purpose.

The MASTER OF THE ROLLS assented.

HATHERLEY, L.C., Jan. 26, 28, 1869.

TENNANT *v.* TRENCHARD.

38 L. J. Ch. 169; L. R. 4 Ch. 537; 20 L. T. 856: further proceedings, [1869] E. R. A.; 17 W. R. 640 (V.C.).: affirmed, [1869] E. R. A.; 38 L. J. Ch. 661; L. R. 4 Ch. 537 (L.C.); and [1872] E. R. A.; 41 L. J. Ch. 779 (L.C.).

Referred to, *Parker* v. *McKenna*, 1875, L. R. 10 Ch. 107 n.; 31 L. T. 296 (V.C.): affirmed, [1875] E. R. A.; 44 L. J. Ch. 425; L. R. 10 Ch. 96; 31 L. T. 739; 23 W. R. 271 (L.C. & L. JJ.). Distinguished, *Sadler* v. *Worley*, [1894] E. R. A.; 63 L. J. Ch. 551; [1894] 2 Ch. 170; 70 L. T. 494; 42 W. R. 476 (Ch. D.). Referred to, *In re Owen*, [1894] E. R. A.; 63 L. J. Ch. 749; [1894] 3 Ch. 220; 71 L. T. 181; 43 W. R. 55 (Ch. D.).

Trustee—Mortgagee—The two Characters united in same Person—Mortgage, Incidents of—Charge simpliciter, Incidents of—Foreclosure—Sale— 15 *&* 16 *Vict. c.* 86. *s.* 48.

MORTGAGE. TRUST AND TRUSTEE.—*An estate, at the time heavily incumbered, was settled by the owner for the benefit of her several children in undivided shares. She appointed her sons the trustees, the eldest surviving one for the time being to be sole managing trustee, with very large powers for the development of the resources of the trust estate and the discharge of the incumbrances. The settlement contained a provision that any of the settlor's children who should at her death hold her acknowledgment for money advanced for her use, should be entitled to "a charge by way of mortgage" on the estate. The managing trustee being in possession of such an acknowledgment from the*

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deceased settlor, and having filed his bill for a foreclosure, a foreclosure was refused, and a sale at chambers ordered. The Lord Chancellor, ***in reversal of a decision by*** Vice Chancellor Giffard, ***on the construction of the settlement, having regard to the settlor's manifest desire, to be gathered from the whole of the settlement, to preserve the estate to the uses of the settlement, and having regard also to the circumstance that the benefit of a " charge by way of mortgage " secured to persons advancing money to the settlor was reserved in favour, not of strangers, but of persons who themselves took a benefit under the settlement*** :—Held, ***that the charge created by the settlement was a charge simpliciter, with the incident of sale only, and not of foreclosure.***

Semble, *that the interest of a trustee having the sole management of an estate, is inconsistent with the interest of a mortgagee having the right to foreclose; and that the Court will not grant foreclosure at the suit of any mortgagee standing in such a double relation to an estate.*

The late Mrs. Margaret Elizabeth Tennant was absolute residuary devisee and legatee under the will, dated the 30th of August, 1831, of her husband, George Tennant the elder, who died in 1832 possessed of considerable freehold and leasehold estates in Glamorganshire. These estates were at the time subject to a mortgage for 50,000*l.* to Messrs. Child, of Temple Bar. In July, 1832, after George Tennant's death, Mrs. Tennant had certain other lands in Glamorganshire conveyed to her in fee simple.

By an indenture of the 9th of April, 1835, to which Mrs. Tennant and her three sons, viz., Henry Tennant, the plaintiff Charles Tennant, and George Tennant the younger were the parties, Mrs. Tennant conveyed her Glamorganshire property to her three sons in trust for herself for life, and then in undivided sevenths for the benefit of her three sons, Henry, Charles and George, and her three daughters, Jane Trenchard, Margaret Tennant and Frances Carré for life respectively, with remainder to their respective children. The settlement provided that it should be lawful for Mrs. Tennant to take the rents and profits in as full and beneficial a manner as she then enjoyed them for her life, and to charge the property with the payment of any sum not exceeding 10,000*l.* It was also provided, that in case any one of the children should hold any bond, note or other security or acknowledgment in writing for money advanced for the use of Mrs. Tennant during her life, he or she should be " entitled to a charge by way of mortgage " on all the premises comprised in the indenture for the amount of the principal money so secured, with all interest which should be due thereon at the time of the death of the said Mrs. Tennant, such charge to take effect next after the mortgage to Messrs. Child; and moreover that, if any one of the children should out of his or her proper moneys pay off the debt due on Messrs. Child's mortgage, " or any part thereof," he or she should be entitled to stand as a mortgagee on the premises for the moneys so paid in place of the Messrs. Child. The trustees were empowered to grant leases with the consent of Mrs. Tennant in her lifetime, and after her death the senior acting trustee, who was to be the senior of the three sons successively for his life, and then the eldest lineal descendant of George Tennant the elder, was empowered to take on himself "the sole and uncontrolled management" of the property, and to do all "lawful and reasonable acts and things whatsoever in and about the management of the said hereditaments and premises as he in his sole discretion should think fit and proper for the benefit and improvement of the said trust estate." . . . " as fully and effectually as the said Margaret Elizabeth Tennant, her heirs, executors, administrators or assigns, could have done them about the management of the said estates and premises in case this indenture had not been executed." There was a power of revocation in the settlement; but it was never executed.

It appeared from the plaintiff's bill that in 1839 out of his own money he paid 7,722*l.* 0*s.* 5*d.* to the Messrs. Child, by which their mortgage debt was reduced to 42,500*l.*, and that he also advanced 12,266*l.* 17*s.* 6*d.* for the purchase of " the Compton Estate," a property convenient to be held with the settled

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property, and which was conveyed to Henry Tennant and himself, it being arranged that it should be held by them on the trusts of the settlement. On the 8th of February, 1850, an account was drawn up of the plaintiff's advances for the benefit of the trust estate, including this purchase, shewing a balance of 56,820*l*. 11*s*. due to him, and Mrs. Tennant wrote and signed at the foot the following memorandum: "I have examined the foregoing account and I admit the above balance of 56,820*l*. 11*s*. to be due and owing from my estate to my son Charles, this 8th day of February, 1850." Mrs. Tennant died subsequently in 1850, and George Tennant the younger in 1851.

On the 9th of March, 1859, the plaintiff filed a bill *(Tennant* v. *Tennant)* against Henry Tennant, the then managing trustee, and the other persons interested under the settlement for the carrying out of the trusts of the settlement, and he obtained a decree, on the 17th of December, 1859, from Vice Chancellor Page Wood, for the carrying of this out. Henry Tennant died on the 26th of September, 1865, leaving the plaintiff the sole surviving trustee of the settlement. In 1845 Mrs. Tennant had mortgaged the estate bought by her in July, 1832, to Richard Harrison for 8,000*l*. The mortgage subsequently became vested in W. S. Davidson, together with an additional security given by Henry Tennant and the plaintiff for an advance on their interests in the trust estate. By an indenture of the 14th of January, 1867, the plaintiff repaid out of his own money the mortgage debt, which then amounted to 8,700*l*., and took a transfer to a trustee for his own benefit of the debt, together with the securities which the mortgagee held on Henry Tennant's and the plaintiff's own beneficial interests in the settled property.

The chief clerk had certified in the suit of *Tennant* v. *Tennant* that three several sums of 14,865*l*. 4*s*. 9*d*., 23,503*l*. 14*s*. and 43,803*l*. 14*s*. 1*d*. were then due to the plaintiff, to which the plaintiff now claimed to add the mortgage debt of 8,700*l*. transferred from Davidson. From the chief clerk's certificate it also appeared that at the date of the decree in *Tennant* v. *Tenn nt* Messrs. Child's mortgage was the first charge on the property comprised in George Tennant the elder's will; that Davidson's mortgage was the first charge on the estate purchased in July, 1832; that the plaintiff's debts of 14,865*l*. 4*s*. 9*d*. and 23,503*l*. 14*s*. were the first incumbrances on the property not charged in favour of Messrs. Child and of Davidson, and the second on what was so charged. It lastly appeared that there was a debt from the estate of 2,250*l*., to the defendant John Trenchard Trenchard, which formed a second incumbrance on the estates not charged to Messrs. Child and Davidson, and the third on those which were. The plaintiff's debt of 43,803*l*. 14*s*. 1*d*. was the last incumbrance on the property.

The plaintiff's bill in the present suit was filed on the 2nd of February, 1867. It stated the facts as above, and that the plaintiff had applied to the persons interested in the equity of redemption in the trust property to release it to him, but that they had refused. It prayed an account of what was due to the plaintiff on the sums of 8,700*l*., 14,865*l*. 4*s*. 9*d*., 23,503*l*. 14*s*. and 43,803*l*. 14*s*. 1*d*., and that in default of payment the defendants might be foreclosed from all equity of redemption in the premises.

Messrs. Child were content with their securities, and did not desire to be redeemed.

The plaintiff was at present tenant for life of two undivided sevenths of the trust estate. The trust estate consisted of lands and canal and wharf property near Swansea.

The defendants resisted a foreclosure in the expectation that the property would in course of time increase greatly in value. At present it was alleged that the income was inadequate to pay the necessary expenses and to keep down the incumbrances. What the defendants desired was an order by the Court, under the 15 & 16 Vict. c. 86, for a sale in preference to foreclosure. They submitted that the plaintiff's position as trustee was inconsistent with his exercise of the right of foreclosure, even if this would in any case have been his proper remedy, and that at all events he could not be entitled to foreclose those

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parts of the settled estates in respect of which he was tenant for life or entitled in remainder or reversion.

Giffard, V.C. (before whom the case came in the Court below) said, in delivering judgment, on the 1st of June, 1868, that he entertained no doubt on the plaintiff's right to sustain the suit. He thought it "absurd to suppose that because a person was trustee he could lose his right as a mortgagee." But he held that the plaintiff being tenant for life of two sevenths could not to that extent enforce his securities against the incumbrances, but that he might enforce them *ultra* such interest. His Honour said he had no discretion to order a sale except under the 48th section of the statute, and that he could not order it under the statute unless there were reasonable ground that on a sale there would be a surplus, and that the plaintiff would be indemnified against the loss from an abortive sale. He should require two undeniable affidavits that the money likely to arise from a sale would exceed the incumbrances, and there must be a reserved bidding covering the amount of the incumbrances. A sum of money (800*l.*) must be also paid into Court to cover any loss from an abortive sale, with an undertaking to be liable for any further loss. The family of Henry Tennant by their counsel accepted this offer, and the Vice Chancellor thereupon ordered the cause to stand over for a month to give time for these conditions being carried out, intimating that he should order the sale without prejudice to any rights of the plaintiff to a foreclosure in the event of the attempt to sell proving as the plaintiff's counsel predicted abortive. His Honour further stated his opinion to be that the plaintiff had a right to foreclose, on the ground that the settlement had created, he thought, a trust by way of mortgage, and that the ordinary right of a mortgagee, whether legal or equitable, was a right to foreclose. It had not been disputed that a foreclosure was the plaintiff's right as to Davidson's mortgage. The payment in part of the Messrs. Child's mortgage would not have given a right to foreclose in respect of that part: but the plaintiff had such a right specially under the provision in the settlement respecting the discharge wholly or in part of that mortgage by any of the settlor's children. As regarded the compton estate, he should order inquiries whether that estate had been in fact brought within the settlement by Mrs. Tennant. But even if nothing more had been effected than a purchase by the trustees of that estate out of their own money, the trustees would be entitled to something very like foreclosure, it being in His Honour's opinion "quite clear that a vendor who had a lien for unpaid purchase-money and who could not get paid might file his bill to have the property foreclosed, or to have the contract delivered up to be cancelled, which would be equivalent to foreclosure."

On the case coming on again, on the 29th of June, the Vice Chancellor ordered a sale of the whole property in one lot, on the ground of the difficulty which would arise should it be put up in several lots if some were sold and the rest could find no purchaser. He was willing however to insert words in the order to the effect that if it should appear to the Judge at chambers that a portion would be likely to produce enough to cover the mortgages, so much might be put up first, with a reserved bidding to that amount.

The conduct of the sale was given to the plaintiff. He declined to take liberty to bid.

The defendants (the children of the late Henry Tennant, Mrs. Tennant's eldest son) appealed from the Vice Chancellor's order. The other defendants did not appeal.

Sir R. Palmer, Mr. Freeling and *Mr. Speed*, for the appellants, contended that the expression in the deed of settlement "a charge by way of mortgage," meant a charge only. It applied to six persons, and it was impossible that it could have been intended that each of, it might be six, different individuals having a charge under the provision should be entitled to a conveyance of the legal estate, or that there should be priorities as among them. The whole object of the deed was adverse to such a view. The main aim was to preserve the estate. With this object there was no trust for sale, and the provisions respecting

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management of the property contemplated that the trust estate should be made to pay its own debts. If it had been intended to give a mortgage the deed would have said so. The relief prayed and obtained by the plaintiff in his former suit of *Tennant* v. *Tennant*, viz., an administration of the trusts of the settlement, was in fact inconsistent with the relief by way of foreclosure, which he claimed now. As trustee he could not be permitted to insist on the remedy by way of foreclosure, for that would be a premium on a trustee expending money on an estate where the expenditure was necessarily unproductive, with a view to foreclosing when the expenditure was about to turn out productive. It was the knowledge which he had acquired as trustee which might have made him now wish to foreclose. If another person had filed a bill of foreclosure it would have been his duty to have done his utmost to resist it.

But, in fact, foreclosure required a mortgagor and a mortgagee, whether the mortgage was legal or only equitable. Where there was no contract for a mortgage between two persons, one a mortgagor the other a mortgagee, there could be no foreclosure. The right followed wholly from that personal contract, and did not attach to a mere charge—*Sampson v. Pattison* (1 Hare, 533); *Footner* v. *Sturgis* (5 De Gex. & Sm. 736; 21 L. J. Ch. 741). Certainly then a trustee could not foreclose; for to do this he must be regarded both as mortgagor and mortgagee, since the *cestui que trust* could not fill the character of mortgagee—*Tuckley* v. *Thompson* (1 Jo. & H. 126; 29 L. J. Ch. 548). There had been some variance in the decisions on the point, the authority of Lord Cottenham, Sir John Leach and Vice Chancellor Wigram and Parker being on the one side against those of Sir L. Shadwell and the present Master of the Rolls on the other. But the Master of the Rolls had never granted foreclosure in a case like the present—*Scweitzer* v. *Mayhew* (31 Beav. 37). On the point of redemption by a trustee there was the authority of—*Hill* v. *Browne* (Dru. 426). That a trustee could not stand as incumbrancer for more than he actually paid was decided by—*Hamilton* v. *Wright* (9 Cl. & F. 111, 122). And that he could not act in derogation of the trust estate appeared from—*The Attorney General* v. *Munro* (2 De Gex. & Sm. 122, 162). The fact that the plaintiff was tenant for life of two undivided sevenths made it still harder for him to establish a right to foreclose. The debt and the estate were both indivisible. He clearly could not foreclose in respect of the parts of which he was tenant for life, and therefore, he could not as to the rest. This was in effect decided by—*Riley* v. *Croydon* (2 Dr. & Sm. 293); *Wicks* v. *Scrivens* (1 Jo. & H. 215). Then as to the Compton estate, that estate had been practically treated as an addition to the settled estates. It was bought with money advanced by a trustee, and the trustee could not turn himself into a mortgagee in respect of his advance—*Lucas* v. *Seale* (2 Atk. 56).

The following cases were also cited:—*Pain* v. *Smith* (2 Myl. & K. 417); *Metcalfe* v. *the Archbishop of York* (1 Myl. & Cr. 547; 6 L. J. Ch. 65); *Price* v. *Carver* (3 Myl. & Cr. 157); *Tipping* v. *Power* (1 Hare, 405, 412; 11 L. J. Ch. 257); *Brocklehurst* v. *Jessop* (7 Sim. 438); *Meux* v. *Ferne* (Seton on Decrees, 445); *Johnson* v. *Seymour* (Seton on Decrees, 445); *Carlon* v. *Farlar* (8 Beav. 525); *Jenkin* v. *Row* (5 De Gex. & Sm. 107); *Ex parte Mountfort* (14 Ves. 607); *Parker* v. *Housefield* (2 Myl. & K. 419; 4 L. J. Ch. 57); *Jones* v. *Bailey* (17 Beav. 582); *Pryce* v. *Bury* (18 Jur. 967; 2 Drew. 11); *Creswick* v. *Harrison* (Seton on Decrees, 444; 23 L. J. Ch. 676).

Mr. E. K. Karslake and *Mr. W. W. Karslake*, for the plaintiff, urged that, from *Newton* v. *Aldous* (referred to by the Master of the Rolls in *Parker* v. *Housefield* (2 Myl. & K. 421)), in 1804, downwards there was a chain of authorities in favour of the proposition that an equitable mortgagee is entitled to foreclose; and they contended that it could be further shewn that whenever it was possible to spell out a mortgage there the title to foreclose arose—1 *Fisher on Mortgage*, 518, ed. 2; *Malone* v. *Geraghty* (3 Dru. & W. 252; affirmed, 1 H.L. C. 81). The argument for the appellants implied that there were no such words as "by way of mortgage" added to the word "charge" in the settlement. There

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was nothing in this settlement inconsistent with the creation of a mortgage. Mrs. Tennant might have got rid of the whole settlement the day after executing it by a conveyance, and she could assuredly have mortgaged it. Further, it was not the fact that for the incidents of a mortgage to arise the characters of mortgagor and mortgagee must be borne by two different persons. There were precedents for this kind of mortgage, of which the possibility had been denied by the other side—1 *Seton on Decrees*, 426. As for the alleged violation of the settlor's intention by the result the plaintiff contended for, the object of the settlor certainly was that the trust estate, and not she herself, should bear the burden of incumbrances, but the construction which the plaintiff supported did effect that.

Lastly, there was no authority for the assertion that a trustee taking the transfer of a mortgage could not be allowed to stand as mortgagee for the amount he had paid off—*Morret* v. *Paske* (2 Atk. 54). They also referred to—*Cox* v. *Toole* (20 Beav. 145); *Lechmere* v. *Clamp* (30 Beav. 218; 30 L. J. Ch. 651). If the decision in *Redmayne* v. *Forster* (35 L. J. Ch. 847; L. R. 2 Eq. 467), were correct, so was the Vice Chancellor's decision in the present case.

A reply was not called for.

The Lord Chancellor (*Jan.* 28).—The case has taken a good deal of time in argument, and it is necessary in some degree to comment upon the peculiar character of the deed before me. It is a deed quite *sui generis*, and no other can be found like it. I have to consider what is really the reasonable construction of the deed. I do not feel any hesitation in saying I very much regret having to come to a conclusion different from the decision of Vice Chancellor Giffard, and I should, if it depended solely and entirely upon the construction of the deed (which I do not think it does, for there is another important point in the case), have taken longer time to consider the case. My own impression of the true construction of this deed is, notwithstanding the expressions there used with reference to a charge by way of mortgage and those entitled to stand as mortgagees, that it is simply to give those who shall contribute the sums of money referred to in connexion with those particular directions, a charge upon the property, and nothing more, there being no direction whatever in the deed (which circumstance I lay considerable stress upon) to carry into effect that which would be in substance a mortgage, and to provide that upon payment the trustees shall be called upon to execute a mortgage to the persons advancing the money. I think the real and substantial intent of the parties was, looking at the whole character of the deed, that there should be a right to claim by way of charge every sum specified, namely, every sum advanced for Mrs. Tennant's use, and acknowledged under her hand, and advanced for the purpose of paying off part of Childs' mortgage, or the whole of that debt.

Now, the form of the deed is this. It is evidently a family voluntary deed executed by the lady who was the owner of the property, in which she is exceedingly anxious to provide, if she can do so, for the whole of her family through the medium of a trust to be created, by which great confidence is to be reposed in her sons successively as managers of the estate. She first of all provides that there shall be three trustees, who are her own three sons. She makes the eldest son the senior trustee, and she gives to the eldest son, and then to the second son, and then to the third, very unusual powers of control and management over the property. Having thus provided for the management of the property, she says, that after her own decease the property shall be limited upon certain trusts in favour of the sons and daughters, making each son and daughter a tenant for life, with a power to each son and daughter to appoint in such manner as they should think fit, provided the appointment be to the descendants of her husband. What was to be expected took place with regard to the family, namely, those who had children naturally made appointments in favour of their children, who are the persons in the events which have happened now before the Court. Having done that, she also reserves specially to herself very express power to raise 10,000*l.*, and that clause appears in the 9th page of the bill. It is thus

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stated: "In the indenture now in statement was contained a proviso, that it should and might be lawful to and for the said Margaret Elizabeth Tennant, at any time or times during her life, by any deeds or deed, instrument or instruments, in writing, with or without power of revocation and new appointment, to be executed and attested as therein mentioned, or by her last will and testament, or any codicil or codicils thereto, to charge and make chargeable all and singular the real and personal estates thereby released and assigned respectively, or any of them, or any part thereof respectively, with the payment of any sum or sums of money not exceeding in the whole the sum of 10,000*l.* unto or in trust for any person or persons as therein mentioned." That is the first provision, and then there is also contained a proviso that so much of the money as was not paid off on Child's mortgage shall be a charge upon the property and not upon Mrs. Tennant's own personal estate. Then there is a provision, which has been very much commented on, by which it is declared that any of the children advancing money for the use of the said Margaret Elizabeth Tennant during her life should be entitled to a charge by way of mortgage on all the lands and premises thereby released and assigned.—[His Lordship read the provision.] —What one sees in the first place is this, that it has no relation to any such notion as has been urged before me in argument by the respondents, namely, that Mrs. Tennant was to defeat her settlement by way of creating a mortgage as a mode of carrying this conception into effect. It contemplates a state of things only to happen at her death. An account is to be taken of what is acknowledged to have been advanced to her and of what is remaining due to her at her death; and then it is that, in respect of all remaining due at her death, they are to have this charge, as she expresses it, by way of mortgage, following next in order, I think, to Messrs. Child's mortgage.

It has been argued with considerable force, having regard to the authorities, that if a person has a mortgage, the right of foreclosure accrues. Although some of the authorities appear to conflict with each other, I think it to be settled that if it is a charge *simpliciter*, then the right of the parties having such a charge is a sale and not a foreclosure. I do not think it is necessary to go into the question of the conflict, which still seems to exist between some of the authorities, as to whether in particular cases sale or foreclosure is the proper remedy. I think, unless you have a mortgage, or an agreement for a mortgage, which in some cases the mere deposit of deeds has been held to create, you cannot foreclose. If you have that, you can foreclose, but if not, you must treat it by way of charge, and simply have a sale of the property. There is no magic in the mere words, and although they would be strong in the ordinary case of an instrument creating *simpliciter* a right to charge by way of mortgage, if you find such words as are here adopted in the instrument, you must then look to the whole character of the transaction. Mrs. Tennant never contemplated that any of her children were to become what I may call the mortgagees, or that any of the children were to pay money out of their own pocket, or to settle any existing liabilities. All she contemplated was that the trust should go on as long as it could. It might happen that Messrs. Child's mortgage would swallow up the property; but the deed contemplates a property existing, a property settled, which the children are to have the benefit of according to the settlement, and in the meantime, and in consequence of the possibility of Messrs. Child calling in their mortgage, she says that persons advancing on those mortgages are to have a charge upon the property. When she uses the words "by way of mortgage," in respect of a deed framed as this is, and the persons who are to have this particular charge by way of mortgage are not persons who are strangers, but are persons who are to have the benefit of the trusts of the settlement, it cannot, I think, be contended that any one or more of those persons advancing money to her in her lifetime was to have a formal mortgage executed by which they could be put in a position to foreclose the estate, and that instead of realizing by sale what may be realized, they should be able to destroy the trusts of the settlement. That, I think, would be an unreasonable construction to put upon

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this deed, with such words as there are here, without any direction that thereupon the trustees shall, with regard to those of her children who make those advances, invest them with all the rights of mortgagees. Nothing of that kind being found here, I think the true construction of the instrument is that they should have simply a charge by way of sale. Then the subsequent part of the deed is, that any person paying off the whole or any part of Messrs. Child's mortgage should be "entitled to stand and be a mortgagee or mortgagees on the said hereditaments and premises for the money so to be paid and interest in the place of them," in addition to any beneficial interest which might accrue to such party or parties under or by virtue of "the indenture now in statement." I think, as far as I can see, it was intended to be to this effect, that if they paid the whole mortgage off, of course they would be at liberty to take an assignment from Messrs. Child; and subject to other questions, which I have next to deal with, of the trustee's position, I think they would be in the same position as any other person taking an assignment of the mortgage, and would have all the rights which the original mortgagee could convey to them. But if part only was paid off, it does not appear to me that anything more is meant than in the former part. I do not think it means more than that (before coming to the question of beneficial interest) you must pay, and the estate must bear the burden of all the charges paid off by any of the persons beneficially interested. It seems to me that the circumstances of there being persons already provided for by the deed, and of these being powers created by the same deed, when you regard the whole scope of the investment, does not amount to an argument in favour of such a view of the construction, but that it does amount to a very strong argument for giving a construction to the deed which will make the deed consistent, according to which the settlor will have given a charge and said, I preserve all the charges, but I do not execute an instrument by which some of those persons who may advance sums of money, being objects of the trust, shall be able to defeat all the other objects of the trust by foreclosure. She must be taken to have known that under the circumstances of this particular property, which she was making a settlement of, it was in the highest degree improbable that those who were the objects of the deed would be able at once themselves to raise the funds which would be the only possible funds for redeeming the mortgage. She is making provision for her children and grandchildren. The grandchildren (for whom, indeed, the principal provision would be made) who would come into existence would not be persons having themselves the competency to redeem these different charges or submit to a foreclosure. What was the true intent, as will be afterwards seen by the very large powers vested in the trustees, was that the moneys which were to be paid off were to be charges on the estate, but to be raised and paid off by any possible means placed in the power of and vested in the managing trustee.

Now we come to see the extraordinary powers which were vested in the managing trustee, which make this construction the more reasonable. As I have before said, she first chooses one son to be the senior acting trustee; and he is to take upon himself the sole and uncontrolled management, except so far as it is controlled by the indenture now in statement, of the freehold and leasehold messuages. He is to occupy, farm, cultivate, and manage the same or any part thereof. The managing trustee is to do all things with her consent in her lifetime: "To grant leases and to sell, partition or exchange the said hereditaments." Then he has sole discretion to do what he thinks fit, with certain exceptions which it is not important to mention. The settlement then goes on to state that he may "settle and adjust all accounts, reckonings and demands whatsoever relating to the premises." Then come these words: "And generally at his own discretion, and of his own authority, to do, perform and execute all and every or any other acts and act, deeds and deed, matters and things whatsoever which he should think necessary or proper to be done in or about or concerning the management of the trust estates and premises, as fully and effectually, to all intents and purposes, as the said Margaret Elizabeth Tennant

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might or could have done in or about or concerning the management of the said estates and premises, in case the indenture now in statement had not been made or executed." There is also contained in the indenture a statement that it "should be lawful to and for the said acting trustee for the time being, as such managing trustee as aforesaid, but by and with the consent of Mrs. Tennant, if in her lifetime, yearly and every year, from and out of the rents, issues and profits of the said trust estates and premises, after payment of all interest due in respect of the said mortgage debt" (viz., to Messrs. Child), "and also in respect of every other debt charged in the said trust estates and premises, or affecting the same, and also after payment of all other charges, after setting apart a sufficient sum of money to satisfy and discharge all such charges and expenses, to retain and set apart any sum he in his discretion should think fit and proper, for the purpose of forming a fund for payment and discharge of all and every debt and debts charged upon and affecting the said trust estates and premises, and from time to time to invest such sum or sums of money so retained or set apart for such purposes." Then she directs that Henry Tennant, the eldest son, shall be the first managing trustee, and the next the plaintiff, and then the third son, George Tennant.

Now, looking to those vast powers which are so given to the managing trustee, there is a very anxious desire manifested, especially in the power of sale, and in the power of accumulation and making a sinking fund conferred on the senior managing trustee, to preserve the estate from being destroyed, and to preserve the trusts of the deed from being completely annihilated, as of course they would be if there were anything in the shape of foreclosure; and, with all those powers, there is no power to execute a mortgage to any of the persons declared to have a charge by way of mortgage. I think the sound construction of the whole instrument would be, that these charges by way of mortgage were to be simply charges raised by way of disposing of the estate, namely, the powers which here exist of selling parts of the estate, and, if necessary, a power of making an accumulating fund. I think that it would not be a proper execution of the trusts of this instrument to hold that there ought to be a formal instrument of mortgage executed giving a right to foreclose to those persons who so advanced the money.

But, as I have said, I should be sorry to determine this case without more at length reflecting upon the true construction of the deed, were it not for the second point in the case, which appears to me to be conclusive upon the present contention. First of all, let us suppose that this gentleman, Mr. Charles Tennant, had acquired a right under certain circumstances to call for a mortgage of this property, together with the consequent ordinary right of foreclosure. Then suppose that while he is the senior managing trustee, with all the vast powers vested in him, he comes to the Court and asks for foreclosure. In this case he is placed in a position, which the Court invariably controls, of a person whose duty and interest are entirely in conflict. He has behaved, as it appears to me from all I have heard of the case, and from what I know of the origin of it in the former suit, with great consideration towards all those concerned in the estate. I think I am justified in saying he has saved the estate at times from very considerable peril. I have not heard any fault found with him in reference to the course he has pursued in the management of the property. But let me take one single instance which has fallen from his counsel, as to the position of this property, and the position he is put in as trustee, with an interest as mortgagee seeking to foreclose. It is the duty of every trustee to make the most he can of the trust property for the benefit of the *cestuis que trust*. Here is an estate vested in *cestuis que trust*, who must have been known when the instrument was framed to have been in a position in which it was scarcely possible that large sums of money could be raised by them by way of redemption, and that the only means in their power, except by dealing with the estate itself, nursing the estate on the one hand, and selling it to advantage on the other,—the only possibility I say, of the *cestuis que trust* saving the estate would be

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by selling some portion of it. This gentleman, as mortgagee, is not at all interested in doing that; he is interested in foreclosing the estate as far as mere interest goes, as soon as possible; and when he has foreclosed the estate, the estate is charged with such an amount of incumbrance that it is extremely improbable that anybody could raise the money in order to clear off his debt. There is no possibility of its being avoided. He would become master of the estate, and becoming the master of the estate, the whole trust which he is bound to protect by his duty as far as he can do would be entirely frustrated. An instance was, as I have said, given this morning. Here is a trustee; he has purchased an estate for 12,000*l*., called the Compton Estate. It has been said, and nobody has hitherto disputed it, that that was an extremely beneficial purchase for the estate, and he has not been blamed for so doing. It has been brought into the trust, and everybody seems to acquiesce in its being so brought into the trust, and it now forms part of the subject-matter before me under this trust deed. Then Mr. Karslake tells me, "I am quite willing to take it back again, because it is already of four times the value it was." Here is a property of increasing value. If he forecloses he will take all the necessary measures to improve that property to the utmost. So again, if he were only *cestui que trust*, and not the mortgagee, or only trustee and not mortgagee, what would he do on a bill being filed for foreclosure, say by Messrs. Child? I have no doubt, from the intelligence he has displayed in the management of the estate, what his conduct would be. He would immediately sell to the greatest advantage property in order to realize sufficient to pay off the mortgage; and thus, having paid off the mortgage, to save, as he says he has saved, the estate from destruction. From the first moment he becomes mortgagee, it is greatly to his interest that the estate should be at once foreclosed, and when it is foreclosed (with all those improvements which, in one of his affidavits he intimated, he saw his way to,—I do not doubt that he was taking a somewhat exaggerated estimate of what those improvements were, though no doubt honestly and fairly), he being trustee, bound to save the estate, would then be able to destroy the estate of the *cestuis que trust*, and acquire to himself all the benefit and advantage which as trustee he might secure. It cannot be too often repeated that we are to look at the position of the *cestuis que trust*, and their utterly defenceless position as against this gentleman. They having no means of raising the money, except out of this estate, they not having the mastery of the estate which this gentleman under the deed has, but he having the sole power of controlling it and dealing with it, how is it possible that they can raise any money? I put this case upon the broad principle that I find a trustee in a position in which it is impossible for him, if I grant a foreclosure, to make the performance of his duty coincide with his interest, and therefore this Court would be bound, even if this deed gave him the power of foreclosure, to say that it is impossible that the Court can allow him to foreclose, when his duty is to take every possible step he can take for the saving of the estate. In that respect the observations made by Lord Brougham are of very considerable force. It is a doctrine so well recognized in this Court that it scarcely required the authority of the House of Lords. But I prefer resting my decision upon the narrower ground of the construction of the deed. I think as regards the construction, all things being considered, it would be more correct to construe it in the way I have described, namely, that the charge was to be a simple charge, not by way of mortgage in the technical sense of giving a right to foreclosure, but coming in in its proper place among the different charges existing on the estate. Therefore I now propose to alter the Vice Chancellor's decree. The direction will be simply to vary the decree, simply to strike out that direction as to the deposit, and then direct a sale to be made at chambers under the direction of a Judge, and reserve further consideration. The costs of the appeal will be costs in the cause.

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HATHERLEY, L.C. AND SELWYN, L.J., Dec. 18, 19, 1868.

BELL *v.* BLYTH.

38 L. J. Ch. 178; L. R. 4 Ch. 136; 19 L. T. 662; 17 W. R. 194: affirming, [1868] E. R. A. 552; 37 L. J. Ch. 526; L. R. 6 Eq. 201 (M.R.).

Shipping—Mortgage—Merchant Shipping Act, 1854, *ss.* 68. 73.—*Receipt—Registration—Revival—Priority.*

SHIPPING.—*A. mortgaged a ship for* 1,200*l. to B, who transferred the mortgage to C. A. then executed a second mortgage for* 400*l. B. afterwards paid off C, and C. signed a statutory receipt, instead of a re-transfer. This receipt was produced to the registrar, who made an entry in the register-book, under section* 68. *of the Merchant Shipping Act*, 1854, *to the effect that the mortgage had been discharged. C. afterwards executed a deed purporting to be a re-transfer of the* 1,200*l. mortgage to B, which was registered, and at the same time a note was made by the registrar against the entry of the receipt, stating that the receipt was signed in error, and the mortgage was afterwards again transferred to C, to secure a balance on account current, and this deed remained in C.'s hands, after satisfaction of all that was due on the account. B. then took a fresh mortgage from A. for* 2,500*l., which included the* 1,200*l. and* 400*l. and had since been transferred to the plaintiff. After the new mortgage, B. agreed with C. that the mortgage for* 1,200*l. should be a security for advances on an account current. The transfer of the mortgage to the plaintiff was not registered until after this agreement. Upon a question of priority between C. and the plaintiff*:—Held, *affirming the decision of Master of the Rolls, that the receipt with the entry on the register operated as a discharge of the first mortgage, and the same could not afterwards be revived by the note made by the registrar.*

This was an appeal from the decision of the Master of the Rolls, 37 L. J. Ch. 526.

On the 23rd of April, 1862, M. J. Routh, being absolute owner of the ship *Providence*, which was registered in his name, mortgaged it to Messrs. Grierson & Cole, for 1,200*l.*

The mortgage was registered on the 25th of April, and designated "G." on the register. On the same day the mortgage was transferred to Philip Blyth to secure an advance, and the transfer duly registered.

On the 24th of April Routh executed a second mortgage for 400*l.*, which was also duly registered and designated "H." on the register.

On the 21st of October Messrs. Grierson & Cole paid to Blyth the money due on mortgage G, and Blyth indorsed on the mortgage a receipt in the statutory form provided by the Commissioners of Customs, under section 96. of the Merchant Shipping Act, 1854, and on the 23rd of October the receipt was produced to the registrar, who thereupon made an entry in the register-book, under the 68th section of the act, to the effect that mortgage G. had been discharged, thus making Routh appear on the register as the owner of the ship, subject only to the mortgage H.

In November, 1863, Messrs. Grierson & Cole again deposited mortgage G, which appeared on the register to have been cancelled, with Messrs. Blyth, Webb & Co., of which firm Philip Blyth was a member, to secure the repayment of accommodation bills; and on the 20th of October, 1864, the money due on the pledge having been paid off, Blyth again executed a deed purporting to be a re-transfer to Grierson, Cole & Co., and at the same time the following note was made by the registrar and signed with his initials against the entry of the receipt of the money due on mortgage G. in the column for remarks:

"Deed reproduced; receipt signed in error when re-transfer intended by Philip Blyth."

On the 25th of October, mortgage G. was again transferred to Blyth, Webb

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& Co., to secure their acceptance on behalf of Grierson & Cole, and the transfer was registered on the 3rd of November.

In March, 1865, Grierson & Cole's liabilities to Blyth, Webb & Co. were at an end, but mortgage G. was still allowed to remain in their hands.

On the 25th of May, 1865, Routh executed another mortgage to Grierson & Cole, which was registered on the same day and designated "I." on the register, to secure 2,500*l.* and account current. This sum included the 1,200*l.* originally secured by mortgage G, and the 400*l.* secured by mortgage H, which was then in the hands of Grierson & Cole; and on the 17th of November, 1865, mortgage I. was transferred to the plaintiff.

On the 28th of March, 1866, nothing being due to Blyth, Webb & Co., it was agreed between Messrs. Grierson & Cole and Blyth, Webb & Co. that mortgage G, which still remained in their hands, should become a security for the general balance that might be due from Grierson & Cole to Blyth, Webb & Co.

The transfer of mortgage I. to the plaintiff was registered on the 12th of July, 1866, and in January, 1867, he filed his bill to realize his security by a sale, praying that it might be declared that he was entitled to priority over Blyth, Webb & Co., the transferees of mortgage G.

The Master of the Rolls held that the plaintiff was entitled to priority, and Messrs. Blyth, Webb & Co. appealed.

Mr. Druce and *Mr. W. F. Robinson*, for the appellants, contended that the entry of the discharge on the register being made by mistake, the section (68.) did not apply. The receipt by the transferee only discharged the transfer, and not the original mortgage.—They referred to *Parr* v. *Applebee* (7 De Gex, M. & G. 585; 24 L. J. Ch. 767).

Mr. Jessel and *Mr. Kekewich*, for the plaintiff, supported the decree.—They cited *Pease* v. *Jackson* (37 L. J. Ch. 725; L. R. 3 Ch. Ap. 576); *Peel's case* (36 L. J. Ch. 757; L. R. 2 Ch. Ap. 674); *Hooper* v. *Gumm* (36 L. J. Ch. 605; L. R. 3 Ch. Ap. 282).

Mr. Hull appeared for the stakeholder; and

Mr. Hadley, for Routh.

Mr. Druce replied.

The Lord Chancellor (*Dec.* 19).—We have neither of us any doubt upon this transaction, regard being had either to the date of the registration of the discharge or that which was subsequently urged with reference to the new title acquired—an entirely new title in substance—after the old mortgage had been paid off, which was intended, as it is said, to be secured by the *quasi* revival, if I may so call it, made by the instrument registered on the 3rd of November, 1864.

Now, first, as to the discharge. It seems to me, I confess, that it would be within the very mischief which was intended to be prevented by the act if we felt ourselves at liberty to say that, although that discharge is registered—registered with the consent and with the concurrence undoubtedly of Messrs. Grierson, Cole & Co., who were the parties entitled to the original mortgage—and although the act is peremptory as to what the effect of such a discharge shall be, it could be revived in consequence of its being stated to have been made by mistake; because the words of the section of the statute are these: "Whenever any registered mortgage has been discharged, the registrar shall, on the production of the mortgage-deed, with a receipt for the mortgage-money indorsed thereon, duly signed and attested, make an entry in the register-book to the effect that such mortgage has been discharged."

The first argument upon that section has been this, that the words are "whenever any registered mortgage has been discharged," and therefore, if in effect it has not been discharged, the original security which was given by Routh for the 1,200*l.*, to Grierson, Cole & Co., and by them assigned to the present defendants, has never in substance been discharged, and that the recital of such discharge is entirely a mistake; but I apprehend that such a reading of

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the statute would be one that would defeat in effect the whole benefit of the operation of the Ship Register Act, because if every purchaser of a ship is to be fixed with these consequences, namely, that although a receipt given by the person who is entitled to receive the money, and entered by the registrar accordingly, upon the application of those who are entitled to receive the money, is declared to be a good discharge, the purchaser is to be held liable to this possibility, namely, that although all this has been done, which is right and proper to be done when the mortgage has been discharged, yet in effect the mortgage has not been discharged. He would then have to inquire into circumstances utterly beyond his knowledge, or any power he may have of ascertaining the facts. The ship would be unsaleable as regards vendors; the object of the statute therefore would be liable to be defeated, and the mischief which it was intended to guard against would occur, by having still a demand set up again upon the ground of some mistake upon the register.

Now, what took place with regard to this transaction was this: First, Grierson, Cole & Co., the owners of the original mortgage for 1,200*l.* from Routh, transferred it to Blyth. Blyth, therefore, was on the register as the owner of the mortgage, the mortgage had been transferred to him, and he was the owner of it, and, being the owner of the mortgage, he gave a receipt which expressed that it was discharged, and that receipt was given at the instance of the original mortgagee. It is said that Grierson, Cole & Co., in effect, never intended to release Routh, the original mortgagor, but that all that they had done was to create, though doing it by way of transfer, a sub-mortgage as it were upon their mortgage, and that the proper form of receipt was given. But if it were dealt with according to those facts it would have been simply a receipt indorsed on the deed that as between Grierson, Cole & Co., the original mortgagees, and Blyth, the transferee, the matter had been settled, leaving Grierson, Cole & Co. to have their remedy against Routh according to the existing mortgage. That is not what has been done. Grierson, Cole & Co. ask for a discharge in the very form which the act prescribes, and that being done, it is registered by the registrar. The instrument is brought to him, signed by the proper person in whom the interest in the mortgage is vested, to enter it, and it is so entered. Accordingly, I confess, it appears to me that by the 68th section of the act the transaction as to the original mortgage was at an end, whatever might be the equities as between Routh and Grierson, Cole & Co., upon the outstanding account between them, upon which there seems to be some question; there was an entry made of the discharge by the person who appeared to be the legal owner; and there was an end of the mortgage, in fact, upon the register. What appears to have taken place afterwards is somewhat singular, and one is rather surprised that the register should allow this public document to be so dealt with. There appears to have been a scrawl of pencil made along that discharge, and then there is something written in pencil at the side, which pencil writing is afterwards inked over, the exact date of inking over not appearing. This inking over is as follows: "Deed reproduced; receipt signed in error when re-transfer intended by Philip Blyth.—E. S." It appears to me that such a state of things as that is to alter the letter of the statute, and that, if a re-transfer is intended, this mode of making an entry of this description would not be sufficient to satisfy the requisitions of the Ship Register Act, nor to revive that mortgage which has so become defunct.

But, however, the case certainly does not rest there, because what takes place afterwards is this: Blyth, professing to act upon that marginal note, that a re-transfer only was intended, enters this as the next entry upon the record: "22nd of October, 1864. Transfer of mortgage G, dated the 20th of October, 1864." Then the next entry again professes to deal with G. in this way. Grierson, Cole & Co. being the owners of the mortgage by virtue of the transfer by Blyth, execute a transfer to Frederick Philip Ripley Webb, who seems to have been one of the firm of the present defendants, and then, among the list of incumbrances, there is written upon that, "1,200*l.* G. mortgage, 400*l.* H.

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mortgage, 350*l*. I. mortgage." That having been done, it appears that subsequently the whole of the mortgage-money which that transfer was intended to secure (that attempted fresh transfer of G. by Grierson, Cole & Co., if it had not been a thing already defunct), was paid off in March, 1865, before the plaintiff took his security upon the property.

Now, the whole of that debt having been so paid off, the plaintiff takes his security at a time when Grierson, Cole & Co. supposed all this to be correct, and that mortgage G. was still something existing when Grierson, Cole & Co. were in a position to hand over to him by way of security this original mortgage for 1,200*l*. That being so, the agreement is made for a transfer to the plaintiff, but he does not register the instrument by which the transfer was made until the 12th of July, 1866, and in making that re-transfer, in creating the security, it was not transferred subject to subsequent mortgages, but there is a covenant by the mortgagor against any incumbrances other than those appearing on the register, and amongst those appearing on the register is the mortgage G. for 1,200*l*. and interest, mortgage H. for 400*l*. and interest, and mortgage I. for current account and interest. Now, that being so, it is said: Here, at all events, you have notice of these claims existing, and you cannot complain. All the objects of the register are fulfilled. You were told that there was a mortgage of 1,200*l*. existing. Whether the course of proceeding has been right or wrong with reference to the memorandum of discharge, you were told, nevertheless, that that was an existing security. Now, just observe; suppose he has been told that, when, in point of fact, at the time there was no existing security whatever, and that the debt had been paid and satisfied for which the security was given, and that a new bargain had been entered into by which these parties were to acquire a new security for a debt subsequently created, and which debt was not created at the time that the plaintiff took his present security, how can that be held to be correct under the provisions of the Ship Register Act? I confess it appears to me to be clear that when a new engagement of that kind is entered into, what is actually directed by the 66th section is that when a registered ship is made security for a loan, the instrument creating the security shall be in such a form, and that it shall be registered; and what is clearly incumbent upon those who take this new security is to deal with it as being in point of fact a new security, to register it as a new security, and in such capacity only could they have got a new security affecting the plaintiff. Whereas, what they attempt to do is this—they attempt to affect the plaintiff by saying: True it is that the security which was on the register is paid off—we cannot deny that, and that it was paid off at the time you took your security; but before you register your security we had got a new security; we had got a new agreement for a mortgage; we never registered it, it is true, but nevertheless we have a right to stand upon that old security, which has been paid off, as against you, who have got a new security, because you did not register your security until we had obtained an engagement on the part of those who were our original mortgagors, who have paid us off, that we shall stand possessed of the old security as security for the new debt. I apprehend it would be very inconsistent with the provisions of the Ship Register Act if there was to be that form allowed of creating a new security, viz., that there shall not be, as the 66th section requires, an entry of your new engagement upon the register, but that you shall say, there is something standing on the register: here is an old mortgage which has been perfectly well satisfied, long satisfied. If this were so, could not the mortgagor, as against any subsequent incumbrancer, register it at any time he thought proper, and say that is an existing mortgage? What I mean to say is this, suppose at any intervening time before the new registration, the person who has got his security, registering his security and finding afterwards, just as here, the whole thing undischarged (I am now assuming it was undischarged); finding notice of a 1,200*l*. mortgage, would it be possible for the mortgagor to say, Why you took it knowing there was the 1,200*l*. security; there it was; you are told of that, you are in no way damnified: that was an

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existing charge, and you took it knowing that, and therefore you are to hold it just as if the mortgage had not been discharged? That would be perfectly idle. Can the mortgagor afterwards, by a subsequent bargain, give to any person that privilege which he could not set up for himself? It appears to me plainly not, and that the whole object of registration is that there shall be a true statement upon the register of every transaction, and that it would be a most dangerous innovation if we were for the first time to lay down that, if there be one alone existing satisfied mortgage standing upon the register, it is competent for the mortgagor to enter into a bargain, and say, being aware that somebody else has made a subsequent mortgage and has been negligent in not registering his security, I will take advantage of that, and hand over to a third person an old security which shall take precedence of that fresh charge which has been created, because the subsequent mortgagee has been negligent in not registering the security. I take it that is not the intent and purport of the act of parliament; and therefore, upon the legal construction of the register and the instruments that we have here before us, it appears to me that the mortgage was gone and dead altogether by the entry on the register of the discharge. But even if that were not so, the appellants have no title, legal or equitable, upon which to stand in reference to the subsequent transaction, inasmuch as the only thing under which they claim the new charge does not appear upon the register at all. Therefore, the decision of the Master of the Rolls is right, and the appeal must be dismissed with costs of all parties served.

SELWYN, L.J.—On the 19th of May, 1865, the day of the plaintiff's mortgage for 2,500*l.*, the appellants had not, nor had any of them, any beneficial interest in or charge upon the ship in question, and at that time the only persons having any beneficial interest in the ship were Routh, the mortgagor, and Grierson, Cole & Co., the mortgagees under that deed, and these parties were consequently competent to deal with the ship as they thought fit. They dealt with it by creating the mortgage for 2,500*l.*, which was registered on the next day, the 20th of May, and that sum of 2,500*l.*, included the prior mortgage debt of 1,200*l.*, and this mortgage of 2,500*l.* was transferred to the plaintiff on the 17th of November, 1865, at which time the appellants were as destitute of any beneficial interest in, or charge upon the ship as they were on the 19th of May, 1865; and if the plaintiff at that time had made all possible inquiries, and had ascertained all the facts, he would have ascertained that the appellants had no claim or interest whatever in the ship. Independently, therefore, of any question under the Ship Register Act, the appellants, whose claims arose for the first time under an agreement entered into on the 25th of March, 1866, are clearly subsequent in point of time, and have no reason or ground for postponing the prior right of the plaintiff. But it was argued, on the part of the appellants, that, as the transfer of the 2,500*l.* mortgage to the plaintiff was not registered until the 12th of July, 1866, and after the agreement of the 28th of March, 1866, under which the appellants claim, they are entitled to set up the original mortgage of 1,200*l.*, and are entitled to priority as from the date of the registration of that mortgage. But, in my judgment, such a claim is inconsistent, not only with the letter, but also with the spirit and policy of this act; and I think that to allow such a claim would be to introduce the very difficulties, technicalities and complications, which it was the object of this act to exclude from transactions relating to the sale and mortgage of ships. And in the present instance this claim is made in a case in which the register itself, upon which alone the appellants can rely, contains an entry made with the knowledge and consent of the authorized agent of the person entitled to the mortgage-money, and made in the ordinary form indorsed on the original mortgage, stating that the within-written security has been discharged. It does not appear upon the register that any new mortgage was created by Routh; and although the register does contain entries of the transfers of the mortgage for 1,200*l.* on the 20th of October, 1864, from Blyth to Grierson, Cole & Co., and on the 25th of October, 1864, from Grierson, Cole & Co. to the

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defendant Webb, there does not, as the Lord Chancellor has already observed, appear any entry whatever of this new contract of March, 1866, and it is admitted that, in fact, the sums intended to be secured by means of those transfers had all been paid off before the mortgage of the 19th of May, 1865, was executed. I think, therefore, that, both in point of fact and also under the act, the claim of the appellants entirely fails, and that the appeal must be dismissed with costs.

JAMES, V.C., Jan. 18, 19, 22, 1869.

CHARLTON v. THE EARL OF DURHAM.

38 L. J. Ch. 183; L. R. 4 Ch. 436 (n.); 19 L. T. 763; 17 W. R. 348: affirmed, [1869] E. R. A.; L. R. 4 Ch. 433; 20 L. T. 467; 17 W. R. 995 (L.C.).

Executors — Trust-moneys — Receipt — Forgery by one Executor of Co-Executor's Signature—Lapse of Time—Notice.

EXECUTOR AND ADMINISTRATOR.—*D, the obligor of a bond given to the two executors of G, the testator in the cause, to secure a debt forming part of the testator's general assets, thirteen years after the testator's death, paid to one of the executors a moiety of the debt (the other moiety having been previously paid off), and obtained a receipt therefor purporting to be signed by both the executors. In fact, the executor receiving the money forged the signature of his co-executor to the receipt and appropriated the money to himself. In a suit against D. by the executor whose receipt was forged and by the cestuis que trust to recover the money from him:*—Held, *that, notwithstanding the lapse of time from the testator's death, the money was due on the executorship account and not on the trustees' account; that the circumstances of the case did not fix D. with notice; and that he was released from his debt by payment to and the receipt of one executor.*

Thomas Glaholm died on the 29th of January, 1849, having made his will, whereby he gave his residuary estate to one James Wilson and the plaintiff Edward Charlton, upon certain trusts, one of which was to pay his widow an annuity of 100*l.* a year, and subject thereto upon certain trusts for his children. The testator appointed as executors the said James Wilson and the plaintiff Edward Charlton. The will was proved by them on the 10th of December, 1849. Part of the testator's general personal estate outstanding at the time of his death was a sum of 5,000*l.*, lent to certain trustees of the Earl of Durham's estates, and secured by the bond of the trustees. The defendant, the Earl of Durham, attained his majority on the 5th of September, 1849, and shortly afterwards he gave his bond to Wilson and Charlton for the same sum of 5,000*l.*, in exoneration of his said trustees and in substitution for their bond. The bond was a common money bond to secure 5,000*l.* and interest, and under it the debt was made payable on the 10th of December, 1849. The obligees of the bond were therein described as, and were, in fact, the executors of the testator Glaholm. On that bond the money remained outstanding for nearly ten years, the interest being paid regularly to the executors, one of whom, Wilson, gave receipts for such interest on behalf of himself and his co-executor. In February, 1859, 2,500*l.*, part of that sum, was called in, and was paid to the one executor upon the joint receipt of the two. Afterwards, in the year 1862, Wilson, on behalf of himself and his co-executor, called in the remaining 2,500*l.* That sum was paid by the Earl of Durham's agent, Mr. Morton, to Wilson, who, on such payment, sent the bond to Mr. Morton to be cancelled, and it was cancelled accordingly. Upon the bond thus delivered up by Wilson there was indorsed, near to the receipt for the 2,500*l.* paid in February, 1859, which

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was admittedly the genuine receipt of both executors, a receipt for the remaining 2,500*l.* and interest, in these words:—

"Newcastle, June 3, 1862.

"Received of the Right Hon. the Earl of Durham the sum of twenty-five hundred pounds, in full of the within-named bond, together with all interest up to this day.

"Jas. Wilson } Executors of the late
"Edw. Charlton } Thos. Glaholm."

Wilson was confidential clerk in the banking-house of Messrs. Lambton & Co., of Newcastle, the bankers of the executors, in whose custody the documents of the testator's property were kept, and he had access to the bond and other papers of the testator. After the cancellation of the bond as aforesaid, he continued regularly to pay the annuity of 100*l.* to the testator's widow till March, 1866. In that month he was arrested upon a charge of forgery; this led to inquiries being made about the bond, and thereupon Wilson confessed to Charlton, his co-executor, that he had received the money and forged the plaintiff's name to the receipt therefor, and that he had misappropriated the money so obtained by him. Thereupon Charlton and the widow and children of the testator Glaholm filed their bill, praying for a declaration that the receipt so forged by Wilson was a fraud, and ought to be delivered up to be cancelled, and that the Earl of Durham might be ordered to pay to the trustees of Glaholm's will 2,500*l.* with interest, or to deliver to the trustees a new bond to secure that amount.

The bill alleged that the substitution of the bond given by the earl for that of his trustees was effected entirely by Mr. Morton, the earl's land agent, and Mr. Philipson, acting as the solicitor of the earl and his trustees, as well as Glaholm's executors, and that the bond was prepared by Mr. Philipson by his filling up a printed form and the costs thereof paid by the earl; that Mr. Philipson had before and since acted, more or less, as the earl's solicitor; that he was also in that matter and generally the solicitor of the testator's executors, and as such solicitor he well knew that the moneys secured by the bond formed part of the residuary estate of the testator, subject to the trusts of his will, and that the earl must therefore be taken to have full knowledge of the trusts attaching thereto. It appeared that, in fact, Mr. Philipson had habitually acted for the earl in different matters, but was not his general solicitor; that Mr. Morton, who was not a solicitor, had made all the requisite arrangements on the part of the earl and his trustees respecting the substitution of the bond, and that although Mr. Philipson had been paid his costs of the transaction by the earl he had acted only as the solicitor of the testator's executors, having been before employed as the family solicitor of the testator.

Mr. Kay and *Mr. Haddan*, for the plaintiffs.—These were trust moneys standing on a trust account. The earl must be taken to know that the moneys no longer remained on the executorship account, first, because he was a party to the calling in the money invested upon the old security of the trustees' bond and the re-investment of it on his own sole bond, a change of investment which mere executors had no power to make; secondly, he was precluded by the lapse of time since the testator's death, during which the money had been left outstanding, from now setting up that it remained due on an executors' account; thirdly, through his solicitor, Mr. Philipson, he had notice of the trusts attaching to these moneys under the testator's will. Then, even if he had the genuine receipt of both trustees he would have been liable to repay the money as a participator in the breach of trust which by payment to one only of the trustees he had enabled him to commit—*Webb* v. *Ledsam* (1 Kay & J. 385); *Hall* v. *Franck* (11 Beav. 519; 18 L. J. Ch. 362). The fact that Wilson had deceived him by forging Charlton's name did not relieve the earl from his liability to replace the fund—*The Midland Railway Company* v. *Taylor* (8 H.L. C. 751; 31 L. J. Ch. 336); *Cottam* v. *the Eastern Counties*

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Railway Company (1 Jo. & H. 243; 30 L. J. Ch. 217); *Dix* v. *Burford* (19 Beav. 409); *Eaves* v. *Hickson* (30 Beav. 136).

Mr. Druce and *Mr. Chitty*, for the Earl of Durham.—The plaintiff Charlton and Wilson were dealing as executors and not as trustees. They were estopped from saying otherwise by their own bond, in which they were described as executors. Then the receipt of one of two executors was a valid legal discharge —*Shep. Touch.* 484. From the first inception the money was standing on the executors' account, and there was no evidence of any alteration of the estate. The mere lapse of thirteen years did not make the general assets trust property. The cases cited on the other side had no bearing on the case, keeping in mind the distinction between trustees and executors—*Boursot* v. *Savage* (35 L. J. Ch. 627; L. R. 2 Eq. 134).

Mr. Kay replied.

JAMES, V.C. (after stating the facts of the case) said—The plaintiffs have filed their bill seeking to make the Earl of Durham pay over again the 2,500*l.* which he had so paid. The Earl of Durham's answer is a very simple one. He says: I dealt with the executors; I had a right to deal with the executors; and I paid one of the executors, as by law I might. I got from him the security back; I am legally discharged from that debt, which I have legally satisfied. The plaintiffs say: That may be a good answer, but in equity you are still liable to pay for that debt, notwithstanding you have obtained a good legal discharge for it. In the first place it was suggested, true it is, that you are now setting up this case of your having paid to one on the receipt of the one, but that is not what you intended to do; you intended to pay to the two and on the receipt of the two, and as you have not got the receipt of the two you are not at liberty to set up the receipt of the one as sufficient discharge. One does not know how to deal with such a question as that. If a man has got the receipt of one he is entitled to rely on it.

It was then said, you had notice, through your solicitor, that this was residuary trust estate. The solicitor you employed in the matter of the bond, and who charged you for preparing that money bond, knew all about the will, and therefore you had constructive notice through him of the trusts upon which the money was held. I certainly should not be the first Judge to lay down that which I do not find has ever been laid down before, namely, that an obligor, who goes to the solicitor of the intended obligees of a bond and pays that solicitor his charges for filling up a money bond, has constructive notice through that solicitor that the obligees are trustees, and of the trusts upon which those obligees hold the money which is so secured. But, in truth, the solicitor himself had no notice, and could have had no notice at that time, that this was residuary trust estate, for this transaction took place very shortly after the death of the testator, and, in fact, before the will was proved, and therefore before anything substantial could really have been done in the administration of the trusts of the estate, or in ascertaining whether it was residuary estate. In point of fact, it was not residuary estate at that time.

Then it is said, you ought to have presumed, and must be taken to have known from the lapse of time which occurred between the death of the testator and the ultimate transaction in paying off the 2,500*l.*, that these had ceased to be assets, and had become residuary estate. There is no authority that I know of for that proposition. There are conclusive authorities, as it seems to me, to the contrary in those cases in which it has been held, that even a purchaser cannot suggest such a presumption as a reason why he should not be compelled specifically to perform the contract for the purchase of leaseholds from an executor after the lapse of twenty-seven years—*Sabine* v. *Heape* (27 Beav. 553; 26 L. J. Ch. 79).

I should say it was also suggested, that the transaction itself involved a breach of trust which imposed upon the earl a liability distinct from that which he undertook in terms by his bond. The plaintiffs say the substitution of the bond of the earl for the bond of the trustees was a breach of trust on the part of

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the executors, and the earl was a party to that breach of trust. The transaction must be considered exactly the same as if his trustees had paid so much money to the executors, and then he had borrowed that money on his own bond, that not being a proper investment of the moneys of the testator. I do not know that there is any authority for that. It is possible, no doubt, that if executors will take the bond of one man instead of the bond of two, they may themselves in certain events and contingencies become liable as for a *devastavit* of the assets; but it does not follow from that that the person who gives his bond simply in the character of an obligor, incurs any obligation in respect to the moneys other than that which is expressed upon the face of the instrument itself. I am of opinion, therefore, in this case that the earl never was liable, except as a legal debtor, upon a legal instrument to obligees, any one of whom had a right legally to receive the money which he was bound to pay, and, having paid, that he is effectually discharged in this Court as well as in a Court of law.

But, even assuming that the transaction had produced the effect which is suggested, that this was trust money, and that the earl was paying trust money, intending to pay it to two trustees, I am not prepared to hold that a person who has legally obtained a discharge from a legal debt can be made liable to this Court, where he has behaved with perfect honesty and taken all the ordinary precautions which a man in the ordinary course of business would take. I think that this Court has gone in many cases to the very verge of justice, and to the very verge of its legitimate jurisdiction, in helping *cestuis que trust* out of moneys belonging to men who have dealt honestly, but incautiously, with their trusts; and I certainly will not extend that doctrine one iota beyond what I find in the decided cases, or what I am directed by the Court of appeal to do.

This bill must be dismissed, and must be dismissed with costs. The only reason why I reserved my judgment was to see whether I could, it being a case of great hardship as far as the plaintiffs are concerned, find any reasonable ground on which I could excuse the plaintiffs from paying the costs of the suit, but I have been unable to find any such ground, and therefore the costs must abide the event.

Note.—This case has been affirmed on appeal.

STUART, V.C., Jan. 21, 22, 23, 25, 1869.

CROW *v.* PETTINGILL.

38 L. J. Ch. 186; 20 L. T. 7; 17 W. R. 364: reversed, [1869] E. R. A.; 20 L. T. 342; 17 W. R. 562 (L. JJ.).

Mortgage—Father and Son—Mortgage by the Father of an Estate in Fee for a Term of Years—Payment of the Mortgage Debt by the Son—No Re-assignment of the Term.

MERGER.—*The owner in fee of an estate mortgaged it, in* 1808, *for a term of* 1,000 *years, to secure* 3,000*l. and interest. In* 1826 *he paid off* 500*l. of the debt. In* 1851 *he and his son made cross wills, devising and bequeathing their real and personal estates to each other absolutely. In March,* 1853, *the son paid off* 1,500*l. of the debt; and in October of the same year he paid the balance of it. The title-deeds of the property were deposited with the solicitor of both the father and the son, on their behalf, to secure the amount which the son had borrowed to pay off the balance of the debt; but no re-assignment of the mortgage term was ever executed. In* 1862 *the father made another will, by which he devised his real estates to his son for his life only. He died in* 1865, *and the son died in* 1866, *having by his will appointed his widow (the plaintiff*

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in this suit) his sole executrix. Upon the question whether, under all the circumstances of the case, the mortgage term of 1,000 *years was intended to be kept alive for the son's benefit*:—Held, *that, as the evidence in the suit did not shew that the son paid off the* 2,500*l. mortgage debt for the exclusive benefit of his father, and without any purpose of benefit to himself, the plaintiff was entitled to be repaid the* 2,500*l. out of the father's estate.*

Harriet Crow, the plaintiff in this suit, was the widow and sole executrix of Robert Crow the younger; and the principal objects of the suit were to obtain a declaration that the plaintiff, as such executrix, had a valid charge on a farm called the Bradwell Farm, in Suffolk, and the purchase-money thereof, for a sum of 2,500*l.* and interest, and for satisfaction of that charge out of the farm, or the purchase-money for the same.

The facts of the case were these: By indentures of lease and re-lease, dated respectively the 6th and 7th of October, 1808, the Bradwell Farm was duly sold and conveyed by Elisha de Hague to Robert Crow the elder and his heirs, to the use of such persons and for such estates as he should by deed appoint. In order to complete his purchase, Robert Crow the elder required the loan of 3,000*l.* Elisha de Hague agreed to lend him that amount on the security of a mortgage of the farm. Accordingly, by an indenture dated the 8th of October, 1808, Robert Crow the elder demised the farm to Elisha de Hague, his executors, administrators and assigns, for a term of 1,000 years, subject to a proviso and condition that, if Robert Crow the elder, his heirs, executors, administrators or assigns, should pay to Elisha de Hague, his executors, administrators or assigns, the sum of 3,000*l.* on the 8th of April then next, with interest for the same as therein mentioned, that indenture and the estate and term of years thereby granted should cease, determine and be void. On the 1st of April, 1826, Robert Crow the elder paid off 500*l.* of the 3,000*l.*, and a receipt for that payment was duly indorsed on the mortgage deed.

In 1837 the plaintiff married Robert Crow the younger, the son of Robert Crow the elder.

Robert Crow the elder was then the lessee of a farm adjoining the Bradwell Farm. Wishing to advance his son in life, he placed him in the possession of that adjoining farm, and gave him the necessary stock and capital for the purpose of enabling him to carry the same on for his own benefit. The lease of that farm would have expired in 1840, but Robert Crow the elder renewed the lease for four years. Robert Crow the younger so occupied and carried on that farm for his own benefit till the end of the renewed term; and, in fact, with his father's help till Michaelmas, 1845. At that time, however, he was enabled by his own means, and without the assistance of his father, to become lessee of another farm at Henham, in the same county of Suffolk, and to give up the one adjoining the Bradwell Farm.

On the 3rd of January, 1851, Robert Crow the younger made a will, whereby, among other things, he bequeathed a legacy of 500*l.* to the plaintiff, and devised and bequeathed the rest of his property to his father absolutely, but with a gift over in the event of his father pre-deceasing him.

On the 4th of January, 1851, Robert Crow the elder made a will, whereby, after appointing Robert Crow the younger and the defendants W. D. Pettingill and W. Worship his executors, he devised and bequeathed the whole of his real and personal estates to his son absolutely, but with a gift over in the event of his son pre-deceasing him.

In January, 1852, Robert Crow the elder had, through the misconduct of others, become liable for a certain breach of trust, to the amount of about 500*l.* or 600*l.* The plaintiff alleged that her husband was therefore anxious to assist his father by relieving him personally during his life from the payment of the 2,500*l.*

On the 29th of January, 1852, Robert Crow the younger wrote a letter to

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the defendant W. Worship, who was the solicitor of both the father and the son. In that letter, alluding to the breach of trust, he stated as follows:—

"I thank you, but was much surprised to hear the amount so heavy. It's a bad job these times, I must confess. I cannot understand how it can be so much. However, I will do the best I can. I have made up my mind to sell off at Michaelmas next, and relieve him of business altogether. I now think it's time, at his years, to give up the toils of this life."

In pursuance of the desire so expressed by Robert Crow the younger, he, on the expiration of the term which he held in the Henham Farm (viz., in Michaelmas, 1852), gave up his occupation of it, sold the produce, received the tenant's valuation of the farm, and retained the whole of the moneys so realized for his own use. He then took a house at South Town, near Great Yarmouth, and went to reside there with his wife. In 1853 he left that place and went to live with his father at the Bradwell Farm, and did live there till his father's death. The plaintiff alleged that from the produce of the sale of the Henham Farm, from his moneys in hand, from money borrowed by him from her father and otherwise (as hereinafter mentioned) her husband ultimately acquired the means of paying off, and did in fact pay off, the said sum of 2,500*l.* owing on the security of the indenture of the 8th of October, 1808.

The plaintiff also alleged that "in prospect thereof it was arranged between the said Robert Crow the elder and Robert Crow the younger, that the said sum of 2,500*l.* should be paid off by the said Robert Crow the younger on behalf of the said Robert Crow the elder, and that the said Robert Crow the younger should thereupon become entitled to the benefit of the said security."

The mode in which Robert Crow the younger effected the payment of the 2,500*l.* was this: The money was payable to James Stone, the legal personal representative of Elisha de Hague. The plaintiff alleged that her husband wrote to James Stone telling him of the arrangement by which he, Robert Crow the younger, was, on his paying off the mortgage debt, to have the benefit of the security. James Stone in reply fixed the following Saturday for a meeting upon the subject. Accordingly, on the following Saturday, viz., the 12th of March, 1853, Robert Crow the younger called on James Stone at his office in Norwich and paid him 1,500*l.*, by a cheque for that amount, dated the 12th of March, 1853, drawn by Robert Crow the younger upon his bankers, Messrs. Gurneys, Turner & Brightman, of Great Yarmouth, and the cheque was indorsed by James Stone, and duly honoured. James Stone then indorsed and signed a receipt on the indenture of the 8th of October, 1808, as follows:—

"12th March, 1853.

"Mr. Crow has this day paid me 1,500*l.* in further payment of the principal of this mortgage, with all interest for the same, leaving 1,000*l.* principal.

"James Stone."

The plaintiff also alleged by her bill that on the 8th of October, 1853, her husband applied to the defendant W. Worship for the loan of 1,000*l.* wherewith to pay off the balance of the mortgage debt. The defendant W. Worship obtained the amount from his uncle Thomas Dade, who was one of his clients, upon the security of the promissory-note of Robert Crow the younger, and a deposit of the title-deeds and documents relating to the Bradwell Farm, when Robert Crow the younger should have received the same from James Stone. Robert Crow the younger then obtained the cheque of Thomas Dade for the 1,000*l.* and paid it to the credit of his account with his bankers. He then, accompanied by a clerk of the defendant W. Worship, went, on the same day, to the office of James Stone, and paid him the 1,000*l.* by a cheque drawn by him on his bankers for 1,019*l.* 8*s.* 4*d.* (*i. e.* 1,000*l.* principal and 20*l.*, less 11*s.* 8*d.* income-tax for one half-year's interest thereon). That cheque was also indorsed by James Stone, and duly honoured.

James Stone then delivered up the title-deeds of the farm to the clerk of

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the defendant W. Worship, and signed a memorandum indorsed on the indenture of mortgage of the 8th of October, 1808, which was as follows:—

"I, the undersigned, James Stone, of the city of Norwich, Esquire, do hereby acknowledge to have this day received of Mr. Robert Crow the sum of 1,020*l.* in full discharge of all principal and interest now due to me upon the within written security as surviving executor of the Rev. George de Hague, clerk, deceased, who was surviving executor of the within named Elisha de Hague.—Dated this 8th day of October, 1853.

"James Stone."

No re-assignment of the residue of the term of 1,000 years was ever executed.

Robert Crow the elder made several wills and codicils between 1851 and 1862, but in that year he made his last will. It was dated the 11th of December, 1862; and thereby, after appointing Robert Crow the younger and the defendants W. D. Pettingill and W. Worship his executors, he bequeathed the residue of his personal estate to Robert Crow the younger absolutely; and devised all his real estate to the defendants W. D. Pettingill and W. Worship, their heirs and assigns, upon trust for Robert Crow the younger for his life; and from and after his decease, upon trust for sale, and distribution of the proceeds thereof as therein mentioned; with a residuary trust as to one moiety of such proceeds for the defendant W. Worship absolutely.

Robert Crow the elder died on the 31st of August, 1865, and his executors duly proved his will.

Robert Crow the younger died on the 28th of April, 1866, having made his last will, dated the 1st of September, 1865. He thereby appointed the plaintiff his sole executrix, and she duly proved the will.

On the 11th of July, 1866, the plaintiff, being informed that it was the intention of the defendants W. D. Pettingill and W. Worship to sell the Bradwell Farm, and to apply the proceeds of such sale upon the trusts of the will of Robert Crow the elder, served them with a notice "not to part with the title-deeds and writings relating to the real estate of Robert Crow the elder, but to hold and retain the same, on her behalf, until her claims were satisfied, such title-deeds having been deposited with them, or one of them, on behalf of Robert Crow the younger as equitable mortgagee thereof."

The circumstances under which the title-deeds of the Bradwell Farm had been deposited with the defendant W. Worship, on behalf of Robert Crow the younger, as alleged by the plaintiff, were stated in the bill to be these: On the 8th of October, 1853, after the title-deeds and documents had been surrendered by James Stone, there were handed to the defendant W. Worship by his clerk. On the 12th of October Robert Crow the younger signed and gave to W. Worship, as the solicitor for Thomas Dade, a promissory-note for the 1,000*l.*, whereby Robert Crow the younger promised to pay Thomas Dade that sum so borrowed by him as aforesaid, with interest at the rate of 4*l.* per cent. On the 19th of October, 1853, Robert Crow the elder and Robert Crow the younger, then in company, signed and left with the defendant W. Worship, as such solicitor as aforesaid, a memorandum of the deposit of the title-deeds and documents for further securing the said sum of 1,000*l.* and interest.

The interest which accrued on the sum of 1,000*l.* down to and inclusive of the 8th of April, 1856, less income-tax, was paid half-yearly by cheques of Robert Crow the younger upon his said bankers, which were duly honoured. On the 8th of October, 1856, Robert Crow the elder and Robert Crow the younger went in company to the office of the defendant W. Worship, and Robert Crow the younger then and there paid to the defendant W. Worship the sum of 1,017*l.* 6*s.* 8*d.*, in discharge of the said principal sum of 1,000*l.* secured by the said promissory-note and memorandum of deposit, and half a year's interest thereon, less income-tax, by a cheque for 1,017*l.* 6*s.* 8*d.*, dated the 8th of October, 1856, and drawn by Robert Crow the younger on his said bankers. That cheque was indorsed by the defendant W. Worship, by writing

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his initials thereon, and was duly honoured. The bill then further alleged that for the purpose of preserving to Robert Crow the younger the benefit of the said indenture of the 8th of October, 1808, and thereby securing repayment to him of the said sums of 1,500*l.* and 1,020*l.* paid by him to the said James Stone as aforesaid, and interest thereon, Robert Crow the elder and Robert Crow the younger left the said promissory-note and memorandum of deposit, the said indenture of the 8th of October, 1808, and the other deeds and documents relating to the Bradwell Farm, in the custody of the defendant W. Worship, as their solicitor, and on their joint account. The defendant W. Worship then signed and gave to Robert Crow the younger in the presence of Robert Crow the elder the following memorandum:—

"Great Yarmouth, 8th October, 1856.

"Memorandum, that Mr. Robert Crow and his son have this day left with me a tin box, lettered R. C, containing the deeds of the Bradwell estate and other documents, to be put into my safe *on their behalf*.

"William Worship."

The deeds and "other documents" referred to in that memorandum all related to the Bradwell Farm.

Notwithstanding the aforesaid notice of the 11th of July, 1866, the defendants W. D. Pettingill and W. Worship, on the 11th of July, 1866, put up the Bradwell Farm for sale by public auction; and the defendants Elizabeth Smith and Samuel Harrison Smith became the purchasers thereof for the sum of 9,500*l.* The balance of that sum, less the deposit and certain other charges, as agreed upon between the parties, had been since ordered to be, and had been duly paid into Court to the credit of this cause.

The bill in the suit prayed a declaration that the plaintiff, as the executrix of Robert Crow the younger, was entitled to a charge in equity upon the Bradwell Farm, for the said sums of 1,500*l.* and 1,020*l.* paid by her husband to the said James Stone, as the legal personal representative of Elisha de Hague, in discharge of the amounts then owing upon the security of the indenture of the 8th of October, 1808, with interest thereon respectively, after the rate of 5*l.* per cent. per annum.

The plaintiff, in support of the agreement which she set up by her bill, deposed as follows:—

She was well acquainted with her husband's and her father's affairs. The 500*l.* or 600*l.* for which her father was responsible as a trustee was secured; and it was not necessary for his son to assist him as to that; but "in order to relieve Robert Crow the elder from his pecuniary embarrassment, it was agreed between him and Robert Crow the younger, that the latter should pay the 2,500*l.*, and in the place of the said James Stone become entitled to the benefit of the mortgage of the Bradwell Farm created by the indenture of the 8th of October, 1808. It was not probable, and indeed it was not the fact, that Robert Crow the younger intended to make a present of the said 2,500*l.* to his father, who was then a widower without any issue, except the plaintiff's husband, and did not require such a gift. The sole object of the said agreement between the plaintiff's husband and her father in that behalf, was to relieve her father personally during his life from the payment of the said sum of 2,500*l.*, and the interest thereof; and that object was fully effected by the plaintiff's husband paying to the said James Stone the said sum, and forbearing to sue his father for the said sum of 2,500*l.* when so paid, or the interest thereof; and becoming entitled to the benefit of the said mortgage, in the place of the said James Stone."

With respect to the deposit of the title-deeds of the Bradwell Farm with the defendant W. Worship, the plaintiff alleged that since the death of Robert Crow the elder the defendant W. Worship had destroyed the aforesaid promissory-note and memorandum of deposit, and untruly pretended that the said promissory-note was signed by Robert Crow the elder, and not by Robert Crow the younger; that the said memorandum of deposit was signed by

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Robert Crow the elder alone, and not by Robert Crow the elder and Robert Crow the younger jointly; and that the said sums of 1,500*l.* and 1,000*l.* paid by Robert Crow the younger to the said James Stone, as legal personal representative of Elisha de Hague, in discharge of the amount then owing on the security of the said indenture of the 8th of October, 1808, as aforesaid, were paid by Robert Crow the elder, or out of his moneys.

The defendant W. Worship by his answer stated, in opposition to the agreement which the plaintiff alleged by her bill, and deposed to as aforesaid, that in the year 1853, Robert Crow the younger took possession of the Bradwell Farm itself, as tenant thereof to his father, and accordingly it was, "*as the defendant believed*," agreed between him and Robert Crow the elder, that Robert Crow the younger should take and manage the said farm; and should have all stock and effects on the same, which an incoming tenant would have to pay for, at the usual valuation; and also the farming implements on the said farm which was the property of his father; and which said valuation and farming implements were together of the value of about 1,500*l.*, upon the terms that the said Robert Crow the younger should pay a small annual rent, and also should pay off the balance of the said mortgage debt charged upon the said farm, which then amounted to 2,500*l.*; and that with a view to such payment the said Robert Crow the younger should retain the amount of the valuation received by him on his quitting the said farm at Henham, and all the other sums from time to time advanced to him by his said father, of which only a very small portion had, "*as the defendant believed*," been repaid.

The defendant W. Worship, in order to corroborate the agreement, which he believed had been so entered into, stated that the value of the stock and capital on the farm adjoining the Bradwell Farm, when Robert Crow the younger entered, was not less than 2,000*l.*, for which Robert Crow the younger paid nothing to his father; and moreover large sums of money were subsequently advanced by the latter to Robert Crow the younger during his occupation of that farm, and for the purpose of his carrying on the same; as appeared from the banking account of the father, shewing cheques to the amount of 1,102*l.*, drawn by him on his account, and which the defendant W. Worship believed were transferred to the credit of the banking account of the son, while during the said time the son only transferred to the credit of his father's account 655*l.* 5*s.* 6*d.* So, also, during the son's occupation of the Henham Farm, he appeared to have received from his father 1,012*l.* 13*s.* as against a payment of 40*l.* only, and the defendant believed there were also further advances. Then, again, between Michaelmas, 1853, and Michaelmas, 1861, payments were made to the son to the extent of 200*l.*, while the father received from him only 152*l.* 15*s.* He believed the mortgage had not been called in; and he also "believed" that the "son was much pressed by his father to fulfil his agreement, and pay off the residue of the mortgage debt." He also stated, with reference to the memorandum which he had signed as to the deposit of the title-deeds with him, that he understood it to be intended only as an acknowledgment of that fact, and not in any way as a security on the Bradwell Farm, to Robert Crow, the younger.

With respect to the aforesaid promissory-note and memorandum of deposit, which the plaintiff alleged that the defendant Worship had destroyed, he said that Dade's loan was paid off after Robert Crow the younger had taken possession of the Bradwell Farm, while his father was living with him, and by both the father and son when the note of hand and memorandum of deposit were cancelled. The plaintiff denied that there ever was any such agreement as that set up by the defendant in his answer; and she also insisted that the loan by Dade was made to her husband alone, and not to him and his father.

Mr. Greene and *Mr. Lorence Bird*, for the plaintiff.—The question was whether, under the circumstances above stated, the mortgage security had been kept alive for the benefit of Robert Crow the younger, to the extent of the money advanced by him? 1. They relied on the agreement alleged and deposed

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to by the plaintiff. 2. They insisted that the money advanced by Robert Crow the younger was his own, or procured by him; which was clear, not only from the above-stated facts, but also from the entries in the books of the defendant W. Worship. Those entries were as follow:—

"Entries in my call-book, 1853.

"Saturday, 24th September—Mr. Robert Crow, jun., Saturday week, Norwich.

"Wednesday, 5th October—Mr. Robert Crow, Mr. Robert Crow, jun., arrangement to pay off mortgage.

"Saturday, 8th October—Mr. Robert Crow, jun., advance of 1,000*l*.

"Wednesday, 12th October—Mr. Robert Crow, jun., note of hand, &c.

"Wednesday, 19th October—Mr. Robert Crow, Mr. Robert Crow, jun., signed deposit-note."

3. The agreement set up by the defendant was positively denied by the plaintiff, and the defendant only "believed" it to have existed. 4. It was the duty of the defendant, as the solicitor of the father and son, to have obtained a re-assignment of the term to Robert Crow the younger, or to have informed him that it ought to have been executed; but he had not done so. 5. Inasmuch as Robert Crow the younger had paid the debt with his own moneys, the term could not be regarded as thereby made a "satisfied term" within the 8 & 9 Vict. c. 112. 6. The term was therefore still a subsisting one, and there was a resulting trust of it for the benefit of the estate of Robert Crow the younger, to which the plaintiff, as his executrix, was now entitled.

Mr. Dickinson and *Mr. North*, for the defendant W. Worship.—1. They relied upon the agreement deposed to by him in his answer, which they insisted was supported by the advantageous circumstances under which Robert Crow the younger had taken possession of the Bradwell Farm. 2. The moneys advanced by the son were not conclusively shewn to have been his. 3. They were, in fact, those of his father, as appeared from the state of the accounts between the father and son. 4. Robert Crow the elder never intended to keep the charge alive for his son, nor did the son himself consider that he had done so. For it was proved that Robert Crow the elder executed, among his various wills, one in 1857, but made no provision in it for the payment of the 2,500*l*. to his son. Moreover, when Robert Crow the younger made his last will he spoke to the defendant of the amount of his property (which he said consisted of a marsh, his furniture and ready money, and live and dead stock on the farm, all of which he estimated at 2,000*l*. only). Besides, the succession duty accounts made no mention of the 2,500*l*. debt; and Robert Crow the younger never himself preferred a claim to any debt due to him from his father's estate. The defendant W. Worship therefore rightly believed that the sums were paid by Robert Crow the younger on behalf of his father and in pursuance of the aforesaid agreement. 5. No transfer of the mortgage term was ever made, because, for the aforesaid reasons, it never was intended that it should be transferred to anyone. 6. They also contended that the deeds were deposited with the defendant for the exclusive benefit of Robert Crow the elder; and, 7, that the defendant Worship was correct in saying he believed that the request for Dade's loan was made to him by both the father and son; for the father was always treated by him as the debtor in his account in respect of the loan on behalf of Mr. Dade. 8. As Robert Crow the younger had been so largely advanced at various times by his father, as he never himself claimed to be repaid these mortgage moneys by him, and as he never considered that they were to form part of his estate, it must be assumed now that he intended them as a gift to his father. 9. But whatever the motive might have been on which he acted, when once the mortgage was paid off, the term was a satisfied one, under the 8 & 9 Vict. c. 112. 10. Robert Crow the younger, or his representative, was now, if a creditor at all of the estate of Robert Crow the elder, a simple contract creditor only, and the debt was therefore clearly barred by the Statute of Limitations.

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STUART, V.C.—The plaintiff is the executrix of a son who paid off a mortgage on the estate of his father, who was the owner of the fee simple. In the bill it is averred that the mortgage was paid off by the son pursuant to an agreement that he should have the benefit of the security. There is no evidence of that agreement except the affidavit of the plaintiff, who was the wife of the son, and may be presumed to have some knowledge of his affairs. But that cannot be considered as sufficient evidence of the agreement, and the case cannot be disposed of on that footing. What the bill prays is, that the plaintiff may be declared to have a charge upon the estate, and may receive payment out of the assets of the father. The defendant Worship is executor, and one of the residuary legatees of the father, so that he is greatly interested in resisting the demand of the plaintiff. He was also the solicitor and professional adviser of both father and son. In his answer he insists that the son paid off the mortgage pursuant to an express agreement; and that that agreement was made in consequence of the father having put the son in possession of a farm and farming-stock of the value of 1,500*l.*, upon the terms that the son was to pay off the mortgage. The averment of that agreement, however, is not absolute. There is in the answer and the evidence of the defendant no more than an averment that the defendant "believes" there was such an agreement. No fact is alleged as a ground of that belief. And it is a circumstance unfavourable to the defendant's case that the possession of the farm was not given till long after the son had paid off the mortgage. That amounted to 2,500*l.*, while the value of the farming-stock is stated by the defendant to have been 1,500*l.* That is the view of the case presented by the answer. If it rested there, upon the evidence, the Court could not consider that either the plaintiff or the defendant had proved any agreement. For the defendant, therefore, the case was argued upon the circumstances stated in the evidence in support of the presumption that the payment was made by the son as for a benefit to the father, without any intention of retaining any security over the estate, and that the benefits which the son had secured from the father by advances of money to a considerable amount on various occasions were a reasonable motive for that bounty.

Cases which involve the consideration of transactions between parents and children, or persons standing towards each other in such relations as raise a presumption of advancement or bounty, are to be decided on principles now very well understood. But the proper application of those principles is in some cases a matter of great difficulty. Where a father makes a purchase in the name of his son, a presumption arises that it is intended as a benefit to the son. No such presumption would be made if the purchase was in the name of a stranger; for where the purchase is in the name of a stranger, there is a resulting trust for the benefit of the person who pays the money. The presumption arises from the relation of the father to the son, and the duty of the father to make a provision for his son. Since the case of *Dyer* v. *Dyer* (2 Cox, 92) the principle has been better understood. I consider it to be now the settled law of the Court that the relation of father and son is "a circumstance of evidence"; and that the same presumption may be raised by the evidence of circumstances in other cases where the relation of father and son does not exist. There is indeed a case, *In re De Visme* (2 De Gex, J. & S. 17; 33 L. J. Ch. 332), in which the Lords Justices are reported to have held that the principle did not apply to the case of mother and child. But I do not understand that decision to be an authority for the proposition that the presumption will not arise in the case of a mother, when the circumstances in evidence are sufficient to shew that an intention of bounty is to be presumed. In all such cases the question is, whether there is evidence sufficient to rebut the resulting trust in favour of the person who pays the money; and evidence is admissible to support the resulting trust as well as to rebut it.

Where the question arises as to the payment of a mortgage by a person not bound to pay it, who takes no assignment of the security, it is a question which

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must in like manner be determined on the evidence which supports or rebuts the presumption that the person, who paid it without taking an assignment, did so for a purpose of benefit of the mortgagor or owner of the estate. Where a tenant for life pays off a mortgage charged upon the inheritance, without keeping the security alive for his own benefit, it is always held that the money which he pays continues a charge upon the land for his benefit. That is held upon a presumption founded on the fact of what has been called "the scantiness of his interest," and the absence of any evidence to shew that he intended to benefit the owners of the inheritance. If that presumption arises in the case of a tenant for life from the scantiness of his interest, it would arise more strongly in the case of a stranger. The case of a stranger paying off a mortgage is not likely to occur, unless under peculiar circumstances, and from some motive which would be the subject of evidence. But if the mortgage was paid off by an heir apparent, or by an expectant devisee who knew that a will had been executed by which the estate was devised to him, the presumption is so strongly fortified that, unless upon overwhelming evidence to rebut it, it must be held that the money paid for the redemption of the mortgage continues a charge upon the estate for the benefit of the person who paid.

In the present case the son was heir apparent, and knew that his father had executed a will by which, not only this estate, but the father's real and personal property, were devised and bequeathed to him. The circumstances in evidence tending to rebut the presumption are all equivocal, and of no force compared with the strength of those which support the presumption. It is proved that the mortgage was paid off, on a notice given by the son, and not upon any pressure or demand from the mortgagee. It is also proved that the son had on previous occasions received considerable sums from his father, and had the farming stock and other articles, which the answer states to have been of the value of 1,500*l*. Those seem the strongest of the circumstances in this case to rebut the presumption. The effect of the evidence as to the title-deeds, and the way in which they were dealt with, is equivocal; and there is nothing to shew decisively that they were delivered to Worship on behalf of the father exclusively. On the contrary, the impression produced by the evidence, and especially by the memorandum of Worship, dated the 8th of October, 1856, is rather in favour of the allegation that they were left in the custody of Worship to be held on behalf of both father and son; but the evidence is not decisive. Upon the whole case, the result is that it has not been proved that the payment of the mortgage debt by the son was made for the purpose of exclusive benefit to his father, and without any purpose of benefit to himself. Therefore the plaintiff is entitled to the declaration which she prays for, and to receive payment from the father's assets of the money advanced by the testator, her husband, in favour of the mortgage. She is also entitled to the costs of the suit.

GIFFARD, V.C., Nov. 5, 6, 14, Dec. 19, 22, 1868.

THORPE v. HOLDSWORTH.

38 L. J. Ch. 194; L. R. 7 Eq. 139; 17 W. R. 394.

Referred to, *Heath* v. *Crealock*, [1874] E. R. A.; 43 L. J. Ch. 169; L. R. 18 Eq. 215; 29 L. T. 763 (V.C.): affirmed with variations, [1875] E. R. A.; 44 L. J. Ch. 157; L. R. 10 Ch. 22 (L.C. & L. JJ.); *Union Bank of London* v. *Kent*, [1888] E. R. A.; 57 L. J. Ch. 1022; 39 Ch. D. 238; 59 L. T. 714; 37 W. R. 364 (C. A.); *Taylor* v. *Russell*, [1890] E. R. A.; 59 L. J. Ch. 756; [1891] 1 Ch. 8; 62 L. T. 922; 38 W. R. 663 (Ch. D.): reversed, [1891] E. R. A.; 60 L. J. Ch. 1; [1891] 1 Ch. 21; 63 L. T. 593; 39 W. R. 81 (C. A.):

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the latter decision affirmed, [1892] E. R. A.; 61 L. J. Ch. 657; [1892] A.C. 244; 66 L. T. 565; 41 W. R. 48 (H.L.).

Equitable Mortgages—Outstanding Legal Estate—Possession of Deeds—Priorities—Production of Deeds.

MORTGAGE.—*J. T. was the equitable owner in fee of an undivided moiety of land at W. as devisee under his father's will. The other moiety was by the same will devised to W. T, to whom, on the testator's death, the legal estate in the entirety had descended. J. T, in* 1812, *by deed, charged his moiety with an annuity of* 50*l. In* 1813 *J. T, by his marriage settlement, charged other land with a sum of money to be raised at his death. In* 1823 *he purchased the legal fee of the other moiety of the land at W, and in* 1825 *he, in exercise of a power for that purpose contained in the settlement, substituted the land at W. for the land comprised in such settlement. In* 1830 *he mortgaged his original moiety of the land at W, and he, or the trustee of the settlement, who was his solicitor, deposited with the mortgagee the deed of* 1812, *and an earlier deed. In* 1832 *the mortgagee first became aware of the settlement. The mortgagee appeared to have been in possession since* 1834. *In* 1835 *she bought up the annuity. The annuitant died in* 1837. *J. T. died in* 1866:—Held, *that the charge under the settlement had priority over the mortgage, the mere custody of the title-deeds not giving the mortgagee priority; that the Court would not order such deeds to be delivered up, but would order them to be produced for the purposes of the sale decreed in the suit.*

William Thorpe made his will, dated the 21st of May, 1805, and he thereby gave to his wife Elizabeth for her life two annuities of 50*l.* each, and charged one of them upon the estate thereinafter devised to his son William, and the other upon the estate thereinafter devised to his, the testator's, son John.

The testator then devised a piece of land at Waddingham which he had agreed to purchase but which had not, at the date of his will, been conveyed to him, to his sons William and John, their heirs and assigns for ever, as tenants in common.

The piece of land was afterwards, by an indenture, dated the 11th of October, 1806, conveyed to the testator.

The testator died on the 6th of April, 1807, without having, after the date of the conveyance, republished his will, and thereupon the legal estate of the whole of the land at Waddingham descended to his son William as his heir-at-law.

John Thorpe, on the death of the testator, entered into the receipt of the profits of a moiety of the property.

By an indenture, dated the 8th of February, 1812, and made between Elizabeth Thorpe of the one part, and John Thorpe of the other part, Elizabeth Thorpe released John Thorpe's moiety of the Waddingham property from her annuity of 50*l.* charged thereon.

By another indenture, also dated the 8th of February, 1812, John Thorpe conveyed his moiety of the property to Anthony Thorpe and George Minnitt, their heirs and assigns, upon trust to raise thereout and pay to Elizabeth Thorpe an annuity of 50*l.* for her life, and subject thereto upon trust for John Thorpe; and after the death of Elizabeth Thorpe, to the use of John Thorpe in fee.

By indentures of lease and release, dated respectively the 12th and 13th of May, 1813, the release being the settlement made on the marriage of John Thorpe, certain other hereditaments were conveyed by John Thorpe to William Hemsworth Wilkinson and George Thorpe to the use (after the marriage, which was duly solemnized) of William Hemsworth Wilkinson and George Thorpe, their heirs and assigns, upon trust to permit John Thorpe to receive the rents thereof during his life, and after his death upon trust to raise the sum of 3,000*l.*, to be held by them upon the trusts thereinafter declared concerning the same. And subject to the trusts aforesaid, the hereditaments thereby settled, or the

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residue thereof, were to be held in trust for such person as John Thorpe should by deed or will appoint, and in default of appointment, in trust for the right heirs of John Thorpe.

The trusts declared concerning the 3,000*l.* were for Catherine (the intended wife of John Thorpe) for her life, and after her death for the children of the marriage.

By an indenture, dated the 6th of April, 1823, William Thorpe conveyed his undivided moiety of the Waddingham property to John Thorpe in fee.

By indentures of lease and release, dated respectively the 25th and 26th of April, 1825, and respectively made between William Hemsworth Wilkinson and George Thorpe of the one part, and John Thorpe of the other part, the Waddingham property (along with other property) was, by virtue of a power for that purpose contained in John Thorpe's marriage settlement, substituted for the hereditaments comprised in such settlement, and the last-mentioned hereditaments were discharged from the trusts by such settlement declared concerning the same.

By articles of agreement, dated in 1828, and expressed to be made between John Thorpe of the one part and Mary Nelson of the other part, John Thorpe agreed to mortgage to her (among other hereditaments) his original moiety of the Waddingham property, and to deposit with her the title-deeds relating to the same, to secure the repayment of 1,700*l.* and interest.

On the 5th of January, 1830, John Thorpe gave to Mary Nelson his bond to secure payment to her by him of the above-mentioned sum of 1,700*l.* and interest on the 5th of July then next; and by an indorsement on this bond, under the hand of John Thorpe, he charged (among other hereditaments) his original moiety of the Waddingham property with the payment of the 1,700*l.* thereby secured. In these transactions, George Thorpe, who was a solicitor, acted for John Thorpe.

Contemporaneously with the giving of this bond, John Thorpe or George Thorpe deposited with Mary Nelson the indentures of the 11th of October, 1806, and the 8th of February, 1812, and the leases on which such indentures were respectively grounded.

In 1832, John Thorpe became bankrupt, and assignees of his estate were appointed.

In or before 1834, Mary Nelson, who did not, until after John Thorpe's bankruptcy, become aware of the deeds of 1813 and 1825, entered into receipt of the profits of a moiety of the Waddingham property, and she continued in such receipt until her death.

By an indenture, dated the 3rd of March, 1835, and another indenture, dated the 18th of May, 1835, indorsed thereon, Elizabeth Thorpe's annuity of 50*l.*, so far as the same was charged upon John Thorpe's moiety of the Waddingham property, was assigned to Mary Nelson. And by the same indentures, the estate of the heir-at-law of the surviving trustee of the annuity deed of February, 1812, in John Thorpe's moiety was vested in Mary Nelson and her heirs, subject to such equity of redemption as was then subsisting therein on payment of the annuity of 50*l.* and the before-mentioned sum of 1,700*l.* and interest.

Elizabeth Thorpe died in 1837.

Mary Nelson died in 1860, having previously made her will, dated the 23rd of January, 1857, whereby she devised and bequeathed to the defendant Harriet Pogson her moiety or other share of the Waddingham property, and all moneys that might be due to her as mortgagee or otherwise in respect of the same.

John Thorpe died on the 13th of July, 1866, and Catherine Thorpe died on the 27th of July, 1867.

Only two children of the marriage between John Thorpe and Catherine Thorpe attained a vested interest in the 3,000*l.* to be raised under the settlement of 1813.

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In the year 1848, part of the property comprised in the deeds of substitution of April, 1825, had been sold, and the purchase-money, amounting to 401*l.*, had been accepted by Catherine Thorpe and her children in part payment of the 3,000*l.*

William Hemsworth Wilkinson died on the 20th of May, 1835; and George Thorpe died on the 16th of May, 1851; and by an indenture, dated the 6th of September, 1866, Samuel Luke Bingham and John Henry Burkill were appointed trustees of the indentures of May, 1813, and April, 1825.

The plaintiff Thomas Fowler claimed, as assignee for valuable consideration, the interests of the children of John and Catherine Thorpe in the sum of 2,599*l.*, the residue of the 3,000*l.*

The bill was filed by Catherine Thorpe the mother and Thomas Fowler against William Holdsworth, Thomas Hodgkinson the younger, Richard Colton, Alfred John Pogson and Harriet his wife, Samuel Luke Bingham and John Henry Burkill, and prayed that the sum of 2,599*l.*, residue of the sum of 3,000*l.* to be raised under the indentures of 1813 and 1825, might be raised and paid to the plaintiff Thomas Fowler. The bill alleged that the trustees, Bingham and Burkill, were unable by reason of the claims of the other defendants to raise the sum above mentioned. The bill had been amended after the death of Catherine Thorpe the mother.

The defendants Holdsworth and Hodgkinson and the defendant Colton claimed, as purchasers for valuable consideration, other parts of the property comprised in the deed of 1825, but by their answers they respectively admitted that they purchased with notice of the indentures of 1813 and 1825. The defence set up by the answer of the defendant Alfred John Pogson and Harriet his wife was as follows:

They submitted that Mary Nelson was, under the securities of 1828 and 1830, a mortgagee of the moiety, formerly John Thorpe's, of the Waddingham property, without notice of the charge of 3,000*l.*; and that, being such mortgagee, she acquired, by the indentures of 1835, a right paramount to that of the parties claiming under the indentures of settlement and substitution to call for a conveyance of the legal estate of such moiety; that Mary Nelson became entitled, after the execution of the indentures of 1835, to hold the aforesaid moiety as a security, not only for what might be found due in respect of the annuity, but also for what might be found due under the securities of 1828 and 1830; that since Mary Nelson's death they had been in the receipt of the profits of the moiety, formerly John Thorpe's, of the Waddingham property, and that no acknowledgment in writing had ever been given by them or, as they believed, by Mary Nelson to John Thorpe, or to those claiming under him, of his or their title; that from January, 1830, the deeds relating to the aforesaid moiety had constantly been in the possession of Mary Nelson or those claiming under her; and that all equity of redemption in such moiety had become vested in Harriet Pogson for a legal estate of inheritance in fee simple, free from incumbrances.

Mr. Kay and *Mr. Freeman*, for the plaintiff.—The interests of the plaintiff and of the defendants Pogson and wife in the moiety, formerly John Thorpe's, of the Waddingham property, are equitable only; and that of the plaintiff, being prior in point of date to that of the defendants, is entitled to priority. The Statute of Limitations does not help the defendants, as John Thorpe did not die until 1866—*Macarthy* v. *Daunt* (11 Ir. Eq. Rep. 29).

George Thorpe was a trustee, and the deposit by him of the deeds with Mary Nelson gave her no rights as against the *cestius que trust*—*Newton* v. *Newton* (37 L. J. Ch. 705; L. R. 6 Eq. 135). They also referred to *Phillips* v. *Phillips* (3 Giff. 200; 31 L. J. Ch. 321); *Colyer* v. *Finch* (5 H.L. C. 905, 920; 26 L. J. Ch. 65); *Knight* v. *Bowyer* (2 De Gex & J. 421; 27 L. J. Ch. 520; 26 L. J. Ch. 769); *Joyce* v. *De Moleyns* (2 Jo. & Lat. 374).

Mr. W. M. James and *Mr. Smart*, for the defendants Holdsworth and Hodgkinson.

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Mr. Nalder, for the defendant Colton, asked for the costs of his appearance.

Mr. Willcock and *Mr. Horton Smith*, for the defendants Pogson and wife.—Since the death of the testator, in 1807, the legal estate of the moiety, formerly John Thorpe's, of the Waddingham property, has been outstanding in the testator's heirs. The plaintiff's claim, therefore, like that of the defendants for whom we appear, is equitable only. Mary Nelson having, in 1830, advanced her money and taken a deposit of the deeds of 1806 and 1812 without notice of the settlement or of the deed of substitution, and having, in 1835, taken from Elizabeth Thorpe an assignment of her charge upon the property, which was prior in date to the date of the settlement, we have a better right than the plaintiff to call for the legal estate. *Willoughby* v. *Willoughby* (1 Term Rep. 763); *Marsh* v. *Lee* (2 Vent. 337; 1 White & Tudor, L.C. (3rd edit.) 550); *Colyer* v. *Finch, ubi supra; Newton* v. *Newton, ubi supra*. Even if our equities are not better than those of the plaintiff, the possession by us of the title-deeds gives us a right to priority—*Layard* v. *Maud* (36 L. J. Ch. 669; L. R. 4 Eq. 397); *Rice* v. *Rice* (2 Drew. 73; 23 L. J. Ch. 289); *Joyce* v. *De Moleyns, ubi supra*. Mary Nelson and the defendants Pogson and wife, as devisees under her will, have been in adverse possession of the moiety in question since 1834, and we claim the benefit of the Statute of Limitations.—They also referred to *Stackhouse* v. *the Countess of Jersey* (1 Jo. & H. 721; 30 L. J. Ch. 421; *Lloyd* v. *Attwood* (3 De Gex & J. 614; 29 L. J. Ch. 97; *Rooper* v. *Harrison* (2 Kay & J. 86); *Jones* v. *Powles* (3 Myl. & K. 581); *Perry-Herrick* v. *Attwood* (2 De Gex & J. 21; 27 L. J. Ch. 121); *Lady Langdale* v. *Briggs* (8 De Gex, M. & G. 391; 26 L. J. Ch. 27); *Tucker* v. *Hernamaann* (4 De Gex, M. & G. 395; 22 L. J. Ch. 791); *Lord St. Leonards' Vendors and Purchasers* (14th edit.), 791, 794. The suit ought to have been instituted by the trustees, and not by the plaintiffs —*Jerdein* v. *Bright* (2 Jo. & H. 325; 30 L. J. Ch. 336).

Mr. Kay, in reply.

GIFFARD, V.C. (*Nov.* 14), after stating the facts, and observing that he had decided on the hearing that the defendant Colton was simply in the position of a person having an estate subject to a charge, and that the defendants Holdsworth and Hodgkinson could make no claim in priority to the plaintiffs on the ground that they derived title through John Thorpe; that they did not stand in any better position than he would have stood in; and that he could in no way raise any claim until after the 3,000*l.* had been first duly paid, said—The date of John Thorpe's death is enough to dispose of the defence of the Statute of Limitations. As regards the rest of the defence, the case made by the plaintiff is one which, on the face of it, is complete, and it rests entirely with the defendants to allege and prove some grounds for defeating it. They do not allege, and cannot be taken to allege, that they have the legal estate. They allege it to be outstanding in the heir of William Thorpe, and it appears to be so outstanding. The grounds on which they allege that they have the best right to call for the legal estate are the facts of their being assignees of all the rights and interests of Mary Nelson, and of their having as such, amongst other things, the deeds of the 8th of February, 1812. I have altogether failed to see any reason why the possession of those deeds by them as assignees of Mary Nelson can give them the best right to call for the legal estate. Then it is said that they are mortgagees, and as mortgagees, purchasers for value without notice, and that, besides, possession of the title-deeds generally gives priority. True it is that neither Mary Nelson nor these defendants had notice of the plaintiff's charge; but from the case of *Brace* v. *the Duchess of Marlborough* (2 P. Wms. 491) down to *Finch* v. *Shaw* (19 Beav. 500: affirmed by the House of Lords, 26 L. J. Ch. 65) and *Rooper* v. *Harrison*, the rule has always been that which was laid down by Lord Justice Wood in the last of these cases and in *Stackhouse* v. *Lady Jersey*, namely, that as between equitable incumbrancers, relief will be given to the incumbrancer prior in point of date, unless he has lost his priority by some act or neglect of his; and that relief will not be refused as against a subsequent incumbrancer on the sole ground of his being a purchaser

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for value without notice, unless he has the legal estate or the best right to call for it.

This being so, what I have to consider first is, whether there is anything in this case to postpone the priority of the plaintiff's mortgage, and I am of opinion that there is not; for, in point of fact, no negligence as to the deeds is proved. The allegation in the answer is, that either John Thorpe or George Thorpe handed over the deeds, George Thorpe being one of the trustees, and therefore one of the persons who had a perfect right to the custody of the deeds; and though it was argued that the mere custody of the deeds was enough to give the defendants priority, I am of opinion that this is not so. Nor can I take *Layard* v. *Maud* to be an authority for such a proposition. It appears that in that case there was conduct amounting to acquiescence in what was done on the part of the first mortgagee, and the decision was founded on *Roberts* v. *Croft* (2 De Gex & J. 1; 27 L. J. Ch. 220), which is one among the several authorities for the proposition, that the mere possession of the title-deeds by a second mortgagee, though a purchaser for value without notice, will not give him priority. There must be some act or default on the part of the first mortgagee to have this effect. Nothing of this description is proved in this case. I have, therefore, no difficulty in going the length of declaring the plaintiff's priority, and, regard being had to the nature of the security and the 48th section of 15 & 16 Vict. c. 86, in directing a sale. But whether I can or cannot deprive the subsequent mortgagee of the custody of the deeds, is a different, and, regard being had to the authorities, a difficult question. The point was discussed by Lord Cottenham in the case of *Frazer* v. *Jones* (5 Hare, 475, before Vice Chancellor Wigram: on appeal, 17 L. J. Ch. 353). In the result he found it unnecessary to decide the question. The Lord Justice Wood also discussed the question in *Stackhouse* v. *Lady Jersey*, but he also found it unnecessary to come to a decision on the point. In this case the defendants claim to be interested in a moiety of the property only, admitting that some one else is interested in the other moiety. At the instance of the persons interested in the other moiety, they may be compelled to produce, though not to part with, the deeds relative to the entirety. I, therefore, can order a sale and a reproduction of the deeds; and, of course, attested copies can be taken. The right to retain the deeds, therefore, is not of much pecuniary value. At the same time, I am bound to give my opinion on it. If the question had been *res integra* I should not hesitate, and I infer that neither Lord Cottenham nor the Lord Justice Wood would have hesitated as to the conclusion to be come to on the subject. Unfortunately, however, it is not *res integra*. In *Head* v. *Egerton* (3 P. Wms. 280) Lord Hardwicke's opinion, though he refers in some measure to the conduct of the first mortgagee, appears to be against ordering a delivery up of the deeds. *Wallwyn* v. *Lee* (9 Ves. 24), a decision of Lord Eldon's, is direct on the point, and has been so treated by Lord St. Leonards in *Joyce* v. *De Moleyns*. Therefore, considering myself bound by these authorities, I shall not make any decree depriving the defendants Alfred John Pogson and Harriet his wife, of the possession of the deeds. Beyond this I do not consider my hands tied, and the order I shall make is a declaration, first, that the charge vested in the plaintiffs and their trustees is the first charge on the entirety of the property in the pleadings mentioned, and that they, by force of that charge, have a right to have the legal estate conveyed as they may direct, and to have what is due for principal, interest and costs, raised by a sale of the property. I shall, then, order an immediate sale of the property, with liberty to apply for directions as to the parties who are to join in the conveyance, and as to the proceeds to arise from the sale. I shall also order the defendants Alfred John Pogson and Harriet his wife to produce, for the purposes of the sale, all deeds or muniments of title in their or either of their possession or power, relating to the entirety of the property; and there will be, besides, an account of what is due to the plaintiff for principal, interest and costs, and I shall appoint a receiver. But Alfred John Pogson and Harriet his wife will not be required to

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hand over the title-deeds to him. There will probably be no surplus after paying the first charge; if there is, it can be dealt with subsequently to the sale.

It was suggested in the course of the argument, that the plaintiff's trustees were the only proper parties to be plaintiffs. I am not of this opinion. The costs of the two last-named defendants, who are trustees, must, in point of fact, be taxed and paid with the plaintiff's costs. The suit is really a suit for carrying into effect the settlement of May, 1813, and the defendants are all necessary parties for that purpose, though not entitled to costs as against the person interested in the prior charge.

The decree must be without prejudice to such proceedings, if any, as may be taken at law in respect of the deeds, or any of them, against Alfred John Pogson and his wife.

December 19, 22.—The cause was spoken to on the minutes on these days. By the draft decree it was directed that "for the purposes of the sale the defendants Alfred John Pogson and Harriet his wife do produce all deeds and documents in their custody or power relating to the said hereditaments as the Judge shall direct."

The plaintiff now moved to insert also in the decree a clause ordering the defendants Holdsworth and Hodgkinson and the defendant Colton to deliver upon oath to the plaintiff Fowler all deeds and documents in their or either of their possession or power relating to the property comprised in the indenture of settlement of the 25th of April, 1825.

GIFFARD, V.C. said there could be no doubt that the clause which the plaintiff proposed to insert was not one which the ordinary forms of the Court could justify. The form would be, after striking out the clause proposed by the plaintiff, to order that the defendants Alfred John Pogson and Harriet his wife were not to deliver over the deeds and writings in their custody or power, but that they were to produce them for the purposes of sale; that all other parties were to produce the deeds in their custody or power for the purposes of sale; and that as to the delivery up of the last-mentioned deeds, the purchaser was to be at liberty to apply in chambers as he might be advised; and his Honour said that upon such an application he would not hesitate to order the last-mentioned deeds to be delivered up to the purchaser.

LORD ROMILLY, M.R., Jan. 27, 1869.

CHINA STEAM-SHIP COMPANY; *Ex parte* MACKENZIE.

38 L. J. Ch. 199; L. R. 7 Eq. 240; 19 L. T. 667; 17 W. R. 343.

Distinguished, *In re Milan Tramways Co.*, [1883] E. R. A.; 52 L. J. Ch. 29; 22 Ch. D. 122; 48 L. T. 213; 31 W. R. 107 (Ch. D.): affirmed, [1884] E. R. A.; 53 L. J. Ch. 1008; 25 Ch. D. 587; 50 L. T. 545; 32 W. R. 601 (C. A.); *Christie* v. *Taunton*, [1893] E. R. A.; 62 L. J. Ch. 385; [1893] 2 Ch. 175; 68 L. T. 638; 41 W. R. 475 (Ch. D.). Discussed, *In re Gwelo Exploration Co.*, [1901] 1 Ir. R. 38 (C. A.).

Companies' Act, 1862, *s.* 75.—*Call—Debenture.*

COMPANY.—*After a resolution to wind up a company voluntarily has been made, a debenture issued by the company and in the hands of a shareholder can only be assigned subject to future calls.*

A resolution was passed to wind up the China Steam-Ship Company voluntarily, which was confirmed on the 19th of December, 1866. Lowe was a shareholder in respect of sixty shares; he was also the holder of fifteen debentures issued to him by the company; he assigned the debentures for value to Mackenzie, and notice was given to the company on the 1st of March, 1867,

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of the assignment. A call was made payable on the 1st of July, 1867, On the 8th of August, 1868, an order was made to continue the winding-up under the supervision of the Court, and another call was made payable on the 1st of February, 1868. Mackenzie was allowed to prove the amount due on debentures, subject to the calls due on Mackenzie's shares. This was a summons to vary the certificate by allowing him to prove in full.

Mr. Jessel and *Mr. F. J. Turner*, for Mackenzie, did not dispute that debentures were assignable only subject to the equities between the assignor and the company at the date of the assignment; but said that here the equity could not accrue till the call was made.

Mr. Roxburgh and *Mr. Wickens*, for the official liquidator, said that, by section 75. of the Companies' Act, 1862, a call made in a winding-up related back to the time the person liable to pay it became a shareholder; that is to say, it was in the nature of *debitum in præsenti solvendum in futuro*. In *In re the Rhos Hall Iron Company; Ex parte the Birmingham Bank*,[1] July 16th, 1868, in this branch of the Court. Apart from statutory provision, as the calls were made in a winding-up, they must be the result of liabilities of the company incurred previously to the notice of assignment, and ought not to be affected by it.

Mr. Jessel replied.—Even at law a debt accrued due since the assignment on a contract made previously could not be set off against the debenture—*Watson* v. *the Mid Wales Railway Company* (36 L. J. C.P. 285; L. R. 2 C.P. 593). The act had not and could not make the call payable before it was made. The dividends due to a creditor who happened to be a shareholder were not stayed to meet future calls—*In re Overend, Gurney & Co.; Ex parte Grissell* (35 L. J. Ch. 752; L. R. 1 Ch. 528); and so he would not be prevented from dealing with his debt while no calls were actually due; otherwise, he would practically be paying in advance. In the latter case, in construing section 75, Lord Chelmsford said: "Until the call is made, there is nothing more than a liability to contribute. This, indeed, creates a debt; but the debt does not accrue due until a call is made." The principle of equity regulating the assignment of a chose in action was, that the assignee took the whole benefit provided everything had been done which could be done to perfect the assignment, subject, nevertheless, to any debt due from the assignor to the debtor, of the existence of which he could inform himself; but here there was no debt in existence,—the call might never have been wanted. A debt due, not payable, was a contradiction in terms: though no doubt there might be some collateral reason for not enforcing a debt, such as a covenant not to sue till a certain time. However, the certainty of having to pay a sum of money at a future day was very different from a mere liability or chance; and, in any case, the Court would hesitate to extend the harsh rule of equity which tended to defeat the object for which debentures were created.

The MASTER OF THE ROLLS (*January* 27). said: The only question which arose on this summons was whether a certain debt due on debentures could be proved in full, or should be set off against a call. There was no doubt it could be proved in a way; the question was whether it could be set off. After stating the facts, the Master of the Rolls continued: As to the nature of the debentures, it was admitted that they are assignable only subject to equities; that is to say, the equities subsisting at the date of the assignment. The only question then was, whether the call was a debt due at the time of assignment; if so, the debenture debt was subject to the call; according to the ordinary course of law

(1) *In re The Rhos Hall Iron Company; Ex parte The Birmingham Bank* was a case similar to this, except that the assignment was made and an entry of the same made in the books of the Rhos Hall Iron Company before it was wound up; but it was argued solely on the question whether the form of the debentures, which were made payable to "transferees," was such as to bring it within the decision of *In re The General Estates Company; Ex parte The City Bank* (L. R. 3 Ch. 758), or that of *In re The Natal Investment Company* (37 L. J. Ch. 362; L. R. 3 Ch. 355). The Master of the Rolls thought it within the latter decision, and therefore assignable only subject to the equities.

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this was not the case, and it must have been made so by act of parliament. After reading the 75th section of the Companies' Act, 1862, he said: It created a debt which was *debitum in præsenti solvendum in futuro*. He thought the object of the legislature was to prevent the happening of what was argued would be the case here. Where the assignment took place before the winding-up, the section did not come into operation. He did not think any of the cases cited had any bearing on the subject, except *In re the Rhos Hall Iron Company; Ex parte the Birmingham Bank*, a decision of his own which he did not feel bound by; but there was no decision against it, and on the construction of the act he thought the call related back to the time of the commencement of the winding-up. The 75th section seemed to have been introduced to meet the very thing which had here occurred,—to prevent persons avoiding the payment of calls while they had claims against the company which they could assign away. The proof must therefore be reduced to the extent of the amount due on the call.

STUART, V.C., Nov. 19, 1868. LORDS JUSTICES, Jan. 11, 1869.

In re THE COMPANIES' ACT, 1862. *In re* THE ACCIDENTAL AND MARINE INSURANCE CORPORATION; *Ex parte* BRIDGER AND TWO OTHERS.

38 L. J. Ch. 201; L. R. 4 Ch. 266; 19 L. T. 624; 17 W. R. 216.

Principle followed, *In re Blakeley Ordnance Co.; Creyke's case*, [1870] E. R. A.; 39 L. J. Ch. 124; L. R. 5 Ch. 63; 21 L. T. 572; 18 W. R. 103 (L.J.).

Winding-up of Company—Transfer of Shares—Forfeiture of Shares—Past Member—Contributory—Extent of Liability.

COMPANY.—*In January*, 1866, *A. transferred the shares which he held in the above-named company to B, and in the month of February*, 1866, *the transfer was duly registered, nothing being then due upon the shares in respect of calls. Two calls were afterwards made upon B. in respect of the shares. Neither of those calls was paid; and on the 3rd of October*, 1866, *the shares were declared forfeited for non-payment of the calls. On the 24th of October*, 1866, *an order was made for the voluntary winding-up of the company, which was afterwards continued under the supervision of the Court. A.'s name was placed on the list of contributories of the company as a past member of it. Upon a summons to remove his name from the list*:—Held, *that he was properly placed on the list as a past member of the company; but the question whether his liability could be extended to the full amount unpaid on his shares, including calls after forfeiture, was not determined; and the summons was dismissed with costs.*

This matter came on, upon three adjourned summonses, on behalf of a Mr. Bridger and two other gentlemen of the names of Tyler and Lowe, for orders directing that their names, which had been placed on the list of contributories of the above-named company as past members of it, might be taken off such list, and that their costs might be paid by the company.

Mr. Bridger's case was taken first.

The facts of that case were these: The company was duly incorporated and registered in July, 1865, as a company limited by shares, with a capital of 2,000,000*l*., divided into 80,000 shares of 25*l*. each. Mr. Bridger held five shares in the company. In August, 1865, he contracted to sell them to a Mr. Ball. On the 27th of January, 1866, the shares were duly transferred by Mr. Bridger to Mr. Ball, and on the 15th of February, 1866, that transfer was registered. Two calls were afterwards made upon Mr. Ball in respect of the five shares, the second call being made on the 19th of July, 1866. Neither of these calls was paid.

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On the 3rd of October, 1866, the shares were, in pursuance of a resolution of the company to that effect, duly declared forfeited by the directors for the non-payment of the calls. On the 24th of October, 1866, an order was made for the voluntary winding-up of the company. That order was afterwards confirmed, and the voluntary winding-up was directed to be carried on under the supervision of this Court. In the settlement of the list of the contributories the name of Mr. Bridger was placed on the list as a past member of the company; and from that ruling he applied to the Court by way of appeal.[1]

By the articles of association of the company it was, among other things, provided as follows:

"XXVII.—Forfeiture of Shares.

"154. After forty-two days non-payment of any call in respect of any share the directors may declare the share forfeited for the benefit of the company.

"157. The forfeiture of a share shall involve the extinction at the time of the forfeiture of all interest in, and all claims and demands against the company in respect to the share, and all other rights incident to the share (except only such of those rights as by these presents are expressly saved).

"158. The forfeiture of a share shall be subject and without prejudice to all claims and demands of the company for calls in arrear thereon (if any) and interest on the arrears, and all other claims and demands of the company against the holder of the share when it was forfeited, and to the rights of the company to sue in respect thereof.

"159. But the company shall not sue unless they, at such time and in such manner as they think reasonable, first ascertain that the forfeited share and the net proceeds thereof are less in value than the amount of their claim, and shall then sue only for the balance unsatisfied by the net proceeds.

"160. Provided that the forfeiture of any share may, at any time within twelve months after the forfeiture thereof is declared, be remitted by the directors, at their discretion, on payment by the defaulter of all sums due from him to the company, and all expenses occasioned by the non-payment thereof, and on such other terms as the directors deem reasonable, but the remission shall not be claimable as a matter of right.

"161. The forfeiture of a share shall not prejudice the right to any dividend or dividends already declared thereon.

"162. The sales and other dispositions of forfeited shares may be made by the directors at such times and on such conditions as they think fit.

"XXVIII.—Forfeited and Purchased Shares.

"164. Shares forfeited or purchased for the benefit of the company may,

(1) By the Companies' Act, 1862, section 38, it is enacted as follows:

"In the event of a company formed under this act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualification following; (that is to say,)

"(1.) No past member shall be liable to contribute to the assets of the company if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding-up.

"(2.) No past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member.

"(3.) No past member shall be liable to contribute to the assets of the company unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this act.

"(4.) In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member."

And by section 74. as follows:

"The term 'contributory' shall mean every person liable to contribute to the assets of a company under this act, in the event of the same being wound up; it shall also, in all proceedings for determining the persons who are to be deemed contributories, and in all proceedings prior to the final determination of such persons, include any person alleged to be a contributory."

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at the discretion of the directors, be sold or disposed of by them, or be absolutely extinguished, as they deem most advantageous for the company.

" 165. Shares so forfeited or purchased shall, until sold or disposed of or extinguished, form part of the reserved fund, and the dividends declared thereon shall be carried to the reserved fund."

Mr. Bridger had paid to the company all that was due from him to them in respect of the shares at the time of the transfer; but it appeared that the existing members of the company would not ultimately be able to satisfy in full the contributions required to be made by them in pursuance of the act.

Under those circumstances, the question was, whether the transfer of Mr. Bridger's five shares to Mr. Ball, and the registration of the transfer, followed by the forfeiture of the transferred shares, released Mr. Bridger from his liability as a past member of the company?

Mr. Greene and *Mr. Locock Webb*, for Mr. Bridger.—The transfer of the shares by him to Mr. Ball, and the registration of the transfer, followed by the forfeiture of the shares, extinguished all Mr. Bridger's rights and remedies in respect of them as against the company.—They referred to the Articles of Association of the Company, clauses 154, 157, 158, 159, and 160. But if all Mr. Bridger's rights and remedies against the company were lost by the forfeiture, so also were his liabilities in respect of the shares to the company. The rights and liabilities of a member of the company were commensurate. The articles expressly excepted out of the operation of the forfeiture certain things—Clauses 160, 161. and 162, *ubi supra*. But none of these excepted thigs now remained to Mr. Bridger in respect of the shares. They also cited *Beresford's case* (3 De Gex & Sm. 175; 19 L. J. Ch. 166: on appeal, 2 Mac. & G. 197; 2 Hall & Tw. 388; 19 L. J. Ch. 332); *In re the China Steam Ship Company; Dawes's case* (37 L. J. Ch. 901; L. R. 6 Eq. 232); *In re the Blakely Ordnance Company; Stocken's case* (37 L. J. Ch. 5; L. R. 5 Eq. 6: on appeal, 37 L. J. Ch. 230; L. R. 3 Ch. Ap. 412).

Mr. Dickinson and *Mr. Everitt*, for Messrs. Tyler and Lowe, whose cases were admitted to be similar to that of Mr. Bridger.—The test of the liability of a past member, in the position of these gentlemen, was this: All creditors of the company must be regarded as dealing with it with a full knowledge of the provisions of its articles. And by the forfeiture the directors had made the shares " assets of the company "—*The Articles of Association of the Company*, clauses 164, 165. But Mr. Bridger and the other transferors had, long before that, ceased to have any interest in the company or its assets. The company had, also, by the forfeiture placed the shares entirely in their own power. Suppose they had then extinguished them? There was here no liability for past calls; and (except for that) there could be none on the part of a past member in respect of forfeited shares. No liability at all existed for non-existent shares. In addition to that, to continue the liability of a transferor, after the forfeiture for the benefit of the company of the transferred shares—forfeited, too, on account of the misconduct of the transferee—and after the payment by the transferor to the company of all he owed it in respect of the shares, was an enormous hardship. *Inter alia*, it subjected the transferor to the tortious acts of his transferee, over whom he could exercise no control. The names of these gentlemen ought, therefore, to be removed from the list of contributories. In the course of their arguments they referred to the Articles of Association of the Company, clauses 154, 158. and 159, and cited—*The Companies' Act*, 1862, s. 35 (and also sections 38, 74); *In re Blakely Ordnance Company; Needham's case* (36 L. J. Ch. 665; L. R. 4 Eq. 135); *In re Barned's Banking Company; Andrew's case* (36 L. J. Ch. 802; L. R. 4 Eq. 458); *In re Overend, Gurney & Co. (Limited); Oakes's case; Peek's case* (36 L. J. Ch. 233, 413; L. R. 3 Eq. 576; and, on appeal to the House of Lords, 36 L. J. Ch. 949; 2 L. R. E. and I. Ap. 325); *Stocken's case*, ubi supra; *In re the Home Counties and General Life Assurance Company; Wollaston's case* (4 De Gex & Sm. 437; 28 L. J. Ch. 721).

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Mr. Hardy and *Mr. J. N. Higgins*, for the official liquidators of the company, were not called upon.

STUART, V.C.—The gentleman who now applies, by Mr. Greene, to have his name taken off the list of contributories to this company was the proprietor of shares in it. He held five shares, which, in January, 1866, he transferred to a person of the name of Ball. The transfer was duly registered on the 15th of February, 1866. In the month of October of that year, Ball not having paid some calls made subsequently to the date of the transfer, his shares were declared forfeited by a resolution of the company; which resolution is admitted to be a valid one, and to have created a forfeiture of the shares.

It has been gravely argued that, because Ball's shares were forfeited for the breach of his contract by the non-payment of his calls, therefore all the liability of Bridger as a shareholder of the company up to the time when he ceased to be a shareholder in it is discharged. As I understood the argument, it was that the forfeiture operated as an extinction of all rights and liabilities on account of those shares, in respect of any antecedent holder. It would be an extraordinary thing if the provisions of any act of parliament should lead to such a result; for the effect would be that the misconduct of the transferee, in not paying the calls on his shares, would produce a great benefit to a previous holder. That is a proposition so startling as to make it difficult to believe anything was countenanced by parliament which could give rise to it. Such, however, was the effect of the argument.

The real and true view of the case, however, is this: that Bridger, while the holder of the shares, was liable according to the measure of his proportion of liability with the other shareholders for all the transactions of the company, and for the debts contracted by the company during the time he was a shareholder. But from the time of a valid transfer having been effected by him, his liability for future transactions ceased. When the transfer takes place then the state of things is this; that Bridger ceases to be a shareholder from the date of his transfer, but remains subject to liabilities which accrued before the transfer. Ball becomes a shareholder from the date of the registry of his transfer; and Ball failing to perform his contract for the payment of calls, loses all right to his shares, incurs a liability to a forfeiture of them, and that forfeiture is declared. But that forfeiture obviously is in respect of the contract subsisting between Ball and the other shareholders of the company of whom Bridger had ceased to be one; and how anything done between the company, constituted as it was after Bridger had left it, and Ball—especially if it was an act of misconduct by Ball—could operate in favour of Bridger, it is difficult to conceive.

It was said, however, that the present Lord Chancellor in construing the words of this act of parliament, and upon articles of partnership which were in the same terms as these, has decided that the forfeiture of shares is an extinction of all rights held by the shareholder; that being an extinction of all his rights it is also an extinction of all his liability; and it is said that his liability is commensurate with his rights. That is an expression which it is difficult to understand, but is, no doubt, a very convenient one. To say that a man's liabilities are commensurate with his rights is to state a proposition that cannot be maintained. His liabilities fairly incurred must be answered, and his rights fairly acquired must be established. All the rights of Ball were forfeited to the company; and the effect of the forfeiture is, no doubt, to extinguish all future liability. But how it could operate to extinguish past liability, it is difficult to conceive. If the argument that has been urged in favour of the forfeiture occasioned by Ball being an extinction of the liability of Bridger is to succeed, what enormous frauds might be perpetrated! The directors of a company would only have to lay their heads together and get rid of every solvent member by having a forfeiture declared of the shares, on account of his withholding payment of his calls. Such a state of things was never intended by the legislature; and the provisions of the act of parliament are many of them, indeed nine-tenths of

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them, mere repetitions of the ordinary law of contract as between partners and creditors.

This case has been argued as if the Court had only to look at the rights of creditors, and how far shareholders were liable to creditors. But in a winding-up, this Court is as much bound to do justice in apportioning the burden between the shareholders as in establishing the rights of creditors. The rights of creditors, generally speaking, are easy to establish; but the Court has to see that in providing for the payment of the creditors, every person who is liable to share that burden should share it. In the 38th section of the act of parliament the rights of Mr. Bridger are clearly defined. He is put on the list of contributories as a person liable in the secondary degree, and is called a past member. That he was a past member is beyond all doubt. He was a past member and his liabilities and rights as a past member are defined by the 38th section. The second head of that section is this: "No past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member." That is a provision of obvious justice to him. Then the next head is this: "No past member shall be liable to contribute to the assets of the company unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them." Under those two heads Mr. Bridger comes—he is a past-member, properly put on the list; and he is not liable for anything, if the existing members can satisfy all the demands; but if the existing members cannot satisfy all the demands, the extent of his liability is to answer the debts and liabilities of the company in respect of transactions of the company during the time he was a member. Therefore on these grounds these summonses must be dismissed, with costs.

Jan. 11.—The appeal from the above decision of the Vice Chancellor on the part of Mr. Bridger, and Mr. Neill, another person similarly situated, and against whom a similar order had been made, now came on for argument.

Sir Roundell Palmer, *Mr. Dickinson* and *Mr. Everitt* appeared for Mr. Bridger.

Mr. Maule and *Mr. Fischer* appeared for Mr. Neill.

Arguments were adduced by counsel similar to those in the Court below, and the same cases were cited. Counsel especially pressed upon the Court the consideration that since the shares were forfeited nothing could be said to be unpaid on them, and therefore under section 38. rule 4. of the Companies' Act, 1862, no contribution could be required from either Mr. Ball, the owner at the date of the forfeiture, or the former owners.

Mr. Hardy and *Mr. Higgins*, for the liquidator, were not called upon.

SELWYN, L.J., after noticing that the facts in each appeal were substantially the same, and stating them, said—The question is, whether the appellants are liable to be put upon the list as past members. The contention before us, as before the Vice Chancellor, was, that, inasmuch as the shares in respect of which the appellants are now sought to be put upon the list have ceased to exist by reason of the forfeiture of those shares declared by the company, their liability in respect of those shares has ceased also. In the first place, there was, as is admitted by the argument, an existing liability on the part of each one of these appellants to the creditors of the company at the time of the transfer. Has this liability been put an end to? The words of the statute are, in my judgment, conclusive on this point. Omitting the words which do not relate to past members, the 38th section may be read thus: "Every past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company." He is therefore declared liable, as he was in truth previously liable, to contribute to the debts and liabilities of the company, subject to the qualification which is afterwards mentioned, viz., that the debts and liabilities must have been in existence when he ceased to be a member of the company. The liability so declared is also declared to be subject to further qualifications, of which the

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first that is material in any view of the case for the present purpose is, that "no past member shall be liable to contribute to the assets of the company unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this act." This we have not now to deal with, since we are not discussing the amount of liability, but whether there is any liability abstractedly considered. The other is (and on this the question mainly turns) the 4th clause, which declares, that "In the case of a company limited by shares no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member." It is said that as these shares are no longer in existence, this 4th clause is equivalent to a declaration that the liability of these appellants has ceased. Now the 4th clause is limited to the case of a company limited by shares. In other companies, therefore, it is clear a forfeiture would not have the effect contended for. The argument of the appellants has gone to this length: that if, in the exercise of their judgment, the directors thought fit (and did it, of course, without fraud) to purchase *bona fide* one half of the shares in this company, the antecedent liability of the past members would be reduced to that extent. I assume that there was a liability of the company existing before the date of the transfer, and then a subsequent transfer, and a purchase by the company of the shares so transferred. There are no words in this act of parliament that can give any colour to an argument of that kind. The shares in respect of which that liability arises are shares not existing at the date of the winding-up, but shares in respect of which he is liable as a past member. What are they but the shares which he held as past member, which were his shares at the time the liability arose? The words of the act appear to me to confine the qualification to the sums unpaid, and I think the argument pressed on us might have gone further, and if it had been shewn that any sum had been paid from any source, either by a call or a payment by any person more immediately liable in respect of these shares, it might have been contended that the payment so made would go in diminution of the liability of the appellants. There is nothing in the act of parliament which says that because there is a power in the directors to purchase or forfeit shares, therefore forfeiture of those shares or the purchase of those shares shall be considered as payment on account of those shares. I think there is an express declaration of liability, and this qualification does not extend to give to that existing liability any such exemption as has been contended for in respect of the forfeiture of shares. It would be necessary to shew that something had been paid in respect of the shares; and as nothing has been paid, I think the liability of the past members continues to pay the debts of the company, subject to the two qualifications specified, that they must be debts or liabilities incurred before the time when they ceased to be members, and also that it shall appear to the Court that the existing members cannot satisfy the existing liabilities. We have been much pressed with the authority of the judgment of Lord Cairns in *Stocken's case*. It appears to me that that case has no application to the present. That was not with reference to a liability such as arises here. It was only a question whether certain unpaid calls at the date of the winding-up order could be enforced as against a person who had ceased to be a member. I think, therefore, that the Vice Chancellor has arrived at a proper conclusion in this case.

GIFFARD, L.J.—In this case, no doubt, the deed of the company and the statute must be taken into consideration. The effect of the deed, coupled with the transaction which has taken place, is, that the shares were forfeited and extinguished antecedently to the winding-up, but within a period of one year antecedently to that time. If we turn to the clause in the act of parliament, we find that clause first enacts, that there shall be a liability as regards all past and present members in the most unqualified terms; and if there were no qualifications at all in the 38th clause, it would seem that they would be liable as ordinary members. You have certain qualifications mentioned, and the first

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three qualifications apply to members of an unlimited company; and no one of the arguments which were deduced from the 4th clause could be applied to any one of those three qualifications, nor can I for one moment imagine that it could be contended that, as regards past members in an unlimited company, you must at the date of the winding-up have an existing share and a present shareholder. I can see no ground for that. The whole argument turns upon the 4th clause of section 38. The 4th clause, to my mind, has simply this object, that whereas in ordinary companies there is an unlimited liability, in limited companies the liability shall not extend beyond the amount not paid in respect of the shares; and if we take the words of that clause, they really mean that and nothing else. The words are—[His Lordship read them.]—The "amount, if any, unpaid," is the amount, if any, which has not been paid; and I am clearly of opinion that forfeiture is not payment. The 5th clause further bears out the construction which I have put on the 4th. I think, therefore, these appeal motions ought to be dismissed, with costs.

GIFFARD, V.C., Dec. 14, 15, 1868.

TRIMINGHAM *v.* MAUD.

38 L. J. Ch. 207; L. R. 7 Eq. 201; 19 L. T. 554; 17 W. R. 313.

Questioned, *In re Yglesias & Co.*, [1876] E. R. A.; 45 L. J. Bk. 54; L. R. 10 Ch. 635; 32 L. T. 677; 23 W. R. 780 (L. JJ.).

Bill of Exchange — Remittances from Abroad — Appropriation — Double Bankruptcy—Property in Remittances.

BILLS OF EXCHANGE.—*Business transactions were carried on between R. & Co., of London, and B. & Co., of Barbadoes, on a general account between the two houses. The course of business was for B. & Co. to draw bills of exchange upon R. & Co. and sell them in Barbadoes, and in order to keep R. & Co. in funds to meet the bills so drawn upon them and repay them for any moneys expended on behalf of B. & Co., B. & Co. were in the habit of buying bills in Barbadoes and remitting them to R. & Co. The proceeds of such remittances were carried to the general account between the two firms. Between the time of certain remittances being posted in Barbadoes for transmission to R. & Co. and of the same being received by R. & Co. the London firm became bankrupt. Subsequently B. & Co. also failed*:—Held, *that under the circumstances there was no specific appropriation of the remittances, but that so far as the remittances were in specie at the time of R. & Co.'s bankruptcy, the assignees of B. & Co. were entitled to have the same appropriated to the purposes of the general account, subject to the right of appropriation by the London firm to items in such account; and that R. & Co. submitting to appropriate the proceeds of such remittances to outstanding acceptances, the order in* Ex parte Waring (19 *Ves.* 345) *must be followed.*

This was a suit instituted by the official assignee of the estate and effects of the late firm of Barron, Laurie & Co., of Barbadoes, against the assignees and manager of the estate and effects of the late firm of Rattray & Co., of London, and the Merchants Banking Company of London (Limited), to determine the rights of the parties in the proceeds of certain bills of exchange.

From 1848 to 1865 the London firm of Rattray & Co., merchants and commission agents, consisted of Andrew Barron and A. Rattray. From 1865 till his bankruptcy in September, 1866, Andrew Barron was the sole representative of that firm. The business of Rattray & Co. consisted chiefly in obtaining consignments of sugar and other produce from planters in the West Indies for sale in this country. The firm of Barron, Laurie & Co., of Barbadoes, consisting of the said Andrew Barron and two other persons, was formed in 1863. They

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acted as the agents in Barbadoes of Rattray & Co. in the collection and consignment of produce to that firm, but had also an independent business of their own. The course of business between the two firms was regulated by an agreement entered into upon the formation of the Barbadoes firm in 1863. Rattray & Co. acted as the London agents of Barron & Co. in matters connected with the independent business of such last-mentioned firm. The course of business between the two firms, so far as it related to the consignment of produce from Barbadoes, was as follows: Barron & Co., as agents of Rattray & Co., were for certain fixed remuneration to collect sugar and other produce from planters and ship the same to Rattray & Co. in England; Barron & Co. being at liberty when any planters required advances on such produce to indorse bills drawn by such planters on Rattray & Co., so as to make such bills negotiable in the colony. It was further the custom between the two firms, as stated in the 9th paragraph of an affidavit made by A. Barron, that Barron & Co. should have the privilege of drawing bills of exchange upon Rattray & Co. (which bills were negotiable in Barbadoes) so as to give Barron & Co. the advantages of a floating capital for the purpose of carrying on the business of both firms, and accordingly Barron & Co. were in the habit of drawing bills for various amounts on Rattray & Co. and selling them in Barbadoes. They were also in the habit of buying bills in Barbadoes and remitting them to Rattray & Co. in order to place the latter firm in funds to repay them for bills so accepted by them and already matured and paid, and also to meet and provide for other such bills when matured, and to repay Rattray & Co. for any purchases made in England on their behalf in accordance with the said agreement. Such last-mentioned bills were generally drawn upon houses in England, and were not accepted until after they were received by Rattray & Co. It further appeared by the same affidavit that such bills were remitted to and received by Rattray & Co. on the understanding that Rattray & Co. were to deal with the same in such manner as they thought best by discounting or otherwise, credit being given for the amount thereof in the general account current between the two firms. None of the said bills so remitted to Rattray & Co. were specifically appropriated either to meet the bills drawn by Barron & Co. on Rattray & Co., or to any particular payment, but the invariable custom and course of proceeding between the two firms with regard to such remittances, as well before as since the year 1863, was to treat Rattray & Co. as the absolute, unfettered and uncontrolled owners of such remittances immediately upon the receipt thereof. There was but one general account between the two houses, embracing every transaction.

On the 18th of June, 1866, the English house of Rattray & Co. stopped payment, and an endeavour, which ultimately proved futile, was made to wind up the affairs of that firm under inspection, the defendant William Joseph White being appointed inspector. On the 20th of July, 1866, upon news of the failure of the English house reaching Barbadoes, Barron & Co. were duly adjudicated insolvent according to the laws of Barbadoes, and the plaintiff was appointed their official assignee for the benefit of their creditors. At the time of the stoppage of the English firm they were indebted to the Barbadoes house to the amount of about 19,800*l.*, independently of the bill transactions to which the suit related, and also independently of certain consignments of sugar which were *in transitu* at the time, and were not included in the suit. In September, 1866, Rattray & Co. were adjudicated bankrupt, and the defendants Maud, Slater & Scrutton were appointed assignees of their estate and effects. In October, 1866, the defendant White was appointed manager of their estate. Rattray & Co., after their suspension, received from the Barbadoes firm a number of bills amounting in the whole to about 16,440*l.*, which were handed over to the defendant White, as such manager as aforesaid. Many of these bills were not remitted from Barbadoes until after the date of the stoppage of the English house. By the same mails by which the said bills were transmitted, other bills drawn by Barron & Co. on the English house, amounting to about 16,000*l.*, were also sent home by the holders thereof, who were purchasers of them for value

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from the Barbadoes house. It appeared that all such drafts were accepted by Rattray & Co., but were not paid on arriving at maturity, but with few exceptions all of them were subsequently proved against the estate of Rattray & Co. under their bankruptcy.

The whole of the said bills remitted to Rattray & Co. by Barron & Co. were duly accepted by the various houses and banks on whom they were drawn, and they all arrived at maturity and were duly paid. The proceeds of such bills, amounting to 12,319*l.* 2*s.* 4*d.*, were received by the assignees and managers of Rattray & Co., who claimed to hold the same as part of their general assets. The plaintiff, on the other hand, claimed these proceeds for the creditors of Barron & Co. The defendants the Merchants Banking Company of London were the bankers of Rattray & Co., and claimed to be entitled to the proceeds of some of the last-mentioned bills under a letter of hypothecation dated the 4th of June, 1866, pledging such bills to secure the balance due to the bank. By such letter Barron & Co. were instructed to send all remittances of bills, &c. direct to the bank, and Rattray and Co. engaged immediately on receipt of remittances of bills, &c. from Barron & Co., to hand the same over to the bank. The Barbadoes firm were parties to this hypothecation.

The bill prayed for a declaration that the plaintiff, as assignee of the Barbadoes firm of Barron, Laurie & Co., was entitled to the sum of 12,319*l.* 2*s.* 4*d.* and to all other the proceeds which had arisen or might arise from the bills mentioned in the schedule, and that the defendant William Joseph White might be ordered to pay that sum, and that he and the other defendants who might have received any of the proceeds of the said bills, and had not duly applied the same in payment of bills for which they were specifically remitted, might be ordered to pay the same respectively to the plaintiff; for an injunction to restrain the defendant White and the assignees of Andrew Barron from parting with the proceeds of the bills except to the plaintiff, and from applying the same in payment of any dividend among the creditors of Andrew Barron. That in case the Court should be of opinion that the claim of the Merchants Banking Company of London had priority to the plaintiff's claim, an account should be taken of the claim of the last-mentioned defendants, and the balance handed to the plaintiff.

Mr. Druce and *Mr. W. F. Robinson*, for the plaintiff, argued, that although there might have been no specific appropriation of the remittances for any special payment, there was a condition implied that the London house should not take the payments, except for the purpose of meeting the drafts of the Barbadoes house. The fulfilment of this obligation had become impossible by reason of the bankruptcy of the London house. Therefore the Barbadoes house, or their assignees, were entitled to have back these remittances—*Ex parte Waring* (19 Ves. 345), which would be relied upon on the other side, was a different case. There bills had been deposited with bankers as a security against their acceptances of the depositor's drafts, and the reasoning of that case did not apply to the circumstances of this. They also cited—*Frith* v. *Forbes* (31 L. J. Ch. 793; overruled, 32 L. J. Ch. 10) and *Powles* v. *Hargreaves* (3 De Gex, M. & G. 430; 23 L. J. Ch. 1).

Mr. Amphlett and *Mr. Pontifex*, for the assignees of Rattray & Co., argued, that the London firm was the principal and did not act as factors of the Barbadoes house. Accordingly the remittances were the property of the London house, and the proceeds passed to their assignees—*Ex parte Pease* (19 Ves. 25). The bills were sent on a general account, therefore on the letters of advice being posted the bills became absolutely the property of the London house—*Bolton* v. *Puller* (1 Bos. & P. 539). They also cited *Ex parte Waring* (19 Ves. 345); *Ex parte Carrick* (2 De Gex & J. 208); *Ex parte Metcalfe* (11 Ves. 404); *Vertue* v. *Jewell* (4 Cambp. 31).

Mr. Rudall, for White, the inspector of the London house.

Mr. Kay and *Mr. Eddis*, for the Merchants Bank, supported the contention of the assignees of the London house, that the proceeds of the bills were

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exclusively the property of the London house; and further urged, that the bank had a lien on the fund under the general hypothecation by the London house, which had always been acted upon and confirmed by the Barbadoes firm—*Collins* v. *Martin* (1 Bos. & P. 648).

Mr. Druce, in reply.—The chief question was, in whom was the property in these bills at the time of the bankruptcy of the London house, and what were then the equities between the two firms? The property in the remittances was not intended to pass, and did not pass on the mere posting of the letters of advice. If his Honour decided against the plaintiff with regard to his claim to the general proceeds of the bills remitted to the London house in favour of the bill-holders and creditors of that house, at all events the surplus proceeds must be made good to the plaintiff, on the authority of *Ex parte Waring*.

GIFFARD, V.C.—I think I may dispose of this case now, as far as I can, because it very much depends on questions of principle, and there does not seem to me to be any real conflict of fact. With regard to the specific appropriation, if this were the first transaction between the Barbadoes firm and the London firm, the state of things would be different from that with which I have to deal. It was not at all the first transaction. Their relations (it is not necessary to define them) were not the relations of factor and agent. There had been dealings between them without end, and there was kept by the London house a general account with the house at Barbadoes, and beyond all question the Barbadoes house remitted generally on account. I do not think that the matter can be put more clearly than it is in the 9th paragraph of Mr. Barron's affidavit. He says, " In addition to the provisions of the said agreement hereinbefore referred to (that is the agreement proved by the plaintiff), it was further the custom between the said two firms that Barron, Laurie & Co. should have the privilege (being, in fact, a drawing credit) of drawing bills of exchange upon William Rattray & Co. (which, from the long-established character of the latter firm, were easily negotiable in Barbadoes), so as to give Barron, Laurie & Co. the advantages of a floating capital for the purpose of carrying on and developing the business of both firms; and I say that Barron, Laurie & Co. were accordingly in the habit of drawing bills of exchange for various amounts on William Rattray & Co., and selling such bills in Barbadoes. They also bought bills in Barbadoes and remitted them to William Rattray & Co., in order to place the latter firm in funds to repay them for bills so accepted by them and already matured and paid; as also to meet and provide for other such bills when matured; and also to repay William Rattray & Co. for any purchases made in England on their behalf, in accordance with the said agreement. Such bills were remitted to William Rattray & Co., and received by them on the understanding that William Rattray & Co. were to deal with the same in such manner as they thought best, either by discounting or otherwise, credit being given for the amount thereof in the general account current between the two firms. None of the said bills so remitted to William Rattray & Co. were specifically appropriated to any particular payments: and I further say, that the custom between the two firms with regard to such remittances was to treat William Ratrray & Co. as the absolute, unfettered and uncontrolled owners of such remittances immediately upon the receipt thereof by them; and that such has been the invariable practice and course of proceeding between the Barbadoes and London firms, not only since the year 1863, when the said agreement was executed, but prior thereto."

Well, that being the course of dealing between the parties, you could not arrive at a specific appropriation unless you found it in the terms of the letter that accompanied the remittances. If we look to the terms of the letter they amount to this, and nothing else: There were a certain number of drafts which the London house were required to accept, and there was a certain amount of remittances sent—sometimes nearly the same amount, sometimes not quite the same amount—but not a syllable about specific appropriation. In the absence of anything in these letters, according to the true course of dealing, beyond all question the remittances were sent on general account, and being

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sent on general account the party receiving them had a right to retain them, could hand them over to other parties, and so make a title to those other parties; but if they remained in specie at the date of the bankruptcy then a different state of circumstances arose, with which I will deal presently. Then, again, the fact that the acceptances were refused which accompanied those letters would not prevent the London firm who received these remittances from having the property in those remittances or dealing with them. At the utmost, the arrangement between the parties amounted to so much as that they might possibly be liable in damages for not accepting, but could not by possibility be liable beyond that, and could not be deprived of their right to reserve and deal with those remittances which were so sent. These observations I think dispose of that part of the case.

Then, also, if you come to the general dealing and understanding between the parties, on the defendant's evidence it was this, that, in some shape or other, either the bills which were sent or the proceeds of those bills were to be carried into general account between the two firms. Then if you find these remittances in specie, or what is equivalent to being in specie, at the date of the bankruptcy, I think that *Ex parte Pease* quite warrants me in saying what, in my opinion, justice also warrants me in saying, namely, that it is the right of the party who is the remitter to say to the persons who have in their hands these remittances in specie that they shall be applied on general account. I do not go beyond that. It is the right of the party remitting on such an understanding as this to say that those remittances shall be applied on general account, and shall not be abstracted from the general account and go for the benefit of a number of creditors who were never intended to have any interest whatever in those remittances.

That being so, it enables one to arrive at a very clear conclusion, I think, as to the relations between these parties, and I may make a very plain declaration on that subject. But before doing so I should observe I am of opinion that these remittances were posted before the bankruptcy, and posted, I am satisfied, with the intention of being remittances on general account. The property passed to the defendants the London firm. I admit *sub modo* subject to the right of the parties to say, as long as it remained in specie, it should be appropriated to the general account. That being so, I think it will be proper first to declare that there was no specific appropriation. I think the dealings with the remittances to White amount to nothing. All that was done with the remittances was this: they came to the hands of Barron, and Barron, as I understand, handed them over to White, he being the inspector, and this being done on the supposition that the inspectorship would be carried out, that the inspectorship fell through, and the state of things was the same as if the remittances had been in the hands of Barron at the time; and I think it does not make the slightest difference that White realized these remittances because he had the proceeds distinguished in his hands at the time, and therefore I treat them as if they were in specie. That would be one declaration. Then the second will be, "Declare, that so far as the remittances at the date of the bankruptcy were in specie, or the proceeds in the hands of White, it was the right of the plaintiff to have the same appropriated to the purposes of the general account, subject however, to the rights and claims of the mercantile bank, if any, and to the right of the London firm to appropriate to any part of the account." Then, when you bring the matter to that point, *Ex parte Waring* necessarily applies, that is to say, unless it is desired by the London firm to make any appropriation of any part of these remittances otherwise than to the acceptances. I understand they do not require anything of the sort, and therefore the next declaration will be this: "The London firm on this footing submitting to appropriate, not to any cash debt, but to the outstanding acceptances," then an order must be drawn up, to be copied from *Ex parte Waring*. You will find the order in *Powles* v. *Hargreaves* (8 De Gex, M. & G. 430, 457), adapting the order exactly to the state of circumstances here.

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Declare, that the remittances were not specifically appropriated as between Messrs. Barron, Laurie & Co. and Rattray & Co. Declare, that as far as the remittances remained in specie at the date of the bankruptcy, or the proceeds of them were in the hands of White, it was the right of the plaintiff to have the same appropriated to the purposes of the general account, subject, however, to the rights of the Merchants Bank, if any, and to the right of the London firm to appropriate to any part of the account. Declare, that so far as the remittances are applicable to the acceptances *Ex parte Waring* applies. And order accordingly, whether any and what parts are properly applicable to the drafts, regard being had to the declaration.

STUART, V.C., Dec. 15, 16, 17, 1868. LORDS JUSTICES, Feb. 12, 13, 1869.

MARTIN *v.* POWNING.

38 L. J. Ch. 212; L. R. 4 Ch. 356; 20 L. T. 133.

Approved, *Stone* v. *Thomas*, [1870] E. R. A.; 39 L. J. Ch. 168; L. R. 5 Ch. 219; 22 L. T. 359; 18 W. R. 385 (L.C.). Applied, *Hood* v. *North-Eastern Railway*, [1871] E. R. A.; 40 L. J. Ch. 17; L. R. 11 Eq. 116; 23 L. T. 433; 19 W. R. 266 (V.C.). Discussed, *Graham* v. *Winterson*, [1873] E. R. A.; 42 L. J. Ch. 633; L. R. 16 Eq. 243; 28 L. T. 803; 21 W. R. 722 (V.C.); *Jenney* v. *Bell*, [1876] E. R. A.; 45 L. J. Ch. 369; 2 Ch. D. 547; 34 L. T. 485; 24 W. R. 550 (V.C.); *Eyre* v. *Smith*, [1877] E. R. A.; 2 C.P. D. 435; 37 L. T. 417; 25 W. R. 871 (C. A.)

Pleading—Plea—Concurrent Jurisdiction—Court of Chancery—Court of Bankruptcy—Trust Deed under Bankruptcy Act, 1861—*Administration—Breach of Trust.*

COURT.—*This Court will not in general entertain jurisdiction as to the execution of the trusts of deeds registered under the Bankruptcy Act*, 1861.

Observations on the form of pleas to jurisdiction.

The bill was filed by one Martin, on behalf of himself and all others the creditors of one Parkin (a trader) entitled to the benefit of a trust deed under the 192nd section of the Bankruptcy Act of 1861, against the three trustees of the deed, and contained the following allegations:

That by an indenture dated the 19th of December, 1866, and made between Parkin and Powning, Barker and Bramall, the three trustees, after reciting that Parkin was unable to pay his creditors in full, and it had been arranged that he should pay them in discharge of their debts the sum of 10*s.* in the pound by instalments, Parkin covenanted with Powning and the creditors to pay that sum by four quarterly instalments of 2*s.* 6*d.* in the pound; Barker joining in the covenant as surety for the first, and Bramall joining therein as surety for the second instalment of 2*s.* 6*d.*; Parkin then granted and assigned all his real and personal estate to the three trustees upon certain trusts, by which Parkin was to carry on or wind up his business under the superintendence of the trustees; and the trustees were empowered to employ any persons for effectuating the purposes of the deed, and also to draw, accept, or indorse promissory notes, and to make advances of money in respect of the carrying on and winding up of the business or in furtherance of the trusts of the deed; and all moneys received by the trustees under the provisions of the deed were to be applied, first, in payment of all expenses incident thereto; secondly, in payment of all debts and expenses incurred in carrying on or winding up the business, and all advances made by the trustees; thirdly, in payment to Parkin of such remuneration as the trustees thought proper; and, fourthly, in such manner as the trustees

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should think best calculated to give effect to the provisions of the deed, and subject thereto in trust for Parkin. The deed contained numerous other provisions, and, in particular, a declaration that it was intended to operate as an inspectorship and composition deed under the Bankruptcy Act, 1861, and that all questions relating to the deed and the subject-matter thereof should be decided according to the provisions of that act.

That the deed was duly executed by Parkin and the three trustees, and assented to by a majority in number representing three-fourths in value of the creditors whose debts respectively amounted to 10*l.* and upwards; that it was duly registered on the 9th of October, 1867, and became a binding trust deed for the benefit of the creditors of Parkin under the provisions of the Bankruptcy Act, 1861.

That after the execution of the deed Parkin continued to carry on his business under the superintendence of the trustees. That the trustees paid the two first instalments of 2*s.* 6*d.* in the pound, borrowing money for the purpose, and afterwards repaying it out of sums received from Parkin on account of the business, making such payments in improper exoneration of the personal liability of Barker and Bramall, two of their number, under their respective covenants.

That Barker and Bramall being merchants supplied the trust estate with goods, paying themselves out of the trust moneys and making large profits. That the plaintiff had, at the request of the defendants, supplied the trust estate with a quantity of iron for which he had not been paid. That the defendants had wound up the business and realized the assets, but had not paid the third or fourth instalments of 2*s.* 6*d.* in the pound, and alleged that they had no funds in their hands applicable to the payment of debts incurred in carrying on the business.

The bill then prayed that the deed might be carried into execution and the trusts thereof administered under the direction of this Court; for an account against the defendants of the trust estate, and of their disposal thereof; and that, in taking such account, they might be disallowed all payments on account of the first and second instalments of the composition in priority to debts incurred in carrying on the business, or in exoneration of the liability of Barker and Bramall under their covenants; and might also be disallowed the amount of the profits made by Barker and Bramall as aforesaid.

To this bill the defendants, who severed in their defence, filed two pleas, containing averments to shew that all the requirements of the Bankruptcy Act of 1861, in order to render the deed binding under the 192nd section upon all the creditors of Parkin, had been complied with, and averring further that the deed became and still was binding on the plaintiff; and that, by the provisions of the Bankruptcy Act, 1861, the debtors, creditors and trustees, parties to or bound by such deed, were, after registration thereof, subject to the jurisdiction of the Court of Bankruptcy (following in this averment the language of the 197th section); and they submitted that "this Honourable Court ought not to entertain jurisdiction of the matters in the bill mentioned, and that the plaintiff could have a complete and effectual remedy in the Court of Bankruptcy, to which Court he ought to appeal."

Mr. J. Hinde Palmer, in support of the plea of the defendant Powning.—Where a debtor has executed a trust deed of this character under the Bankruptcy Act of 1861, and has complied with all the requirements of the act, in order to render it binding, the debtor, the creditors and the trustees of the deed are subject to the exclusive jurisdiction of the Court of Bankruptcy, which has ample powers to administer the trusts of the deed, and, if necessary, to punish the trustees, and the Court of Chancery will not interfere.

[STUART, V.C.—It is new to me to hear that the paramount jurisdiction of this Court has been taken away.]

In the case of *Bell* v. *Bird* (L. R. 6 Eq. 635), which is on all-fours with the present case, Giffard, V.C. decided that the administration of the trusts of these deeds belongs exclusively to the Court of Bankruptcy. That case was

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argued upon demurrer, a mode of defence not available here, owing to an error in the bill. A trustee under a deed of this kind stands in the same relation to the creditors as an assignee under an adjudication in Bankruptcy—*Ex parte Lawrence* (1 De Gex, J. & S. 307; 32 L. J. Bk. 61); and creditors thereunder are *in eodem statu* with creditors under a bankruptcy—*Ex parte Morgan* (1 De Gex, J. & S. 288; 32 L. J. Bk. 15). Under the 136th section of the Bankruptcy Act of 1861, the Court of Bankruptcy has power to summon and examine upon oath the assignee, trustee or any other person, as to any matters concerning the bankruptcy or trust estate, to make orders relative thereto, and to award costs, and, by the 175th section, to debit the assignee with interest at 20*l.* per cent. upon moneys above 50*l.*, improperly retained by him. If there were a concurrent jurisdiction, there might be a conflict between this Court and the Court of Bankruptcy. That Court has powers adequate for all the purposes of this bill, and the importance of maintaining the exclusive jurisdiction of that Court in cases committed to its administration has been fully recognized—*Preston* v. *Wilson* (5 Hare, 185, 192; 16 L. J. Ch. 137).

Mr. Greene, in support of the plea of the defendants Barker and Bramall.—The jurisdiction conferred by the act of 1861, with respect to composition deeds, is entirely new; for previously to that act an opposing creditor would not have been bound by such a deed, and the Court could not have dealt with the assets so as to liquidate his debt and relieve the debtor, as is now the case; for a deed of this kind can be pleaded in bar to an action by a non-assenting creditor —*Strick* v. *De Mattos* (3 Hurls. & C. 22; 33 L. J. Ex. 276); affirmed in *Woods* v. *De Mattos* (35 L. J. Ex. 64; L. R 1 Ex. 91). This administration of assets for the benefit of an opposing creditor, then, is entirely new; and a new jurisdiction being thus constituted, no old jurisdiction of this Court is taken away, but that new jurisdiction is given to the Court of Bankruptcy. That Court is armed with full powers of dealing with cases of this nature, and was the proper tribunal for the plaintiff to resort to.

Mr. Ince, with *Mr. Hinde Palmer* and *Mr. Greene*, in support of both pleas.—Even before the act of 1861 the Court of Bankruptcy had full power of dealing with breaches of trust similar to those complained of in this case. Thus, assignees improperly purchasing a bankrupt's estate has been removed—*Ex parte Reynolds* (5 Ves. 707); *Ex parte Badcock* (1 Mont. & Mac. 231); and have been ordered to make good the loss—*Ex parte Gover* (De Gex, Ca. Bk. 349); *Ex parte Gore* (3 Mont. D. & D. 77); *Ex parte Lewis* (1 Glyn & J. 69); and have not been allowed to charge for business done as accountants—*Ex parte Read* (1 Glyn & J. 77). And since the act of 1861 the Court of Bankruptcy has still larger powers—Sections 135. and 175; *Griffith & Holmes's Bankruptcy*, 516, 517; and has charged an assignee who had improperly been buyer and seller at the same time with a penal rate of interest on the price in his hands—*Ex parte Ridgway* (11 L. T. 467). There is, in fact, nothing prayed by the bill as to which that Court could not have given relief.

Mr. Wickens and *Mr. Russell Roberts*, in support of the bill.—First, there is nothing in the act of 1861 to exclude the general jurisdiction of the Court of Chancery in the case of a breach of their duty by trustees; and the trustees of a deed like this are not the less trustees in that they are in the same position as creditors' assignees. In overruling a demurrer to a bill filed to administer the estate of an insolvent under 1 & 2 Vict. c. 110, Lord Campbell held that an existing jurisdiction cannot be taken away except by express words.—So also Lord Eldon in *Galsworthy* v. *Durrant* (2 De Gex, F. & J. 466; 30 L. J. Ch. 402); *The Attorney General* v. *the Mayor of Dublin* (1 Bligh. N.R. 358). It is not enough to say that a Court has been created which has full powers to deal with the question; and a plea that as good relief can be obtained elsewhere is bad. Neither Court has exclusive seisin. Each Court having a concurrent jurisdiction, where the first application is to this Court, it thereby acquires seisin over the case. In these pleas there is no averment that the Court of Bankruptcy has done anything in the matter. It is said that an assignee is

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in precisely the same position as a trustee, but that proposition must be taken with some qualification. An assignee is an officer of the court, a trustee an officer created by contract, and bound by the terms of the contract, and is only in the position of an assignee as to that portion of his duties which is not covered by the contract. Moreover, an assignee is removable by the Court of Bankruptcy, which can appoint another in his place, but the Court of Bankruptcy has no power to appoint a new trustee of a trust deed—*In re Price's Trust Deed* (L. R. 6 Eq. 460). In *Riches* v. *Owen* (L. R. 3 Ch. Ap. 820), the Lords Justices affirmed the decision of Giffard, V.C., appointing a receiver under a creditor's deed, and it is difficult to reconcile the Vice Chancellor's judgment in that case with *Bell* v. *Bird*, *ubi supra*. Trustees under these deeds are bound, first, by the provisions of their deed, and, secondly, by the principles of the Court of Chancery.

Secondly, there are in this bill allegations of special equitable grounds on which relief is sought. The plaintiff is both a creditor under the deed and a person who has sold goods to the trustees. The deed is peculiar, and the trustees are charged with committing breaches of trust for their own benefit. None of the cases cited upon the other side go further than to shew that where assets are found in the hands of an assignee, he will be held liable for them. The questions here are such as the Court of Chancery can, and the Court of Bankruptcy cannot, properly and efficiently deal with.

The following cases were also referred to: *Pooley* v. *Quilter* (2 De Gex & J. 327; 27 L. J. Ch. 180, 374); *Hankey v. Garratt* (1 Ves. jun. 235); *Hilliard's case* (1 Ves. jun. 89).

Mr. Hine Palmer, in reply, cited *Ex parte Cox* (31 L. J. Bk. 49).

STUART, V.C.—The questions that have been argued in this plea upon the construction of the statute are of very great importance. Various authorities have been cited, and the apparent want of uniformity between them has been commented upon; but upon serious and accurate examination of the cases: I think there is no contrariety of decision at all.

The 197th section of the Bankruptcy Act of 1861 was clearly intended to commit to the Court of Bankruptcy the administration of the property of debtors who executed trust deeds for the benefit of their creditors, provided the solemnities and proceedings indicated by the act are properly observed and followed; and that section places trustees under such deeds upon the footing, and gives them all the rights, and subjects them to all the liabilities of assignees for creditors in bankruptcy. The duties of assignees in bankruptcy are well defined; and if there be nothing to be done in administering the assets of a debtor under such a trust deed but what falls properly within the province of those assignees, the legislature, I think, intended to give the Court of Bankruptcy a complete jurisdiction, as the assimilation of the character of trustee to that of assignee is very plainly indicated by the act; but there the act stops. If the trustees under a creditors' deed have any duties or trusts to perform which are not within the range of the duties of an assignee in bankruptcy, I think the act of parliament has no reference to such a case at all, and that it has not committed to the Court of Bankruptcy a duty which that Court could ill discharge, namely, that of saying, in a case where such unusual trusts are grafted on such a deed, what shall amount to a breach of those trusts, and how in the execution of them the trustees shall be dealt with when their conduct is complained of. Such matters are foreign to the duty of assignees in bankruptcy, and it is not easy to conceive what good or beneficial purpose could have been effected if the legislature had actually committed the administration of complicated trusts to the Court of Bankruptcy.

The administration of assets, and the performance of trusts declared by deed or by writing, are entirely different things. What takes place upon the administration of assets is simply to collect them and pay the creditors. These duties are perfectly simple, and the Court of Bankruptcy has extensive powers to control, regulate, and, if necessary, punish these assignees (who are officers

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of the Court), or trustees placed in the situation of assignees, in reference to their conduct in the ordinary administration of assets. But I am not aware that the Court of Bankruptcy has, or has been supposed to have, any of those powers which this Court exclusively has of regulating the performance of trusts declared, and of administering trust property according to trusts of a more complicated kind than simply the payment of creditors. But even where trustees under a deed of this kind have no more than the ordinary duties of assignees administering assets to discharge, there is nothing in the act of parliament that excludes the jurisdiction of this Court.

In the case of *Riches* v. *Owen*, there seems to have been nothing in the deed beyond the ordinary trust for the administration of the property for the benefit of the creditors, and no complication of trusts or unusual duties imposed upon the trustees, yet this Court interfered to the extent of appointing a receiver. No doubt, the Court was asked in that case to perform the trusts of the deed, and the appointment of the receiver upon the jurisdiction exercised by the Court, was an appointment for the purpose of performing the trusts the performance of which by this Court was asked by the bill. In my opinion, that bill was properly so framed, because where the Court exercises by its paramount authority that jurisdiction which seems in no degree properly to belong to the Court of Bankruptcy, and arms the inspector with all the authority and power which a receiver appointed by this Court would have, the duty of the Court is to see that the property of which it takes possession is administered according to the trusts which are fastened upon it. But it may very well happen in the progress of that cause, that this Court, seeing the property preserved by its own jurisdiction, may consider that the simple process of ascertaining who are creditors and dividing it amongst them, may be more properly performed by the Court of Bankruptcy than by itself. Upon that the Court has as yet pronounced no decision, for that suit is still pending; but the undertaking which the Court exacted upon the appointment of the receiver manifests its intention, and shows that this Court did not decide that it would take the mere administration of the property out of the hands of the Court of Bankruptcy.

Now, with that explanation it seems to me that the case of *Riches* v. *Owen* proceeded upon the soundest principles. It rejects the notion of any abridgement of the jurisdiction of this Court by the 197th or any other section of the act of 1861; and no such abridgement is indicated or to be collected from that act, which has provided a jurisdiction only to be considered concurrent for the purpose of the simple administration of the trust.

In a subsequent case *Bell* v. *Bird*, where no relief was sought except such as was incident to the simple administration of the property, where no difficulties were stated as to the deed, and nothing asked of this Court by the bill but a simple performance of duties which could well be performed by the Court of Bankruptcy, the Court, finding no special allegation to induce it to exercise its jurisdiction, refused to entertain jurisdiction, and allowed a demurrer to the bill; but I think it a mistake to suppose that any Judge by such a decision, has held this Court to be deprived of any part of its proper jurisdiction in the administration of trusts.

Lord Cottenham, in *The North-Eastern Railway Company* v. *Martin* (2 Phill. 758), stated the principles upon which this Court ought to act where there is a concurrence of jurisdiction, namely, that the convenience of the parties and the circumstances of the case must indicate what the course of the Court should be in deciding which of the two jurisdictions is to prevail.

As to the pleas in this case, they seem to me to have an incurable vice. They are simply pleas of concurrent jurisdiction, and such a plea is no plea at all. It is not a bar to the proceedings. A plea of a concurrent jurisdiction, stating some single fact which would settle the question as to the exercise of jurisdiction by one Court over the other, might be a good plea. But a plea which simply avers, as the plea in this case does, that the plaintiff may apply to the Court of Bankruptcy, and that the Court of Bankruptcy could give him a

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sufficient remedy, is not an answer to a bill which asks that the jurisdiction of this Court may be exercised. It presents no fact to the Court upon which the Court can exercise its judgment upon the convenience or propriety of the exercise of its concurrent jurisdiction, and therefore, in the progress of the litigation, can serve no good purpose whatsoever; and for that reason alone it would be my duty to overrule these pleas.

Leave to amend the plea has been asked for, but that leave I think it would be futile to grant; for this is a case in which, looking at the act of parliament and giving a fair consideration to the arguments in support of the plea founded upon the act, it seems perfectly plain that the Court cannot now decide that it will not exercise jurisdiction. This is a case of a trust deed of a very unusual kind, and a case in which the relief prayed for by the bill is of a character wholly foreign to the jurisdiction usually exercised by the Court of Bankruptcy in the mere collection and administration of assets. This trust deed imposed upon the trustees duties as to carrying on the business of the debtor, with complicated provisions for that purpose wholly foreign to the ordinary duties of an assignee, and as to the performance of which it is the province of this Court, and of no other, to decide upon. The relief prayed by the bill is also relief in respect of matters not properly cognizable by the Court of Bankruptcy. It is said that these trustees, to whom was committed the duty of carrying on the business of the debtor, themselves supplied goods to the estate at a large profit, and thereby violated one of the rules of this Court with respect to trustees. I know no authority or principle which enables the Court of Bankruptcy to deal with that matter. Another complaint, perhaps less exclusively within the province of this Court, is that the trustees, having incurred debts in carrying on this business, improperly divided the profits of the business among the previous creditors, leaving those persons with whom they have contracted debts in the course of carrying on the business still unpaid. It might not be impossible for the Court of Bankruptcy to give relief in a case of that kind; but I am quite certain that, considering it involves questions as to the due administration of this unusual trust, it would not be proper for this Court to delegate to the Court of Bankruptcy, or any other Court, a question of that kind, arising upon the performance of a trust.

It has been said that in older cases which have been cited, the Court of Chancery has, as against assignees in bankruptcy, in exercise of the bankruptcy jurisdiction and without resorting to proceeding by bill, set aside sales, charged assignees with interest and treated them in their character of trustees as liable under the Bankruptcy jurisdiction in respect of matters which would seem more properly cognizable by the Court of Chancery. But there, again, the question is simply one of convenience. Nobody can doubt the power of the Court of Bankruptcy, or of the Lord Chancellor sitting in bankruptcy, to punish the assignee (who is an officer appointed by him to discharge certain well-defined duties) and to make him account for balances in his hands, and to charge him with interest thereon. But in such a case, where the Court has seen that the conduct of the assignee involved matters of breach of duty, and raised questions as to the amount of liability which would be more conveniently decided under the equitable jurisdiction of this Court, it has directed bills to be filed for this purpose. The case of *Hankey* v. *Garratt*, which has been referred to during the argument, is a case of that kind, and there the Lord Chancellor thought the matter was not one that ought to be dealt with in the jurisdiction in bankruptcy, but upon bill. That is a matter of discretion with the Court, which considers the way in which the question should be properly decided as a matter of convenience; and when the bill in that case came on to be heard, the wisdom of what the Lord Chancellor did was perfectly apparent, because it turned out that the assignees in that case had for years employed large sums of money in their hands for their own profit, and that bill sought to have an account of those profits taken and to make them liable in respect thereof, and the decree of the Court made them account accordingly. It is perfectly plain that, but for the

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bill, relief to that extent could not have been properly given in bankruptcy. No doubt there are cases in which the Lord Chancellor sitting in bankruptcy has, without resorting to the equity jurisdiction, gone very far in deciding questions that would seem more properly decided under the equitable jurisdiction, that, for instance, of setting aside a sale. But the Lord Chancellor, in not incumbering the case with the expenses and delay of a suit only exercised that jurisdiction as to setting aside the sale from his paramount authority in bankruptcy over the assignee as his own officer.

In short, it may be observed as the result of the authorities, that the Lord Chancellor in Bankruptcy, as in other cases of concurrent jurisdiction, has been guided by the principles stated by Lord Cottenham in *The North-Eastern Railway Company* v. *Martin*, namely, the consideration of the course which would be most convenient and expedient for effecting the purposes of justice with the least possible delay and expense; deciding in some cases that the jurisdiction in bankruptcy should be extended to meet the case, in others directing that a bill should be filed. Now, in the present case, it seems to me that it would be improper for this Court to stop the bill at this stage by listening to any dilatory defence or allegation in bar of jurisdiction. How far the Court may think that the jurisdiction in bankruptcy may be resorted to in the administration of this estate in any subsequent stage, as in the case of *Riches* v. *Owen*, it is not necessary now to decide. All I am called upon now to decide is, whether the doors of this Court should be shut against this plaintiff or not. I am decidedly of opinion that nothing has been alleged in this plea or represented in the course of the argument that would justify me in making any other order than to overrule this plea with costs.

Feb. 12.—The defendants appealed from the above decision.

Mr. Hinde Palmer, for the defendant Powning, and *Mr. Greene*, for the other defendant, and *Mr. Ince*, for both defendants.

In addition to the cases cited in the Court below, the following were referred to—*Ex parte James* (8 Ves. 337); *Hankey* v. *Garratt* (3 Bro. C.C. 457); *Ex parte Lawrence* (32 L. J. Bk. 61; 1 De Gex, J. & S. 307); *Wearing* v. *Ellis* (26 L. J. Ch. 15; 6 De Gex, M. & G. 596, 606); *Dyson* v. *Hornby* (7 De Gex, M. & G. 1, 7; 11 L. T. 467).

And as to the form of the plea—*Newdigate* v. *Johnson* (2 Ch. Cas. 170); 2 *Newland's Chancery Practice*, 181; *Beames on Pleas*, 325.

Mr. Wickens and *Mr. Russell Roberts*, for the plaintiff, argued as in the Court below.—They pressed the argument as to the informality of the pleas which his Honour had commented on.

SELWYN, L.J. (delivering the judgment of the Court) said—Some formal objections have been taken in argument to the pleas, but we think that there is no just ground for such objections, and that the effect of the pleas is simply to correct the mis-statement in the bill as to the date of the registration of the deed, and to place the parties in the position in which they would have been if that date had been correctly stated, and if the substantial question which we now have to decide had been raised by demurrer; and we think that the averment, and submission with which the pleas conclude cannot be held to be informal, so as to vitiate the pleas.—[His Lordship then stated the opinion of the Court, that the question could properly be raised by demurrer or plea, and proceeded:]—Passing then to what is the substance of the case, we have to decide, first, whether in the case of a trust deed registered under the provisions of the Bankruptcy Act, 1861, this Court ought to entertain a suit for the execution of the trusts of the deed? And, secondly, whether, if the Court would under ordinary circumstances decline to entertain such a suit, the circumstances of this case or the provisions of this deed are so peculiar and exceptional as to induce the Court to entertain it? With respect to the first question it has been correctly stated by the respondent's counsel that before the Bankruptcy Act, 1861, this Court habitually exercised jurisdiction over composition deeds and trust deeds for the benefit of creditors, in the same manner as over other trusts;

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and in the case of *Riches* v. *Owen*, which was the case of a deed registered under the act of 1861, the Court appointed a receiver; but in that case the deed was a deed of inspectorship, the plaintiffs were the trustees of the deed, and were suing the insolvent debtor for the purpose of enforcing the deed against him, and the interference of the Court was limited to the appointment of a receiver for the protection of the property, and we have not been referred to any case, nor do we think that any case can be found in which the Court has entertained a suit for the administration of the trusts of a deed registered under the act; and in *Bell* v. *Bird* the Court refused to entertain such a suit. The act of 1861 has placed the trust deeds registered under its provisions in a position widely differing from that occupied by composition deeds and trust deeds for the benefit of creditors under the old law. For, by the act of 1861, if the proper majority of creditors be obtained, and the other requisites be observed, the deed becomes binding on the minority in the same manner as if they had executed the deed, and the 197th section of the act gives to the deed effects similar to those of an adjudication of bankruptcy.—[His Lordship referred to the provisions of section 197. and proceeded:]—The powers confided to the Court of Bankruptcy by the act are very large, and afford to it ample means for correcting any abuses which may occur in the administration of the estates of bankrupts.—[His Lordship then mentioned in detail the provisions of section 1. and section 136. of the act of 1861, and of section 120. of the Bankruptcy Act of 1849, and went on to say:]—The policy of the law of Bankruptcy adopts the principle of the local administration of the estates of bankruptcy by means of district Courts, and this policy is recognized in the latest act on the subject, the Bankruptcy Amendment Act, 1868,[1] which came into operation after the bill in this case was filed, but which is incorporated with the Bankruptcy Act of 1861. The practice of this Court has been uniform in refusing to interfere with the jurisdiction of the Court of Bankruptcy. Thus in the case of *Wearing* v. *Ellis*, Lord Cranworth, in deciding that a bill in equity in respect of the surplus real property of an insolvent debtor could, under the circumstances, be sustained, guarded himself in coming to that conclusion by saying, "I certainly should not have done so had I not been perfectly satisfied that I do not in the slightest degree intrench upon the doctrine of any of the cases laying down the proposition which ought to be the pole-star to guide in questions of this sort; namely, that this Court has nothing whatever to do with respect to the distribution of the property of a bankrupt or insolvent, the jurisdiction in which matters has, by the legislature, been transferred to the Court of Bankruptcy, or the Insolvent Debtors Court." Again, in the case of *Dyson* v. *Hornby*, Lord Justice Turner said, "The legislature has created the Insolvent Debtors Court for the purpose of administering the estates of insolvents; has provided for the vesting of their estates in their assignees, and for the payment of their debts, and for the revesting in them or those claiming under them of the surplus, if any, of their property through the medium of that Court, and I scarcely know anything which, in my judgment, would be more mischievous than for this Court to interfere with the jurisdiction thus created by the legislature. If this Court were to interfere as to the surplus it could hardly stop short of ascertaining whether there was a surplus or not, and then there would follow an examination of all the property of the insolvent, and an inquiry as to each of his debts without the powers which the legislature has given to the Insolvent Court for the purpose of such examination and inquiry."

The principles thus enunciated are, we think, applicable to the case of trust deeds under the act of 1861. The trustees of such deeds are, as we have seen, placed in the position of creditors' assignees; their office is to secure the due payment of the composition agreed upon, or the proper distribution of the debtor's estate according to the law and practice of bankruptcy, being, in fact, substituted for the ordinary machinery of the Court of Bankruptcy, and they are made by the act directly amenable to the jurisdiction of that Court.

(1) See section 8.

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There may be cases—of which *Riches* v. *Owen* is an example—in which it may be right for this Court to exercise its jurisdiction, notwithstanding the registration of a trust deed under the act of 1861, but we think it is not intended by the legislature that this Court should, under ordinary circumstances, entertain a suit for the administration of the trusts of such a deed, and that it would be contrary to the principle and practice of this Court to do so. The Court would otherwise be involved in the very difficulties which have been pointed out by Lord Cranworth and by Lord Justice Turner, and would be undertaking the administration and distribution of the debtor's estate without those extensive powers to which we have already alluded, and which have been given to the Court of Bankruptcy for the purpose, but which the Court of Chancery does not possess. In his judgment in the present case Vice Chancellor Stuart, in referring to the decision in *Bell* v. *Bird*, said, "Where no relief was sought by the bill except what was incident to the simple administration of the property, no difficulties stated in the bill, and nothing asked of this Court but a simple performance of that duty which can well be performed by the Court of Bankruptcy, the Court, finding nothing specially alleged by the bill to induce it to exercise that jurisdiction which might easily be exercised by the Court of Bankruptcy, refused to entertain the jurisdiction, and allowed a demurrer to the bill;" and the Vice Chancellor proceeded to say that "Lord Cottenham in a case of concurrent jurisdiction which arose before him stated the principles upon which the Court ought to act when there is a concurrence of jurisdiction—I mean the case of *The North-Eastern Railway Company* v. *Martin*. In that case there was an action at law to recover the balance of an account, and there was a bill filed in the Court to have the accounts taken. The case was one in which there was a concurrence of jurisdiction, and Lord Cottenham stated that when there is concurrence of jurisdiction, and this Court has to decide which of the two jurisdictions is to prevail, the convenience of the parties and the circumstances of the case must indicate what the course of the Court should be." We conclude from these passages in his judgment that the Vice Chancellor was of opinion that, under ordinary circumstances, this Court ought not to entertain a suit for the administration of the trusts of a deed registered under the act of 1861; and in that opinion we entirely concur.

It remains for us to consider the second question, namely, whether the circumstances of this case, or the provisions of this deed, are such as to take the case out of what we have held to be the ordinary rule of the Court, and such as to induce the Court to entertain this suit.—[His Lordship then referred to the facts above mentioned as to the alleged profits made by the defendants by the supply of goods and the relief sought by the bill in that respect, and proceeded:]—But it is clearly competent to the Court of Bankruptcy to deal with such transactions and to give the necessary relief, either in the case of assignees in an ordinary bankruptcy or in the case of trustees under a trust deed, and that Court would, of course, disallow any items or sums of money proved to be improperly included in the discharge of the trustees; and the special powers to which we have already alluded, and particularly those of summoning and examining all persons whomsoever, are peculiarly adapted to the investigation of such circumstances, and to the discovery and conviction of any neglect or misfeasance on the part of the persons in the position of the defendants; and as the bill merely prays that the trusts of the deed may be administered, and that an account may be taken of the moneys and property received by the defendants, and of their disposal thereof, and that in taking such account the defendants may be disallowed their payments and profits to which we have alluded, we think that there are no such special or extraordinary circumstances in the case as to take it out of what we conceive to be the ordinary rule of the Court, and, consequently, that the second question must be answered in the negative.

The pleas of the defendants were therefore allowed.

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HATHERLEY, L.C., Jan. 30, 1869.

GREEN v. WYNN.

38 L. J. Ch. 220; L. R. 4 Ch. 204; 20 L. T. 131; 17 W. R. 385: affirming, [1869] E. R. A.; 38 L. J. Ch. 76; 19 L. T. 553; 17 W. R. 72 (V.C.).

Adopted, *Bateson* v. *Gosling*, [1872] E. R. A.; 41 L. J. C.P. 53; L. R. 7 C.P. 9; 25 L. T. 570 (C.P.). Applied, *Forbes* v. *Jackson*, [1882] E. R. A.; 51 L. J. Ch. 690; 19 Ch. D. 615; 30 W. R. 652 (V.C.); *In re Whitehouse*, [1888] E. R. A.; 57 L. J. Ch. 161; 37 Ch. D. 683; 57 L. T. 761; 36 W. R. 181 (Ch. D.).

Principal and Surety — Composition Deed by Principal — Covenant by Surety to pay Interest on Debt thereby released—Right of Creditor against Surety not barred.

BANKRUPTCY. DEED AND BOND. PRINCIPAL AND SURETY.—*In a mortgage-deed by the principal debtor a third party entered into a covenant to pay interest only on the money thereby secured. Subsequently the principal executed a deed under section* 192. *of the Bankruptcy Act*, 1861, *which amounted to a cessio bonorum, and contained a general release from his creditors, followed by a proviso reserving any rights they might have against any other persons in respect of any debt due by the debtor, either alone or jointly with any other person*:—Held, *that the surety was not discharged from payment of interest which had accrued due since the date of the composition deed.* Semble—*The surety might insist on redeeming the mortgage, and so release himself from his liability.*

Webb *v.* Hewitt (3 Kay & J. 438) *distinguished.*

This was an appeal from an order of Giffard, V.C., dismissing the plaintiff's bill with costs. The case is reported, 38 L. J. Ch. 76, where the facts and judgment of his Honour are fully set out.

Mr. Druce and *Mr. Caldecott*, for the appellants.—In this case there has been an absolute release of the principal debt, and, inasmuch as the surety was never liable for it, as soon as that was gone there was nothing on which the covenant to pay interest could operate. The words of the covenant in the mortgage-deed are clear and precise. The surety is to pay interest only "so long as the principal sum shall remain unpaid." That sum has virtually been paid and the debt extinguished. How can the surety be further liable? Moreover the case comes within your Lordship's decision in *Webb* v. *Hewitt* (3 Kay & J. 438).

[The LORD CHANCELLOR.—That was a very special case. The whole property of the debtor was given to one creditor to pay a composition to the other creditors, and retain the surplus for himself.]

We come within the principle of your Lordship's judgment in that case; and moreover the facts are strictly analogous. We have here a *cessio bonorum*, a release of the debt, and no resulting trust to the debtor.

[The LORD CHANCELLOR.—I think it clear that there would be a resulting trust here if there were any surplus.]

But, granted that the release in the deed is to be construed as a mere covenant not to sue, can it be that the surety is to be liable to a perpetual annuity of 10*l.* per cent. (for it amounts to that) on the 1,000*l.*, which neither the creditor nor the surety can require the principal debtor to pay?

[The LORD CHANCELLOR.—Could not the surety release himself by paying off the principal debt, and take the mortgage security?]

We submit not; that would be altering the contract of suretyship. In all the reported cases where a release of this kind has been held to amount only to a covenant not to sue, there was a debt due at the time of the release for which the surety was liable. In this case there was no debt then due from

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the surety, and no authority has subjected the surety to any obligation, except such as existed at the date of the release—*Price* v. *Barker* (4 El. & B. 760; 24 L. J. Q.B. 130). This case is not decided by *Owen* v. *Homan* (4 H.L. C. 997), and all the other cases which may be cited by the other side are in Courts of the first instance; and in none of them, except in *Kearsley* v. *Cole* (16 Mee. & W. 128; 16 L. J. Ex. 115), and *Webb* v. *Hewitt* (ubi supra), was there a *cessio bonorum*.

Mr. Kay and *Mr. Whately* appeared for the respondents.

The LORD CHANCELLOR.—I will not trouble you, Mr. Kay. I think the case is with you, because what strikes me is this—that this right which is by the composition-deed reserved against the surety comes within the words of the proviso, as being "a right or remedy which a creditor may have against any other person or persons in respect of any debt due by the debtor, either alone or jointly with any other person."

This is a debt due by the debtor of 1,000*l.*; the right which the creditor has against another person in respect of this debt is, that as long as it remains unpaid that other person shall pay him 100*l.* a year. But then the deed contains in words a release of the debt, which of course *per se* would extinguish the debt, and also any right that the creditor would have as against the surety in respect of future interest, because the debt would be extinguished. But then the authorities say this, that if you find that there is on the one hand a release of a debtor, and on the other hand a reservation of all demands that the creditor may have against any other person in respect of that which the debtor owes, it is inconsistent with the frame and object of the deed, as expressed upon the face of it, to hold that the release is intended to be complete and absolute, because the two parts of the deed would then be utterly inconsistent.

The Courts therefore have held that a release of this description in deeds which reserve the rights of creditors against third parties in respect of the same debts, must not be construed as being an absolute extinguishment of the debt, but only a covenant not to sue the debtor. That being so, the debt, in other words, is gone as between the creditor and the debtor, if nothing else takes place, to this extent, that the creditor cannot sue the debtor in respect of it; but in another sense, as against all other persons against whom the creditor reserves any right, it is not gone; it is just as if the debt existed and there was a covenant or engagement not to sue the principal debtor. That being so, the surety for the whole debt would have to pay it, and the surety for the interest of the debt, as long as it remains unpaid, is in the condition of a person against whom the creditor has a right reserved on account of that debt; he has reserved on account of that debt, as long as it remains unpaid, his right to be paid the interest, and if so, he has, according to the authorities, a right to sue the surety for it. It is true that in this particular case the surety at the time of the execution of this instrument owed nothing, because from all that appears there was no interest then due, and he was only to become a debtor whenever the interest should remain unpaid. But the right to sue the surety as soon as interest remained unpaid is, as I said before, according to the construction of all deeds of this class, a right reserved in respect of that particular debt, and therefore I cannot do otherwise than hold that the debt is not gone.

There was only one argument which weighed with me a little. I thought at the time that it was in substance correct; it was said, that if this be so, and this debt still exists, the surety can by no means get rid of it, and therefore will be obliged to pay 100*l.* a year for ever, because otherwise, as the debt still exists and as the debtor cannot be sued, the surety has no means of liberating himself from his liability. But it appears to me that when, as in this case, there is a mortgage, there can be no doubt that a surety under liability to pay interest only on the mortgage debt is entitled to redeem; for as the surety becomes liable to this obligation in respect of the principal debt, and in consequence of the default of the principal to pay interest, I cannot entertain a doubt that he is entitled to say to his principal, You must pay that debt, and

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if you do not, I shall pay it myself and charge you with the amount so paid. In one sense it would not be money paid for the use of the debtor by the creditor; yet at the same time, as between the surety and the principal, the latter is bound to save harmless and indemnify the former; and it appears to me that the surety can in no other way be indemnified than by being allowed to redeem the mortgage.

This case is entirely distinguishable from the case which has been cited of *Webb* v. *Hewitt*, for that was the case of a man taking upon himself the whole assets, and paying *5s.* in the pound to the other creditors. Here the trustees have the whole property assigned to them to pay out as in bankruptcy, and only as in bankruptcy, and I have no doubt whatever that the effect of the deed would be a resulting trust to the assignor if there were any surplus. Therefore the case in every point of view is entirely taken out of *Webb* v. *Hewitt*, to say nothing about its not being the case of a person taking a release of his debt, but of an assignment made by the debtor to trustees for the benefit of all the creditors. I cannot distinguish this case from the class of authorities to which I have referred, and therefore the appeal must be dismissed with costs.

JAMES, V.C., Feb. 12, 1869.

BICKENDEN *v.* WILLIAMS.

38 L. J. Ch. 222; L. R. 7 Eq. 310; 17 W. R. 441.

Referred to, *In re Pryce*, [1911] E. R. A.; 80 L. J. Ch. 525; [1911] 2 Ch. 286; 105 L. T. 51 (C. A.).

General Power of Appointment—Feme Covert—Appointment to Trustees —Right to Undisposed of Beneficial Interest.

POWERS.—*Where a married woman, having a general testamentary power of appointment over personal property, appoints the whole property to trustees in such a manner as to shew an intention to make it part of her general personal estate, any undisposed of beneficial interest will belong to those entitled ab intestata, not to those entitled in default of appointment*:—Semble, *An appointment to executors eo nomine is prima facie evidence of such intention.*

By an indenture, dated the 19th of May, 1823, certain funds were settled in the events which happened, upon trust after the death of Richard Davies and Eleonora his wife, for such persons and in such shares as Eleonora should by deed or will appoint, and in default of appointment, upon trust for the persons who, at the death of the survivor of Richard Davies and Eleonora Davies, should be Eleonora's next-of-kin, according to the Statute of Distributions.

By an indenture, dated the 13th of November, 1852, a beneficial lease for twenty-one years of certain tithes was settled upon trust, after the death of Eleonora Davies, for such persons, for such purposes, and in such manner and shares as Eleonora Davies should by deed or will appoint; and in default of appointment, in trust for the person or persons who, at the decease of the said Eleonora Davies should be of her blood and of kin to her, and who, in right of himself, herself, or themselves, or of his, her or their representatives, would be entitled to the same under the Statutes for the Distribution of the effects of Intestates, in case the said Eleonora Davies had died intestate and without having been married; and if there should be more than one such person, then to be divided between them in such proportions as they would be entitled to the same under these statutes.

The will of Eleonora Davies, dated the 27th of April, 1855, was as follows: "This is the last will and testament of me, Eleonora, the wife of the Venerable Richard Davies, Archdeacon of Brecon, made in pursuance of all powers enabling me in this behalf. I devise and bequeath all the estate, both real and personal,

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over which I have any disposing power, to my executors hereinafter named, their heirs, executors, administrators and assigns, upon trust to pay to Frederick Watkins, of Brecon, out of such part of my property as consists of tithes, the sum of 100*l.* a year, clear of all deductions, and also upon trust to allow my said husband during his life to receive the annual produce of my personal estate, and also the remainder of such part of my property as consists of tithes, after payment of the said sum of 100*l.* a year to Frederick Watkins. I direct my executors to allow my personal property to remain upon its present investment during the life of my said husband, and after his decease I direct them to call in and convert the same, and thereout to pay the following legacies.—[The testatrix then gave several legacies, amounting together to 2,500*l.*, and proceeded:] —I appoint Richard Thomas William Lambart Brickenden, of Dumbarton Castle, and Arthur Armitage, of Morcaston, near Ross, Esqs., executors of this my will; and I direct them to retain the sum of 100*l.* cash for their trouble in executing the same, such legacy so bequeathed to the said Richard Lambart Brickenden being in addition to the share he may be entitled to as one of the children of the said Richard Brickenden. In witness whereof I have hereunto set my hand the 27th day of April, 1855.

"Eleonora Davies."

Eleonora Davies died on the 29th of April, 1855, leaving Richard Davies, her husband, her surviving, and her will was duly proved by the plaintiffs, the executors therein named.

Richard Davies, her husband, had since died.

The plaintiffs, as executors, had received certain moneys which were subject to the trusts of the indenture of the 19th of May, 1823, and they had also entered into a contract for the sale at the price of 1,025*l.* of the tithes, the trusts of which were declared by the indenture of the 13th of November, 1852. Out of the moneys so received, they had paid the debts and funeral and testamentary expenses of the testatrix, and had paid, or provided for the payment of the legacies mentioned in her will, and they had a residue remaining in their hands of about 700*l.*, in addition to the purchase-money due in respect of the tithes.

Such residue and also the purchase-money were claimed, on the one hand, by the defendant Thomas Williams, the executor of Richard Davies her husband, and on the other hand, by the parties claiming as or in right of the next-of-kin of Eleonora Davies: and the bill alleged that under these circumstances the plaintiffs were unable safely to dispose of such residue and purchase-money except under the direction of the Court. The bill accordingly prayed that the respective rights of the defendant Thomas Williams and of the next-of-kin, or the persons representing the next-of-kin, of Eleonora Davies, might be ascertained and declared.

Mr. Everitt, for the plaintiffs.

Mr. Druce and *Mr. Freeling*, for Thomas Williams, the executor of Richard Davies.—The will of Eleonora Davies appoints the entire interest over which she has a disposing power to her executors, and after the death of her husband they are to dispose of the entire interest for the purpose of conversion into money, and it is part of the money thus arising that is undisposed of. But it is clear that the appointment exhausts the power and leaves nothing unappointed, and therefore nothing to go to those whose claim arises only in case of failure of appointment. Under the old law, the undisposed of portion would have gone to the executors beneficially, and it is now, under the 1 Will. 4. c. 40, held by them in trust for the persons who would have been entitled *ab intestata*, *i. e.*, for the representative of the husband. The case is in fact concluded by *Chamberlain* v. *Hutchinson* (22 Beav. 444) and *Lefevre* v. *Freeland* (24 Beav. 403); and *Easum* v. *Appleford* (10 Sim. 274; 5 Myl. & Cr. 56; 10 L. J. Ch. 81) is really in our favour.

The following cases were also referred to—*Dawson* v. *Clark* (15 Ves. 409);

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King v. *Denison* (1 Ves. & B. 272); *Thomas* v. *Jones* (1 De Gex, J. & Sm. 63; 32 L. J. Ch. 139).

Mr. Hardy and *Mr. J. N. Higgins*, *Mr. Bevir* and *Mr. Dundas Gardiner*, for the next-of-kin of Eleonora Davies.—The reference to 1 Will. 4. c. 40. may be speedily disposed of. The gift is to the executors "upon trust," and they have a legacy for their trouble; the case therefore is not one where under the old law the executors would have taken beneficially. With reference to the effect of Eleonora Davies's will, it is to be observed that at its date, and also at the time of her death, she was a *feme covert*, and it is well established that, although a person *sui juris* does, by exercising a general power of appointment, make the appointed property his assets, a *feme covert* under similar circumstances does not—*Vaughan* v. *Vanderstegen* (2 Drew. 165); *Shattock* v. *Shattock* (35 L. J. Ch. 509; 2 L. R. Eq. 182); *Ex parte Matthewman* (36 L. J. Ch. 90; 3 L. R. Eq. 781); *Hobday* v. *Peters* (28 Beav. 354; 29 L. J. Ch. 780); and *Easum* v. *Appleford*, loc. cit., are direct authorities in favour of our contention. In *Chamberlain* v. *Hutchinson* and *Lefevre* v. *Freeland*, loc. cit., the instrument exercising the power took effect when the appointor was *sui juris*.

JAMES, V.C.—I think that the property in question goes as undisposed of personal estate of Eleonora Davies. *Easum* v. *Appleford* seems to be the only authority on the subject. In that case, a legacy which was given out of a fund over which a testatrix had a power of appointment, lapsed; and the Vice Chancellor, and after him the Lord Chancellor, held that the sum which thus lapsed did not fall into the general residue of the testatrix's estate, but went to the persons entitled in default of the appointment. But the Lord Chancellor says, "No doubt she might have made these funds part of her general estate, but it is clear she never intended to do so." In this case, on the other hand, it is clear that the testatrix did intend to make the whole fund part of her personal estate. She not only gives it to her executors *eo nomine*, and this is to me a strong indication of such an intention, but she proceeds to speak of "my personal property," which would include savings of her separate estate, evidently treating the property over which she had a disposing power and that which was in the strict sense her own as one mass, to be dealt with by her executors as executors. The executors therefore hold the property in question upon the same footing as personal estate arising from any other source, that is, they hold it upon trust for her husband's representative; and I must therefore declare that the defendant Williams is entitled to the whole of the property in question.

HATHERLEY, L.C., Feb. 24, 1869.

CRUSE *v.* PAINE.

38 L. J. Ch. 225; L. R. 4 Ch. 441; 17 W. R. 1033: varying, [1868] E. R. A. 743; 37 L. J. Ch. 711; L. R. 6 Eq. 641; 19 L. T. 127 (V.C.).

Referred to, *Maxsted* v. *Paine*, [1869] E. R. A.; 38 L. J. Ex. 41; L. R. 4 Ex. 81; 20 L. T. 34 (Ex.). Distinguished, *Maxted* v. *Paine*, [1871] E. R. A.; 40 L. J. Ex. 57; L. R. 6 Ex. 132; 24 L. T. 149; 19 W. R. 527 (Ex. Ch.). Referred to, *Davis* v. *Haycock*, [1869] E. R. A.; 38 L. J. Ex. 155; L. R. 4 Ex. 373; 20 L. T. 954 (Ex.); *Bowring* v. *Shepherd*, [1871] E. R. A.; 40 L. J. Q.B. 129; L. R. 6 Q.B. 307; 24 L. T. 721; 19 W. R. 852 (Ex. Ch.); *Merry* v. *Nickalls*, [1872] E. R. A.; 41 L. J. Ch. 767; 26 L. T. 496 (L. JJ.). On appeal, [1873] 42 L. J. Ch. 479; L. R. 7 H.L. 530; 27 L. T. 12 (H.L.); *Neilson* v. *James*, [1882] E. R. A.; 51 L. J. Q.B. 369; 9 Q.B. D. 546; 46 L. T. 791 (C. A.); *Re Blundell*, [1888] E. R. A.; 57 L. J. Ch. 730; 40 Ch. D. 370; 58 L. T. 933; 36 W. R. 779 (Ch. D.).

Shares, Sale and Purchase of—"Registration Guaranteed"—Liability of Jobber, the first Purchaser.

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STOCK EXCHANGE.—*Where a purchase of shares on the Stock Exchange by a jobber is expressed to be "with registration guaranteed," the meaning of the contract is that the jobber will either register them himself or will find a purchaser who will accept and register them. The giving in, therefore, by the jobber to the vendor's brokers of the name of a transferee, who is accepted by the vendor as purchaser, does not discharge the jobber until the transferee has actually registered the shares in his name; and, if the transferee does not register, the jobber is bound to register in his own name, and must indemnify the vendor for any damage suffered by him through such omission to register.*

The case, when in the Court below, is reported 37 L. J. Ch. 711.

The late Albert Cruse, on the 2nd of November, 1865, sold through his stockbrokers, Vertue & Whiting, 100 shares in the Contract Corporation (Limited) to the defendants Hammon Paine and George Paine, stock-jobbers, the sale being specified as being "subject to the rules of the London Stock Exchange," and "with registration guaranteed," *i. e.*, by the Messrs. Paine. Prior to the 15th of November, which was the next settling day, Messrs. Vertue received from Messrs. Paine the name of one Hutchinson as the person into whose name the shares were to be transferred. Cruse executed a transfer to Hutchinson, and received the purchase-money from the latter's brokers, Price & Potts; but Hutchinson omitted to execute the transfer or to have himself registered as transferee. A decree had been obtained from Vice Chancellor Stuart (36 L. J. Ch. 169), which was affirmed on appeal by the Lords Justices (37 L. J. Ch. 485) at the suit of the Paines against Hutchinson, ordering the latter to procure himself to be registered as holder of the shares; but, though not through any want of diligence on the part of the Paines, this had not been done, and Cruse remained accordingly on the register. The company had been ordered to be wound up before Vice Chancellor Stuart's decree had been made, and Cruse had been settled on the list of contributories, and calls to the amount of 3,500*l.* were made upon him. Under these circumstances he filed his bill praying that the contract for sale between himself and the Paines might be specifically performed, and the latter ordered to pay the calls already made, and to indemnify him against future calls and liabilities. The case of the defendants was that on the guarantee the plaintiff's remedy, if any, was at law, and moreover that their general obligation under the covenant of the 2nd of November, 1865, was discharged by delivering to Cruse's brokers the name of a *bona fide* purchaser of the shares, and doing all in their power to compel him to register. The special guarantee of registration, they alleged, only entitled Cruse to the interference of the Committee of the Stock Exchange against them in the event of their not exerting themselves to procure registration. It appeared, however, that the Committee of the Stock Exchange, before whom the defendants had brought the case, had resolved that under the guarantee for registration the defendants were "liable for the registration of the shares."

Cruse died after the institution of this suit, but his executors revived it. Cruse had not paid any of the calls made on him. His estate having been sworn under 100*l.*, the defendants contended that at any rate as against his executors they could be called upon to pay his estate only what the liquidators of the Contract Corporation would be able to recover against it. Vice Chancellor Giffard, however, held that on the original contract the plaintiff had a clear equity against the defendants, that if living he could have compelled the defendants to pay the calls, and generally to indemnify him in respect of the shares, and that their liability to his executors was similar, and independent of the amount of the plaintiff's assets. The defendants appealed. In the meantime the cases of *Coles* v. *Bristowe* (38 L. J. Ch. 81; L. R. 4 Ch. Ap. 3) and *Grissell* v. *Bristowe* (38 L. J. C.P. 10; L. R. 4 C.P. 36) had been decided on appeal. The respondents in the present appeal conceded that this case was the same as those in other respects, but urged that it was distinguished by the presence of the guarantee of registration.

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Sir R. Palmer, Mr. Kay and *Mr. J. Napier Higgins* appeared for the appellants.—They argued that the Vice Chancellor's decision could not be supported since the appeal decision in *Coles* v. *Bristowe*, although it was correct according to the earlier authorities, which left the rights of parties unchanged by the execution of a transfer until complete registration. They contended that as between Cruse and Hutchinson, Cruse had become trustee for Hutchinson, and Hutchinson was bound to indemnify him. Cruse was not trustee for the defendants. They distinguished the case from *In re The National Financial Company; Ex parte Oriental Commercial Bank* (L R. 3 Ch. Ap. 791). Besides, the obligation to register could attach only to the owner of the shares, who alone could register. Consequently, the liability to do the act of registering was as entirely transferred to Hutchinson as it had been held to be in *Coles* v. *Bristowe*. The circumstance that a third party had given a guarantee could not affect the question of the liability to register as between vendor and purchaser. It was Messrs. Paine's duty, indeed, under their guarantee to do all in their power to procure registration by Hutchinson. But this they had done in instituting their suit. To make them liable for more would be to give a different effect to a guarantee in this case than in any other. The principle of a contract with a jobber was that the jobber's liability ceased after he had handed in the name of a real purchaser, and that nominee of his had been accepted. Thenceforward the transferor and this transferee were in perfect privity with each other, and the transferor could no longer sue the jobber. If, however, Cruse, by the application of this principle, became in privity with Hutchinson, the guarantee could not affect this privity. The guarantee in nowise implied a liability of the guarantors to take the registration in their own names.

Then, supposing even that the plaintiff could establish any right to indemnity as against the defendants, what was the proper measure of this indemnity? According to the Vice Chancellor's decree, the result might be to give Cruse's executors some thousands of pounds for the benefit of an insolvent estate. Yet the decree did not proceed on this footing, but implied that the sum to be paid by the defendants was to be for the benefit, not of Cruse's estate, but of the Contract Corporation, which nevertheless was not allowed to intervene in any way.

The plaintiff's remedy, if any, was at law.

Mr. Mellish (of the Common Law Bar) and *Mr. Marten* contended that the simple effect of the guarantee, which they allowed was the sole distinction between the present case and those of *Coles* v. *Bristowe* and *Grissell* v. *Bristowe*, was to continue the jobber's liability up to registration. That was the object of the additional commission paid when such a guarantee was given. In fact, in the former cases the answer to the argument as to the hardship on a vendor of forcing him to take any one the jobber offered as transferee, had invariably been that, by paying for a guarantee of registration, the vendor could have kept the jobber directly liable to him. The original relation between the vendor and jobber was, indeed, that of vendor and purchaser, not, as contended for the defendants, of surety and principal; and the object of the guarantee was to maintain this relation till the registration of some transferee.

As for the argument about the amount of Cruse's assets, it was strange if damages could be reduced because of the insolvency of the estate to which they were payable. Then, again, it had been argued that this was not a case for equity. But a contract for the sale of shares was proper matter for a suit for specific performance, as appeared from *Paine* v. *Hutchinson;* and if there were a right to file a bill for specific performance, clearly a case for indemnity might also be made at equity. Nor, when the right to come into equity had once vested, could it be devested by turning it into a mere right to damages.

Sir R. Palmer, in reply, said that before a jury it would have been necessary to shew actual damage, which had not been shewn here. The present was not a case for specific performance. On the defendant's view of the

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force of this guarantee, the plaintiff would have got something substantial under it in obtaining the suretyship of the defendants and their guarantee for the fulfilment of the contract.

The LORD CHANCELLOR said: I had thought at first of taking time to consider this case; but after the very able and learned arguments which have been addressed to me, I do not think there is any occasion for me to reserve judgment.

Part of the argument was addressed to the case of *Coles* v. *Bristowe* (38 L. J. Ch. 81; L. R. 4 Ch. Ap. 3). With reference to the decision that was come to in that case, I acquired a good deal of information then upon the subject from all the authorities which were brought before the Court. It seemed to me, I confess, then, and looking back to the case of *Paine* v. *Hutchinson* (36 L. J. Ch. 169; L. R. 3 Eq. 257) it appears to me now, that that case might well be rested (it may or may not be so, I have not all the materials before me as to the expressions there used) upon this distinction: that in the case of the ordinary sale through the medium of the jobber or broker it is now established, through the decisions that have taken place both here and at law, that the real contract is this: that the contract of the jobber is, that at the settling-day he will either take the shares himself and register the transfer, or that he will give the name of one or more transferees, to whom no reasonable objection can be made, who will accept and pay for the shares.

Now, there is superadded to the ordinary rule here this express provision: that the sale is made not in the ordinary way, and simpliciter, but "with registration guaranteed." Now, it seemed to me, I confess, upon consideration and reconsideration of *Coles* v. *Bristowe* and *Paine* v. *Hutchinson*, that there is a very material distinction introduced by these words, "registration guaranteed," into the ordinary contract. It is a superadded term. The ordinary contract will extend up to that term, and then by that term there will be something introduced different from the ordinary contract; something would have been added to it, the exact meaning of which the Court is now called upon to arrive at.

Taking, then, the ordinary contract, namely, that Mr. Paine had gone to Mr. Cruse *simpliciter*, and in the ordinary course of dealing on the Stock Exchange, Mr. Paine would have been liberated the moment that he found a purchaser who was free from reasonable objection, and who was willing to accept a transfer, and to pay for the shares. Up to that stage he would have done all that was required under this contract, omitting the words "registration guaranteed." What is there now imposed upon him by those superadded words? Sir Roundell Palmer says, all that is done is this, the contract will proceed exactly as before, and must be performed in exactly the same manner, and to no greater extent as regards the dealing with the shares; but we undertake a separate liability, and when the contract has been performed in the ordinary mode of the Stock Exchange, and a willing purchaser has been found, who has paid the money and accepted the transfer, we are liberated from doing anything more with reference to the contract, *qua* contract, for the purchase and sale. But we have a separate engagement as it were, a separate contract or undertaking, on our part, by which we say we will guarantee the performance of another condition, namely, that having produced to you the purchaser, and having procured him to accept and undertake to pay the money, we would further guarantee that you should not be entitled to look to us except for this special provision, viz., that he shall register himself as a shareholder, that whereas, under the ordinary contract, you would file your bill to compel him to register (and I apprehend you would be entitled to do it), here you will not be bound to take that step, or, if you do take it, at all events you have the additional guarantee, or if you do not choose to take it, you must rest upon our simple guarantee that we will engage that he shall so effect the transfer.

Now, it does not appear to me that that is the sound construction of the contract, because I think there is a great deal of force in what Mr. Mellish says, that the contract is really one indissoluble bargain for a given price, a price fixed with reference to the value of this guarantee. The shares were parted with

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to the seller to be dealt with over and above the ordinary provisions of a contract of this description, and with this superadded condition, that you shall find me a purchaser not merely willing to pay for and accept the shares, but a purchaser who is willing to and will register them, and that until you have found a purchaser willing to accept and pay and to register (the fact is it appears to me to have that term superadded to the contract), until, that is, you have found that purchaser, not only who is willing, but who has paid and accepted and registered, you are not discharged from the engagement that you entered into. In the first place, it is reasonable that the ordinary custom and practice which has been followed for so long a time on the Stock Exchange should be recognized. If you choose to add this term, what you mean is this: I am the purchaser unless I procure some one else to stand in my stead, so that I am entitled to transfer to some one else that will take them, or some one else that will buy and register them; and therefore that contract is not completed until the man who enters into it has either himself bought and registered, or has procured a purchaser who has bought and registered the shares. Consequently, as Mr. Hutchinson has not been to this moment registered the purchaser, the original purchaser, if I may so call him, that is, the original contractor, has not performed the whole of his contract, he has not performed the one alternative of his contract, which was to find some one who should be bound to do those acts. He has not found the other person, and he remains therefore liable himself to perform the contract. He says, I will find you a purchaser in any other respect than that which is most important. Of course these contracts for registration are only entered into when there is a doubt and difficulty (inasmuch as there is a sacrifice of price), with reference to the company from which the person wishes to be liberated. And it would be a strong construction of the contract to say, all that you intend by this contract with your original vendee is this: not that he will take the shares, and get you off the list, but that he will enter into a contract that he will guarantee you from all the consequences of remaining on the list. I think the sound construction is that he will do what he is bound to do, that is, that he will specifically perform that which he has undertaken to do. These risks may go on for years and years. If you are to rest upon such a guarantee, with the construction I have heard put upon it to-day, your must remain for years and years upon the register; and the only remedy your have is one of two things, either, according to Mr. Mellish's view, you must go before a jury and ascertain *uno flatu* all the consequences that may happen to you from remaining upon the list, and get the jury to give you what they think you are entitled to; or, according to the other view, you must remain upon the list year by year awaiting the inconvenience which you yourself or your estate will be subjected to in having calls made upon you, and then having to go to another person who has entered into this contract. That does not seem to me the reasonable construction of these words, ascertained according to the custom of the Stock Exchange, viz., "registration guaranteed." What is said is this: I will either myself take your shares, and put myself upon the register, or find some one else who will do it. I think that would be the meaning of the superadded words, "registration guaranteed."

On these grounds I agree mainly with the decision that has been come to, because as no purchaser has yet been found, the original purchasers, the original contractors, appear to me to remain liable upon their contract, they not having performed the other alternative of that contract. But I have some doubts upon another point, which makes no difference as to the question of costs, because in truth the principle of the indemnity is an indemnity against all costs. It appears to me that the difference is probably more critical than substantial; but I confess there is a little speciality in the form of the decree which orders all these moneys which are called for, amounting to many thousands of pounds, 8,000*l.* or 9,000*l.*, to be paid to the executors of the deceased original plaintiff, these executors undertaking to pay it over. What I think is contracted for is this, that, he becoming a trustee of these persons who had so contracted with

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him, he is entitled to be put in the position of being liberated from all responsibility. It appears to me that the better form would be to put it in this way, which I propose to do. It is not a substantial, but rather a verbal difference. Still I think it brings it out clearer. Put in first the words, " The defendants to pay the costs of the suit up to and including the costs of the appeal." Then go on to " declare that the defendants were, by virtue of the agreement with the late plaintiff in the bill mentioned, liable to procure a registration of the shares of the late plaintiff under the said agreement referred to in the name of some person other than the plaintiff on or before the 15th of November, 1865, and are now bound to procure the release or discharge of the late plaintiff's estate from the payment of all calls which have been made on such shares since the above-mentioned date, and further to indemnify the estate against all costs, damages and expenses in respect of such calls, or otherwise on account of the name of the late plaintiff remaining on the register after the date aforesaid "; and then decree the defendants to " procure such release or discharge accordingly, either by payment of the said calls or otherwise, and to indemnify his estate against all such costs and damages as aforesaid;" with " liberty to the plaintiff in the revived suit to apply in chambers in respect of such release and discharge, and also as to subsequent costs." I think that will meet the justice of the case, and be a more correct form of decree.

I ought, perhaps, to have noticed a point which was urged upon me in the argument upon the subject of the transfer being actually executed. I think nothing of that, for it is stated in the defendants' own answer, that they sent in that name to the plaintiff, and the plaintiff would be bound as far as things went to accept any name that should be so sent in, always relying upon his right to have it registered; and the defendants cannot set up any case as to their having sent in a name which was absolutely necessary to enable them to perform their contract. They cannot rely upon that as discharging them from the contract, unless the whole contract is fulfilled by the completion of the registration.

LORD ROMILLY, M.R., Jan. 15, 1869.

JOHNSON *v.* LANDER.

38 L. J. Ch. 229; L. R. 7 Eq. 228; 19 L. T. 592.

Followed, *In re Emery's Trusts*, [1884] E. R. A.; 50 L. T. 197; 32 W. R. 357 L.J.; *In re Coward & Adams' Purchase*, [1875] E. R.A.; 44 L. J. Ch. 384; L. R. 20 Eq. 179; 32 L. T. 682; 23 W. R. 605 (M.R.).

Judicial Separation—20 & 21 *Vict. c.* 85. *s.* 25.—*Right of Wife to Personalty not reduced into Possession.*

HUSBAND AND WIFE.—*A share of a settled fund became, on the death of a tenant for life, payable to a married woman. After the death of the tenant for life, but before the share had been reduced into possession, the married woman obtained a decree of judicial separation from her husband*:—Held, *that she was entitled to her share absolutely, as a feme sole.*

The plaintiff was the daughter of Mrs. Barbone by her first marriage, and was entitled under the settlement executed on her mother's second marriage to a third of the fund settled, subject to her mother's life-interest.

The plaintiff married in 1842, no settlement being made of her property. Her mother died on the 19th of March, 1867; and on the 7th of February, 1868, before the money to which the plaintiff was entitled under her mother's settlement had been paid, a decree of judicial separation between the plaintiff and her husband was made. The question now raised was, whether she was entitled to the money as a *feme sole*.

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Mr. E. K. Karslake and *Mr. Bristowe*, for the plaintiff, cited—20 & 21 *Vict. c.* 85. *s.* 25[1]; *Wells* v. *Malbon* (31 Beav. 48; 31 L. J. Ch. 344).

Mr. Archibald Smith, for parties not interested in the present question.

Mr. Jervis, for the husband and the trustees of the settlement.—This property did not come to or devolve upon the plaintiff during the continuance of the judicial separation. It is not yet in her possession, and it ought to be settled.

The MASTER OF THE ROLLS held that the plaintiff was entitled to her share of the fund absolutely, as a *feme sole*. This was property for which, if there had been no judicial separation, the husband could have given a receipt; and the 25th section of the Divorce and Matrimonial Causes Act transferred to the wife this right to give a receipt.

LORD ROMILLY, M.R., Jan. 22, 1869.

FISHER *v.* GILPIN.

38 L. J. Ch. 230.

Trustee—Improper Investment—Extent of Liability.

TRUST AND TRUSTEE.—*A trustee, with power to invest in consols or on real security, who makes an improper investment, has the option of replacing either the actual sum misapplied with interest at* 4*l. per cent. per annum, or the sum which would have been produced by an investment in consols.*

Robinson *v.* Robinson (1 De Gex, M. & G. 247; 21 L. J. Ch. 111), *followed;* Brown *v.* Gellatly (L. R. 2 Ch. Ap. 751), *distinguished.*

The testator in this cause was the trustee of a settlement, having power to invest in the public funds of Great Britain, or in government or real securities in England; but, in 1861, he had, at the request of the tenant for life, who died in February, 1867, invested a large sum on the security of debentures of the London, Chatham & Dover Railway. The question submitted to the Court was whether his estate was now liable only to repay the sum so improperly invested, with interest at 4*l.* per cent. per annum from the death of the tenant for life, or to restore to the trust funds such a sum of consols as could have been purchased with the sum misapplied on the day when the breach of trust was committed, together with the dividends which would have accrued from the date of the death of the tenant for life.

Mr. Montague Cookson, in submitting the question to the Court, said that the former alternative was supported by—*Robinson* v. *Robinson* (1 De Gex, M. & G. 247; 21 L. J. Ch. 111); but that this authority had been shaken by *Brown* v. *Gellatly* (L. R. 2 Ch. Ap. 751).

Mr. Jolliffe appeared for the executors of the tenant for life, who had covenanted to indemnify the trustee.

The MASTER OF THE ROLLS held that the trustee still had the option accorded to him in *Robinson* v. *Robinson*, since in *Brown* v. *Gellatly* the question was not between trustee and *cestui que trust*, but between tenant for life and remainderman.

(1) "In every case of a judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead; provided, that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate."

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LORD ROMILLY, M.R., Jan. 28, 1869.

In re THE COUNTY LIFE ASSURANCE COMPANY.

38 L. J. Ch. 231: affirmed, [1870] E. R. A.; 39 L. J. Ch. 471; L. R. 5 Ch. 288; 22 L. T. 537; 18 W. R. 390 (L.J.).

Solicitor's Lien—Partner's Right.

SOLICITOR.—*A. was appointed solicitor of a company. B. entered into partnership with him, and they acted as joint solicitors for the company until it was wound up, when they acted for the liquidators. After the dissolution of their partnership, B. acted separately for the liquidators*:—Held, *that B. had no lien for costs on the documents of the company in his possession.*

This was a summons issued by the official liquidator of the County Life Assurance Company, to compel Mr. Mayhew, a solicitor, to attend before the examiner of the Court and produce certain documents.

Mr. Mayhew declined to produce them, on the ground of an unsatisfied lien for costs. He admitted that he had never been expressly appointed solicitor of the company, but he relied upon the following facts:—

On the formation of the company, Mr. Edmands was appointed solicitor by the articles of association, and in October, 1865, Mr. Mayhew entered into partnership with Mr. Edmands, and they both acted as joint solicitors of the company, until resolutions were passed by it, on the 7th of February, 1866, for a voluntary winding-up. Then they acted as solicitors of the liquidators.

On the 27th of July, 1867, an order was made for winding up the company compulsorily; and on the hearing of the petition for that purpose Mr. Mayhew, on the instructions of the liquidators, appeared, and obtained an order for payment of the costs of such appearance. He also acted separately for the liquidators in certain proceedings at law.

The books and documents which Mr. Mayhew now refused to produce came into the possession of himself and Mr. Edmands in the course of their business as solicitors for the company, and afterwards of the liquidators. No part of the bill of costs for these services had been paid either to himself or to Mr. Edmands.

The partnership was dissolved in July, 1868, and the books were now in the sole possession of Mr. Mayhew.

Mr. Jessel and *Mr. Ince*, for the official liquidator.—Even if the lien exists it is no answer to the summons—*Lockett* v. *Cary* (10 Jur. N.S. 144); *Simmonds* v. *the Great Eastern Railway Company* (38 L. J. Ch. 87; L. R. 3 Ch. Ap. 797).

Mr. Roxburgh and *Mr. Caldecott*, for Mr. Mayhew, cited *In re Faithfull* (L. R. 6 Eq. 325); *Bozon* v. *Bolland* (4 Myl. & Cr. 354; 9 L. J. Ch. 123); *Lord* v. *Wormleighton* (Jac. 580); *Griffiths* v. *Griffiths* (2 Hare, 587; 12 L. J. Ch. 397); *Potter's case* (1 De Gex & Sm. 728; 18 L. J. Ch. 247).

LORD ROMILLY, M.R.—It is clear that Mr. Mayhew never was the solicitor of the company. Mr. Edmands was, but by taking a partner he does not make him the solicitor of the company. The partnership is dissolved, and if I were to make the liquidator pay the bill of costs to Mr. Mayhew, he might have to pay it over again to Mr. Edmands or his assignee. I infer that the liquidators did employ Mr. Mayhew separately in the proceedings at law, but the liquidators are not the company. I must therefore order Mr. Mayhew to produce the documents.

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LORD ROMILLY, M.R., Dec. 19, 22, 1868.

SCHOLFIELD *v.* LOCKWOOD.

38 L. J. Ch. 232; L. R. 7 Eq. 83; 17 W. R. 184.

Applied, *Cartow* v. *Cartow*, [1877] E. R. A.; 2 C.P. D. 362; 25 W. R. 866 (C.P. D.); *Greer* v. *Young*, [1883] E. R. A.; 52 L. J. Ch. 915; 24 Ch. D. 545; 49 L. T. 224; 31 W. R. 930 (C. A.).

Solicitors' Lien—23 & 24 *Vict. c.* 127. *s.* 28.

SOLICITOR.—*In a foreclosure suit it was declared that D. was entitled to redeem a portion of the property, the subject of the suit; but the final certificate had not been made. His solicitors' costs were declared to be a charge on the estate and interest of D, and a sale was ordered.*

This was a suit for redemption and foreclosure, the plaintiff being entitled to the equity of redemption of one-sixth part of the property, the subject-matter of the suit, and also to certain charges on a moiety of the estate. W. R. Durant, a defendant to the suit, was entitled to the equity of redemption of the remaining third of the estate.

By the decree it was, amongst other things, directed that upon W. R. Durant's paying to the plaintiff what should be certified as due on his share of the estate within six months after the date of the chief clerk's certificate, the legal estate should be conveyed to him, and in default that he should be foreclosed.

Before the chief clerk made his general certificate Durant was adjudicated bankrupt, and his solicitors presented a petition praying that it might be declared that they were entitled to a charge for the amount of their taxed costs upon all the estate or interest of Durant, or his assignee, in the mortgaged premises, for taxation of their costs, and for a sale and payment of their costs out of the proceeds. The petition was supported by an affidavit that the petitioners believed that the accounts and inquiries directed by the decree would shew that Durant's interest was of value.

Mr. Montague Cookson, for the petitioners, submitted that Durant's interest was, within the words of the acts, " property recovered or preserved " in a suit. The solicitors were entitled to a charge, though the interest of their client might turn out valueless—*Bailey* v. *Birchall* (2 Hem. & M. 371).

The MASTER OF THE ROLLS (*Dec.* 22) said.—He thought the petition came within the words of the act. The interest was not " recovered," but he thought it might fairly be said to be "preserved." He thought the act was intended to be construed liberally. He made the order as prayed.

LORD ROMILLY, M.R., Dec. 15, 16, 1868.

DRAX *v.* THE SOMERSET AND DORSET RAILWAY COMPANY.

38 L. J. Ch. 232; 19 L. T. 626.

Parties—Suit by Unpaid Vendor—Debenture Holder—Receiver.

COMPULSORY PURCHASE.—*In a suit by an unpaid vendor against a railway company, debenture holders of the company who, in another suit have obtained a receiver, are properly made co-defendants.*

The plaintiff in this suit, having agreed to sell land to the defendant railway company, by the present bill sought the usual relief claimed by the unpaid vendor. Two persons were made defendants on the ground that they had, as

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holders of mortgage debentures of the company, obtained in a different suit a receiver of the tolls and sums of money arising out of the undertaking. The question was now raised whether these persons were proper parties.

Mr. A. G. Langley, for the debenture holders.—We ought not to be parties. We are not parties to the contract, specific performance of which is sought by the bill; and we are not in possession. It is the Court, by its receiver, which is in possession.

Mr. Fry (*Mr. Jessel* with him), for the plaintiff, cited *The Bishop of Winchester* v. *the Mid Hants Railway Company* (37 L. J. Ch. 64; L. R. 5 Eq. 17).

The MASTER OF THE ROLLS (*Dec.* 16), on the authority cited, held that the debenture holders were necessary parties.

LORDS JUSTICES, Jan. 14, 21, 30, 1869.

In re THE GENERAL ESTATES COMPANY (LIMITED); *Ex parte* HASTIE.

38 L. J. Ch. 233; L. R. 4 Ch. 274; 20 L. T. 94; 17 W. R. 302: affirming, [1869] E. R. A.; 38 L. J. Ch. 43; L. R. 7 Eq. 3; 20 L. T. 93; 17 W. R. 152 (M.R.).

Followed, *Cary* v. *Dawson*, [1869] E. R. A.; 38 L. J. Q.B. 300; L. R. 4 Q.B. 568; 21 L. T. 23; 17 W. R. 916 (Q.B.); *Financial Corporation* v. *Lawrence*, [1869] E. R. A.; 38 L. J. C.P. 305; L. R. 4 C.P. 731; 17 W. R. 854 (C.P.). Referred to, *In re Bank of Hindustan; Mitchell's case*, 1870, 21 L. T. 812 (V.C.): reversed, [1870] E. R. A.; 39 L. J. Ch. 530; L. R. 5 Ch. 400; 22 L. T. 188; 18 W. R. 502 (L.J.); *In re Muggeridge*, [1870] E. R. A.; 39 L. J. Ch. 620; L. R. 10 Eq. 443; 23 L. T. 296; 18 W. R. 963 (M.R.). Followed, *City Discount Co.* v. *Lloyd*, [1872] E. R. A.; 24 L. T. 512; 20 W. R. 22 (Ex.). Referred to, *Morgan* v. *Hardy*, [1887] E. R. A.; 56 L. J. Q.B. 363; 18 Q.B. D. 646; 57 L. T. 909; 35 W. R. 588 (C. A.): affirmed, (sub nom. *Hardy* v. *Fothergill*), [1889] E. R. A.; 58 L. J. Q.B. 44; 13 App. Cas. 351; 59 L. T. 273 (H.L.).

Contributory—Liability of Discharged Bankrupt—Bankruptcy Act, 1861, *s.* 154.—*Companies Act*, 1862, *ss.* 16, 75, 77.

BANKRUPTCY COMPANY.—*Where the assignee of a bankrupt shareholder in a limited company, registered under the act of* 1862, *has repudiated the bankrupt's shares, and the company is wound up after the discharge of the bankrupt, the bankrupt's name is properly retained on the list of contributories.*

Prima facie future calls to be made by a company not in course of winding-up are not capable of valuation at the date of the bankruptcy, and therefore are not provable under section 154. *of the Bankruptcy Act*, 1861.

This was an appeal by Mr. Hastie from an order of the Master of the Rolls dismissing without costs a summons which Mr. Hastie had taken out to have his name removed from the list of contributories to the General Estates Company (Limited), and to place thereon the name of his assignee in bankruptcy instead.

The case is reported 38 L. J. Ch. p. 43.

The material facts were as follows: The company was formed and registered in 1865, under the act of 1862. Mr. Hastie became a shareholder, holding 125 shares, on which 2*l.* per share was paid up. In 1866 he became a bankrupt. On the 5th of July, 1866, he obtained his discharge. The creditors' assignee refused to have anything to do with the shares. Mr. Hastie's name remained on the register of the company. There was a winding-up of the company under supervision, which commenced after Mr. Hastie's bankruptcy and discharge. 18*l.* remained due on each of the 125 shares which Mr. Hastie took, and his name was put on the list of contributories for these 125 shares.

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Mr. Jessel and *Mr. Fischer*, for the appellants.—The question in this case is whether the liability to pay future calls on shares in a limited company not in course of liquidation is a debt provable under section 154. of the Bankruptcy Act, 1861. We contend that the effect of sections 16, 75, and 77, of the Companies Act, 1862, is to constitute such a liability a present debt which the company can have valued and then prove for the amount under the bankruptcy. The 75th section of the Companies Act enacts, that "The liability of any person to contribute to the assets of a company under this act, in the event of the same being wound up, shall be deemed to create a debt accruing due from such person at the time when his liability commenced." The 77th section is imperative; it is as follows: "If any contributory becomes bankrupt, either before or after he has been placed on the list of contributories, his assignees shall be deemed to represent such bankrupt for all the purposes of the winding-up, and shall be deemed to be contributories accordingly, and may be called upon to admit proof against the estate of such bankrupt, or otherwise to allow to be paid out of his assets in due course of law, any moneys due from such bankrupt in respect of his liability to contribute to the assets of the company being wound up; and for the purposes of this section any person who may have taken the benefit of any Act for the Relief of Insolvent Debtors, before the 11th day of October, 1861, shall be deemed to have become bankrupt." And then the 16th section says that, "All moneys payable by any member to the company, in pursuance of the conditions and regulations of the company,"—which must include future calls—"shall be deemed to be a debt due from such member to the company." The effect of the decision of the Master of the Rolls in this case and of the Queen's Bench in *Martin's Patent Anchor Company* v. *Morton* (37 L. J. Q.B. 98; L. R. 3 Q.B. 306), is to make the assignees not liable, although the act says they shall be liable; for if a man is on the share-register of a company and becomes bankrupt his assignees are under the act to take his place for the purposes of contribution. Sections 75. and 77. of the act of 1862 cannot be confined to cases where the bankruptcy has taken place after the winding-up has commenced. There Mr. Justice Lush in his judgment in the above case, in the Queen's Bench, is with us. It follows that they must apply to the present case—*Ex parte Nicholas* (2 De Gex, M. & G. 271; 21 L. J. Bk. 64), which was a decision on the 13th section of the Joint-Stock Companies Act (12 & 13 Vict. c. 108), is in our favour. See also *Williams* v. *Harding* (35 L. J. Bk. 25; L. R. 1 E. & I. Ap. 9); *Ex parte Canwell* (33 L. J. Bk. 30).

Mr. Roxburgh and *Mr. E. James*, for the respondents.—As long as a company is a going concern the amount of liability of any shareholder to pay future calls is incapable of valuation—*Pickering's case* (38 L. J. Ch. 1; L. R. 4 Ch. 58, 61), and therefore cannot be proved under the 154th section of the Bankruptcy Act, 1861; and by the 161st section of the act the order of discharge only applies to debts provable under the bankruptcy. The judgment of the Court of Queen's Bench in *Martin's Patent Anchor Company* v. *Morton* (ubi supra), is consistent with the right construction of the statute, and governs this case. They also cited *The South Staffordshire Railway Company* v. *Burnside* (5 Ex. Rep. 129; 20 L. J. Ex. 120); *The General Discount Company* v. *Stokes* (17 Com. B. Rep. N.S. 765; 34 L. J. C.P. 25).

Mr. Fischer, in reply, referred to *Ex parte Chapple* (5 De Gex & Sm. 400); *Parbury's case* (3 De Gex, F. & J. 80; 30 L. J. Ch. 513); *Kuper's case* (3 De Gex & Sm. 113; 19 L. J. Ch. 165); *Luard's case* (1 De Gex, F. & J. 533; 29 L. J. Ch. 269); *Greenshields' case* (5 De Gex & Sm. 599; 21 L. J. Ch. 773); *Burlinson's case* (3 De Gex & Sm. 18; 18 L. J. Ch. 250); *King's case* (L. R. 4 Eq. 566; on appeal, 36 L. J. Ch. 718; L. R. 3 Ch. 10).

GIFFARD, L.J., delivered the judgment of the Court, and after stating the facts said: The Master of the Rolls founded his judgment for the most part on the case of *Martin's Patent Anchor Company* v. *Morton*. In the argument before us exceptions were taken both to the judgment of the Master of the Rolls

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as well as those of the learned Judges of the Court of Queen's Bench in the Patent Anchor Company's case, and it was, among other arguments, urged that, taking the Bankruptcy Act and the Winding-up Act together, there was a distinct legislative enactment that calls under a winding-up should be proved and provable whether the bankruptcy occurred before or after the winding-up. As a ground for this the latter part of the 77th section of the Winding-up Act was much relied upon. The whole of that section is as follows.—[His Lordship read the section.]—The argument on this section was, that as it applied in terms and words to an insolvency before the act, it necessarily applied to a bankruptcy preceding the winding-up, and the observations on the judgments of the Master of the Rolls and the judgments of the learned Judges of the Court of Queen's Bench were to the effect that they were erroneous in attempting to escape the result of this conclusion by laying it down that proof might be made, provided it occurred before the assets under the bankruptcy were distributed and the estate wound up. We think there is great force in this argument and in these observations, but that they may well be admitted without leading to the conclusion that Mr. Hastie's name ought not to be on the list of contributories; for there may be circumstances under which the bankruptcy may precede the winding-up, and the 77th section be applicable. It would be applicable if the assignees chose to take to the shares; it would be applicable to such calls as were made before the bankruptcy, as, for instance, if the directors called up the whole or part of the capital, and these calls were not met. Again, it would be applicable if, for any reasons or under any circumstances, the calls, or any of them, were capable of valuation at the date of the bankruptcy.

Then the cases of *Williams* v. *Harding* and *Ex parte Canwell* were referred to, but they result in this, and nothing more: that the date of the liability has its inception at the date of, and originates with, the membership. But it does not follow that a debt or liability is provable under a bankruptcy because it had its inception or originated in a contract preceding the bankruptcy.

Lastly, the cases of *Ex parte Nicholas*, *Parbury's case* (both in the Court of Appeal) and *Chapple's case* and *Greenshields' case* were brought forward, and it was urged that these cases were inconsistent with the decisions both of the Master of the Rolls and of the Court of Queen's Bench, as well as with *The South Staffordshire Railway Company* v. *Burnside* and *The General Discount Company* v. *Stokes*. In the two cases in the Court of Appeal the winding-up preceded the bankruptcy or insolvency. All the cases had reference to the old Winding-up Act, and proceeded very much upon this, viz., that the liabilities, for payment of which the calls were made, were barred, and that as the proceedings under the then Winding-up Acts were a substitution for a suit for a contribution between partners and had no other effect, it followed that, the liabilities being barred, the calls were barred, and further, that a certificate would have been a defence to a suit for contribution. This reasoning does not apply to proceedings under the act of 1862. In this case the shares continued, and still continue, vested in Mr. Hastie. There are no provisions in the Bankruptcy Act analogous to those which have reference to a bankrupt's liability on leaseholds, where the assignees repudiate the lease. It is essential for proof, under the 154th section of the Bankruptcy Act, that the debt to be proved should be a debt capable of valuation at the date of the bankruptcy. The provisions of the Winding-up Acts of 1862 do not make a debt provable which is incapable of valuation at the date of the bankruptcy, nor can such a construction be in reason put upon them as would have the effect of relieving a bankrupt in consequence of his discharge, though he should have been discharged years before the winding-up, and might have been holding the shares and even receiving dividends subsequently to his discharge. There is nothing in this case to shew that the debt or call in respect of which the bankrupt is made a contributory was capable of valuation at the date of his bankruptcy. *Prima facie* undoubtedly it would not be so, and as the bankrupt is discharged only from debts provable under his bankruptcy, and those debts only are provable which

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were capable of valuation at the date of his bankruptcy, we are of opinion that he must be retained as a contributory.

The case is of importance, and we have gone into it at some length; but for its actual decision it is enough to say that a bankrupt must be retained as a contributory where the bankruptcy and the discharge precede the winding-up. The debt is not shewn to be capable of valuation; the assignees have repudiated the shares, and they have always remained, and still remain, vested in the bankrupt.

The appeal motion will be refused with costs.

MALINS, V.C., Feb. 12, 1869.

In re BAILEY'S TRUSTS.

38 L. J. Ch. 237; 20 L. T. 168; 17 W. R. 393.

Referred to, *Mildred* v. *Austin*, [1869] E. R. A.; L. R. 8 Eq. 220; 20 L. T. 939; 17 W. R. 638 (M.R.); *Earl of Cork* v. *Russell*, [1872] E. R. A.; 41 L. J. Ch. 226; L. R. 13 Eq. 210; 26 L. T. 230; 20 W. R. 164 (V.C.).

Judgment, Registration of, without Execution—Charge upon Lands—27 & 28 Vict. c. 112.

JUDGMENT.—*The mere registration of a judgment upon which no writ of execution has issued, constitutes no lien upon the debtor's land.*

The Judgment Amendment Act, 1864 (27 *&* 28 *Vict. c.* 112.) *has in effect repealed* 1 *&* 2 *Vict. c.* 110. *s.* 13.

Semble—*Registered judgment creditors who have not taken out execution are no longer necessary parties to a foreclosure suit.*

James Bailey having, in 1865 and 1866, mortgaged certain leaseholds situate in Middlesex, to the trustees of a benefit building society, in the following year mortgaged his equity of redemption in the same premises to Edward Hart.

In January, 1868, Bailey executed an inspectorship deed, which was duly registered under the Bankruptcy Act, 1861.

The trustees of the building society shortly afterwards, in exercise of their powers of sale, sold the premises and retained the moneys due upon their mortgages. Some dispute then arose on the part of Bailey's inspectors as to the amount due in respect of Hart's security, in consequence of which the trustees of the building society paid the balance in their hands (537*l.* 18*s.* 2*d.*) into Court.

Bailey and his inspectors now petitioned under the Trustee Relief Act, for payment out, subject to Hart's claim, the full amount of which was admitted at the bar, and no longer remained in dispute.

The petition stated that there were several judgment creditors against Bailey's estate, all of whose names, with the amount of their claims, were set forth in a schedule to the petition. None of the judgments had been entered up before the passing of 27 & 28 Vict. c. 112 (July 29th, 1864), nor had executions been registered.

The petition had not been served upon any of the judgment creditors. One of them, however, whose judgment was registered in the Common Pleas and in the Middlesex Registry in June, 1866, but upon which no writ of execution had been issued, appeared by counsel, and claimed his lien upon the fund in Court for the amount of his judgment debt and costs of appearance.

Mr. Shapter and *Mr. Yool*, for the petitioners, contended that since the passing of 27 & 28 Vict. c. 112. no judgment creditor had any lien upon his debtor's land until the return had been made by the sheriff and the land actually

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delivered in execution. The present creditor, therefore, had no right to appear, They referred to *In re the Cowbridge Railway Company* (37 L. J.. Ch. 306; L. R. 5 Eq. 413); *Guest* v. *the Cowbridge Railway Company* (37 L. J. Ch. 909; L. R. 6 Eq. 619).

Mr. Ellis, for the judgment creditor, argued that there was nothing in the act of 1864 disentitling him to appear and establish his claim. He referred to the language of Wood, V.C. in the case cited: "It could not have been intended that all the remedies given by 1 & 2 Vict. c. 110. should be swept away by a side wind."—He mentioned the case of *Mildred* v. *Austin*, unreported, recently before the Master of the Rolls, in which it was held necessary, notwithstanding the later act, to have all the judgment creditors before the Court in a foreclosure suit. He also cited *Thornton* v. *Finch* (4 Giff. 515; 34 L. J. Ch. 466), as shewing that the act did not apply to an equity of redemption.

Mr. Glasse and *Mr. Jervis*, for Hart.

Mr. Osler for the trustees of the building society.

MALINS, V.C.—I am sorry to find that any doubt exists as to the construction of the act of 1864. Here is a fund in Court representing the surplus proceeds arising from the sale of certain mortgaged premises, and the right of the petitioners to the fund is contested by a judgment creditor, who claims under a judgment registered in the Common Pleas on the 26th of June, 1866, and in the Middlesex Registry on the following day, his contention being, that that judgment so registered constitutes a lien upon the debtor's land.

Undoubtedly under 1 & 2 Vict. c. 110. he would have been entitled to his lien, for the 13th section of that act places such a creditor in the same situation as if he had a "charge in writing" upon the land; but this state of the law was found to cause so much difficulty and embarrassment in the transfer of land, rendering it necessary to obtain a release from all creditors whose judgments were entered up, or, in cases of foreclosure, to bring all the creditors before the Court, however insolvent the mortgagor might be, and however small their chance might be of getting anything out of his estate, that the object of the legislature in passing the Amendment Act was, as stated in the preamble, to "assimilate the law affecting real estates with that affecting personal estates in respect of future judgments"; and so far as the present question is concerned the language of the act is perfectly distinct: it enacts, that "no judgment shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority in pursuance of such judgment."—[His Honour read the 1st and 2nd sections of the act.]—In my opinion, although this act does not in express terms repeal 1 & 2 Vict. c. 110, yet being subsequent to that act in date, and totally inconsistent with it, it does in effect repeal it, and under these circumstances I am bound to decide against the claim of this judgment creditor. The result, therefore, is, that the fund in Court must be paid over to the petitioners, subject to Hart's claim, the amount of which is no longer disputed. There appears to be no report of *Mildred* v. *Austin*, before the Master of the Rolls; but even if it had been brought before me as a formal decision, upon the facts as stated at the bar, I should have felt it my duty to dissent from it.

LORDS JUSTICES, Jan. 14, 15, 21, 1869.

BEAUMONT *v.* OLIVEIRA.

38 L. J. Ch. 239; L. R. 4 Ch. 309; 20 L. T. 53; 17 W. R. 269: varying, [1869] E. R. A.; 38 L. J. Ch. 62; L. R. 6 Eq. 534; 19 L. T. 330; 17 W. R. 41 (V.C.).

Distinguished, *In re Pitt*, [1885] E. R. A.; 53 L. T. 113; 33 W. R. 653 (Ch. D.). Explained, *In re Arnold*, [1888] E. R. A.; 57 L. J. Ch. 682; 37 Ch. D. 637; 58 L. T. 469; 36 W. R. 424 (Ch. D.). Referred to, *In re Rea*, [1902] 1 Ir. R. 451 (M.R.).

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Will—Charitable Bequest—Royal Societies—Real Estate Abroad—Pure Personalty—Administration—Priority—Costs.

CHARITY. WILL.—*A legacy to the "Royal Geographical Society" or the "Royal Society" is a legacy to a charity. (Decree of* Stuart, V.C. *affirmed.)*

A testator bequeathed legacies to several charitable institutions, and directed that "all his said charitable legacies should be paid out of his pure personal estate." He died possessed of real estate in Madeira, and of mixed personalty and pure personalty in England. The pure personalty was insufficient to pay in full the charitable legacies:—Held *(varying the decree of* Stuart, V.C.), *that the proceeds of the Madeira estate, although not savouring of realty within the meaning of the Statute of Mortmain, did not fall within the words "my pure personal estate":*—Held, *also, in a suit to administer the testator's estate (varying the decree of* Stuart, V.C.), *that the administration charges must be paid rateably out of the whole estate; that the charitable legatees were entitled to the remainder of the pure personalty, and had a claim against the rest of the estate for so much of their legacies as should remain unpaid, but that that claim must abate in the proportion which the personalty savouring of realty bore to the proceeds of the Madeira estate, and that the charitable legatees must be allowed their costs of the suit out of the estate.*

Tempest *v.* Tempest (7 De Gex, M. & G. 470; 26 L. J. Ch. 501) *followed.*

In this case there were two appeals from an order of Vice Chancellor Stuart, reported 38 L. J. Ch. 62, from which report and from the judgment of the Court as given below the facts fully appear.

The first appeal was by the Royal Geographical Society and the Royal Society from so much of his Honour's order as decided that they were charitable institutions within the meaning of the Statute of Mortmain, and that they should pay their own costs of the suit.

The second appeal was by the executors of the testator in the cause from the order that the costs of the suit except the costs of the charitable legatees, debts and funeral and testamentary expenses were to be paid primarily out of the mixed personalty, and that the proceeds of the sale of the Madeira property were to be treated as pure personalty, and therefore primarily applicable to the payment of the charitable legacies.

Mr. Dickinson, Mr. Archibald Smith and *Mr. Bagshawe,* for the Royal Geographical Society and the Royal Society.—These societies are founded for the promotion of bare abstract scientific knowledge; they cannot be called "useful" within the meaning of the statute 43 Eliz. c. 4, and that statute has always been considered the guide for the purpose of determining what are charities under the Mortmain Act.—They referred to *The Attorney General* v. *Heelis* (2 Sim. & S. 67; 2 L. J. Ch. 189); *Thompson* v. *Shakespear* (1 De Gex, F. & J. 399; 29 L. J. Ch. 276); *Whicker* v. *Hume* (7 H.L. Cas. 124; 28 L. J. Ch. 396); *Carne* v. *Long* (2 De Gex, F. & J. 75; 29 L. J. Ch. 503); *The Mayor, &c. of Faversham* v. *Ryder* (5 De Gex, M. & G. 350; 23 L. J. Ch. 905); *Jones* v. *Williams* (2 Amb. 651); *Townley* v. *Bedwell* (6 Ves. 194); *James* v. *Allen* (3 Mer. 17); *Morice* v. *the Bishop of Durham* (10 *Ves.* 522); *The Attorney General* v. *the Mayor of Dublin* (1 Bligh. N.S. 357); *The Trustees of the British Museum* v. *White* (2 Sim. & S. 594); *Kendall* v. *Granger* (5 Beav. 300; 11 L. J. Ch. 405); *Nightingale* v. *Goulburn* (5 Hare, 484: on appeal, 2 Ph. 594; 16 L. J. Ch. 270: and on appeal, 17 L. J. Ch. 296).

Mr. Greene and *Mr. A. Bailey,* for the Marylebone School for Girls and the Albert Orphan Asylum.

Mr. Davey, for the Royal Humane Society.

Mr. Wickens, for Miss Oliveira, a legatee.

Sir R. Palmer and *Mr. Langworthy,* for the plaintiffs, the executors, were not called upon with regard to the first appeal. On the second appeal they

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contended that the testator, when he spoke of real estate in his will, must have meant the Madeira property, as he had no other real estate. At any rate it was not "pure personalty" in the sense in which that term was used in the will, and therefore was not primarily applicable to the payment of the charitable legacies. As to costs, the authorities were against the decisions of the Vice Chancellor—*The Philanthropic Society* v. *Kemp* (4 Beav. 581; 11 L. J. Ch. 360); *Sturge* v. *Dimsdale* (6 Beav. 642); *Robinson* v. *Geldard* (3 De Gex & Sm. 499; 18 L. J. Ch. 494: and on appeal, 3 Mac. & G. 735); *Tempest* v. *Tempest* (7 De Gex, M. & G. 470; 26 L. J. Ch. 501); *Hobson* v. *Blackburn* (1 Keen, 273).

Mr. Dickinson, *Mr. H. Smith* and *Mr. Bagshawe*, for the other Societies, contended that the charitable legacies were demonstrative, and therefore not liable to abate with the other legacies, and that the whole of the administration charges ought to be thrown on the mixed personalty. They relied on *Robinson* v. *Geldard* (ubi supra), and on the judgment of Wood, V.C. in *Tempest* v. *Tempest* (2 Kay & J. 635), which they argued was right in principle, and was only overruled by Lord Cranworth, as reported 7 De Gex, M. & G. 470, on the particular wording of the will.

Mr. Langworthy, in reply.

SELWYN, L.J., delivered the judgment of the Court and said: This case comes before us on two petitions of appeal against an order made by Vice Chancellor Stuart, on the 20th of July, 1868, on the second further consideration of the cause. The suit was instituted for the administration of the estate of Benjamin Oliveira, who, by his will, dated the 11th of September, 1865, after appointing the plaintiffs his executors, and giving a legacy of 2,000*l.* to his daughter Emma, and certain other legacies and an annuity, bequeathed to the "treasurer for the time being of the Royal Society the sum of 4,000*l.*," and in similar terms he bequeathed legacies of the same amount to the Royal Geographical Society, the Royal Humane Society, the Marylebone School for Girls, and the Albert Orphan Asylum—in all four sums of 4,000*l.* each, and added, "I direct all the said charitable legacies to be paid out of my pure personal estate." And the testator then gave the residue of his real and personal estate to the plaintiffs, his executors, for their own use.

The decree made on the hearing of the cause directed the usual accounts and inquiries, including an inquiry what real estate there was, and where it was situated; and the chief clerk certified that the pure personalty amounted to a sum much less than sufficient to pay the charitable legacies; that certain leasehold property had realized 8,045*l.*, and that the only real estate was a small one in the island of Madeira, which had been sold with the sanction of the Court, and is now represented by a sum of 866*l.* 12*s.* 6*d.* 3*l.* per cent. Bank annuities.

By the order now under appeal it is declared that the several legacies to the five societies mentioned were given for charitable purposes within the meaning of the statute of 9 Geo. 2, called the Mortmain Act, and that they were payable out of the testator's personal estate in nowise connected with any interest in land, in precedence to any payment thereout of the debts, funeral and testamentary expenses of the testator, and the other legacies given by his will, and the costs of this suit; and it is also declared that the sum of 866*l.* 12*s.* 6*d.* 3*l.* per cent. Bank annuities, which represents the proceeds of the sale of the Madeira estate, was not such an interest in land as that a bequest thereof for charitable purposes was within the operation of the Mortmain Act; and that the same was to be dealt with as personal estate in nowise connected with any real estate, and applied accordingly.

The first of the appeals is that of the Royal Geographical Society and of the Royal Society of London; and the substantial question raised by it is, whether the bequests of 4,000*l.* to each of those societies ought to have been declared to be legacies given for charitable purposes within the meaning of the statute of 9 Geo. 2; and the appellants also complained that the costs of the Royal

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Geographical Society are given only out of their share of the pure personalty, and because no costs are given to the Royal Society.

The Royal Geographical Society is a corporation, and its objects are stated to be, and are, the "improvement and diffusion of geographical knowledge." The Royal Society is also a corporation, and its objects are "improving natural knowledge." The objects of both these societies are public, and they are both societies for the advancement of objects of general pulic utility; and the Vice Chancellor has referred to the judgment of Sir John Leach in *The Attorney General* v. *Heelis*, in which he said, "I am of opinion that funds supplied from the gift of the Crown, or from the gift of the legislature, or from private gift, for any legal, public or general purpose, are charitable gifts to be administered by Courts of equity." It was said by the counsel for the appellants that Lord Eldon in *The Attorney General* v. *the Corporation of Dublin*, had expressed his dissent from the judgment of Sir John Leach in *The Attorney General* v. *Heelis;* but in the case of *The Attorney General* v. *Eastlake* (11 Hare, 205), the present Lord Chancellor (Lord Hatherley), when Vice Chancellor, pointed out that the expression of dissent on the part of Lord Eldon related to a different part of the judgment of Sir John Leach. At page 222, after stating that the exception taken by Lord Eldon to the judgment in *The Attorney General* v. *Heelis* was that the source from which the funds came is not material, as stated by Sir John Leach, but that the criterion is the purpose to which they are applied; and the question is, whether that purpose is a charity or not, he says: "It is sufficient to say it is a large and general purpose for this town, although not beyond the limits of the town." In the case of *The Trustees of the British Museum* v. *White*, a devise to the British Museum was held to be within the statute of 9 Geo. 2; and in the case of *The President of the United States* v. *Drummond* (cited 7 H.L. C. 155), a gift of residue to found at Washington, under the name of the Smithsonian Institute, an establishment for the increase of knowledge amongst men, was sustained as being a charity.

In our judgment the case of *Whicker* v. *Hume* is in no way inconsistent with these authorities, for the decision in that case, so far as relates to this point, cannot be taken as amounting to more than this, that if the terms "advancement of learning" mean "advancement of education," the case is not an arguable one.

Again, the case of *Thompson* v. *Shakespear*, which was relied upon by the appellants, was a case in which a legacy was given to be laid out by the testator's executors, with the concurrence of the persons described in the will as trustees of Shakespeare's house, in forming a museum in Shakepeare's house, and for such other purposes as the trustees of the will in their discretion might think fit for the purpose of giving effect to his wishes; and it was held that the gift could not be supported either as a charity or as a gift for the benefit of private persons. Even in that case the Lord Justice Knight Bruce stated that "perhaps if the object of a museum could be dissociated from Shakespeare's house it might be possible to support the gift."

The case of *Carne* v. *Long* was also relied on by the appellants, but the Lord Chancellor considered the devise in that case as being a devise for a society of individuals at Penzance. In the case now before us both the bequests are bequests to corporations, the objects and purposes of which are the diffusion and improvement of particular branches of knowledge; they subsist for these purposes, and no others; therefore, for public purposes,—therefore, for the advancement of objects of general public utility,—therefore, for purposes analogous and similar to those mentioned in the statute of Elizabeth,—therefore, for charitable purposes; and this being so, we agree with the Vice Chancellor that the legacies given to them are charitable legacies, and applicable only to the purposes for which the recipients exist as corporations.

The second appeal is that of the plaintiffs, and the substantial question which is raised by that appeal is, in what manner the debts and funeral and

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testamentary expenses of the testator, and the costs of this suit (all which are hereinafter referred to as " the administration charges "), ought to be provided for. On the part of the respondents it has not been seriously contended that the proceeds of the sale of the Madeira estate can be considered as falling within the words " my pure personal estate," which are found in the will; and it is also admitted that, as the Madeira estate is included in the general residuary gift, the residuary devisees and legatees can only take it subject to the payment of the legacies.

It was argued, on behalf of the charitable legatees, that their legacies are demonstrative legacies, and that they are, therefore, not liable to abate with the other legacies, and that the whole of the administration charges ought to be thrown exclusively upon those portions of the estate which do not consist of pure personalty, and the case of *Robinson* v. *Geldard* was cited as a conclusive authority in support of this proposition. *Robinson* v. *Geldard* was first heard before Lord Justice Knight Bruce, when Vice Chancellor (3 De Gex & Sm. 499; 18 L. J. Ch. 454: reversed, 3 Mac. & G. 735). Then the Vice Chancellor said: " Had it not been for the recent decisions at the Rolls which have been referred to, I might possibly have thought that, consistently with all the modern decisions, the debts and funeral and testamentary expenses might be borne by the different descriptions of personalty *pro rata*, and that then the pure personalty should be applied, in the first instance, under the directions of this particular will, in payment of the charity legacies. But I should, by acceding to the argument in favour of the charities, be acting against the opinion which is the foundation of the judgment in *Sturge* v. *Dimsdale*." In deference to those decisions at the Rolls, the charitable legacies were ordered to abate; but, nevertheless, and in accordance with the opinion expressed by the Vice Chancellor, the administration charges were ordered to be borne rateably by the pure personal estate and the personal estate savouring of realty. It is true that the petition of appeal (which we have inspected, and which bears the signature of Sir James Parker as counsel) did not complain so much of the order as directed the administration charges to be borne rateably by the two funds, but was confined to that portion of the order which directed that the charitable legacies should abate, and to the consequential directions. Lord Truro, upon the hearing of this petition of appeal, reversed so much of the order of the Vice Chancellor as directed the charitable legacies to abate; but his Lordship nowhere expresses any dissent from the opinion which had been expressed by Vice Chancellor Knight Bruce as to the manner in which the administration charges ought to be borne; and, on the contrary, at the conclusion of the judgment, Lord Truro says: " The result, therefore, is, that the Vice Chancellor's decision, made in deference to the language used by Lord Langdale, must be reversed, while, at the same time, the opinions of both those learned Judges will be affirmed."

The opinion of the Vice Chancellor which is thus affirmed was that to which we have just alluded, and which was actually carried into execution in the order which was then before the Court in an administration suit. In the same judgment Lord Truro says: " These authorities seem to me to shew that the charitable legacies in the present case are demonstrative legacies, or analogous thereto; but whether this is the precise character of these legacies, so that, had there been a deficiency of assets, they would have been entitled to be paid in full in priority to the other legacies, it is not necessary to decide; all that I need determine in the present case is, whether the legacies to individuals are to be paid partly out of the pure personalty, or whether they are to be paid exclusively out of the personalty savouring of realty, which is sufficient for the full payment of those legacies;" and, again, he says: " by directing that the charitable legacies shall be paid exclusively out of the pure personalty, he (the testator) has plainly shewn his intention that they shall be satisfied out of the pure personalty in preference to the legacies to individuals, whether they are strictly demonstrative legacies or not."

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In the case now before us it is clear that the charitable legacies are entitled to be paid out of the pure personalty in priority to the other legatees, and on this point also we agree with the learned Vice Chancellor; but we think that the case of *Robinson* v. *Geldard* cannot be considered as an authority in support of the further contention on the part of the charitable legatees that the administration charges ought to be thrown exclusively upon the rest of the estate. It is true that this contention is supported by the decision of the present Lord Chancellor (Lord Hatherley), when Vice Chancellor, in *Tempest* v. *Tempest;* but as that decision was overruled by Lord Chancellor Cranworth, we are bound to accept the decision of the Court of appeal as an authority superior to that of the judgment of the Vice Chancellor which was reversed.

The counsel for the charities treated this decision as resting upon a very narrow ground, and in a manner not warranted by the terms of the judgment, when they argued that it depended entirely on the insertion by the testator in that case of the words " in precedence of the other pecuniary legacies." Lord Cranworth observed that in *Robinson* v. *Geldard* Lord Truro had said that he must take the direction in the will that the charities were to be paid out of the pure personalty to amount to a declaration of intention that the charitable legacies were to be paid out of the pure personalty in preference to the other legacies, and, after commenting on the nature of demonstrative legacies, and saying that he need not puzzle himself whether the legacies were or were not demonstrative, he proceeded to state that the " testatrix has not directed that her debts or funeral and testamentary expenses should be paid out of that part of the personalty which savours of realty, nor has she expressed any intention to release the pure personalty from its legal liability to contribute to the payment of debts which by law are payable rateably out of both classes of personalty." It having thus been held that a direction to pay charitable legacies out of the pure personalty amounts to a declaration of intention that they are to be paid thereout in preference to the other legacies, it would be a strange result of the authorities if the declaration by a testator in express terms of this preferential payment should place the charitable legacies in a worse position than they would have been if the testator had left the same intention to be implied from the simple direction to pay out of the pure personalty.

If we consider the case before us independently of the authorities, and as a question of the intention of the testator as expressed in his will, we are led to the same conclusion as that at which Lord Cranworth arrived in *Tempest* v. *Tempest* (7 De Gex, M. & G. 470). It is clear that the testator had present in his mind the effect of the statute of 9 Geo. 2. Mr. Joshua Williams, in his book on the *Law of Personal Property*, 6th ed. p. 328, says, "A bequest to a charity ought to be directed to be paid out of such part of the testator's personal estate as he may lawfully bequeath for such a purpose; for, if this precaution should be neglected, the charitable legacies will fail in the proportion which the personal assets savouring of the realty may bear to those which are purely personal."

We have referred to this passage because in our judgment it defines precisely what was the intention of the testator, and what was the precaution which he did not neglect. But we cannot find in this will any expression of an intention to relieve the pure personalty from its obligation to contribute rateably with the rest of the estate to the burden of the administration charges, nor to cast that burden exclusively upon the rest of the estate, and we do not feel ourselves at liberty to imply any such intention. We think, therefore, that the Vice Chancellor's order must be varied by directing that the administration charges be paid rateably out of the whole estate, and the charitable legatees will then take what remains of the pure personalty in part payment of their legacies, and they will have a claim upon the rest of the estate for so much of their legacies as shall remain unpaid; but, as they are precluded by the statute from taking any part of the personalty savouring of realty, this claim must abate in the proportion which the personalty savouring of realty bears to the proceeds of the Madeira estate, which are not the subject of the provisions of the statute.

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We think that the charitable legatees must be allowed their costs of the suit out of the estate, and that the appellants in the first appeal must bear their own costs of that appeal, but the costs of the respondents to that appeal, and the costs of all parties to the second appeal, must be paid out of the estate, and the deposits will be returned.

JAMES, V.C., Feb. 11, 12, 1869.

HORNSBY *v.* BIRD.

38 L. J. Ch. 244; 17 W. R. 367.

Specific Performance—Agreement to Sell—Failure of Execution by a Party having no interest.

SPECIFIC PERFORMANCE.—*Five persons contracted to sell an estate in land, and a formal agreement was prepared, but before its execution it was discovered that the entirety belonged to four only, and accordingly it was verbally agreed that the fifth should not be required to execute. The agreement was executed by the four only as vendors and by the purchaser, but as no alteration was made in the body of the agreement it still purported to be an agreement by the five to sell and convey*:—Held, *that the four who executed could not maintain a bill for specific performance against the purchaser.*

Richard Bird, by his will, dated the 24th of September, 1867, devised and bequeathed all his property real and personal to Isaac Harris and Thomas Collier, in and for the consideration of paying over all the yearly rents, interests and profits arising from the same (after deducting rates and taxes on the same) unto his wife Mary Rebecca Bird during her life, and he appointed the said Isaac Harris and Thomas Collier executors of his will, and directed them to pay all his funeral and testamentary expenses.

The testator made no further disposition in his property. He left no issue. William Bird, his eldest brother, pre-deceased him, having had five legitimate children, one son and four daughters, and an illegitimate daughter.

The son died without issue in the testator's lifetime. Elizabeth Hornsby, one of the four daughters, died in the testator's lifetime, leaving one child, Joseph Hornsby. The other three legitimate daughters, namely, Ann Wrighton, Sarah Howes, the wife of Charles Howes, and Mary Bird, and the illegitimate daughter, Hannah Cryer, were still living.

At the time of the testator's death the illegitimacy of Hannah Cryer was not known, and accordingly she, together with the three living daughters of William Bird and Joseph Hornsby, the child of William Bird's deceased daughter, claimed to be the testator's heirs at law, and to be entitled as such to the reversion of the testator's real estate, and to a share of the reversionary interest in his personal estate, as some of his next-of-kin. At first, however, Harris and Collier, the trustees and executors, claimed to be entitled to these reversionary interests beneficially; and in consequence Mary Bird instituted a suit of *Bird* v. *Harris* against them, in which she prayed that they might be declared trustees for the testator's heirs-at-law and next-of-kin.

It was subsequently proposed that the suit should be discontinued, that Harris and Collier should abandon their claim, and that Mary Rebecca Bird should purchase the reversion of the real and personal estate for 3,200*l*.

An agreement was accordingly prepared and engrossed, which was dated the 17th of December, 1867, and expressed to be made between Isaac Harris and Thomas Collier of the first part, Joseph Hornsby, Ann Wrighton, Hannah Cryer, Charles Howes and Sarah his wife and Mary Bird of the second part, and Mary Rebecca Bird of the third part. This agreement recited the will of Richard Bird and the pedigree of William Bird's descendants, Hannah Cryer being named as one of his daughters. It also recited that, subject to Mary

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Rebecca Bird's life estate Joseph Hornsby, Ann Wrighton, Hannah Cryer, Sarah Howes and Mary Bird deemed themselves to be equitably entitled to the testator's real estate, as coparceners, and that, subject to the payment of the debts and funeral and testamentary expenses, they were entitled to a share of one moiety of his personal estate as some of his next-of-kin. By the operative part these five persons agreed to sell and Mary Rebecca Bird agreed to purchase for 3,200*l.*, provided the five claimants should satisfactorily prove themselves to be the testator's co-heirs-at-law and some of his next-of-kin, the interest of the five claimants in the testator's real and personal estate, subject to the following (amongst other) conditions, namely, that the vendors should execute a proper conveyance to the purchaser and her heirs, such conveyance to be prepared by and at the expense of the purchaser, and that the purchaser should, on the 24th of March, 1868, pay into the hands of such of the vendors as should be proved to be entitled to the real estate as co-heirs, and also to one-sixth of the personal estate as next-of-kin, his or her share of the purchase-money, the proof of heirship to be obtained by and at the expense of the vendors.

The agreement was executed as follows: "Signed by Richard Howes, of Towcester, as solicitor and agent, under written authority and on behalf of Isaac Harris, Thomas Collier and Mary Rebecca Bird.—Richard Howes. Signed by William Whitton, of Towcester, solicitor, an agent under written authority and on behalf of Ann Wrighton, Joseph Hornsby, Charles Howes and Sarah his wife, and in the capacity of solicitor for Mary Bird, plaintiff in suit *Bird* v. *Harris and another*, filed on the 7th of December, 1867, which suit it is hereby agreed shall be taken off the file or dismissed with costs to be paid to the plaintiff.—William Whitton."

The authority under which Mr. Howes signed the agreement was as follows: "*Re Bird, deceased.*—We do hereby authorize Mr. Richard Howes, of Towcester, our solicitor, to sign any contract that may be necessary for the purpose of purchasing and vesting the remainder in fee simple of the real estates of which the said Richard Bird died possessed, and also the share of the children of William Bird, the brother of the said Richard Bird, deceased, of and in the personal estate of the said Richard Bird, deceased, in Mrs. Mary Rebecca Bird, the widow, the *cestui que trust* for life; and I, the said Mary Rebecca Bird, do hereby authorize the said Richard Howes to contract to pay on my behalf the sum of 3,200*l.* to the said heirs-at-law of the said Richard Bird, deceased, for and in consideration of their releasing to me their interest in the said real and personal estate of the said Richard Bird, deceased. Dated this 17th day of December, 1867. Isaac Harris, Thomas Collier, Mary Rebecca Bird."

Before the execution of the agreement it had been discovered that Hannah Cryer was illegitimate, and the bill alleged that it was verbally agreed that she should be regarded as having no interest in the testator's estate, and should not be called upon to execute the agreement although named as a party therein.

Soon after the execution of the agreement, the bill in *Bird* v. *Harris* was taken off the file.

Mary Rebecca Bird now refused to complete the purchase, and this bill was accordingly filed by Joseph Hornsby, Ann Wrighton, Charles Howes and Sarah his wife, Mary Bird and Thomas Collier, against Mary Rebecca Bird and Isaac Harris, to compel specific performance of the agreement.

Neither of the defendants admitted that they had agreed, as the bill alleged, that Hannah Cryer should not be required to execute the agreement. The answers also alleged that the authority under which Richard Howes purported to sign the agreement was improperly obtained from the defendants, and not binding upon them, and much evidence was adduced in support of this contention.

Mr. Amphlett and *Mr. Edgar Rodwell*, for the plaintiffs.—The fact that Hannah Cryer, who neither has nor claims to have any interest in the testator's property, is named as a party to the agreement, does not render it less a valid contract in favour of the plaintiffs, who alone are able to do all that Mrs. Bird

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is entitled to require, namely, to vest in her the entire interest comprised in the agreement. If a contract be made with an adult and an infant which the infant repudiates the adult alone can sue—*Gibbs* v. *Merrill* (3 Taunt. 307).

Mr. Druce and *Mr. L. Field*, for Mrs. Bird.

Mr. Kay and *Mr. Dunn*, for Harris.

JAMES, V.C.—In this case I am of opinion the plaintiff's bill is misconceived. The jurisdiction of this Court is to enforce specific performance of a contract, and the duty of a plaintiff who comes to the Court asking the specific performance of a contract is to shew that the contract of which he seeks specific performance was entered into by the defendant as against whom he seeks it. In this case the defendants have not signed any contract themselves, and they are bound, if bound at all, by the authority which they gave to Mr. Richard Howes. The only contract which is produced, signed by the agent Mr. Richard Howes, is a contract by which certain persons, including one Hannah Cryer, bind themselves to convey the estate. The contract sought to be enforced is a contract which persons, not including Hannah Cryer, say they have entered into with the defendants. The only contract signed by the agent Mr. Howes is a contract that never was completed, because in order to the completion of a contract it is necessary that the contracting parties therein named should all of them have assented to it; and the fact that Hannah Cryer never was a party to that contract would make it as incomplete as if nobody had ever entered into the contract at all; therefore there was no contract in truth ever made between these parties. Even if the contract were made there would be this fatal objection to the bill as it stands, that it seeks to have a written contract performed with a parol variation, and even that parol variation is not proved in the way in which it is alleged in the bill. However, I do not know that that is very material. I proceed entirely on this, that the contract sought to be enforced was never entered into by the defendants at all. Of course the result of that will be that the bill must be dismissed.

With regard to costs, the defendants have made a case that they were induced to enter into the agreement unfairly and by pressure, and they have adduced a good deal of evidence in support of this contention. I am satisfied that no such case is proved, and the justice of the case will be met by not giving them any costs.

GIFFARD, V.C., Nov. 24, 1868.

BLAIKLOCK *v.* GRINDLE.

38 L. J. Ch. 247; L. R. 7 Eq. 215; 17 W. R. 114.

Referred to, *In re Lamberts*, [1888] E. R. A.; 57 L. J. Ch. 927; 39 Ch. D. 626; 59 L. T. 429 (Ch. D.).

Election—Married Woman—Appointment by Will—Will partly inoperative—Next-of-kin.

ELECTION POWERS.—*Three several funds were settled upon a lady for life. On her death, fund* 1. *was to be held for such persons as she should by will appoint. Funds* 2. *and* 3. *were to be held in case she died in her husband's lifetime for such persons as she should by will appoint; but in case she survived him the last-mentioned funds were to become her absolute property. She, by will, made in her husband's lifetime, appointed the three funds to her executors, and directed the latter to pay thereout several legacies to persons some of whom were and others were not her next-of-kin. She survived her husband and died without having republished her will, in consequence whereof funds* 2. *and* 3. *were undisposed of. Fund* 1. *was insufficient to pay all the legacies in full:*—Held, *that those of the legatees who were also next-of-kin were not put to their election, but were entitled to proportionate parts of their several legacies, as well*

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as to their shares of funds 2. *and* 3. *as next-of-kin*:—Held, *also, that testatrix's debts and funeral and testamentary expenses and the costs should be paid out of the undisposed funds.*

This was a SPECIAL CASE.

By the will of Jane Grindle, dated the 2nd of March, 1818, a sum of 8,100*l*. 3*l*. per cent. consolidated Bank annuities was bequeathed to trustees, upon trust for Lady Nickle (then Elizabeth Grindle) for her life for her separate use, and after her death, and in default of children (which event happened), upon trust for such person or persons, for such interest or interests, and in such manner as Lady Nickle should by deed or will, and notwithstanding coverture, appoint.

On the 14th of April, 1846, Lady Nickle (then Elizabeth Nesbitt, widow) intermarried with Sir Robert Nickle.

By an indenture of settlement, dated the 8th of April, 1846, made in contemplation of the marriage, the sum of 1,000*l*. East India stock was settled upon trust, after the solemnization of the marriage, and during the joint lives of Sir Robert Nickle and Lady Nickle, for Lady Nickle for her separate use. And it was thereby declared that if Sir Robert Nickle should die in the lifetime of Lady Nickle, the trust funds thereby settled should, after his death, be held in trust for Lady Nickle absolutely; but if she should die in his lifetime, the trust funds were, after her decease, to be held in trust for such person or persons as she should by will appoint, and in default of such appointment, and after the determination of a life interest thereby in default of such appointment given to Sir Robert Nickle in the trust funds, the latter were to be held in trust for the next-of-kin of Lady Nickle.

By another indenture of settlement, also dated the 8th of February, 1846, and made in contemplation of the aforesaid marriage, the several sums of 9,000*l*. 3*l*. per cent. consolidated Bank annuities, 10,000*l*. reduced annuities, and 113*l*. 3*s*. long annuities (which terminated in 1860), and a leasehold messuage, were settled upon trusts, and subject to powers similar in all respects to the trusts and powers in the first-mentioned indenture declared and contained concerning the 1,000*l*. East India stock thereby settled.

In 1853 the leasehold messuage was sold, and the proceeds of the sale thereof were invested in the purchase of 280*l*. 10*s*. 4*d*. consols, making, with the above-mentioned 9,000*l*. consols, the sum of 9,280*l*. 10*s*. 4*d*. like annuities.

Lady Nickle, in the lifetime of her husband, made her will, dated the 17th of February, 1853, and she thereby, after reciting the before-mentioned will and indentures of settlement, in exercise of the powers to her reserved by such will and indentures respectively, declared that the trustees thereof respectively and all other parties should, after her death, stand possessed of all the trust moneys, stocks, funds and securities, and of all other real and personal estate over which she had a power of appointment, upon trust to pay and transfer the same to her executors and trustees, to whom she thereby appointed the same. The testatrix then directed her executors and trustees to raise and pay thereout several legacies to persons some of whom were, and the rest were not, her next-of-kin.

Sir Robert Nickle died on the 26th of May, 1855.

The testatrix survived her husband, and died on the 17th of March, 1867, a widow, and without having revoked or republished her will. The latter, in the events which happened, became inoperative as to funds 2. and 3.

On the 16th of November, 1867, probate of her will, limited to the administration of such personal estate as she had, by virtue of the aforesaid will and of all other powers, a right to appoint, and had by her will appointed, but not further or otherwise, was granted to the plaintiff as one of her surviving executors.

On the 20th of December, 1867, letters of administration of the rest of the testatrix's personal estate were granted to the defendant, Henry Augustus Louis Grindle, as one of her next-of-kin.

The sum of 8,100*l*. consols was insufficient to satisfy in full the several

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legacies bequeathed by the will of Lady Nickle; but the funds settled by the before-mentioned indentures of settlement were more than sufficient for that purpose.

The debts and funeral and testamentary expenses of Lady Nickle had not been paid.

The questions were: first, whether those of the defendants who were the next-of-kin of the testatrix, and also legatees under her will, were respectively entitled both to their shares of the undisposed of residue of her personal estate as such next-of-kin, and also to the payment out of the before-mentioned sum of 8,100*l.* consols, of proportionate parts of their several legacies bequeathed to them by the said will; or whether such defendants were respectively bound to elect between their legacies and their respective shares of the aforesaid undisposed of residue?

2. Whether the debts and funeral and testamentary expenses of the testatrix ought to be paid out of the before-mentioned sum of 8,100*l.* consols, or out of the undisposed of residue of her estate?

3. Out of what fund the costs of the case ought to be paid?

Mr. Nalder, for the plaintiff, the acting executor of the testatrix.

Mr. Druce and *Mr. Cookson*, for legatees who were also next-of-kin.—The decisions in which parties have been held bound to elect have been founded upon the fact that from the instrument conferring the property an intention to put such parties to their election could be gathered. No such intention can be gathered from the will in the present case. The testatrix, having been under coverture at the date of her will, was incompetent to raise a case of election. They referred to—*Rich* v. *Cockell* (9 Ves. 369); *Schroder* v. *Schroder* (Kay, 578; 24 L. J. Ch. 510).

Mr. Macnaghten, for legatees who were not next-of-kin, contended that the testatrix having thrown into one common fund the three funds over which she had powers of appointment, shewed an intention to put those of the legatees who were next-of-kin to their election. Two exceptions only have been admitted to the general principle on which parties have been put to their election, viz., first, when, before the Wills Act, a person disposed of realty, by an unattested will; secondly, when, under the old law, an infant attempted to dispose by will of real and personal property. These exceptions have not been approved of—*Ker* v. *Wauchope* (1 Bligh, 21). *Rich* v. *Cockell* only decides that when the Ecclesiastical Court has refused probate to a will, this Court cannot look at it for the purpose of raising a case of election. In that case probate of the will had not been granted by the Ecclesiastical Court, but administration *pendente lite* only had been granted. There was not, therefore, before the Court in that case any instrument at which the Court could look to raise a question of election. In the present case the will has been proved, and the Court may read the whole of it. He also referred to *Thelluson* v. *Woodford* (13 Ves. 209); *Noys* v. *Mordaunt* (2 Vern. 581; 1 W. & T. Lead. Cas. Eq. 3rd edit. 301); *Streatfield* v. *Streatfield* (Cas. t. Talb. 176; 1 W. & T. Lead. Cas. Eq. 3rd edit. 303); *Hearle* v. *Greenbank* (1 Ves. 298; 3 Atk. 695); *Sheddon* v. *Goodrich* (8 Ves. 481); *Tatnall* v. *Hankey* (2 Moo. P.C. 342); *Boughton* v. *Boughton* (2 Ves. 12); *Brodie* v. *Barry* (2 Ves. & B. 127); *Dundas* v. *Dundas* (2 Dow & Cl. 349).

Mr. Fischer, for other parties in the same interest, submitted that the testatrix was not under an incapacity like that of the heir in *Hearle* v. *Greenbank*. The bequests to the next-of-kin were on the condition of their complying with the whole will—*Welby* v. *Welby* (2 Ves. & B. 190); *Streatfield* v. *Streatfield* (ubi supra).

Mr. E. P. C. Hanson, for other parties in the same interest.

GIFFARD, V.C., said: I am of opinion that in this case no question of election arises. At the time the will was executed the disposition of the property was good, but subsequent events rendered inoperative part of such disposition. It is unnecessary for me to determine under what circumstances a will of a married

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lady may raise such a question. Those of the legatees therefore who are also next-of-kin are entitled to proportionate parts of their legacies out of the appointed fund, and also to their shares as next-of-kin of the undisposed of residue. The debts and funeral and testamentary expenses and the costs of all parties of this case must come out of the residue.

JAMES, V.C., Feb. 19, 1869.

SALISBURY *v.* THE METROPOLITAN RAILWAY COMPANY.

38 L. J. Ch. 249; 20 L. T. 72: subsequent proceedings, [1870] E. R. A.; 39 L. J. Ch. 429; 18 W. R. 484 (V.C. & L.J.); [1870] E. R. A.; 18 W. R. 974; 22 L. T. 838 (V.C.).

Company—Payment of Dividends out of Capital—Metropolitan Railway Act, 1868, *s.* 22.

COMPANY. RAILWAY.—*A railway company entered into a contract for the construction of an extension of the railway. The contractors were bound to complete the extension by the 31st of December*, 1867, *and until completion to pay to the directors of the company interest on so much of the Extension capital as should from time to time be called and paid up; but if any delay in delivering possession of the land to the contractors should render it impracticable to complete the extension by the time appointed, such allowance was to be made to the contractors as should be equivalent to the interest payable by them for the period of the delay so occasioned. The company's acts prohibited the payment of dividends out of capital. A subsequent act enacted that all moneys paid by the contractors in respect of non-completion should be carried to revenue account and be applicable to the payment of dividends on the Extension capital. The extension was not completed on the 31st of December*, 1868, *and accordingly the contractors paid to the directors* 42,600*l. in respect of the half-year ending on that day; but the directors, admitting that the delay was attributable to the company's default in delivering possession of the land, had repaid or were about to repay this sum to the contractors out of capital*:—Held, *that the* 42,600*l. were not really "moneys paid by the contractors in respect of non-completion," and that to apply this sum in payment of dividends would be a violation of the statutory prohibitions against paying dividends out of capital, and the company and its directors were accordingly restrained by injunction from so applying them.*

This was a motion by which the plaintiff, suing on behalf of himself and all other the shareholders of the defendant company, except such of them as were defendants, sought to restrain the defendant company and its directors from declaring or paying any dividend out of or in respect of a certain sum of 42,600*l.*

The defendants were a railway company incorporated by the Metropolitan Railway Act, 1854. The 196th section of this act is as follows: "It shall not be lawful for the company out of any money, by this act or any other act relating to the company, authorized to be raised by calls in respect of shares, or by the exercise of any power of borrowing, to pay interest or dividend to any shareholder on the amount of the calls made in respect of the shares held by him in the capital by this act authorized to be raised; but nothing hereinbefore contained shall be deemed to prevent the company from paying to any shareholder such interest on money advanced by him beyond the amount of the calls actually made as shall be in conformity with the provisions of 'The Companies' Clauses Consolidation Act, 1845,' in that behalf contained."

By acts passed in 1864, the defendants were authorized to make two extensions of their undertaking, called respectively the Notting Hill and Brompton Extension, and the Tower Hill Extension. These extensions were, in fact, treated as to capital as one undertaking, and this was legalized *ab initio* by the

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Metropolitan Railway Act, 1868, and accordingly the capital and shares of either extension are known as Extension capital or Extension shares.

The Extension Acts authorized the creation of Extension capital by shares to the amount in all of 1,900,000*l.*, and the borrowing on the credit of the extensions of 633,000*l.*; and accordingly, by resolutions passed on the 8th of February, 1865, 19,000 10*l.* Extension shares were created, to carry, after the 31st of December, 1866, the same dividend as the original ordinary shares, but so that for the first three years no such dividend should exceed 6*l.* per cent. per annum. By resolutions passed in February, 1867, the Extension shares were subsequently converted into Extension stock. Each of the Extension Acts contained a clause identical with the 196th clause of the act of 1864, already stated.

Soon after the resolutions authorizing the creation of the Extension shares were passed, the directors agreed with Messrs. Kelk & Co. for the construction of the Tower Hill or Eastern Extension. The agreement provided that this extension should be completed by the 31st of December, 1867, and that in order to secure punctual completion, the contractors should, until the railway should be completed and open for traffic, pay to the directors such sums of money as should be equivalent to interest upon so much of the sum of 700,000*l.* (the share capital created in respect of this extension) as should from time to time be called and paid up, at the rate of 5*l.* per cent. per annum, until the 31st of December, 1866, and thereafter at the rate of 6*l.* per cent.; but that if, in the opinion of the company's engineer, there should be any such delay in the delivery of the possession of the land by the company as should render it impracticable to complete the railway by the time appointed, such allowance, in respect of interest, should be paid to the contractors as should be equivalent to the interest payable by the contractors for the period of the delay so occasioned.

In February, 1868, a suit was instituted by a shareholder for the purpose of restraining the directors from charging certain payments to capital, and an interlocutory injunction was granted—*Bloxam* v. *the Metropolitan Railway Company* (L. R. 3 Ch. Ap. 337). The suit was not brought to a hearing, and in the session of 1868 an act was promoted by the directors for the purpose, amongst others, of putting an end to this litigation. The act eventually passed as the Metropolitan Railway Act, 1868, and by section 22, after a preamble in which it was recited that the progress and completion of the undertaking might be delayed, and the company greatly embarrassed, and the interest of the shareholders endangered if this litigation continued or were revived, and that it was therefore expedient that such provision as in the act is expressed should be made with reference to the charge and application of the share capital, it was enacted, amongst other things, that all moneys paid by the contractors by way of penalty or otherwise for the non-completion of extensions, or arising under their contracts or engagements, should be carried to the revenue account of the extensions and be applicable for the payment of dividends. The act of 1868, as well as the previous acts relating to the financial arrangements of the company, provided that no dividend should be paid out of capital or money borrowed.

By a circular issued in December, 1868, the directors intimated an intention to recommend a dividend on the Extension stock for the half-year ending the 31st of December, 1868, at the rate of 6*l.* per cent. per annum.

Very little progress had been made with the Eastern Extension; in fact, the defendants had scarcely in any case taken possession of land required for the purpose, except under legal compulsion.

In January, 1869, Messrs. Kelk & Co. under their contract paid to the directors 42,600*l.* for delay in completing the Eastern Extension, and the directors, admitting that such delay was attributable to them, had repaid or were about to repay this sum to Messrs. Kelk &. Co.

The bill alleged, and on the hearing of the motion it was for the purposes of the motion admitted at the bar, that the directors intended to apply this

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sum of 42,600*l.* in payment of dividends on the Extension stock; and it was not disputed that the repayment of the 42,600*l.* would be borne by the capital.

The plaintiff, who was a holder of 200 original shares, purchased on the 23rd of December, 1868, sought to restrain the application of the 42,600*l.* to the payment of dividends. His bill was filed on the 20th of January, 1869, and the dividend on the Extension stock would in the ordinary course of things be paid in January.

A previous and more extensive motion in the suit had been made by the plaintiff, and was ordered to stand over till the hearing.

Mr. Amphlett, Mr. Kay and *Mr. B. B. Rogers*, for the motion.—We submit that the payment of the 42,600*l.* was not a *bona fide* payment within the meaning of the act of 1868. It is admitted that this very amount, though paid by Messrs. Kelk & Co., is due to them, and the two debts ought to be set off one against the other. The object of the course pursued can only be to evade the clauses which prohibit the payment of dividends out of capital.

Sir R. Palmer, Mr. Druce and *Mr. Bristowe*, for the defendants, against the motion.—The contract with Messrs. Kelk & Co. was one of the matters discussed in the case of *Bloxam* v. *the Metropolitan Railway Company, loc. cit.*, and the act of 1868 was passed for the express purpose of stifling any similar litigation. Parliament therefore made the provision legalizing the application of the moneys received under Messrs. Kelk's contract with a full knowledge of all the circumstances, and there is no pretence for saying that the legislative sanction does not extend to the 42,600*l.* In this respect the view taken by the House of Lords in *Galloway* v. *the Mayor and Commonalty of London* (35 L. J. Ch. 477; L. R. 1 E. & I. App. 34) is in our favour. In any case we submit that the question now in dispute is not clearly in the plaintiff's favour; and that, having regard to the fact that the plaintiff purchased his shares but a few days ago, and evidently for the purpose of instituting a suit and causing a fall in the price of the Extension stock, and that the general body of the shareholders have for some time expected, and are now on the point of receiving, the dividend, the Court will not now interfere *brevi manu*, but will leave the question open till the hearing.

No reply was called for.

JAMES, V.C.—When this matter was before me on the former occasion I carefully abstained from saying anything whatever, except that I desired the motion to stand over until the cause was heard. At that time I was carefully reticent lest I should throw out anything that appeared like advice or recommendation to the plaintiff to make the motion which he has now been advised to make; and I was in hopes it would not be made. But the plaintiff has now been advised to make that motion, and I have to deal with it as it now stands. It has been decided by my predecessor in this Court, and by the Court of Appeal, that a plaintiff in the position of Mr. Salisbury cannot be objected to on the ground that he has made his purchase recently, or that his interest is small, or that he may have stock-jobbing objects or purposes in view. All of these topics were dwelt upon with considerable force in the former litigation by Mr. Bloxam. I am bound by the decision of the Court of Appeal in *Bloxam's case*; and I am bound to hold that personally Mr. Salisbury is as much entitled to ask the decision of the Court upon the legal question involved in the present motion as if he did really represent the whole body of the shareholders complaining of the directors.

Then what is the question that is now before me upon the Act of Parliament? In the first place, upon the facts for the purposes of this motion, and I only say for the purposes of this motion, I take it to be in effect admitted that the money paid, or nominally paid by Messrs. Kelk to the company is money paid by them out of moneys furnished by the company to Messrs. Kelk beforehand for the purpose of making such payment. That is to say, that the contract with Messrs. Kelk being that they should pay a certain sum by way of penalty on default in doing the work, there is a provision in the contract that there shall

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be an allowance in respect of so much of that delay as can be attributed to the neglect of the company itself, to deliver to the contractors possession of the land. That being the position, that is to say, Messrs. Kelk being liable, on the one hand, to pay for default, but subject to rebate or allowance in respect of so much of the delay as is attributable to the company itself, the fact now appears to be this, that they have nominally made a payment in respect of the delay, and have received before the payment or after the payment the exact sum back again, because the company has admitted that the delay, in truth, was their own delay, and not the delay of the contractors. That being the state of facts, I have to consider what the meaning of the words of the act of parliament is. The act of parliament says, that there shall be carried to the revenue account 'all moneys paid to the company or the directors by the contractors, by way of penalty or otherwise for the non-completion of the extensions, or arising under their contracts or engagements." I am of opinion that that does not imply that all sham payments shall be carried to revenue account; that things may be done by device for the purpose of making that appear to have been paid which has not been paid. I am of opinion, I do not hesitate to express it, even upon this interlocutory application, that these moneys have been paid by Messrs. Kelk out of money found for them by the company for the purpose, or to be repaid to them by money afterwards to be paid by the company, and are not " moneys paid to the company or directors by the contractors, by way of penalty or otherwise, for the non-completion of the extensions, or arising under their contracts or engagements "; that, in truth, no money has been so paid, and no money has so arisen, so far as respects the 42,600*l.* in question. I have, therefore, no hesitation in saying the injunction must go to restrain the company and the directors from declaring any dividend out of the 42,600*l.*, or any moneys which they have received or shall receive from Messrs. Kelk & Co., which have been repaid, or are to be repaid, to Messrs. Kelk & Co. by the company.

STUART, V.C., Dec. 7, 9, 1868; Feb. 11, 1869.

HOLLAND *v.* HOLLAND.

38 L. J. Ch. 252; 20 L. T. 58; 17 W. R. 565: reversed, [1869] E. R. A.; 38 L. J. Ch. 398; L. R. 4 Ch. 449; 21 L. T. 129; 17 W. R. 657 (L. JJ.).

Trustee—Acceptance of Trust under Hand and Seal—Breach of Trust—Specialty.

COVENANT. TRUST AND TRUSTEE.—*Where a trustee accepted the trusts of a will by deed under his hand and seal, and subsequently committed a breach of trust*:—Held, *that the cestuis que trust were entitled to rank as specialty creditors in the administration of the assets of the trustee.*

Henry Clarke, by his will, dated in 1853, devised his real estate unto and to the use of B. Claypon and another, upon trust to pay the rents to his wife for life, and after her death to Dame Elizabeth, the wife of Sir Allan Bellingham, for life, and after her death to the use of Sir Allan for life, with remainder to the use of Lady Bellingham's younger children as tenants in common, and empowered the trustees to sell the real estate and to purchase other real estate, and in the meantime to invest the purchase-moneys; and the testator bequeathed his residuary personal estate to the said trustees, upon trust for conversion, and upon trusts corresponding to the uses and trusts of the real estate, and appointed the trustees executors.

B. Claypon proved the will; the other trustee renounced; and one Millington was appointed a trustee in his place.

Millington died in 1859; and by an indenture dated the 10th of December, 1859, after reciting that Claypon in exercise of a power in that behalf in the will

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of the testator contained, proposed with the proper consents to appoint Frederick Cooke a trustee of the will in the place of Millington, and that "Frederick Cooke had consented and agreed to become such trustee accordingly, as he did thereby testify and declare," it was witnessed that Claypon appointed Cooke to be a trustee of the will, "and the said Frederick Cooke did thereby testify and declare his acceptance of the said trusteeship." The indenture, which was duly executed by Frederick Cooke, then contained a conveyance and assignment of the real and personal estate of the testator for the purpose of vesting it in Claypon and Cooke jointly, which purpose was further carried out by another deed subsequently executed.

The testator's widow died in 1863, and shortly afterwards Claypon and Cooke sold the greater part of the real estate of the testator and received considerable sums on account of the purchase-moneys, of which they invested a portion, but Claypon permitted Cooke improperly to retain in his own hands the remainder.

Claypon died in 1866, and after his death Cooke received and retained in his own hands further sums on account of the purchase-moneys subject to the trusts of the will, and died in 1867 in insolvent circumstances.

Lady Bellingham then instituted a suit against the representatives of Cooke and Claypon for the administration of the estate of the testator Clarke, and for an account against Cooke and Claypon; in which suit new trustees were appointed; and Holland, the executor of Cooke, having by his answer admitted that a sum of 4,694*l.* on account of capital and 320*l.* on account of interest were due from Cooke to the estate of the testator Clarke, the new trustees carried in a claim as specialty creditors for those amounts in the suit of *Holland* v. *Holland*, which had been instituted to administer the estate of Cooke.

The chief clerk refused to admit the claim as a specialty debt, and the new trustees then took out a summons to vary his certificate, which was now adjourned into Court.

Mr. Dickinson and *Mr. Horace Davey*, in support of the motion.—In this case the trustee expressly "testified and declared his acceptance of the trusteeship" in an operative part of the deed by which he was appointed a trustee, and having thus assumed under his hand and seal an obligation rightly to discharge his duties, money due from him in respect of a breach of those duties must be considered as a debt by specialty. It is admitted that a debt of some sort is created by such a transaction, and why not a specialty debt? Lord Talbot, in *Gifford* v. *Manley* (Ca. temp. Talbot, 109), after saying that there "is no other definition of a specialty debt but that it is under seal," held that a trustee who had acknowledged under his hand and seal that he had received trust money, was a debtor by specialty in respect thereof. So, also, Sir Launcelot Shadwell, in *Turner* v. *Wardle* (7 Sim. 80); and Sir J. L. Knight Bruce in *Wood* v. *Hardisty* (2 Coll. C.C. 542; 15 L. J. Ch. 328), held *cestuis que trust* entitled to rank amongst specialty creditors in respect of money due from a trustee on a breach of trust. The words "covenant" or "agree" are not necessary in a trust deed to constitute a specialty contract, and a declaration by the trustee that he will stand possessed on certain trusts has been held to be sufficient—*Richardson* v. *Jenkins* (1 Drew, 477). In *Adey* v. *Arnold* (2 De Gex, M. & G. 432) there was nothing more than a mere conveyance to the trustee of the property, and it does not appear that he executed the deed; and in *Wynch* v. *Grant* (2 Drew, 312; 23 L. J. Ch. 834), which is apparently an authority against our contention, there was no declaration by the trustee of acceptance of the trusteeship, but a mere narrative recital of a consent and agreement to become trustees. That was moreover an exceptional case. The other side will probably rely on *Isaacson* v. *Harwood* (37 L. J. Ch. 209; L. R. Ch. 225), but in that case there was a debt already in existence at the time of the execution of the deed by the trustee; and Lord Cairns, starting with the general rule that it is a question upon the construction of the instrument as to what the parties meant, held that it was not the intention of the parties or the

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effect of the transaction to convert the liability under the existing debt into a specialty debt, but merely to secure that debt by a mortgage without altering the nature of the original obligation of the trustee.

[STUART, V.C.—Where the trustee is sought to be placed in the position of a debtor by virtue of a declaration of trust, who is the creditor?]

This claim is brought by the new trustees on behalf of the trust estate, which is being administered in this Court, and it is immaterial to us whether the proper claimants are the trustees or *cestuis que trust*. If the *cestuis que trust* are *sui juris*, they are the creditors; but if, as in our case, the *cestui que trust* is a married woman with remainder to unborn children, the claim will be brought in by the trustees, who are the proper parties to give a receipt for the money.

Mr. Charles Hall and *Mr. Speed*, for the simple contract creditors of Cooke.—The question is, did the words in the deed create a covenant at law? The trust was created by will, and it would not have been intended that the new trustee should be in a worse position than the original trustee; moreover, in this case there was no trust fund already in the hands of the trustees at the time of the execution of the deed; and that being so, it is not so reasonable to hold that there was an express agreement or contract on his part to stand possessed of it as if an actual fund had been transferred to him. It is settled that the mere execution by a trustee of a deed does not create a specialty debt; and the real question is, was there any legal contract at all by the trustee in this particular deed? There is here a mere recital of an intention to appoint a new trustee, followed by an appointment by the surviving trustee of a new trustee, and the new trustee testifies his acceptance of the trusteeship. This is a mere record, and is no contract or covenant by him that he will apply the funds in accordance with the trusts. Moreover, with whom would such a contract be entered into, and who is to sue upon the covenant? The test is, as laid down by Lord Cairns in *Isaacson* v. *Harwood*, was it intended that the trustee should give a covenant for the payment of money?

[STUART, V.C.—I do not think that either Lord St. Leonards, in *Adey* v. *Arnold*, or Lord Cairns, in *Isaacson* v. *Harwood*, intended to overrule *Gifford* v. *Manley*.]

In *Gifford* v. *Manley* an existing fund was vested in the trustees, and the object of the deed-poll was, that one trustee should admit that he was a debtor in respect of that fund and that the other trustee was not, and the instrument could have no other effect or object than to create a specialty debt. But that case cannot be applied to one like the present, where the instrument is executed for another purpose and under other circumstances, and where there is no specific fund in existence at the time. In *Wood* v. *Hardisty* there was an assignment of the property followed by an express declaration of trust of that property. In *Turner* v. *Wardle* the deed-poll was executed for the express purpose of creating a liability in the trustee; and in *Richardson* v. *Jenkins* there was an express declaration of trust in addition to a transfer of the trust property. The claimants must satisfy the Court that the trustee has entered into a covenant upon breach of which they could bring an action at law against him. And an acknowledgment under seal of a debt cannot be declared upon in an action at law as a covenant, unless an intention to enter into an engagement to pay appears on the face of the deed—*Courtney* v. *Taylor* (6 Man. & G. 851; 7 Scott, N.S. 749; 10 L. J. C.P. 330). Here the breach of the covenant, if any, would merely be that although he covenanted to accept the trusteeship he has failed to do so, which is not the case. Moreover, who could be the plaintiff in this case? In short the debt here is a mere equitable simple contract debt.

[STUART, V.C., referred to *Vernon* v. *Vawdry* (2 Atk. 119; Barnard. 280); *Bartlett* v. *Hodgson* (1 Term Rep. 42).]

Mr. Dickinson, in reply.—It is argued that the contract here was merely a contract to accept; but a declaration *in præsenti* that the trustee accepts cannot be a contract to accept *in futuro*. In *Gifford* v. *Manley*, as stated in the Decree

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and Order Book, A, 1731, fol. 505, Tuesday, the 5th of June, the *cestuis que trust* (who were the husband and the two infant children) and the trustee who had not received the fund were the plaintiffs, and the representatives of the defaulting trustees the defendants. He then cited *Benson* v. *Benson* (1 P. Wms. 129), and stated as the result of the cases, that the persons held to be specialty creditors were in none of the cases those who could be, strictly speaking, considered as entitled to sue at law in the character of covenantees; and that where a trustee had come under an obligation by deed, the Court treated his debt as a specialty for the benefit of the persons ultimately entitled to the fund, and at the suit of those who singly or collectively were entitled to give a discharge for the money.

Mr. C. Hall, in rejoinder.—In *Benson* v. *Benson* there was a covenant to lay out money in land, and consequently a direct obligation binding at law.

STUART, V.C.—This question is one of very great importance, and although I do not intend now finally to dispose of it I wish to state what my present impressions upon it are.

Where a sum of money has impressed upon it a trust, constituted by a declaration of trust under seal, it is quite clear that an obligation under seal is incurred by the trustee, and that the rights of the *cestuis que trust* are purely equitable, one of the objects in the creation of a trust being to make their rights purely equitable and to constitute the trustee the legal owner. Where a breach of trust has been committed by a trustee, and the obligation to perform the trust is an obligation under seal, it is difficult, looking at these well-understood principles, to understand, if he be a debtor at all for the money in respect of which he has abused his trust, how or to whom he can be a debtor by simple contract. If the trustee, by the deed creating the trust, covenant with the author of the trust that he will perform the trust, unquestionably that covenant creates a legal obligation to the author of the trust, and he is a specialty creditor at law of the trustee who breaks that covenant and violates his trust. In what respect does a breach of trust, where the declaration is made by deed under seal, differ from a breach of trust where there is a covenant by the trustee with the author of the trust? The difference is this, that without such a covenant the obligations of the trustee are to the *cestuis que trust*. But if they are obligations to the *cestuis que trust* in equity and under seal, on what intelligible principle can this Court say that the *cestuis que trust* are simple contract creditors of their trustee? As far as regards authority, a decision of Lord Chancellor Talbot, confirming a decision of Sir Joseph Jekyll, as was the case in *Giffard* v. *Manley*, is of the highest authority, and there the decree of the Court was that the plaintiffs, one and all, were specialty creditors of the deceased trustee. Now that decision, the perfect soundness of which appears plain, proceeds upon the principle that there is no legal debt at all; that the liability is a liability to be enforced in this Court, which alone takes recognizance of the rights of *cestuis que trust*, and alone governs and administers all trust; and the obligation being an obligation under hand and seal, the money to be recovered by force of it can be looked upon as no other than a specialty debt, and the case of *Benson* v. *Benson* proceeds upon the same principle. How can such a debt be a simple contract debt? There cannot be a specialty debt and a co-existing separate simple contract; nor can there by any such notion entertained in this Court as that there is under such circumstances a simple contract debt existing between a trustee and his *cestuis que trust*.

But, unfortunately, there has not been a uniformity of decision, and as the judgment of Lord Cairns in *Isaacson* v. *Harwood* which is countenanced by the dicta of other Judges, appears to conflict with these views, it would not become me to undertake to decide without further consideration, however strong my impression may be.

STUART, V.C. (*Dec.* 11.)—In this case Cooke, the testator, executed a deed by which he accepted the trusts of the will of Henry Clarke.

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The effect of the execution of that deed was to impose upon him the obligation of performing the trusts. An obligation for the performance of a duty or the payment of a debt, when that obligation is under the hand and seal of the party who undertakes the discharge of the duty or the debt, is an obligation by specialty.

In *Bac. Abr.*, tit. 'Obligation,' it is said that "the party's seal acknowledging the debt or duty and confirming the contract renders it a security of a higher nature than those entered into without the solemnity of a seal, and therefore bonds or specialties shall be preferred to simple contracts in course of administration."

The execution of the deed by which Cooke accepted the trusts bound him under his hand and seal to perform them. This is an obligation under seal, and cannot be a simple contract. Indeed, it is laid down in *Rol. Abr.* that where there is a previous simple contract the acceptance of an obligation under seal for the same matter extinguishes the simple contract; and this I apprehend is undoubted law.

There are various dicta in the books of reports to the effect that a breach of trust creates only a simple contract debt. Where the trust is created by will or by writing or declaration not under seal, the trustee is not in any way bound by specialty. I have thought it my duty carefully to examine the authorities, and I find the result to be that, except two recent cases, all the cases in which the Court of Chancery has refused to allow the claim against the assets of a trustee for a breach of trust to be a specialty debt, and has held the *cestuis que trust* to rank among simple contract creditors, are cases where the trust was created by will, and where the trustee had executed no deed under his hand and seal which bound him to the performance of the trusts.

The two recent cases in which the contrary has been held, are *Wynch* v. *Grant*, before Vice Chancellor Kindersley, and *Isaacson* v. *Harwood*, before Lord Cairns sitting alone as a Lord Justice. In both these cases the view taken was, that unless the relation of debtor and creditor was constituted under hand and seal, the assets of the trustee could not be liable as upon a specialty debt, although the relation of trustee and *cestui que trust* is acknowledged or declared, or constituted under hand and seal. But upon authority and upon principle this view seems to be a mistake.

In *Isaacson* v. *Harwood* it is said the question is, "was it intended that the trustee should give a covenant for payment of the money?" It is plain enough that if the trustee covenants to pay the money, it is not a case of trust at all, but of a legal debt. The relation of trustee and *cestui que trust*, and of debtor and creditor are essentially different. The rights and remedies of a *cestui que trust* are entirely equitable. Except in an exploded dictum of Lord Hobart, who said that a *cestui que trust* might bring an action at law for a breach of trust, there is no authority and no principle to support the notion that the equitable obligation of a trustee to perform a trust, whether created by will or writing not under seal, or by declaration of trust under seal, makes the *cestui que trust* his creditor either by specialty or simple contract. The *cestui que trust* has an equitable right against the assets of the trustee who commits a breach of trust; and if the obligation of the trustee for the performance of the trust be not under seal the demand of the *cestui que trust* cannot rank above simple contract creditors.

But although the *cestui que trust* would rank with simple contract creditors, his demand is purely equitable, and he is no more a creditor on a legal simple contract than he would be a legal specialty creditor, where, as in *Giffard* v. *Manley* and *Benson* v. *Benson*, and other cases, he was ranked among specialty creditors, because the trust was declared under hand and seal, and the obligation which conferred the equitable right was an obligation by specialty.

Vice Chancellor Kindersley, in *Wynch* v. *Grant*, said, that there is no such thing as an equitable covenant if there is not a legal covenant. But where there is the legal solemnity of execution under hand and seal it would seem that an

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equitable demand arising from an obligation with this solemnity, as it cannot be simple contract, must rank in equity as a demand on a specialty. It is impossible to recognize any soundness in the argument that in a deed under seal, a recital that the trustee accepts the trust amounts to a covenant to accept the trusts, but is not a covenant to perform them. But it is upon that argument that the decisions of Vice Chancellor Kindersley and Lord Cairns proceed. It is due to Vice Chancellor Kindersley to observe that in the case of *Richardson* v. *Jenkins* he expressed views more reconcilable with the better authorities.

Before referring to the earlier cases which established what seems to be the true doctrine, I ought to notice the decision of Lord St. Leonards in *Adey* v. *Arnold* and the two cases of *Vernon* v. *Vawdry* and *Cox* v. *Bateman* (2 Ves. sen. 19), both before Lord Hardwicke, which seem to have misled the text-writers.

Lord St. Leonards' decision in *Adey* v. *Arnold* I understand to be founded on the fact that the trustee had not executed the deed. His views are not fully expressed in the report of his judgment. But his reference to the observations of Lord Eldon in *Montford* v. *Lord Cadogan* (19 Ves. sen. 635) shews that he did not treat the rights of the *cestui que trust* as legal rights, or as depending on the legal relation of debtor and creditor. That which seems really to have misled text-writers is the language attributed by Atkyns to Lord Harkwicke in his report of the case of *Vernon* v. *Vawdry*. On reference to the report of that case in Barnardiston, where the facts are fully stated, and the judgment fully reported, the error is apparent. Atkyns reports Lord Hardwicke to have decided that "a breach of trust is considered but as a simple contract, and can only fall on the personal estate of a trustee, and the particular circumstances of a case ought not to vary the rule." Barnardiston is not a reporter to be relied on in all cases, but I have satisfied myself of his accuracy in the report of *Vernon* v. *Vawdry*. It was the case of a claim under a marriage settlement executed by an infant husband, who covenanted to settle lands on certain trusts. When he came of age he refused to confirm the settlement, and an indorsement of his refusal was written on it but not executed by him. Lord Hardwicke decided, on an elaborate review of his conduct and various letters written by him, that he was bound in equity to perform the settlement. But, as he was only bound by his conduct and not by the execution under hand and seal while he was an infant, there being no binding obligation under hand and seal, the *cestuis que trust* were held to rank with simple contract creditors.

Applying the language attributed to Lord Hardwicke by Atkyns to this case, it is quite intelligible. But as a general and unqualified proposition, it cannot be applied to an obligation to perform a trust under the hand and seal of the trustee.

Unfortunately, the text-writers (not excepting Mr. Fonblanque and Mr. Lewin) have understood it in an unqualified sense. I have referred to the Registrar's book for the case of *Cox* v. *Bateman*, and find it was the case of a breach of trust created by the will of Col. Charles Bateman, and that the trustee had not executed any instrument under his hand and seal.

It is scarcely necessary to notice *Baily* v. *Ekins*, a case reported in the 2nd vol. of *Dicken's Reports*, p. 632. The accuracy of his reports is not to be relied upon, and this case is a remarkable instance of inaccuracy. He reports it to have been laid down by Lord Thurlow that where there was a covenant to settle an estate, if the covenantor sold the estate he was only to be considered as a trustee and a debtor by simple contract; but that if a judgment at law were recovered on the covenant he became a debtor by specialty, that is, that where by the judgment the debt became a debt of higher order than a debt by specialty, it was then, and not till then, a specialty debt.

I shall now mention the cases which establish the doctrine that where a trustee has executed a deed declaring, acknowledging or accepting the trusts,

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the demand of the *cestuis que trust* against his assets has been ranked among specialty debts.

In *Gifford* v. *Manley* Lord Talbot, affirming the decree of Sir Joseph Jekyll, so decided. On referring to the Registrar's book it appears that the *cestuis que trust* were the plaintiffs, and by the marriage articles, under hand and seal of the trustee, trusts were declared for the husband and wife and children of 400*l*. paid to the trustees, and a receipt for the money was indorsed on the articles, and signed by both trustees. Afterwards one of the trustees, by writing (not under seal), declared that he had received the whole money and that his co-trustee had received none of it. There was no debt constituted beyond the equitable obligation, and, that being under hand and seal, the *cestuis que trust* were admitted to rank with specialty creditors of the trustee who had received the money.

Benson v. *Benson* is to the same effect. A sum of 2,800*l*. was agreed by marriage articles, under hand and seal, to be invested in land to be settled upon trust for the husband and wife and children. The husband received the money and did not invest it. The son, as *cestui que trust*, filed a bill against the legal personal representative of the husband. It was objected, for the defendants, that this was not a debt by specialty, there being no express contract to pay it, and that at most it was but a breach of trust. But the Court held *cestuis que trust* entitled to rank with specialty creditors.

It is to be observed, that where there is a legal covenant to pay a sum of money to trustees, who declare that they will hold the money upon trust for the benefit of certain persons, the trustees are at law specialty creditors of the covenantors on a legal obligation. When they receive the money their declaration of trust is in no respect a legal obligation, and the right of the *cestuis que trust* is not a legal right as creditors at all.

When Lord Eldon, in *Montford* v. *Lord Cadogan*, said that the general words " it is declared and agreed " would amount to a covenant, he did not mean a legal covenant on a debt. He spoke only of the obligation in equity, and not of a legal covenant, for the trustees in that case had not executed the deed, and had not bound themselves under hand and seal. Lord Eldon's words are, " They have in equity undertaken to execute the trust exactly as if they had so executed the instrument."

Sir Launcelot Shadwell's decisions in *Mavor* v. *Davenport* (2 Sim. 227) and in *Turner* v. *Wardle*, proceed on the same principle. There were no words amounting to a contract or covenant to pay in the sense of a legal obligation. But there was in both cases a recognition, under hand and seal, of the duty to perform the trust, and the *cestuis que trust* were ranked with specialty creditors.

In *Wood* v. *Hardisty* it was held, that the *cestuis que trust* should rank with the specialty creditors where the declaration of trust was under the hand and seal of the trustee. Upon the whole, this seems to be plain, that the rights of the *cestui que trust* against his trustee are purely equitable; that the relation of trustee and *cestui que trust* is not that of debtor and creditor; that if the right of the *cestui que trust* is put on the footing of his being a creditor of the trustee, it is no longer a question of trust or breach of trust, but a case of debt and breach of legal contract. And if by deed, under his hand and seal, the trustee recites the breach of trust, that is certainly an acknowledgment by specialty of the obligors; unless, indeed, it were possible to hold that there is any difference between the acknowledgment of a trust under seal and the declaration of a trust under seal.

In the present case, the trustee has testified his acceptance of the trust by his deed under hand and seal. This is an obligation under hand and seal to perform the trust, and whether the words be words of acceptance of the trust, or acknowledgment of the trust, or declaration of the trust, the obligation is the same.

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For these reasons, feeling bound by the law as laid down by Lord Talbot, Sir Joseph Jekyll, Sir John Trevor, Lord Eldon, Sir Launcelot Shadwell and the Vice Chancellor Knight Bruce, I must hold that the *cestuis que trust* are entitled to rank with specialty creditors.

HATHERLEY, L.C., Jan. 11, 1869.

THE ATTORNEY GENERAL *v.* THE ELY, HADDENHAM AND SUTTON RAILWAY COMPANY.

38 L. J. Ch. 258; L. R. 4 Ch. 194; 20 L. T. 1; 17 W. R. 356: affirming, [1868] E. R. A. 859; 37 L. J. Ch. 822; L. R. 6 Eq. 106; 16 W. R. 834 (M.R.).

Referred to, *Dowling* v. *Pontypool Railway*, [1874] E. R. A.; 43 L. J. Ch. 761; L. R. 18 Eq. 714 (V.C.). Distinguished, *Pugh* v. *Golden Valley Railway*, [1879] E. R. A.; 48 L. J. Ch. 666; 12 Ch. 274; 41 L. T. 30; 28 W. R. 44 (Ch. D.): affirmed, [1880] E. R. A.; 49 L. J. Ch. 721; 15 Ch. D. 330; 42 L. T. 863; 28 W. R. 863 (C. A.). Considered, *Attorney General* v. *Shrewsbury Railway*, [1882] E. R. A.; 51 L. J. Ch. 746; 21 Ch. D. 752; 46 L. T. 687; 30 W. R. 916 (Ch. D.).

Highway—Obstruction—Diversion—Railways Clauses Act, ss. 16, 46, 53 *to* 56.

RAILWAY.—*A railway company having occasion to cross a public highway in a flat country, but having no authority to make a level crossing, diverted the highway by carrying it parallel with the line of railway to a place where they had authority to cross another road on the level, and then carrying it over the line by the level crossing, by which means persons using the highway were obliged to go about* 130 *yards further than before, and to take two sharp turns, instead of having a straight road. Upon an information filed to restrain the obstruction of the road, the* Master of the Rolls held, *that the diversion of the road was ultra vires, but more convenient than either a bridge or a tunnel, and dismissed the information. Upon appeal, the decree was affirmed, on the ground that, as the road must be diverted either vertically or laterally, the company had, under the circumstances, complied with the* 53*rd and following sections of the Railways Clauses Consolidation Act,* 1845, *by substituting for the road interfered with a road as convenient, or as nearly so as might be.*

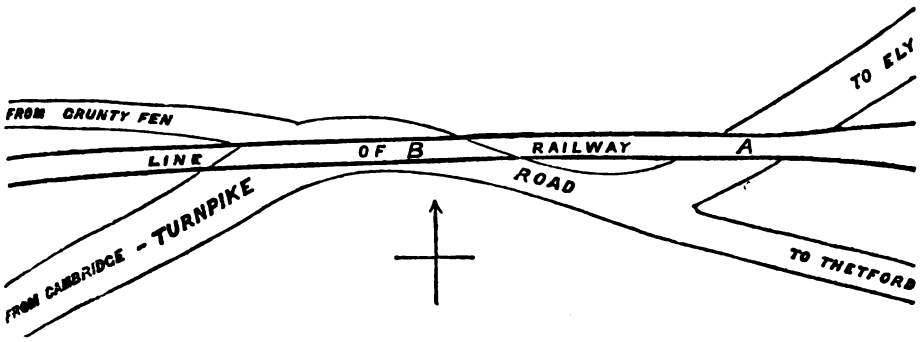
CROWN.—*It is no answer to an information by the Attorney General, to say that a larger section of the public is benefited than injured by the act complained of.*

This was an appeal from a decree of the Master of the Rolls, reported 37 L. J. Ch. 822.

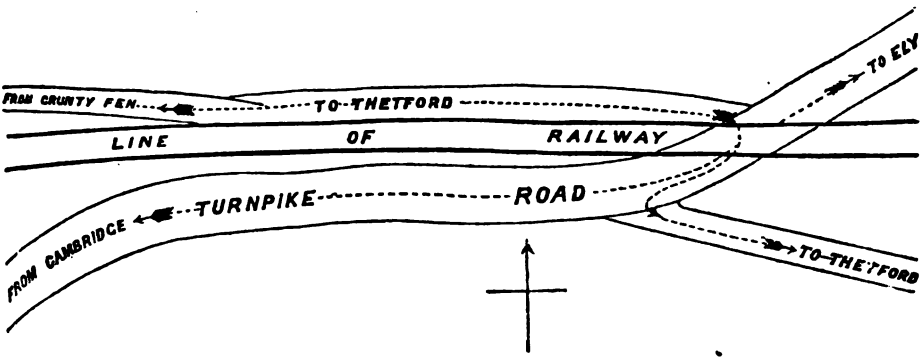
The information was filed, at the relation of ten inhabitants of Thetford, in the Isle of Ely, owners of land in Grunty Fen, for an injunction to restrain the Ely, Haddenham and Sutton Railway Company from obstructing a public road from Thetford to Grunty Fen, and from permitting it to remain obstructed, and from rendering it unfit or less convenient than it had theretofore been for the passage of foot passengers, horses, cattle, carts and carriages; or, at any rate, to restrain them until they should have made another sufficient road equally convenient; and if necessary, that the company might be ordered to construct all bridges, and other works necessary to prevent the road from remaining obstructed, or unfit, or less convenient than it had theretofore been.

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The public road from Thetford to Grunty Fen crossed the turnpike road from Cambridge to Ely, coinciding with it for a short distance, as shewn in the first plan. The portion common to the two roads was within the limits of deviation granted to the railway company by their special act, with which the Railways Clauses Consolidation Act was incorporated; and by their special act the railway was authorized to cross the turnpike road on the level within those limits. The line of railway as laid down in the parliamentary plans, crossed the turnpike road a few yards before its junction with the public road from Thetford, at a point marked A. on the following plan.



It next intersected the portion common to both the public road and the turnpike road, and continuing for a short distance along this portion, passed off from it at the point where the turnpike road to Cambridge diverged from the road to Grunty Fen, and between those two roads. As the portion common to the two roads was then required for the railway, it became necessary to divert the turnpike road, which was done by carrying it along the south side of the railway, as shewn upon the next plan; by which arrangement the line of railway only



crossed the turnpike road once, viz., at the A. crossing. But this left it necessary to provide for the public road from Thetford to Grunty Fen, which was done by a second level crossing, where the railway passed over the portion previously common to both the roads, marked B. on the first plan. This arrangement allowed the public road from Grunty Fen to Thetford to continue as straight as before, but made it necessary for persons going from Grunty Fen to Ely to cross the railway twice. The Board of Trade refused to sanction the use of two level crossings so near each other, and in consequence thereof the company stopped up the B. crossing, and made a new road along the north side of their line, connecting the Grunty Fen road with the A. crossing, as shewn in the second plan. Under this arrangement persons going from Grunty Fen to

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Thetford were compelled to go about 130 yards further than before, and to make two sharp turns before they got back into the public road to Thetford.

It was contended, on behalf of the informants, that this was a diversion of a public road, which the company had no power to make. They were bound, under the 46th section of the Railways Clauses Consolidation Act, 1845, to carry the public road across in a straight line, either by means of a bridge or a tunnel.

The Master of the Rolls was of opinion that the company had diverted the road *ultra vires*, but with the *bonâ fide* view of accommodating the public, and, the diversion being more convenient as well to the public generally as to the parties complaining than either a bridge or a tunnel, dismissed the information, but without costs.

From this decision the relators appealed.

Mr. Jessel and *Mr. G. N. Colt* supported the appeal.

Mr. Baggallay and *Mr. Dryden* appeared for the respondents.

The following authorities were referred to—*The Attorney General* v. *The Great Northern Railway Company* (4 De Gex & Sm. 78); *Raphael* v. *the Thames Valley Railway Company* (36 L. J. Ch. 209; L. R. 2 Ch. Ap. 147); *The Attorney General* v. *the Great Western Railway Company* (14 W. R. 726); *Rangeley* v. *the Midland Railway Company* (37 L. J. Ch. 313; L. R. 3 Ch. Ap. 306); *The Railways Clauses Consolidation Act*, 1845, *ss.* 16, 46, 53, 54, 55. *and* 56).

HATHERLEY, L.C. (*January* 11.)—On looking at the 16th and other sections of the Railways Clauses Act, it appears to me that they may very well be reconciled, if reconciliation be needed, in this way. By the 16th section the legislature has taken care that every provision and restriction either in this or the special act should override the whole clause conferring those large powers upon the railway company, dealing with public roads and ways, and therefore it says that all that follows the first opening of the clause shall be subject to every provision in this particular act and in the special act. Having done that, the section says, that for the purpose of constructing the railway or accommodation works connected therewith, that is to say, for executing any of the following works, they may do any of the following things. Then comes this particular clause. They may alter the course of any rivers not navigable, brooks, and so on " for the purpose of constructing and maintaining tunnels, bridges, passages or other works over or under the same." Then " they may divert or alter, as well temporarily as permanently, the course of any such rivers or streams of water, roads, streets or ways, or raise or sink the level of any such rivers or streams, roads, streets or ways, in order the more conveniently to carry the same over or under or by the side of the railway, as they may think proper." These powers having been given, the 46th section, to which, as to all other clauses of the act, those powers are subject, says: " If the line of the railway cross any turnpike road or public highway, then (except where otherwise provided by the special act) either such road shall be carried over the railway, or the railway shall be carried over the road, by means of a bridge, of the height and width, and with the ascent or descent by this or the special act in that behalf provided," and so on.

Taking these two clauses together, the legislature seems to have meant this: In making your railway and carrying it along its course, you may find it necessary to carry it either over, under or alongside of the road; and in constructing the line you shall have power to divert the road for all or any of those purposes. Before you arrive at the 46th clause the company have made up their mind how they will make up their line and deal with the roads for that purpose; whether they intend to divert the road in order to carry it alongside of the line, or to take it right across. If they mean to carry it alongside for some distance, so as to cross the line afterwards, they will not be within the 46th

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section, which was intended to afford the public a protection by the prohibition against crossing roads at a level.

The legislature says, you shall have no power of running your railway-carriages across places of public traffic, and therefore, when you at any time cross a road in such a way that the railway-carriages run along the road, at that moment you must cease to run it upon a level. That is not inconsistent with saying you may permanently lay down a plan of diversion, which plan of diversion shall be carried along and parallel with the railway, at a proper time crossing the railway.

I think one might illustrate it in this way, and I think the present road does illustrate it: You might suppose a very ill-made country road, of which we may see many, whether from its original faulty construction or from the difficulty of dealing with landowners, pursuing an extremely tortuous course, making several windings and several bends along its course. It would be very absurd for a railway to cross that road and re-cross it at every turn and sweep of its course. In that case the railway would, under the 16th section, deviate it by carrying it parallel until it came to a place where it was necessary to carry it across. The 46th section is to be read in this way, as prohibiting the railway in any case from crossing at a level, and saying how it is to be done. Then the 53rd section is as follows: "If, in the exercise of the powers by this or the special act granted, it be found necessary to cross, cut through, raise, sink or use any part of any road, whether carriage-road, horse-road, tramroad or railway, either public or private, so as to render it impassable for, or dangerous or extraordinarily inconvenient to passengers or carriages, or to the persons entitled to the use thereof, the company shall, before the commencement of any such operations, cause a sufficient road to be made instead of the road to be interfered with, and shall at their own expense maintain such substituted road in a state as convenient for passengers and carriages as the road so interfered with, or as nearly so as may be." That seems to refer to two cases, because the 56th section shews it must refer to the case of a permanent as well as a temporary work—to an entire destruction of the road as well as a temporary cutting through, in which case the company is to provide something else for it, which is pointed out by the 54th and 55th sections; and the 56th section says—"If the road so interfered with can be restored compatibly with the formation and use of the railway, the same shall be restored to as good a condition as the same was at the time when the same was first interfered with by the company, or as near thereto as may be," and if it cannot be restored completely, then there is to be another or substituted road.

Here the company come to four cross-roads. If I am right in my construction of the act, they would be at liberty to take either one or other of the roads and conduct it parallel to their line, or to take it over or under, as might be most suitable for the general purposes they are engaged in; but if they make up their minds to use the road permanently, so as to make it impassable, and if it cannot be restored, they are to make another road as convenient as may be. The case stands thus: if you simply carry a road parallel to your railway without interfering with the traffic, instead of crossing it over and over again, you are at liberty to do so. If, on the other hand, you do not choose to do so, then, according to the 46th section, every time you cross it you must go over or under it. If you take it and use it permanently as part of your railway, so that it can never be devoted to a public turnpike road, then, under the 56th section, you must make another road as convenient as may be. What are the facts as regards this road in question? Coming to the four cross-roads, it would not do to say we have taken the turnpike road to Ely and rendered it as convenient as it was before, within the purview of the 16th section. How is it as to the road to Grunty Fen? It would not do to tell the people who want to go to Grunty Fen that you have accommodated the public by the Ely road, and the persons using that road are more numerous than those who go by the public road to Grunty Fen; in fact, that you give additional benefits to those going in

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another direction. It is not sound argument; and as to the Attorney General representing the whole public, he represents the whole public in the sense that he asks that right may be done and the law observed, which is not done by giving to persons going to Ely greater advantages than were possessed by people going to Grunty Fen. The question is, whether what has been done has been done in accordance with the observance of the law? If not, the Attorney General strictly represents the whole of the public in saying that the law shall be observed.

Have the company, in the course they have taken, transgressed the law? Having laid down the reasonable interpretation of the act, I will apply it to the facts. The company have arrived at a point where the four roads meet. Taking the Ely road in the first instance, they appear to me to act perfectly consistently with the law in carrying it parallel for a certain distance; then, having leave to cross the road at one spot, they have a right to select the spot. Up to that spot they carry it parallel, and then cross it in a reasonable way. That appears to me perfectly legitimate, and in conformity with the provisions of the act. Now, as to the Grunty Fen road. They carry the Grunty Fen road up to the point where they may by law cross the Ely road, and then take it over and bring it back to the Grunty Fen road, making a circuit of a certain distance. They want to cross the Grunty Fen road; they cannot cross it at a level, and therefore it must be dealt with.

Under the 53rd section they would be obliged, if they wanted to permanently occupy it, to make a road as convenient as might be; or if they determined to cross the road, then, under the 46th section, they are obliged to cross it with a bridge. Then they say, We ask the Court to give us this construction of the 16th coupled with the 46th and 53rd sections. We find a place where we must do one of two things: we must either make a bridge over the line, under the 46th section, or we must give accommodation as described in the 53rd; and under the 16th section we say, provided we give you a road as convenient as we can with reference to the subsequent provisions in the 54th, 55th and 56th sections, we have a right to do it by carrying you alongside; and we say that that is as convenient a road as we can possibly give you compatibly with the making of the railway. If we do not do that we must carry you over the railway. It is a diversion, and it must be done in one of two ways, either by carrying you across or parallel with it; and therefore, if we shew you that the road we afford you, by taking you parallel to the railway, is quite as convenient as the road we could afford you by carrying you across the railway, then we have complied with the terms of the 56th section, and given you as convenient a road as is compatible with the making of the railway and as good as we possibly can with regard to the former road. We cannot restore you the former road; it must be deviated vertically or horizontally; we therefore, under the 16th section, avail ourselves of the option of either doing that vertically or horizontally as best can be done; and in bringing ourselves within the 16th section, by saying it is as convenient as can be made, we comply with all the requisitions of the 56th section by making as convenient a road as the one which, by virtue of the 46th section, would take you across by means of a bridge, which would make it necessary for the traffic to be dragged up some 17 feet. The Court is not setting itself up as an engineer to know that which is best for the interest of the persons who desire to have this road, but the Court is construing this act, and saying that the persons must have their road diverted one way or the other, either vertically or horizontally. If vertically, they will have to drag their waggons up an ascent of some 17 feet; if horizontally, they will have to turn a sharp corner and go round some distance. I must come to the conclusion that the 56th section has been complied with, and, by the joint operation of the 46th and 16th sections, that has been done which the law required the defendants to do. I come to the same conclusion as the Master of the Rolls upon the whole, possibly not exactly for all the reasons expressed by him, though his judgment is very short, and I am not at all clear that his view was not, in substance, precisely the same, as mine; still I have satisfied my own mind that the decree was right, and the appeal must be dismissed with costs.

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MALINS, V.C., Feb. 27, 1869.

FENTON v. THE QUEEN'S FERRY WIRE ROPE COMPANY (LIMITED) (2).*

38 L. J. Ch. 263; 17 W. R. 583: s.c., [1869] E. R. A.; 38 L. J. Ch. 137; L. R. 7 Eq. 267; 17 W. R. 155 (V.C.).

Production of Documents—Private Examination in Bankruptcy of Parties to Suit—Privilege.

DISCOVERY.—*Prior and in contemplation of a suit for specific performance, the plaintiff suing as an assignee of a deed of trust for creditors, procured the private examination in bankruptcy of the several parties to the contract with reference to the subject-matter of the suit*:—Held, *that office copies of these examinations in the plaintiff's possession were privileged.*

The question raised upon this summons was, whether the defendants were entitled to the production of copies of certain proceedings in bankruptcy privately taken on the plaintiff's behalf, prior to and with reference to the institution of the suit.

The suit was instituted by John Stanley Blease, for the specific performance of a contract entered into by the firm of Messrs. Fenton, Holden & Edwards with the defendant company, Blease being the assignee under a trust deed which had since been executed by the firm for the benefit of their creditors.

Prior to the institution of the suit, and for the purpose of instructing counsel with reference to the transaction in question, Blease procured a private examination of the members of the firm and himself, as well as the directors and certain agents of the defendant company, to be taken before the Bankruptcy Court at Liverpool.

The defendants took out a summons in chambers for the production of the office copies of these proceedings; the plaintiff admitted possession, but objected to produce them on the ground of privilege. The matter was adjourned into Court for argument.[1]

Mr. H. M. Jackson, for the defendants, in support of the summons.—We ask for the production of evidence privately taken before the Bankruptcy Court in the matter of the suit; the transaction is the same and the parties affected are the same as in the suit. The case of *Gandee* v. *Stansfield* (4 De Gex & J. 1; 28 L. J. Ch. 436; 5 Jur. N.S. 778), upon which the plaintiff relies, does not conclude the point here raised. It appears that only part of the order of the Master of the Rolls in that case was appealed from. There the summons was taken out by the plaintiff, and so much of the order as directed the production of the office copy of the plaintiff's own examination was discharged by the Court of appeal, but there was no appeal from so much of the order as directed the production of copies of the examination of the other witnesses. So here, even if the examination of the plaintiff Blease and the debtors is to be held privileged upon the authority of that decision, at any rate the depositions of the other witnesses are not privileged from production.

Mr. Cole and *Mr. Freeling*, for the plaintiff.—These documents are privileged. The private examination was obtained by way of eliciting the

* See 38 L. J. Ch. 136.

(1) The following paragraph in Blease's affidavit related to the documents in question:

"The proceedings in bankruptcy referred to [in the summons] consist of affidavits in support of applications for and copies of private examinations of myself and my co-plaintiffs, the directors of the defendant company and others, taken on my application in pursuance of the Bankruptcy Act, 1861; and by the course and practice of the Bankruptcy Court all such original private examinations are, as I am informed by my solicitor and believe, kept secret from all persons other than the officers of the Court and the party at whose instance the examinations are ordered, and that such examinations were procured and office copies thereof obtained primarily with the view of enabling me to take the opinion of counsel in reference to the institution of this suit."

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particulars of the transaction in question and for getting up the plaintiff's case. By the rule of the Court of Bankruptcy no person other than the party at whose instance the depositions are taken is allowed to have access to or copies from the originals. This Court will not allow that rule to be contravened or evaded by any indirect means. The privilege extends to all the depositions, and the case is entirely governed by *Gandee* v. *Stansfield* (ubi supra). Upon the general principle they referred to—*Simpson* v. *Brown* (33 Beav. 482); *Lafone* v. *the Falkland Islands Company* (4 Kay & J. 34; 27 L. J. Ch. 25); *Glover* v. *Hall* (2 Phil. 484; 17 L. J. Ch. 249).

Mr. Jackson, in reply, cited *Betts* v. *Menzies* (26 L. J. Ch. 528).

MALINS, V.C.—If these documents had been merely examinations taken in bankruptcy, that is, the bankruptcy of the persons under whom the plaintiff claims, he being in effect the assignee in bankruptcy,—because, although it is not a bankruptcy but an assignment, it is equivalent to a bankruptcy,—they would probably have fallen under the rule laid down by the Master of the Rolls in *Gandee* v. *Stansfield*, in which case he uses this expression—"As to all documents for getting up the defendant's case, the plaintiff is not entitled to see them, but proceedings in the same matter, either before the Court of law or a Commissioner in bankruptcy, the plaintiff might require to be produced." Therefore, in my opinion, if the case had been, as Mr. Jackson desired to present it, that these were examinations simply of the same parties in bankruptcy, that mere fact would not have made the documents privileged. But this case comes before me upon this affidavit of Mr. Blease.—[His Honour read the affidavit mentioned above.]—Therefore these examinations were taken, as appears by that affidavit, primarily, that is, really for the purpose of enabling the plaintiff to form an opinion and obtain materials for instructing counsel to advise whether it was or was not expedient to institute the suit. My view of the matter entirely agrees with that which is laid down in *Gandee* v. *Stansfield*, that all materials obtained by the plaintiff in a suit for the purpose of enabling him to institute the suit, or decide whether he shall or shall not institute it, are privileged. If the plaintiff is not entitled to see the documents which are procured for the purpose of getting up the defendant's case, it must equally follow that where the defendant wants to inspect the documents used by the plaintiff to get up his case, the defendant can have no right to see them. Therefore, upon that short ground, it appears to me that the affidavit entirely covers these documents as being privileged, and I am unable to make any order for their production. The costs of this application will be the costs in the cause.

HATHERLEY, L.C., SELWYN, L.J., Dec. 21, 22, 1868.

THE ATTORNEY GENERAL *v.* THE COMMITTEE OF VISITORS OF THE COUNTY LUNATIC ASYLUM AT COLNEY HATCH.

38 L. J. Ch. 265; L. R. 4 Ch. 146; 19 L. T. 708; 17 W. R. 240.

Discussed, *Attorney General* v. *Gee*, 1870, L. R. 10 Eq. 131; 23 L. T. 299 (V.C.). See, *Attorney General* v. *Birmingham Council*, [1871] E. R. A.; 24 L. T. 224; 19 W. R. 561 (V.C.); *Hill* v. *Metropolitan Asylums Board*, [1879] E. R. A.; 48 L. J. Q.B. 562; 4 Q.B. D. 433; 40 L. T. 491 (Q.B. D.); *Attorney General* v. *Dorking Guardians*, [1882] E. R. A.; 51 L. J. Ch. 585; 20 Ch. D. 595; 46 L. T. 573; 30 W. R. 579 (C. A.); *St. Mary's Vestry* v. *Hornsey Council*, [1900] E. R. A.; 69 L. J. Ch. 324; [1900] 1 Ch. 695; 82 L. T. 580; 48 W. R. 401 (C. A.); *Attorney General* v. *Birmingham Drainage Board*, [1913] E. R. A.; 82 L. J. Ch. 45; 107 L. T. 353 (H.L.).

Nuisance—Injunction—Public Body acting in Execution of Parliamentary Powers—Delay—15 & 16 Vict. c. 80. s. 42.

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INJUNCTION. LOCAL GOVERNMENT. NUISANCE.—*Where at the hearing of a cause instituted for the purpose of restraining the defendants from committing, or continuing to commit, a public nuisance, the existence of a nuisance of such a character as to call for the interference of the Court has been clearly established, it is the duty of the Court to grant an injunction, without regard to the difficulty or expense the defendants may be put to in removing the nuisance; and the cases in which the Court refuses a mandatory injunction, on the ground of the impossibility of obeying it, have no application.*

The C. H. lunatic asylum was built in 1851, *under the provisions of the* 8 *&* 9 *Vict. c.* 126, *and was under the government of the committee of visitors of the county of M, appointed under the Lunatic Asylums Act,* 1853. *In* 1865 *an information was filed at the relation of a local board of health to restrain the committee of visitors from permitting the sewage from the asylum to be a nuisance injurious to public health. The existence of the nuisance, which had been a continuing nuisance from the time of the erection of the asylum, having been proved, one of the Vice Chancellors at the hearing of the cause, referred it to an expert, under the* 15 *&* 16 *Vict. c.* 80. *s.* 42, *to inquire as to the existence of the nuisance and the best means of removing it; but upon appeal it was held that such reference was improper, and that an injunction ought to be granted at once:*—Held, *also, that it was no answer to an application for an injunction to say that the defendants were a public body acting in the discharge of public duties, imposed upon them by act of parliament, which they were unable to discharge without committing the nuisance.*

Nor was it any answer to say that the committee of visitors were a fluctuating body, and that the nuisance had not originated with the individuals composing the present committee:—Semble, *The delay of fourteen years from the commencement of the nuisance to the filing of the information would be no bar to the relief, but at all events where the time had been occupied in negotiations and attempts to remove the nuisance the delay was immaterial.*

The delay of a local board of health to remove nuisances does not disentitle them to their remedy by injunction to restrain a nuisance wrongfully imported into their district.

This was an information by the Attorney General at the relation of the clerk to the local board of health for the district of Edmonton, constituted under the Public Health Act, 1848, against the committee of visitors (appointed under the Lunatic Asylums Act, 1853) of the county lunatic asylum at Colney Hatch, in the county of Middlesex, which was erected in 1851, in pursuance of the Lunatic Asylums Act, 8 & 9 Vict. c. 126, praying for an injunction to restrain the defendants from causing or permitting any sewage matter or gas-water to flow or be passed into a stream called Pymm's Brook, and from otherwise polluting or injuring the stream so as to be a nuisance or injurious to the public health.

It appeared that from the time of the erection of the asylum, which now contained upwards of 2,200 inmates, the excrementitious matters and gas-water were discharged into Pymm's Brook, and the nuisance created thereby was first complained of in September, 1852, and various attempts were made to get rid of it, but without success, and the information was filed on the 19th of October, 1865.

There was scarcely any dispute as to the facts, and the existence of the nuisance was fully proved by the evidence, but upon the matter coming on before Vice Chancellor Malins, upon motion for a decree, His Honour suggested that some arrangement should be made by which the sewage should be effectually carried away from the brook, and the cause stood over for some months to enable this to be done. All attempts, however, to abate the nuisance failed, and ultimately, on the 14th of July, 1868, the Vice Chancellor, after expressing his reluctance to granting an injunction which he was satisfied the

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defendants would not know how to obey, directed the following questions to be referred to Captain Douglas Galton, R.E., under the 15 & 16 Vict. c. 80. s. 42:—

1. Whether it is necessary or proper, having regard to the health of the inhabitants of the district in which the county lunatic asylum at Colney Hatch, in the county of Middlesex, is situated, that any and what steps should be taken for further purifying the sewage as it now flows from the said lunatic asylum into the stream called Pymm's Brook.

2. Or whether it is necessary and proper that the same should be diverted from the said stream, and if so by what means such diversion can be effected. And the expense of the said reference to the said Captain Galton is in the first instance to be borne and paid by the defendants, but without prejudice to any question as to how such expense shall ultimately be borne; and it was ordered that the motion for a decree should stand over until after the report on such inquiries should have been made, with liberty to apply.

The relator appealed from this order.

Mr. Cole and *Mr. M'Naghten*, for the appellant, contended, that the nuisance having been proved it was the duty of the Court to grant an injunction without regard to the difficulty the defendants might have in obeying it—*The Attorney General* v. *the Council of the Borough of Birmingham* (4 Kay & J. 528); *The Attorney General* v. *the Proprietors of the Bradford Navigation* (35 L. J. Ch. 619; L. R. 2 Eq. 71); *Goldsmid* v. *the Tunbridge Wells Improvement Commissioners* (35 L. J. Ch. 382; L. R. 1 Ch. Ap. 349); *Spokes* v. *the Banbury Local Board of Health* (35 L. J. Ch. 105; L. R. 1 Eq. 42). They also contended that the reference to Captain Galton was not authorized by the 42nd section of the 15 & 16 Vict. c. 80—*Mildmay* v. *Methuen* (1 Drew. 216; 22 L. J. Ch. 297).

Sir R. Palmer, *Mr. Schomberg* and *Mr. Renshaw*, for the respondents, contended that the defendants, acting under the powers of the Lunatic Asylums Act, which imposed upon the county magistrates the obligation of building the asylum, were not responsible for a nuisance which was occasioned by the exercise of powers conferred by the legislature—*The British Cast Plate Company* v. *Meredith* (4 Term Rep. 794); *Boulton* v. *Crowther* (2 B. & C. 703; 4 Dowl. & Ry. 195; 2 L. J. K.B. 139); *The Grocers' Company* v. *Downe or Donne* (3 Bing. N.C. 34; 3 Sc. 356; 5 L. J. C.P. 307); *The Attorney General* v. *the Conservators of the Thames* (1 Hem. & M. 1); *The Attorney General* v. *the Metropolitan Board of Works* (1 Hem. & M. 298); *The King* v. *Russell* (6 B. & C. 566; 5 L. J. M.C. 80); *The Attorney General* v. *the Sheffield Gas Consumers' Company* (3 De Gex, M. & G. 304; 22 L. J. Ch. 811). At all events the committee of visitors were a fluctuating body, and the present committee could not be made responsible for the acts of their predecessors in 1851. Moreover, the Board of Health had power, and it was their duty, to construct sewers and remove the nuisance—21 & 22 Vict. c. 98. ss. 30, 31. They also relied on the delay which had taken place in filing the information as disentitling the relators to an injunction.

HATHERLEY, L.C.—We do not think we ought to call upon you, Mr. Cole, to reply, in this case. No doubt such cases as this all shew the difficulty in which persons who are desirous of getting rid of refuse sewage are constantly placed, but that is a difficulty which must be met, not by their taking legal steps to escape from the exigencies of the condition in which they find themselves, but by some application to the legislature. No other means are sufficient to relieve them from all the difficulties of the case.

Now, I believe that the Court will always find its simplest course, as far as regards the administration of justice, will be to ascertain the exact state of the law which regulates the relation of the parties who are brought before it, and, having ascertained that, to proceed to act on it, without any reference to the difficuties of the case on the part of those against whom they are obliged to decide, but leaving those parties to relieve themselves as they best can

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from the position in which they have placed themselves, and, if there be no other mode of escape, to cease to do the acts which occasion the wrong.

Now I cannot help thinking that the learned Vice Chancellor in the Court below has a little mingled or confused two rules of the Court in saying he will not make any order, for that is what it comes to, in a case of this description without being satisfied that the order of the Court can in some manner or other be obeyed. Of course, there are cases where the Court would take care not to pronounce an idle and ineffective order: the Court will not issue a mandatory injunction, for instance, where it is impossible that it can by any means be complied with. Take the simplest instance of all, that of cutting down timber. It is idle when the trees have been cut down to make an order not to allow the trees to remain prostrate, but to replace these trees which are irrevocably destroyed; and all that can be done in such a case is to leave the parties to their remedy in damages. So, again, there might be a bank to prevent the influx of the sea, and that bank might be most improperly destroyed. The Court would restrain that destruction, if it were in time to do so, but the act having been once done, and the sea once admitted, the Court can of course only leave the parties to their remedy in damages, it being impossible to remove a grievance of that kind. But that has no application to a case where the consequence is simply as it is here; there is no difficulty where persons are, as in this case, committing a daily wrong, in enjoining them to cease from committing that wrong, though it may subject them, as I agree that it would in this case, to very considerable inconvenience, because they themselves having for a very considerable time inflicted this wrong upon their neighbours, have a difficulty in at once ceasing to do so; and such a difficulty is one which is more properly met by the Court affording them sufficient time to set themselves right, as has been done in numerous instances; but this difficulty in setting themselves right is no reason whatever why they should be allowed to commit a wrong which in effect would amount to absolute permanent injury to the rights of their neighbours.

Now I apply these observations to the subject before us. Here is a case in which I will assume for a moment that the defendants are the persons who are committing the wrong. It is said,—and here is the difficulty in which the Vice Chancellor has thought himself placed—that unless the defendants are permitted to throw all this sewage into a place where they have no more right to throw it than into this Court or into a gentleman's drawing-room,—unless they are permitted to throw it on to their neighbours' lands, they cannot carry on the affairs of this asylum, and that therefore they must be permitted to throw the whole of the sewage on to the lands of their neighbours. Surely the mere statement of the proposition is enough to refute it. Nobody can suppose the law of England to be in that state. When difficulties of such a character as are alleged here exist, application is made to the legislature, and if the legislature thinks fit it removes the difficulties; but it is not because we are told, as I was told in the case of *The Attorney General* v. *the Council of the Borough of Birmingham*, that 300,000 people will be very much inconvenienced if you do not allow them to use their neighbours' property without paying for it, that they are to have the right so to use it; but the answer is, "You must ask the legislature to let you take it, and you may be sure you will not be allowed to take it without paying for it; then, when you have obtained permission, you may exercise your rights to purchase the property, and all that is desirable can be done." I must say that it appears to me, with great deference to the view which the learned Vice Chancellor has taken, that this Court has nothing to do with the propriety or impropriety of creating new rights on the part of the legislature. This Court has merely to decide what is the law as it exists, to see that it is duly administered, not to order anything which is simply impossible (as in the illustrations I have given) to be done; but to take care, subject to that modification, that all persons shall be restrained from exercising with a high hand powers which they have no right in law to exercise.

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Now try this case, as I say, by that simple proposition. The Attorney General comes here to complain, on the part of all this neighbourhood, that a vast quantity of sewage is poured down into a brook, which at a certain time, some years ago, appears to have been pure, but which is now contaminated with other sewage to a great extent; but the sewage poured into it from this asylum, containing 2,200 inmates, greatly aggravates the evil. The nuisance is what seems to me to be confessed. I find no contrary evidence; all shews that this is a great and threatening evil. That being so, it would seem to me, I confess, that there was nothing to do, when the cause came on for hearing as an undefended cause as to the fact of the nuisance, but to give the informant on behalf of the public that remedy which is always accorded to those who have established their case, namely, a declaration of their right, and an injunction to restrain the wrong from being committed, unless there were that consideration which seems to have pressed so much upon the Vice Chancellor, the apparent difficulty (and I think it apparent only) in enforcing the order of the Court. I put aside for the moment the collateral points about the position of the magistrates and the delay, and I am taking it as if this information had been filed a few weeks after the nuisance began. Then, surely, if that be so, it cannot be right or just that the informants should at the hearing, when everything has been said and proved that can be said and proved, have no statement or declaration of what their right is, or that the only order at the hearing of the cause should be a reference to Captain Galton. That is surely nothing but referring to that gentleman facts which have been proved in the cause; because if a nuisance exists, if there has been that extent of evil which has been strongly deposed to, and if that is not denied or countervailed by the defendants, there can be nothing to inquire into. "Steps for purifying the sewage" must be taken before the sewage is poured out, or the pouring out of the sewage must be discontinued altogether. It must be so: it is not a question to be referred to an engineer, however eminent he may be.

Then as to the second point referred to Captain Galton—"whether it is necessary that the sewage should be diverted from the said stream?"—I make the same observation. Of course it is necessary if nothing else can be done to purify it. Further than that, I take it that no reference at any time ought to be made in a case where the answer to it can have no bearing on what the Court has to do; because, suppose Captain Galton had said, "I do not consider that any steps are necessary or proper," the Court must still have looked at the evidence. In answer to a case in which all parties are agreed that there is a nuisance, and the only thing suggested is the difficulty of getting rid of it, if Captain Galton had reported that it was not necessary to take any steps at all, it would be the duty of the Court to proceed just the same, and substantially to disregard any report that he might think fit to make. But there is another objection, which goes more to the root of the inquiry, which is this: I entertain a very strong opinion that when the nuisance is once established all the Court has to do is to say it must cease; and unless it should be plainly shewn that it was such a case as I have already described, where the whole ocean had been admitted, and could not be carried back again to its place, or such damage had occurred as to shew that the proper remedy must be by an action and not by an injunction, the Court is bound to grant the injunction, and it is no part of the duty of the informant or of the Court to find out how that injunction can be best obeyed, if the Court be satisfied that it is not an order which it is impossible to obey.

Now in this case the matter is really put in a much stronger point of view than it was in the *Birmingham* case, as to the possibility of compliance, because what is it that is the nuisance? It is that daily these 2,200 persons are adding their quota to this continuing evil, and that is allowed day by day. The answer is, of course, that you must not allow this aggravation, day by day, of the evil that exists. Is it impossible to prevent it? Are there not ways and means? Did there not exist ways and means before drainage was ever heard

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or talked of? The common course in the country was to have drains leading to cesspools, which were from time to time emptied; but nobody in the country ever dreamed of turning all the filth of his own house into his neighbour's garden, simply because he had not in his own garden a convenient place in which to deposit it. Therefore, as to the extreme difficulty of the case, the defendants must meet it as best they can. I will not say one word more as to the supposed impossibility of dealing with the sewage. We have had the benefit of seeing Captain Galton's report, and so far as I can see, he says distinctly that it can be done on the premises simply by using about thirty acres of land, whereas there are now seventy acres available for that purpose. Again, it might be met in the ways suggested by Selwyn, L.J., during the arguments, namely, by using the earth-closets, which are now considered by so many engineers a good mode of meeting such a difficulty.

To my mind there is no physical impossibility of restoring things to the condition they were in before. It is only a question of expense, and this Court invariably restrains evil and wrong being done when it is clearly and manifestly established that there is wrong, without listening to any argument on the ground of expense on behalf of the wrong-doer, who says, "it is highly inconvenient and highly expensive to me, if I am put to the alternative of removing the evil, whereas it might be much better done by my neighbours, whom I am wronging."

Now, I am taking this case as if it were between individuals; of course I have to deal with it as a case not of an individual committing a wrong against another individual, but as one between two public bodies, and it is said that it would have been far better that neither of them should have taken a step of this description, but that both of them should have taken counsel together to see how the difficulty could be best avoided.

On that last branch of the case I will not make a single observation. It is not the province of this Court to say how far parties would or would not act better by trying to arrange and settle their disputes between themselves before they come into Court. But when they have not so arranged and settled, all we have to do is to decide on the rights that exist between them. As regards the position of the defendants, it is true, as they said, that they act as a public body from public principle, wishing to discharge their dutes in a proper manner; but that cannot give them any right whatever to throw this sewage on to their neighbours' property. A question which I put to Mr. Schomberg was, where is there in the act anything that authorizes them to do this? Mr. Schomberg cited several cases, which shewed that where by act of parliament certain duties are confided to a public body, and that public body exercises the rights and privileges which parliament has accorded to them, then, if they are doing only what parliament has authorized them to do, and parliament has not thought fit to say that those who may be injured by the necessary consequences of those acts shall be compensated, the persons against whom these rights have been fully created by the legislature must not complain, and cannot be compensated. There was the case of trustees who had to fill up a gap between two hills—*Boulton* v. *Crowther* (*ubi supra*) (and there could hardly be a stronger one, perhaps), where it must have been some oversight of the legislature. They did so, and placed a gentleman's lodge in such a position that it was impossible to drive up to it; there was a high embankment placed in front of it. All I can say is, that the owner had been forgotten, or had himself forgotten to assert his own interests; it was very unfortunate that it should be so, but whatever the loss, the trustees could plead the authority of parliament for what they had done, and that gentleman had no right to compensation. I asked, therefore, of course, what were the clauses which conferred on these visiting magistrates, who have built a house for the accommodation of lunatics, the right to transfer this whole sewage and nuisance by these lunatics into their neighbours' grounds. I find nothing of the kind; nothing that leads one to suppose for a moment that parliament could have any such intention. Of

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course it is not to be, and cannot be deduced from the power given to erect a large building, that, as a necessary consequence, all the refuse from the building is to be thrown on the adjacent lands. I cannot therefore conceive how the fact of these defendants being visiting magistrates can justify them in acting thus.

Another point is this. How can the present magistrates be made answerable now for that which was done by their predecessors fourteen or fifteen years ago; and how are they to redress the wrong that was then done? The simple answer is, that it is a continuing wrong, a daily wrong. All these unfortunate objects are persons having no control over their own motions and their own acts. They are all placed under the control of the magistrates, and the 40th section is quite enough to shew that all the officers of the asylum are placed under that control, and the magistrates must be responsible for their servants and agents, and the unfortunate objects committed to their charge, and there is no doubt they were to deal with them as if they were dealing with persons reduced to the state of the brute creation, and they must be responsible for all the acts performed under their sanction and direction by the persons who thus create a nuisance. There would be no nuisance if these persons did not daily commit it; there would be no nuisance if these persons were removed from this place, or if the deposits were turned into a cess-pool on the property; all would then be remedied, and their neighbours would have no cause of complaint. It is in the power of the magistrates to correct that which is an evil, and they are therefore wrong-doers if the evil is allowed to be continuous.

Then something was said about delay; and in that respect the case stands thus: that this course of proceeding, if not actually commenced, was sufficiently indicated in 1851, and thereupon the clerk to the local board of health of Edmonton immediately called the attention of the magistrates to the evil, and from that time attempts were made by the magistrates to remove it; they have acted most properly in every way in which one would desire them to act, subject always to this one remark, that they were bound not to permit the nuisance at all. They tried a great variety of measures for removing it, and thus things went on between the board of health and the magistrates. This Court would be very loth to say that a public body should rush at once into a Chancery suit in dealing with another public body; and I think that the observations which have been made upon the position of these two bodies are very applicable indeed. Each acts for a large section of ratepayers; neither of them ought to be anxious to increase the burdens of those who have to pay rates, by a useless litigation; therefore it is impossible for the Court to say that such bodies are to be discouraged from entering into negotiations and consideration of the matter before suit, at the peril of being told, if all that is attempted to be done should fail, that they are then too late in coming here, and that their case is without remedy. It appears to me that the delay here must count for nothing, and that when the informants filed this information in 1865 they were quite in time.

Independently of this, I should have adhered to my decision in the *Birmingham case*, and held that a lapse of thirteen or fourteen years would not *per se* be sufficient to justify the continuance of a nuisance which would amount to appropriating the property of others, for that is the effect of this nuisance, from the way the parties have been dealt with in Edmonton; though it would of course and necessarily have had the effect of preventing an injunction being granted by way of interlocutory application. Therefore, as far as delay is concerned, I cannot deny the right of the informant to seek relief.

Another point raised was that the relator, who represents the board of health, might himself do all he is now calling on us to do, and the answer of the defendants to him is, it is your duty, as representing that board, when you find a nuisance being committed in Edmonton, to construct a sewer which would carry off and remove that nuisance; beyond that, you had power by a recent act of parliament to communicate with your neighbours the Tottenham board of health, and, with the assistance of them also, to carry off the sewage through Tottenham, and so remove the nuisance. But, in the first place, it

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is no part of the duty of the board of health of Edmonton to tax the ratepayers in order to diminish and remove a nuisance imported wrongfully into their district. It is their duty, I dare say, to remove every evil which cannot otherwise be removed; but if we take this as being an information on behalf of the board of health *simpliciter*, I apprehend it is no part of their duty to create expense in order to remove that which they have a much more easy and proper remedy for, namely, the remedy of preventing the evil occurring at all. If they can prevent the evil being inflicted on Edmonton, surely it is more their duty to do so than to take means to remove it, when once it has wrongfully and improperly been committed there. But, independently of that consideration, the information here, although at the instigation of the board of Edmonton, is, in fact, not only on behalf of the inhabitants of that district, but on behalf of the inhabitants of all the districts affected by the evil. We have strong evidence what the evil is, and as to the disease which it is likely to produce, and has produced. Therefore the Attorney General would not be content with any proceeding which would deal with Edmonton alone, leaving other persons affected by the evil to be still affected by it. Sir Roundell Palmer said there was no evidence of its extending beyond Edmonton. I do not know how that may be; if it be so, I restrict my observations to Edmonton, but I was under the impression certainly that the nuisance was such as, by going down the stream, must affect everything adjacent to the stream.

Now, as regards authority, and what is proper to be done in such a case. As to authority, I would rather not quote my own decisions (though still I entertain a strong opinion as to the proper course to be taken), and I should not have cited them with much confidence if they had not been adopted by other branches of the Court. The Master of the Rolls has taken a similar course in deciding a much more slender case. There was an appeal from his decision, and his judgment was affirmed. I refer to the case of *Goldsmid* v. *the Tunbridge Wells Commissioners*. Certainly in that case there was very strong evidence to shew that the plaintiffs might possibly be mistaken as to the apparent grievance; that is to say, on looking into that case I find there was evidence of things being done in the intermediate space between the source of the alleged evil and the place affected by it. There was strong evidence to shew that the intermediate space was not affected, and that no such evil occurred there; but it was a slight matter compared with that which has been now before us for our consideration. There the Master of the Rolls took that course which I adopted in *The Attorney General* v. *Heath* (not reported), and which appears to me to be the proper course to take here, namely, to grant an injunction to restrain the defendants, their servants and agents, from allowing any sewage from the asylum to pass into this stream, or otherwise, so as to be a nuisance. These are the words which are there used. Then, to suspend the injunction for a stated time, and then to give liberty to apply.

One single remark will conclude all I have to say on this subject of the form in which his Honour made the order. Merely as a means of arriving at what would be a fair, just and final decision, he has proceeded very much on this,—that it was unusual to interfere with anything a Judge might think it requisite to do in order to procure the proper and adequate information on which he should ultimately act; that that was a matter for his own discretion; that he should wish to be informed on certain points which pressed on his mind before he came to a final conclusion, and therefore he directed this species of intermediate inquiry. I apprehend that that is clearly not the view which one can reasonably take of a case of this description, because it seems that the learned Judge had the evidence before him, and, without a shadow of doubt, had the fact before him that a nuisance had been proved to exist. Therefore there was nothing more to learn on the subject; nobody denied or disputed the nuisance. Indeed, as his Honour said, the defendants admitted far too much for the information to be dismissed. It appears, therefore, that it is not a case in which you can fairly direct inquiries to be made when the substantial point in

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the case is proved. Then again, as to its being wanted in order to come to a decision, it appears to me that that cannot be urged with reference to the particular inquiry which the Vice Chancellor has directed, because this inquiry is not necessary for the aid of the Court; it is not necessary as affording any guidance or direction to the informant. It is only an inquiry which hereafter, for all I know, on the application of the defendants themselves, may be very valuable to them, if given to them out of Court, as telling them what is the best mode of getting out of the difficulty in which they have placed themselves; but it is an inquiry entirely for the defendants to satisfy themselves upon, and not an inquiry with which the Court has anything to do.

However, my attention has been called to the case of *Heath* v. *Wallington* (not reported) with regard to the town of Leamington, in which I did take the contrary course, and I at once fairly admit that the course I took there was wrong; and also in a subsequent case with reference to lights, where I made an order very much like it in principle (*Yates* v. *Jack*, 35 L. J. Ch. 539; L. R. 1 Ch. Ap. 295). I was corrected there by the Lord Chancellor (Lord Cranworth), I think in consequence of having put the order in a form which the Lord Chancellor sitting at that time did not think was justified by the course of procedure of the Court. There was a case with reference to lights in which I prefaced the order with an expression of opinion that the light had been interfered with. I foresaw there would be great difficulty in shewing the exact limits within which a man might build without interfering with his neighbour's light, and that which would transcend that limit; therefore I directed an inquiry at chambers with reference to what steps should be taken with regard to the modification of certain building plans before me, so as to prevent the defendant being injured by the erection of the building. The Lord Chancellor thought that was not the proper mode of dealing with it; that the proper mode was to restrain the defendants from committing the injury; and it having been proved they intended to do that which would interfere with the plaintiff's right, the Lord Chancellor thought the plaintiff had a right to have an injunction in that form, and that the defendants must be left to relieve themselves from the difficulties as they best could. It was felt in that case, as it was felt by the learned Vice Chancellor in the Court below in this case, that there is a great onus undoubtedly thrown on the defendants who have to comply with the terms of this injunction; but that onus is a necessary consequence of their own illegal act, and they must be prepared to satisfy the Court that they have complied with the terms of the injunction irrespective of any duty thrown on the plaintiff in the case. In *Heath* v. *Wallington* I declared my opinion that a nuisance had been occasioned; then I sent a reference to chambers to know in what mode the sewage could be carried off so as to prevent the nuisance, and I gave the parties liberty to apply. I am satisfied in principle I was wrong; but I am still more satisfied that in practice I was wrong, because in practice it worked very ill. There were repeated steps taken at chambers, great expense occasioned, and the parties were driven to compromise in a great measure by the terms in which I originally framed the order, because there never was an appeal from the order itself. Then I prefer very much to fall back on that order which I pronounced in the case of *The Attorney General* v. *Heath*, and to say that the order should be as I have pronounced it, because here, as in that case, it is asked to prevent the parties from permitting this sewage to flow into the stream so as to occasion any nuisance. Mr. Cole said very properly he was ready to do this; and I must do here as was done in several other cases, suspend the operation of this order, so as to give the parties plenty of time to take such steps as they may be advised in this matter; and the time ought now to be fixed at which the order should take effect. Having consulted with the Lord Justice on the subject, we have thought a reasonable time to fix would be the first day of Trinity Term, just before the hot weather comes on; but giving leave, as was done in the other cases, to the defendants to apply, if they think fit, for an extension of that time. And also now is the proper time to direct them to pay to the relators the costs of the suit.

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SELWYN, L.J.—In this case the fact of the existence of a nuisance, and a nuisance of such a serious character as to call for the interference of this Court, has been clearly and unquestionably established. The burden is therefore cast on the defendants of shewing why this nuisance should not be dealt with by this Court, according to its ordinary practice in such cases, and the defence is rested by Sir Roundell Palmer on three points: first, upon the position and character of the defendants; secondly, upon the ground of the delay which has occurred; and thirdly, upon the attempts which have been already made by the Justices, the defendants, to remedy the evil complained of.

With respect to the first of these points, Sir Roundell Palmer says the Justices are a body entrusted with the compulsory discharge of a public duty, and they have no power, like the defendants in the case of *Goldsmid* v. *the Tunbridge Wells Commissioners*, to do anything which would get rid of the nuisance complained of. On the other hand, it is plain, not only from the terms in the act of parliament to which he referred, but also from the evidence in the case, that everything done in this asylum is done by agents and servants of the defendants, and under their order and authority; and the act of parliament under which they act, although it has authorized them to maintain these pauper lunatics, has given them no authority to take or injure the property or rights of other persons. But if we were to listen to the argument, at all events to the extent to which it was carried by Mr. Schomberg, that these persons, having authority to establish one or more lunatic asylums, would have the right according to that authority to take other persons' property, and in any manner they may think necessary for effecting their object, they might stop an ancient light, or interfere with or divert public or private rights of way at their discretion. But the principle of law applicable to these cases has been very clearly and conclusively established by the opinion of the Judges, which was acted on by the House of Lords, in a judgment delivered by Mr. Justice Blackburn in the case of *The Mersey Docks Trustees* v. *Gibbs* (L. R. 1 E. & I. Ap. 93, 112). Mr. Justice Blackburn, in delivering the opinion of the Judges, says, "If the legislature directs or authorizes the doing of a particular thing, the doing of it cannot be wrongful; if damage results from the doing of that thing, it is just and proper that compensation should be made for it, and that is generally provided for in the statutes authorizing the doing of such things. But no action lies for what is *damnum sine injuria;* the remedy is to apply for compensation under the provision of the statutes legalizing what would otherwise be a wrong." Then he proceeds to say, "But though the legislature has authorized the execution of the works, it does not thereby exempt those authorized to make them from the obligation to use reasonable care that in making them no unnecessary damage be done." Now that proposition obviously implies these two things: first, the particular thing complained of must have been directly authorized by the legislature; and, secondly, that in doing that particular thing reasonable care must be taken that no unnecessary damage be done.

Now in the present case, all that has been sanctioned by the legislature is the erection of a lunatic asylum or lunatic asylums. They may be made in any place; the patients may be so distributed in such manageable numbers as that no nuisance may be occasioned at all. Such sites may be chosen, and such ground taken as to render it impossible to be any nuisance to an adjoining proprietor. It is impossible that an act of parliament, merely authorizing the erection of such an asylum, would justify an interference with rights of neighbours to the extent contended for on the part of the defendants. Then in addition to that, as the Lord Chancellor has already pointed out in the case of this very asylum, assuming it to be continued as it is now, there are the means, and Captain Galton has pointed out the means by which the nuisance now complained of may be remedied, and known as Colonel Ewart's separate system of drainage. "The asylum lands are 130 acres in extent, of which I am informed 70 acres are applicable to farm purposes. This latter portion is below the level of the asylum, and is so placed that over a great part of it the sewage

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could be disposed of by gravitation without the necessity of pumping." That plainly shews that, so far from this particular thing which is being done, to use the language of Mr. Justice Blackburn, being authorized by the legislature, the very thing done contains in itself the means of remedying the nuisance.

Then as to delay. Where both parties are public bodies the Court would expect to find, and is glad to find, that before one set of public officers enter into litigation with another, before one part of the county enforces the law against those who represent the whole county, the greatest forbearance should be exercised; and I think it would be a bad practice if this Court were to look narrowly into the length of time which has been occupied by the negotiations or the attempts made in good faith on both sides, in order, if possible, to remedy the evil. But I think in this case there was no unnecessary delay at all. Then it is said, thirdly, that the attempts which have been made by the Justices to remedy the evil (at all events, if they do not render it right for the Court to dismiss this information), are sufficient to justify the inquiry the Vice Chancellor has directed. But I think the matter is also answered by the report of Captain Galton. It may not have been the fault, but certainly it has been the misfortune, of the Justices that, although they made so many attempts, those attempts have all been made in a wrong direction, and have been unsuccessful, while they had within their own property and their own grounds (as now appears by the report of Captain Galton) the means of remedying the evil. Although those attempts may be used by them as a ground for affording them further time, they cannot be used to the extent of prejudicing the right of the informant here to a decree for an injunction, which involves a declaration of his right to put an end to this nuisance.

With respect to the reference which has been directed, if the inquiries were intended as meaning to leave it to Captain Galton to say whether the nuisance has been established or not, then I think it is open to the objection which the Lord Chancellor has pointed out that that nuisance has been completely and clearly established, and therefore that the informant is entitled to a declaratory decree; but, if the inquiry is only meant as to the means to be adopted to prevent or cure the evil, then it is a reference which might possibly be made after the decree. Then the question arises whether the defendants have been doing all that was possible in order to carry into execution the terms of the decree, or whether they ought to be allowed further time to do so. In neither of those cases would it be right to make such an inquiry preparatory to or before the decree. I think, therefore, the order, so far as relates to that inquiry, is certainly inconsistent with the practice of the Court.

The only remaining point that was raised is that which the Lord Chancellor has fully adverted to, and to which I will only add one word, viz., that the relators are a body who have the power to make sewers, and that they themselves might have remedied this evil. That objection also, I think, is clearly answered in the report of Captain Galton. Two courses have been suggested; it is said they should have made a sewer and connected it with the system of the general metropolitan sewage discharging itself into the river at Barking, or they might have made another system of sewers carrying it in the direction of the river Lea. But then, as Captain Galton has pointed out, it is absolutely unlawful to divert any drainage whatever into the river Lea. As respects the alternative plan of carrying it into the metropolitan system, that system was made with reference to one particular area, and has been found, I fear, not more than sufficient for that area; and as he says it would be contrary to the act of parliament, and it would increase the evil which we all know has already arisen from the vast amount of sewage discharged into the river at that point if you were to attempt to add to that amount of sewage by carrying into it the sewage of another district not intended originally to be comprised within that system. It is plain that it would be unlawful, and could not be done without the authority of some subsequent act of parliament. Therefore neither of the

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courses suggested was open to the defendants. Although I thought it right to add this, I entirely concur with what has fallen from the Lord Chancellor, that it does not lie in the mouths of these defendants, who have created this nuisance, to say to the relators that they are not entitled to a decree, because they themselves might have performed the duty which, in our judgment, is not cast upon them at all. I think, therefore, the order must be discharged, and that the decree should be made in the form suggested by the Lord Chancellor. I think there should be no costs on this appeal, and that the deposit should be returned.

JAMES, V.C., Feb. 1, 1869.

In re WILMOTT'S TRUSTS.

38 L. J. Ch. 275; L. R. 7 Eq. 532.

Discussed, *Haydon* v. *Rose*, [1870] E. R. A.; 39 L. J. Ch. 688; L. R. 10 Eq. 224; 23 L. T. 334; 18 W. R. 1146 (M.R.). Followed, *Chell* v. *Chell*, [1875] E. R. A.; 23 W. R. 252 (V.C.). Discussed, *Wakefield* v. *Richardson*, 1883, L. R. I. 13 Ch. 17 (C. A.): affirmed, sub nom. *Wakefield* v. *Maffett*, [1886] E. R. A.; 55 L. J. Ch. 4; 10 App. Cas. 422; 53 L. T. 169 (H.L.). Considered, *Martin* v. *Dale*, 1884, L. R. I. 15 Ch. 345 (M.R.); *In re Leader's Estate*, 1886, L. R. I. 17 Ch. 279 (C. A.): affirmed sub nom., *Leader* v. *Duffey*, [1889] E. R. A.; 58 L. J. P.C. 13; 13 App. Cas. 294; 59 L. T. 9 (H.L.). Distinguished, *Cobden* v. *Bagwell*, 1886, L. R. I. 19 Ch. 150 (M.R.).

Settlement—Construction—"Due and Payable"—Gift over—Vested Interest.

VESTED, CONTINGENT AND FUTURE INTERESTS.—*By a marriage settlement a sum of stock was settled upon trust for the husband and wife successively for life, and after the death of the survivor of them on trust to assign the trust fund among their children, and the issue of such of them as should be then dead leaving issue, as the husband and wife should appoint, and in default of appointment amongst the said children and the issue of any of them who should be then dead leaving issue (such issue to take only their parents' share), equally to be divided among them, to sons at twenty-one, and daughters at twenty-one or marriage. And until their respective shares should become "payable" on trust to pay the income towards their maintenance. And in case any child should die without issue before his share should become "due and payable" upon trust to pay and divide the share of such child among the survivors or survivor and the issue of any of the said children then dead, leaving issue, equally, when and as their original share should become "due and payable"; and if at the death of the surviving tenant for life no such child or issue should be living, or in case any of such children and issue were then living, but all of them should die before their respective shares were "payable," then on trust over for other persons. The settlement also contained a provision enabling the trustees to pay the children's shares to them before the expiration of the respective times therein-before limited for the "payment" thereof:*—Held, *that the words "due and payable" must bear their natural meaning, so that the share of a son who attained twenty-one and died in the life of the surviving tenant for life passed under the accruer clause.*

This was a petition for the payment out of Court of moneys paid in by trustees, under the Trustee Relief Act.

By a settlement made upon the marriage of James Wilmott and Susannah Pigram, dated the 12th of August, 1807, a sum of 2,000*l.* stock was invested in the names of trustees, upon trust, after the solemnization of the said marriage, to pay the dividends thereof to the said James Wilmott during his

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life, and after his decease then upon trust to pay the dividends thereof to the said Susannah Pigram during her life, and after the decease of the said survivor of the said James Wilmott and Susannah Pigram upon trust to assign the said principal sum of 2,000*l*., and the yearly proceeds thereof, unto and amongst James William Wilmott, the only son of the said James Wilmott, by Judith Ann, his late wife, deceased, and all and every child and children of the said James Wilmott by the said Susannah Pigram, and the issue of such of them respectively, in case any of them should be then dead, leaving issue, in such shares, parts and proportions, and at such time and times, and in such manner and form as the said James Wilmott and Susannah Pigram should in manner therein mentioned jointly appoint, with such power of revocation and new appointment as therein mentioned, and for want of and in default of such appointment then unto and amongst the said James William Wilmott, and all and every the child and children of the said James Wilmott on the body of the said Susannah Pigram, lawfully to be begotten, equally to be divided between them share and share alike; and in case either or any of them, the said James William Wilmott or the child or children of the said intended marriage, should happen to be dead leaving issue, unto the issue of such one or more which should be then dead (but the child or children of the deceased should be entitled only to the share which his or her or their father or mother would have been entitled unto if living), equally to be divided amongst the said James William Wilmott and such child or children of the said intended marriage or their issue respectively, to each being a son at his age of twenty-one years, and to each being a daughter at the age of twenty-one years or day of marriage, which should first happen, and in the meantime, until their respective shares and proportions should become payable as aforesaid, upon trust to pay the dividends, interest, yearly income and other profits of the said principal sum of 2,000*l*., or a competent part thereof, for and towards their maintenance and education, as the trustee or trustees for the time being should thing fit and proper; and in case the said James William Wilmott or either or any of such children of the said intended marriage should happen to depart this life without issue before his or their share or shares of and in the said trust-moneys should become due and payable, then (as to such share or shares) upon trust to pay and divide such share or shares of him, her or them so dying without issue unto and amongst the survivors and survivor of them the said James William Wilmott and the children of the said intended marriage, and the issue of any one or more of them who might happen to be dead leaving issue, in equal shares and proportions in manner aforesaid, and when and as his, her or their original or proper share or shares should become due and payable; and in case at the time of the decease of the survivor of them the said James Wilmott and Susannah Pigram, there should be neither the said James William Wilmott nor any child or children of the said intended marriage, nor any issue of the said James William Wilmott or of any such child or children living, or if there should be the said James William Wilmott, or any such child or children of the said intended marriage, or any issue of the said James William Wilmott, or of any such child or children then living, yet if all of them should die before his, her or their share or respective shares were payable, then that the trustee or trustees for the time being should stand possessed of the said principal sum of 2,000*l*., and the dividends, interest, proceeds and other profits thereof, and of every part thereof, upon trust for the executors and administrators of the said James Wilmott, or other the person or persons legally entitled to have and receive the same.

The settlement also contained the following provision: That in case the trustee or trustees for the time being should see it necessary or requisite for any or either of such child or children aforesaid, or the issue of any one or more of such child or children, to have his or her or their share or shares of the said principal sum of 2,000*l*., and the dividends, interest, proceeds and other profits thereof, or any part thereof, paid, assigned or transferred unto them, or otherwise for their use and benefit, before the expiration of the respective times therein-

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before limited for the payment and division thereof respectively, then upon trust that the trustees for the time being should pay or otherwise assign and transfer the whole of the share or shares of him, her or them, so appearing to require or have occasion for the same or any part or parts thereof, unto him, her or them, or otherwise for his, her or their benefit accordingly.

James Wilmott died on the 31st of August, 1818, leaving his widow him surviving.

There were four children of the marriage, viz., Susannah, Charles, Maria and Eliza, of whom Eliza Wilmott died under twenty-one and unmarried. Susannah Wilmott, in June, 1833, married John Prior, and in January, 1843, she died, having survived her husband, and leaving two children, viz., William Sangster Prior and John Prior. William Sangster Prior died in 1857 without having had any issue, leaving a widow, Caroline, him surviving. His widow subsequently married Thomas Cole. Maria Wilmott, in July, 1830, married Edward Staveley Briggs, and by her marriage settlement then executed all her interest under the settlement of the 12th of August, 1807, was assigned to trustees on certain trusts therein mentioned. Edward Staveley Briggs died in January, 1858. James William Wilmott died in March, 1867, leaving his widow and executrix him surviving, but without leaving any issue. Susannah, the widow of James Wilmott, in July, 1820, married Thomas Allen, and died in October, 1867. Under these circumstances, there were living at the death of the said James William Wilmott two only of the children of the marriage of James Wilmott and Susannah Pigram, viz., Charles Wilmott and Maria Briggs, and one grandchild, John Prior, and no other issue of any deceased child of the said marriage. Questions having arisen whether James William Wilmott's original and accrued share in the stock comprised in the said settlement passed to his executrix, or whether it accrued in thirds to Charles Wilmott, the trustees of Maria Brigg's marriage settlement and John Prior, the trustees of Mr. and Mrs. James Wilmott's settlement paid such share (then amounting to one-fourth of the whole fund) into Court under the Trustee Relief Act.

Mr. J. W. Chitty, for the petitioners Charles Wilmott and John Prior, said he contended that the share accrued in thirds. Thereupon

Mr. F. T. White, for the executrix of James William Wilmott, was called upon by the Court to support the opposite contention.—He argued that the words "due and payable" in the settlement meant "vested," though not indefeasibly vested. If this had been a question of construction under a will, the case would have been different. He relied upon the principle laid down in *Emperor* v. *Rolfe* (1 Ves. sen. 208), which had always been followed. *Mocatta* v. *Lindo* (9 Sim. 56); *Swallow* v. *Binns* (1 Kay & J. 417); *Schenck* v. *Legh* (9 Ves. 300).

Mr. J. W. Chitty, being called upon to distinguish this case from the authorities cited, said his contention was that the shares were vested at once, and were payable at twenty-one, with gifts over in case the person entitled to any share died in the lifetime of the surviving tenant for life. The leaning of the Court in favour of indefeasible vesting had already gone far enough. The words "due and payable" could not mean vested; they meant to be handed over. The cases had been strained. The Court ought not to go beyond the natural meaning of the words.

Mr. J. Chester, for the trustee of Mr. and Mrs. Briggs's marriage settlement, supported the same contention.—He referred to *Bright* v. *Rowe* (3 Myl. & K. 316); *Creswick* v. *Gaskell* (16 Beav. 577); *Eyre* v. *Marsden* (2 Keen, 564, 573; 7 L. J. Ch. 220; 4 Myl. & Cr. 231); *Crowder* v. *Stone* (3 Russ. 217; 7 L. J. Ch. 93).

Mr. White replied.—If this had been a will he should have argued it in the same way, but the case of a settlement was different—*Mendham* v. *Williams* (L R. 2 Eq. 396).

JAMES, V.C. said he should have no doubt whatever as to the construction of this instrument if the case were uncovered by any authority. From all the

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clauses it was clear the settlor meant that under certain events the shares should be devested at any time during the life of the surviving tenant for life. On the instrument itself the question was whether he was bound to give an artificial or a natural meaning to the words. The case of *Emperor* v. *Rolfe* proceeded upon a strong and unrebuttable presumption that the shares were to be indefeasibly vested in the children at the time when they wanted them. There was this distinction between cases of that class and the present case, that there the event with regard to which the question of the shares being vested arose had not been provided for; here the settlor had provided for the happening of every event. The principle of that case did not apply where there were special trusts expressly declared for the issue of children dying in the life of the tenant for life. This case was clearer than *Mocatta* v. *Lindo* and *Mendham* v. *Williams*. There the Vice Chancellor held that the words "due and payable" meant vested. This was a case of devesting. The gift to the issue of a child was not made to depend upon his attaining twenty-one. The gift over was to take effect "if any child should die without issue before his share became due and payable." Having regard to all the clauses of this settlement, the intention of the settlor was so clearly expressed that the Court in construing it was not bound by the cases which had been cited. Since J. W. Wilmott died in the lifetime of the tenant for life all his share passed under the accruer clause.

STUART, V.C., Feb. 9, 1869.

In the matter of THE COMMON LAW PROCEDURE ACT, 1854, SECTION 17; *and*

In the matter of the arbitration between THE REV. GEORGE DRURY, *Clerk, and* THE REV. JOSEPH LEYCESTER LYNE, *Clerk.*

38 L. J. Ch. 278; 19 L. T. 763.

Arbitration—Statute 3 & 4 Will. 4. c. 42. s. 39.—The Common Law Procedure Act, 1854, Section 17.—Submission not under Seal—Revocation of by Deed—Motion to make the Submission an Order of Court refused with costs.

ARBITRATION.—*An agreement not under seal for submission of the matters therein mentioned to arbitration, did not provide that it should be made a rule of any Court of record; nor did it contain words purporting that the parties to it intended that it should not be made such. It was, however, unusual in its terms, and created certain trusts of the property directed to be sold by order of the arbitrators. Pending the reference under the submission one of the parties to it, by a deed-poll under his hand and seal, revoked the agreement for the submission. A motion by the other party to the agreement to make it, notwithstanding such revocation, an order of this Court was refused with costs.*

By an agreement of reference, in writing but not under seal, which was dated the 31st of March, 1868, and entered into and signed between and by the Rev. George Drury of the one part and the Rev. Joseph Leycester Lyne of the other part, after reciting that George Drury was seised to him and his heirs for an estate of inheritance in fee simple in possession of and in certain freehold messuages, lands and hereditaments in the city of Norwich, known as the Elm Hill Monastery (formerly occupied as a monastery by Joseph Leycester Lyne and his companions), and other hereditaments adjoining, subject to certain incumbrances or charges thereon, and that questions and disputes had arisen and were then pending between George Drury and Joseph Leycester Lyne in reference to the said hereditaments and the incumbrances thereon, which questions and disputes the said parties were desirous of having adjusted and finally settled, it was agreed and declared

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1. That the Rev. Pascoe Grenfell Hill and the Rev. Edward Stuart should be. and George Drury and Joseph Leycester Lyne did, and each of them did, constitute and appoint the said Pascoe Grenfell Hill and Edward Stuart arbitrators, to whom or to whose umpire, to be appointed as thereinafter mentioned, all questions and disputes between the said parties were to be referred.

2. That prior to the said arbitrators entering upon the said reference they should agree in appointing and should appoint some third person to decide as umpire between them, the said arbitrators, in case they should differ on any matter thereby referred to them.

3. That the said arbitrators or their umpire should take an account and ascertain all moneys due in respect of the said charges or incumbrances properly incurred upon the said hereditaments or any part thereof.

4. That the said arbitrators or their umpire should cause the said hereditaments to be sold by public auction or private contract, and either together or in parcels, and either subject or not to special conditions as to the title or evidence of title and commencement thereof or otherwise, and at such price or prices as the said arbitrators or their umpire should think fit, with full power to buy in or rescind any contract, and to re-sell without being responsible for any loss which might be occasioned thereby: the said George Drury and Joseph Leycester Lyne, according to their respective estates and interests therein, thereby respectively binding themselves and their respective heirs and assigns to do and execute all such acts and assurances as should be necessary for effecting or completing any such sale or sales as the said arbitrators or their umpire should think necessary.

5. That the said arbitrators or their umpire should stand possessed of the moneys arising from such sale or sales, upon trust thereout in the first place to pay and satisfy all such sum and sums of money as should be due and owing to the respective incumbrancers on the said hereditaments for any incumbrance properly incurred thereon; and in the next place to pay and discharge all costs of effectuating and completing such sale or sales, charges and expenses of and incidental thereto or consequent thereon; and subject as aforesaid, that the said arbitrators or their umpire should stand possessed of the surplus of any moneys arising from such sale or sales upon trust to dispose of or apply the same to such cognate purposes as they, the said arbitrators or their umpire, should think fit.

On the 9th of June, 1868, the arbitrators met, and appointed a Mr. Robert Brett as their umpire. That appointment was approved by Mr. Drury and Mr. Lyne; and after Mr. Lyne's attorney had opened his case the arbitrators adjourned till the 18th of June, 1868. On that day the parties again met, the reference was proceeded with, and again adjourned to the following day. On that day the solicitor for Mr. Drury closed his case, and the attorney for Mr. Lyne concluded his; a great deal of evidence, oral and written, having been adduced on both sides. The arbitrators expressed a wish to have copies of the written evidence left with them for perusal, and accordingly they adjourned the reference till the 4th of November, 1868. On that day the arbitrators met. Mr. Drury attended the meeting, but Mr. Lyne (who had in the meantime changed his attorney) then appeared by counsel. When the proceedings were about to commence Mr. Lyne's counsel stated that if Mr. Drury would pay Mr. Lyne 600*l*. he would release to Mr. Drury all his interest in the hereditaments in question; but that unless Mr. Drury paid that money the counsel for Mr. Lyne was instructed to withdraw from the reference.

No reason was assigned why Mr. Lyne so acted; and Mr. Drury's solicitor declined to accede to the proposal.

Mr. Lyne's father (who was then attending the meeting in the place of his son) refused to take any further part in the proceedings, and left the arbitrators' room. Before that withdrawal, however, verbal notice had been expressly given, on behalf of Mr. Drury, to the counsel and attorney of

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Mr. Lyne, that in the event of their withdrawing, Mr. Drury would request the arbitrators to proceed *ex parte*. That was accordingly done.

The arbitrators then adjourned till the 30th of November, 1868, and issued a peremptory appointment to all parties to attend them on that day. Notice of that appointment was duly sent to Mr. Lyne's attorney, and personally served on Mr. Lyne himself.

On the 30th of November, 1868, Mr. Drury attended the meeting before the arbitrators with his solicitor; but neither Mr. Lyne nor his counsel or attorney were then present.

Mr. Drury was willing that the reference should be completed in pursuance of the agreement; and the arbitrators therefore requested his solicitor to have the agreement of the 31st of March, 1868, made an order of this Court.

By a deed-poll under the hand and seal of Mr. Lyne, and which was dated the 4th of January, 1869, he "revoked, countermanded, put an end to, annulled and made void" the therein and hereinbefore stated agreement of the 31st of March, 1868, and the aforesaid appointment of the arbitrators, and all directions and authorities thereby given and delegated to them, and all powers and trusts thereby by him created and vested in them.

Notice of that deed was duly served on the arbitrators.

The matter now came on to be heard upon a motion on behalf of Mr. Drury, that the agreement of the 31st of March, 1868, might be made an order of this Court pursuant to the enactments and provisions of the Common Law Procedure Act, 1854, section 17.

Mr. Greene and *Mr. Francis Webb*, for Mr. Drury, supported the motion. —The case was within the spirit, if not the letter, of the 3 & 4 Will. 4. c. 42. s. 39, as modified by the Common Law Procedure Act, 1854, section 17. By the former act and section, after reciting that "it is expedient to render references to arbitration more effectual," it was enacted, that "the power and authority of any arbitrator or umpire appointed . . . . by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any Court of record, shall not be revocable by any party to such reference without the leave of the Court . . . . which shall be mentioned in such submission, or by leave of a Judge; and the arbitrator or umpire shall and may, and is hereby required to proceed with the reference, notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference." The submission in this case did not, in fact, contain such an agreement as was mentioned in that section; but by the Common Law Procedure Act, 1854, section 17, it was enacted that, "every agreement or submission to arbitration by consent, whether by deed or instrument in writing not under seal, may be made a rule of any one of the superior Courts of law or equity at Westminster, on the application of any party thereto, unless such agreement or submission contain words purporting that the parties intend that it should not be made a rule of Court," &c. The submission contained no words purporting that it was not to be made a rule of Court, and therefore Mr. Drury was now entitled to the order for which he moved. They also cited *Pope* v. *Lord Duncannon* (9 Sim. 177); *Morse* v. *Merest* (6 Madd. 26).

Mr. Dickinson and *Mr. Herbert Smith*, for Mr. Lyne, were not called upon.

STUART, V.C.—In this case the submission contains no provision that the agreement shall be made a rule of any Court of record. The case is therefore clearly not within the 3 & 4 Will. 4. c. 42. s. 39, by which statute it is provided that the submission shall not be revoked if it contains a provision that it shall be made a rule of Court. What is to be inferred where there is no such provision? According to the old law this is a case in which the submission was clearly revocable. It is in evidence that this submission has been revoked by a deed-poll by one of the parties to it; and I do not doubt that at law that deed is good. The Common Law Procedure Act, 1854, section 17, seems to me to make no material alteration in the law as it then stood. It contains no pro-

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vision which would justify this Court in entertaining this special application, and to direct that this submission—under hand only, and not under hand and seal, and which has been revoked by deed—should be made an order of this Court. The submission is, moreover, one of a very unusual kind, and contains trusts for sale of the property in question and for the disposition of the proceeds of the sale. In the absence of any express authority upon the point, I must refuse this motion, with costs.

JAMES, V.C., Jan. 23, 1869.

FARHALL *v.* FARHALL.

38 L. J. Ch. 281; L. R. 7 Eq. 286: reversed, [1872] E. R. A.; 41 L. J. Ch. 146; L. R. 7 Ch. 123; 17 W. R. 350 (L. JJ.).

Administration—Securities of Testator in Bankers' Hands—Advances to Executor—Misapplication—Notice.

BANKER AND BANKING COMPANY. EXECUTOR AND ADMINISTRATOR.—*A testator died indebted to his bankers, who held as a security title-deeds of his estate. His executrix and widow was empowered by his will to charge his real estates in aid of his personal estate. She drew from the bank on account of the testator's executors, and deposited other title-deeds of the testator's estate as a further security. The sums thus drawn were misapplied by her. In a suit to administer the testator's estate*:—Held, *that, in the absence of notice of any breach of trust, the bank was entitled to hold the title-deeds as a security for the moneys advanced to the executrix.*

Adjourned summons, taken out in the above suit by the London and County Joint-Stock Banking Company. The suit was for the administration of the estate and effects of Richard Farhall. The testator by his will, dated the 4th of October, 1853, appointed his wife, the defendant Mary Farhall, and two other persons executrix and executors and trustees of his will, and he directed his debts to be paid; and devised to his wife a rent-charge of 100*l.* issuing out of the hereditaments thereby devised; and he directed and empowered his said trustees to execute all such deeds and instruments as should be requisite or advisable for carrying out, facilitating and giving legal effect to the trusts and purposes of his will; and he further directed and empowered his trustees from time to time in execution and furtherance of the trusts and purposes of his will during the lifetime, but always by the direction in writing of his said wife to get in, convert and sell his real and personal estate as therein mentioned, " or in aid of his personal estate to mortgage and grant powers of sale of the whole or any portion of the same " real estate; and subject to the foregoing trusts, powers and provisoes he devised and bequeathed his real and personal estate to his said trustees upon trust for his three sons and his daughter as therein mentioned. The testator died on the 11th of December, 1861, and his will was proved by his widow alone on the 27th of May, 1863, the other executors therein named having duly renounced probate. In 1867 this suit was instituted by the testator's daughter, against his widow as executrix and against his two surviving sons. The testator during his life had kept a banking account with the Petworth Branch of the London and County Bank. In November, 1861, the testator, having then withdrawn his account with the said bank, deposited with them the title-deeds of certain real estates, and signed a memorandum of deposit, by which he declared that the deposit deeds should be held by the bank as a security for 1,000*l.*, in which he acknowledged himself to be then indebted to the bank, and for all moneys which should at any time become due to the bank on the general balance of his account, including interest, commission, &c. At the testator's death there

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was due from him to the said bank a sum of 732*l.* 2*s.* 3*d.*, secured by the said deposit and memorandum. Immediately after the testator's death his widow (as appeared from the affidavit of Mr. Osborn, the manager of the Petworth Branch of the bank) applied to the bank to be allowed to draw on her late husband's account, but Mr. Osborn dishonoured a cheque drawn by her in her personal character, and being referred by her to her late husband's solicitor, who was one of the executors named in his will, Mr. Osborn wrote to him to ask whether the testator's executors authorized Mrs. Farhall to open an executorship account. The solicitor replied, that Mrs. Farhall was sole executrix and could draw cheques on account of the testator's estate. Thereupon the bank opened an account entitled "Mr. Richard Farhall's Executors' Account," and honoured cheques upon it signed "Mary Farhall, for the executors of Richard Farhall, deceased," and no others. Mrs. Farhall overdrew such account by such cheques to a large amount. In January, 1863, the account being then overdrawn to the amount of 1,171*l.* 11*s.* 6*d.*, the bank required Mrs. Farhall to give them some further security for the current balance against her, whereupon she deposited with the bank the title-deeds of certain parts of the testator's real estate, and signed a memorandum declaring that the same deeds should be held as a security for the sum of 2,000*l.*, and "for all moneys which shall at any time be due from me to you on the general balance of my account with you, such balance to include all interest, charges for commission and other expenses which you may, in the course of your business as bankers, charge in respect of any advances or discounts made to me or on my account, or for keeping my said account with you;" and she thereby undertook when required to execute to the bank a valid legal mortgage of the hereditaments to which the title-deeds related. This memorandum was signed by Mrs. Farhall, "For the executors of the late Richard Farhall." On the faith of this security the bank continued as before to honour Mrs. Farhall's cheques on the executorship account. In April, 1864, the balance due to the bank from the testator was, at Mrs. Farhall's request, transferred to the same executorship account; and in October, 1864, the bank, thinking they had reached the limit of their securities, ceased to make any payment on the executorship account, which then stood at 2,578*l.* 19*s.* 11*d.* against the executors. In January, 1867, the claim of the bank in respect of principal, interest and commission amounted to 2,593*l.* 17*s.* 1*d.* Mr. Osborn stated in his affidavit that "All the payments made by the bank on the said account were made in reliance upon the authority of Mrs. Farhall to mortgage the testator's real estate in aid of his personalty, and were made by the bank *bona fide*, and with every reason to suppose that Mrs. Farhall was properly applying the money in payments due from the testator's estate. The bank never had any knowledge, suspicion or notice of any improper application of any of the money, even if any such improper application was made." Mr. Osborn was not cross-examined on this affidavit. It appeared that Mrs. Farhall had expended a very large amount of the money advanced to her by the bank for the general purposes of herself and her children and in her own private speculations, and had applied only a very small part of it in respect of the administration of the testator's estate. By an order in the suit dated the 6th of May, 1868, the lands to which the deposited title-deeds related were sold without prejudice to any question as between the bank and the testator's estate: the 732*l.* 2*s.* 3*d.* (due from the testator) and interest were paid to the bank out of the proceeds of the sale, and the surplus proceeds paid into Court to the credit of the cause, to await the result of an inquiry directed by the same order as to what was due thereout to the bank. The bank took out this summons to have the above inquiry proceeded with.

Mr. Kay and *Mr. Waller*, for the bank, supported their claim to hold the deeds as a security for the sums advanced to the testator's widow. The only question was, whether a mortgage by trustees would be supported in the absence of an express power to mortgage. It would be allowed where the

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estate was devised subject to a particular charge—*Stroughill* v. *Anstey* (1 De Gex, M. & G. 635; 22 L. J. Ch. 130). In order to fix a person advancing money to a trustee upon the security of an estate charged for payment of debts with liability for misapplication of the moneys advanced, he must have notice of the intended misapplication—*Watkins* v. *Cheek* (2 Sim. & S. 199); *Haynes* v. *Forshaw* (11 Hare, 93; 22 L. J. Ch. 1060); *Forbes* v. *Peacock* (1 Phil. 717; 15 L. J. Ch. 371); *Greetham* v. *Colton* (34 Beav. 615); *M'Leod* v. *Drummond* (17 Ves. 152, 168).

Mr. Druce and *Mr. Haddan*, for the plaintiff, the testator's daughter, opposed the application, on the grounds that the testator's widow had no power to make such a deposit, and the bank had notice that the moneys were not required by her as executrix, as was shewn by the manner in which the money was drawn out in driblets and the time which had elapsed since the testator's death. They referred to *Cutbush* v. *Cutbush* (1 Beav. 184; 8 L. J. Ch. 175).

Mr. J. N. Higgins, for Saffery, the assignee of the testator's eldest son, argued that the course of dealing raised a fair notice that all the sums advanced by the bank were not advanced on the executorship account.

Mr. Cottrell, for the assignee of Mary Farhall, the testator's widow.

Mr. Kay, in reply, argued that there was nothing to fix the bank with notice. The cheques were drawn on the face of them on the executorship account. Mr. Osborn had not been cross-examined on his affidavit, and his account of the course of dealing must be taken to be correctly stated.

JAMES, V.C. said he could draw no distinction between a case in which security had been given for a current banking account, and a case in which the security was for money borrowed from the bank. Then it could make no difference whether the sums lent were borrowed in one, or forty, or four thousand different sums, unless the bank had notice that the moneys borrowed were not to be applied on the executorship account. The smallness of the amounts drawn by the cheques afforded no evidence that those cheques were not drawn on the executorship account. He thought that the bank was entitled to hold the securities deposited with them for the amount paid to the testator's widow as well as for the sums advanced to the testator himself, and the claim of the bank must be allowed with costs, according to the terms of the memorandum of deposit.

LORDS JUSTICES, Jan. 26, 27, 1869.

BEIOLEY v. CARTER.

38 L. J. Ch. 283; L. R. 4 Ch. 230; 20 L. T. 381; 17 W. R. 300: reversing, [1869] E. R. A.; 38 L. J. Ch. 92; 19 L. T. 472; 17 W. R. 130 (V.C.).

Referred to, *In re Shepheard's Settled Estate*, [1870] E. R. A.; 39 L. J. Ch. 173; L. R. 8 Eq. 571; 21 L. T. 525 (V.C.); *Alexander* v. *Mills*, [1871] E. R. A.; 40 L. J. Ch. 73; L. R. 6 Ch. 124; 24 L. T. 206; 19 W. R. 310 (L. JJ.). Adopted, *Bell* v. *Holtby*, [1873] E. R. A.; 42 L. J. Ch. 266; L. R. 15 Eq. 178; 28 L. T. 9; 21 W. R. 321 (V.C.). Referred to, *In re Strutt's Trusts*, [1874] E. R. A.; 43 L. J. Ch. 69; L. R. 16 Eq. 629; 21 W. R. 880 (V.C.); *In re Ives; Bailey* v. *Holmes*, [1876] E. R. A.; 3 Ch. D. 690; 24 W. R. 1069 (M.R.).

Vendor and Purchaser—Specific Performance—Leases and Sales of Settled Estates Act, 19 & 20 *Vict. c.* 120.

SETTLED LAND.—*The 17th section of the Leases and Sales of Settled Estates Act*, 19 & 20 *Vict. c.* 120, *requiring the concurrence in all applications to the Court of all persons in existence having any beneficial estate or interest under the settlement, does not apply where, from the nature of the case, such persons*

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cannot be ascertained, as where a remainder is limited to the heirs of a living person as purchasers.

Under a marriage settlement a remainder in fee simple after a life estate given to the wife for her separate use without power of anticipation, was vested in her heir-at-law as a purchaser:—Held, *reversing the decision of the Master of the Rolls, that the Court had power under the Leases and Sales of Settled Estates Act*, 19 *&* 20 *Vict. c.* 120, *to make a valid order for sale in the lifetime of the wife, notwithstanding the person who might eventually be her heir-at-law could not be ascertained, and therefore could not be a party to the application.*

This was an appeal from the decree of the Master of the Rolls dismissing the bill with costs.

The case is reported 38 L. J. Ch. 92.

Mr. Joshua Williams and *Mr. Upton* appeared for the appellants; and

Mr. Southgate and *Mr. H. F. Bristowe*, for the respondent.

The following authorities were referred to—*In re Greene's Settled Estates* (10 Jur. N.S. 1098); *In re Laing's Trusts* (35 L. J. Ch. 282; L. R. 1 Eq. 416); *In re Thompson's Settled Estates* (Johns. 418); *In re Burdin's Will* (28 L. J. Ch. 840); *Fearne's Contingent Remainders*, 370; 19 *&* 20 *Vict. c.* 120. *ss.* 1, 11, 17, 18, 28; 27 *&* 28 *Vict. c.* 45. *s.* 3.

SELWYN, L.J., said that without losing sight of the fact that this suit was one for specific performance, and that the Master of the Rolls had come to a conclusion adverse to the title, it was the duty of the Court of appeal to form its own opinion upon the matter and to act upon it. In *Sheppard* v. *Doolan* (3 Dru. & W. 8) Lord St. Leonards said, "I cannot agree with the proposition that an unfavourable decision in the Court of inferior jurisdiction renders the title doubtful. The Judge of the superior Court would still be bound to exercise his own discretion and decide according to his own judgment. I have myself often argued at the bar in support of the proposition, but always without success; for although I have urged that no Judge would consider a title to be free from doubt when one or two Judges competent to decide the question had pronounced it to be defective, I have ever been met with this answer, that to adopt such a doctrine would be in effect to leave the ultimate decision of the question to the Court below while the law provides an appeal to the Court above." The adverse opinion of the Master of the Rolls therefore was no ground for refusing specific performance if the Court considered that a good title was made out.

With regard to the jurisdiction of the Court to make the original order for the sale, there could be no doubt that the limitation to the persons who should be the heirs of Mrs. Heighton at her decease, being a limitation to them as purchasers, created a succession, and it was therefore a settlement within the meaning of the act. The question then arose whether all the proper parties were served with and consented to the petition for sale. It was objected that the heir of Mrs. Heighton ought to have concurred, and that as that heir could not be ascertained in her lifetime, the proper concurrence could not be obtained, inasmuch as the 17th section provided that the parties to concur or consent should be all the persons in existence having any beneficial estate or interest under or by virtue of the settlement. But his Lordship was of opinion that the persons whose consent or concurrence were required by that section to be obtained must be persons whose consent could be obtained, and not persons whom, from the nature of the case, it was impossible to find. If there were any irregularity in the sale it was cured by the 28th section of the act, which enacted that after the completion of any lease or sale or other act under the authority of the Court, and purporting to be in pursuance of the act, the same should not be invalidated on the ground that the Court was not by the act empowered to authorize the same, except that no such lease, sale or other act

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should have any effect against any person whose concurrence in or consent to the application ought to have been obtained and was not obtained. This seemed to put the case in exactly the same position as sales made under the ordinary jurisdiction of the Court. In *Lloyd* v. *Johnes* (9 Ves. 37, 65) Lord Eldon said, "I dare not say a purchaser is to be answerable because an estate was directed to be sold in this Court, when as yet the accounts had not been taken to determine what was finally to be the charge upon the estate to be sold. It is the daily practice of this Court, for convenience, to carry to market property which in a subsequent part of the cause perhaps it would have been unnecessary to sell, looking at its own powers of setting right the interests of all parties as among each other. The Court often directs real estate to be sold before it can know the real situation of the personal estate. Therefore, unless some ground can be stated upon the interest of the tenant in tail, or fraud in the conduct of Wallis & Johnes, I dare not set aside the sale upon the irregularity only." And again, in *Bowen* v. *Evans* (1 Jo. & Lat. 259), Lord St. Leonards said: "In *Curtis* v. *Price* (12 Ves. 89) the Master of the Rolls, though not called on to decide the point, declared his opinion to be that, although accounts were not taken or inquiries directed, which ought to have been taken and directed, yet that being the act of the Court it could not affect the purchaser; and he was also of opinion that a direction by the Court to pay the purchase-money to a wrong person would not affect the purchaser. I entirely subscribe to that opinion. I think that though there may have been some advantage taken of the parties in the cause, it ought not of itself to constitute a ground for impeaching the sale; for it would be extremely dangerous to impress upon the minds of purchasers under decrees, that that which had escaped the vigilance of the Court, of its officers, and of the bar, would form a sufficient ground to set aside a sale. I could not lay down a rule more mischievous to the suitors of the Court and the interests of the public, for it is of the greatest importance that sales made under the authority of the Court should not be lightly set aside."

Entirely concurring in these observations, his Lordship was of opinion that any technical irregularity was cured by the 28th section, and the plaintiff was entitled to a decree for specific performance with costs, but there would be no costs of the appeal.

GIFFARD, L.J. said that he did not forget that the suit was one for specific performance, and that the Master of the Rolls had decided against the plaintiff's title, but he was satisfied that the rule laid down by Lord St. Leonards in *Sheppard* v. *Doolan* was the correct one, and that the Court of Appeal was bound to exercise its own judgment on the question.

With regard to the construction of the Leases and Sales of Settled Estates Act, his Lordship, after observing that the object of that statute was to obviate the necessity for applying to the legislature for power to sell estates where there was no power for that purpose contained in the settlement, and the persons interested were under disability, said he had no doubt that the instrument in question, being a limitation to persons in succession, was a settlement within the meaning of the 1st section of the act, and the estate was a settled estate of which the Court had power, under the 11th section, to authorize a sale, subject to the provisions and restrictions contained in the act. The Master of the Rolls appeared to have thought that the heir of a living person was a known and specified person whose concurrence was required by the act, but in this opinion his Lordship could not concur. There was no known and specified person in existence of whom it could be said that he had any beneficial interest in the property as the heir of Mrs. Heighton. There was only a possibility that some person now in existence might ultimately have an interest in the property in that character. The words of the 17th section, "All the persons in existence having any beneficial estate or interest under the settlement," could not possibly apply where it could not be predicated of any person in existence that he had any interest in the property.

It was, however, contended that if the consent of all persons interested in

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the estate could not be obtained the sale could not be effected. If this were the right construction the operation of the act would be very much cut down, for in no case in which there was a limitation to unborn children as purchasers could a sale be made. But it was to be observed that the act did not give to the Court a power of sale to be exercised with the consent of all the persons interested in the estate, but an absolute unqualified power of sale was given in the first instance, with a provision that the application to the Court for the exercise of it should be made with the concurrence or consent of certain persons. His Lordship then referred to the observations of Turner, L.J. in *Hawkins* v. *Gathercole* (6 De Gex, M. & G. 1; 24 L. J. Ch. 332), as to the principle of construing acts of parliament, and said he was satisfied that where from the nature of the case the consent mentioned in the 17th section of the act could not be obtained by reason of there being no one to give it, a sale could be made without it.

HATHERLEY, L.C., Jan. 23, 25, 28, 1869.

HORSLEY *v.* COX.

38 L. J. Ch. 285; L. R. 4 Ch. 92; 20 L. T. 128; 17 W. R. 596.

Common Law Procedure Act, 1854, *ss.* 60-66.—*Judgment Creditor—Charge on Equitable Debt.*

ATTACHMENT.—*The Court cannot by any process analogous to an attachment at law under the garnishee clauses of the Common Law Procedure Act*, 1854, *give to a judgment creditor a charge upon money in the hands of trustees for the judgment debtor.*

The bill in this case was filed by a judgment creditor against his judgment debtor and the trustees of the will of a Mrs. Cox, seeking to make the share to which the debtor was entitled in the profits of a business carried on by the trustees available for the satisfaction of his judgment debt by analogy to the garnishee clauses of the Common Law Procedure Act, 1854.

The interest of the debtor arose under the will of Jane Caroline Cox, dated the 12th of August, 1858, whereby she bequeathed the weekly publication called the *Builder*, and the leasehold premises whereon the publication was carried on, to John Charles Mason and Daniel Smith Bockett, upon trust to carry on the publication and to pay one-fourth share of the nett profits to John Axtell Deacon Cox during his life, subject to a proviso that if he should be outlawed or declared bankrupt, or become an insolvent debtor, or assign, charge or incumber, or attempt or affect to assign, charge or incumber his share of the profits, or any part thereof, or should do or suffer anything whereby the same or any part thereof might, if belonging absolutely to him, become vested in or payable to some other person, then and thenceforth his share of profits should during the remainder of his life sink into and form part of her general personal estate; and the trustees were directed in the course of every month of January to draw up a balance-sheet of the nett profits during the year ending on the preceding 31st of December.

The testatrix died on the 14th of August, 1858, and the trustees carried on the publication, making out sometimes half-yearly and sometimes quarterly instead of yearly balance-sheets, and by the account rendered for the half-year ending the 30th of June, 1865, it appeared that the outstanding debts due to the estate in respect of the publication to that date was 3,890*l.* 4*s.* 7*d.*, and that the actual realized profits in cash were 1,978*l.* 10*s.*, of which Cox's one-fourth share was 494*l.* 12*s.* 6*d.* This latter sum was, in August, 1865, assigned by Cox to the plaintiff upon certain trusts, one of which was to retain 100*l.*, and the money was paid to and applied by him accordingly.

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Another account was made out for the quarter ending the 29th of September, 1865, whereby it appeared that Cox's share of the profits was 250*l.*

The bill was filed on the 17th of November, 1865, alleging that the trustees had in their hands a considerable sum of money representing the share of the defendant Cox in the profits of the *Builder*, and particularly claiming that the 3,890*l.* 4*s.* 7*d.* included in the account of the 30th of June, 1865, and other moneys alleged to have been invested by the trustees in their names, represented a portion of the accrued nett profits realized from the publication of the *Builder* since the death of the testatrix, to one-fourth of which the defendant Cox was entitled, and praying declarations accordingly; and also a declaration that the judgment operated as a charge upon all the moneys in the hands of the trustees, or invested in their names, which belonged to Cox, and also praying that the trustees might be decreed to pay to the plaintiff all moneys in their hands belonging to Cox, including his share of the moneys invested, and of the 3,890*l.* 4*s.* 7*d.* when it should come to their hands, and also his future accruing share of the profits.

By an order made in the suit by consent, 150*l.*, part of the profits declared for the quarter ending on the 29th of September, 1865, was paid to the plaintiff, and the residue to the defendant Cox.

The cause was heard before the Master of the Rolls, who dismissed the bill with costs.

The plaintiff appealed.

Mr. Jessel and *Mr. Locock Webb*, for the plaintiff.—The money in the hands of the trustees is an equitable debt due to the defendant Cox. If it were a legal debt, it could be attached under the garnishee clauses of the Common Law Procedure Act, 1854, and all that the Court is asked to do is to give to the plaintiff the same remedy as he would have had at law if it had been a legal debt. The Court will not suffer a mere dry legal interest in the trustees to be an obstacle—*Harris* v. *Davison* (15 Sim. 128; 15 L. J. Ch. 255); *Gore* v. *Bowser* (3 Sm. & Gif. 1; 24 L. J. Ch. 316, 440); *Bennett* v. *Powell.* (3 Drew, 326; 24 L. J. Ch. 736). It is no objection that Cox's share in the profits has not been ascertained. It is a mere matter of account, and *certum est quod certum reddi potest*—*Habershon* v. *Blurton* (1 De Gex & Sm. 121); *Daniel* v. *M'Carthy* (7 Irish Com. L. R. 261). They also claimed to be entitled to a charge upon so much of the profits as had been realized from the 29th of September, 1865, to the date of the decree.

Mr. Southgate, *Mr. Roxburgh* and *Mr. Edmund James*, for the defendant Cox, and *Sir R. Baggallay* and *Mr. Faber*, for the trustees, contended that the garnishee clauses could not be applied to the case of an equitable debt—*Thomas* v. *Cross* (2 Drew & Sm. 423; 34 L. J. Ch. 580). Nor, if they could be so applied, would there be anything upon which the charge could attach, as all the profits declared before the filing of the bill had been disposed of, and any charging order would operate as a forfeiture of the defendant's future share in the profits—*Montefiore* v. *Behrens* (L. R. 1 Eq. 171).

HATHERLEY, L.C.—In this case, which was very ably argued on both sides, the question is in truth whether or not Mr. Horsley, as a judgment creditor of Mr. Cox the defendant, was entitled to arrest any portion of the profits which had accrued from a business carried on under the will of the testatrix by Messrs. Bockett & Mason the other two defendants as trustees, and which profits arising from the business were to be divided into four equal parts, whereof Cox, the judgment debtor, was entitled to one. The trustees were directed by the will to state yearly accounts, and they have in fact in several instances stated them quarterly, but the accounts being so made up, the profits were to go to the four legatees interested under the will; and this was followed by the special proviso in the common form (which would include any charge by the operation of the judgment), declaring that if any of the legatees did any act by which the profits derivable from the business should become payable to anybody but themselves, the interest would be forfeited.

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The argument has been that, inasmuch as a Court of equity, where there has been nothing but a legal obstacle in the way of a person recovering a right, will set aside such obstacle, therefore, whereas, by the Common Law Procedure Act, the power of attachment is given to a judgment creditor in respect of any money due from any person to his debtor (there being, as is alleged in this particular case, moneys due to Cox at the filing of the bill, and still more at the date of the decree now appealed from), this Court will give the judgment debtor such aid as he would be entitled to at law if the debt were a legal one. There is certainly much plausibility in the argument, but I have come to the conclusion, after carefully considering the act of parliament, that the doctrine which has been referred to has no application to a case of this description.

The remedy pointed out by the Common Law Procedure Act is granted in a very special manner and in very special terms; and there is no ground for saying that this Court can interfere so as to alter the position of the parties by simply putting aside the legal obstacles and bringing the whole matter into this Court, as if the debt were wholly governed by the provisions of the Common Law Procedure Act on every point, except the point that it was an equitable instead of a legal debt, and therefore a claim may be made to interfere between the trustees and the *cestui que trust* to arrest this money by means of a process analogous to an attachment.

The first thing to be observed is, that it is a very special remedy created by an act of parliament, and to be exercised in a very special manner. The 60th section of the Common Law Procedure Act, 1854, enables a judgment creditor to summon a person whom he believes to be indebted to the judgment debtor, in order that he may be examined on the subject of the debt. The 61st section then declares that "it shall be lawful for a Judge, upon the *ex parte* application of such judgment creditor, either before or after such oral examination, and upon affidavit by himself or his attorney stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, to order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor shall be attached to answer the judgment debt; and by the same or any subsequent order, it may be ordered that the garnishee shall appear before the Judge or a Master of the Court, as such Judge shall appoint, to shew cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt." Then, by the subsequent sections, proceedings are directed to be taken by which a summary remedy is had, unless the debt be disputed. Then, in the 64th section, a process is directed in the case of a garnishee disputing the debt similar to the proceedings for the purpose of reviving a judgment: "the proceedings shall be the same, as nearly as may be, as upon the writ of revivor issued under the Common Law Procedure Act, 1852."

The 65th section directs that "payment made by or execution levied upon the garnishee under any such proceeding as aforesaid shall be a valid discharge to him as against the judgment debtor to the amount paid or levied"; and, by the 66th section, "In each of the superior Courts there shall be kept at the Master's office a debt attachment book, and in such book entries shall be made of the attachment and proceedings thereon, with names, dates and statements of the amount recovered, and otherwise; and the mode of keeping such books shall be the same in all the Courts, and copies of any entries made therein may be taken by any person, upon application to any Master." All this clearly involves a series of regulations for a very peculiar process which is accorded by this act; and I ought to notice that the superior Court is by the interpretation clause declared to be a Court of common law. This Common Law Procedure Act follows the previous act of 1852, in which there is a special clause applying the procedure to Courts of equity. There is no such clause in the act of 1854,

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and the whole course of that act applies strictly and expressly to common law procedure.

The case is, therefore, very different from that of a person having a judgment against his debtor where at common law he finds his judgment is interfered with (though much less since the 1 & 2 Vict. c. 110. than before) by outstanding terms. In that case the Court would simply set aside the outstanding terms and the procedure would take its ordinary course, and the party would be relieved accordingly. But here there are very special observances directed by the act of parliament, in particular that a book is to be kept by the Court, in which everything is to be registered, and which anybody is to be at liberty to look at. No such rules or regulations are applied to this Court, and it is obvious that the whole course of procedure is intended to be carried into effect by a simple process by which, where A. is indebted to B, and C obtains a judgment against B, C. could go against A. and obtain payment of his debt.

Mr. Jessel called my attention to a case decided in Ireland, in which it was said that the mere circumstance of its being a matter of account did not prevent the operation of the Judgment Debtors Act. That is true, where it is a mere matter of account between the judgment debtor and the person indebted to him; but I am asked to say that where there are trusts to be administered, which may require a vast number of persons to be brought before the Court as parties, —and, in this very case, I am not clear that it might not be necessary to bring here all the *cestuis que trust* interested under the will,—the Court is to adopt this quick remedy for the purpose of recovering by way of execution any debts which may be due.

It seems to me that the whole case is out of the scope of the principle by which this Court assists those who, by reason of some technical difficulty at law, are unable to obtain relief.

Independently of that, however, there is another reason which I thought it right to go into because the judgment of the Master of the Rolls is based almost entirely on it.

It is quite clear that the moment the plaintiff establishes a charge on the defendant's interest in the profits, the defendant's interest ceases. Past profits only, therefore, could be affected, but subsequent profits could not. In this case previously to the filing of the bill the trustees, who were only bound to account every January, had invariably been accommodating enough to their *cestuis que trust* to make up quarterly accounts, and they had made up accounts to the end of June. Those profits were appropriated partly to the payment of something to Cox himself, and the rest of the profits were paid over to Mr. Horsley by virtue of an assignment by Cox, which he could properly make, of the moneys due, and Horsley received those payments up to June. Then the trustees set out another account up to September, and Mr. Horsley, by his solicitor, demanded what should be found due on that account. That application of course could not be acceded to, because there was then no charge, and as the judgment *per se* would not pass those profits there was no title in the plaintiff. The plaintiff filed his bill in November, and subsequently, by an arrangement in the cause, those profits which accrued up to Michaelmas were divided in a given ratio between Horsley and Cox. That disposed of everything which was due up to that time, so that there could be nothing coming due till the following Christmas. In that state of circumstances, could the plaintiff establish any claim whatever? It appears to me that he could not establish any claim unless, as Mr. Jessel argued with great ingenuity, the charge was not to be considered effective till actual decree; and when that is made he claims to fix upon the profits which have accrued between the time of filing the bill and the date of the decree. It is not for his interest to fix any earlier time than the date of the decree for attaching the profits, because as soon as he does so they are all gone by virtue of the provisions of the will; but it appears to me that, even if I could assist the plaintiff by following the analogy of the cases at law, which I have held that I cannot do, I should be very ill following that analogy if I

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did not hold that the filing of the bill was the time when the charge would attach as being equivalent to a Judge's order, which is notice, on the part of the plaintiff, of his charge on the property. If it were otherwise, then as soon as a bill of this kind was filed the judgment debtor would immediately do his best to obtain payment from the trustees of all money due up to the time of the decree, which would not be a very convenient arrangement for the creditors. In every ordinary case it would be for the interest of the creditors that the charge should attach immediately upon the filing of the bill. The correctness of this conclusion is also shewn in this way. In order to bring the case within the authorities which establish that this Court will aid the execution when there is an outsanding legal estate, all must be done at law that can be done; you must issue execution and take out your *fi. fa.*, and lodge it in the sheriff's hands before you come to this Court for aid, because this Court only steps in where a Court of law fails. If that be so, there ought to be some process analogous to an attachment against the debt at law, and every right should exist at the time of filing the bill which you would have at law, except for the legal obstacle which intervenes. If that were so, from the moment of the bill being filed the trustee would be fixed and prevented from making any payment to the debtor; but, under the circumstances I have before me, there was nothing due at the period of the filing of the bill. There could not be an attachment at law, because the 61st section of the Common Law Procedure Act requires an affidavit stating that there is a debt due and owing which could not properly be made in this case, because at law a trust does not constitute a debt. Therefore the step analogous to execution could not be taken, and that shews that I ought not to hold the analogy to exist at all, or that anything could be done by way of granting relief by giving effect to the attachment.

I do not forget Mr. Jessel's argument that the debt is going on *de die in diem*, but that is not the case here, because there can be nothing due till the actual ascertainment of profits. The trustees are not bound to ascertain them till December, and they may be all gone before that time; and it has been determined at law, in the case of *Dresser* v. *Johns* (28 L. J. C.P. 281), that as long as a debt is unliquidated the statute has no application.

It appears to me, therefore, that, if I could have seen my way to applying the doctrine to which I have referred to this particular case, the facts would not have justified any such application. In either case, therefore, I think the plaintiff fails, and the appeal must be dismissed, with costs.

LORDS JUSTICES, Jan. 22, 23, 1869.

LOCKETT *v.* LOCKETT.

38 L. J. Ch. 290; L. R. 4 Ch. 336; 17 W. R. 476.

Followed, *Thompson* v. *Dunn*, [1870] E. R. A.; 18 W. R. 334 (V.C.): affirmed, [1870] E. R. A.; L. R. 5 Ch. 573; 18 W. R. 854 (L. JJ.); *Wier* v. *Tucker*, [1872] E. R. A.; 41 L. J. Ch. 471; L. R. 14 Eq. 25; 26 L. T. 719; 20 W. R. 586 (V.C.).

Pleading—Answer—Exceptions to Answer—Account.

DISCOVERY.—*An answer expressed in general terms to an interrogatory as to accounts is sufficient if it shews enough for all the purposes of the suit up to the hearing, when the answer denies the right of the plaintiff to have an account; and the trial of that right is one of the objects of the plaintiff.*

The plaintiff and the defendant were partners until a certain day, upon which a dissolution of the partnership took place upon terms then agreed upon, under which the plaintiff received a sum of money and retired from business, the defendant continuing the business solely. Afterwards, according to the

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allegations of the bill, the plaintiff discovered that the defendant had concealed the state of the affairs of the partnership to such an extent that the terms which the plaintiff had accepted were grossly unfair. There were particular allegations that certain large debts owing to the partnership which, through the representations of the defendant, the plaintiff had treated as bad, were good debts. The plaintiff required, by his interrogatories, a complete account of all sums received in respect of these debts; and also a complete account of all the assets, liabilities and affairs of the partnership at the date of the dissolution. The defendant, by his answer, said that nothing had been received in respect of the particular debts in question, but he admitted that, by means of subsequent transactions relative to certain patent inventions an interest in which formed a security for the said debts, he had received sums of money greater in amount than the debts. This security was, as he alleged, worthless at the date of the dissolution, and only became valuable by means of costly litigation and great trouble, which the defendant had undertaken at his own risk and expense, and also through an extension of the patent, which had been granted after much opposition, and which extension had been obtained under subsequent agreements with the patentee, and by the aid of great expenditure by the defendant. He denied the plaintiff's right to any account of the sums received by him in respect of the securities. As to the general account of the affairs of the partnership, the defendant refused to set it out, alleging that the plaintiff had the same means of making out the same from the partnership books as he himself had:—Held, *that the answer was sufficient.*

This was an appeal from an order of Vice Chancellor Malins overruling two exceptions to the answer of the defendant.

The plaintiff and defendant had been for many years prior to 1861 partners in a business which had been very profitable. In that year they dissolved partnership, but, according to the plaintiff's allegations, for some time previously he had taken no active part in the management of the business. The terms of the dissolution were that the plaintiff should receive 10,000*l.*, and that the defendant should take all the assets of the partnership and should indemnify the plaintiff against all claims.

The plaintiff, by his bill, alleged that at the date of the dissolution there were certain large debts of 32,000*l.* and 70,000*l.* owing to the partnership from two firms of Swayne & Bovill and Swayne & Co., which were represented to him as being valueless, the said two firms having suspended payment, and that no dividend had been or was likely to be paid in respect thereof; and the terms of the agreement were arranged upon the faith that these debts were total losses. He charged, however, that there was a security for the said debts of which he was at the date of the agreement in total ignorance, which security was a mortgage upon a certain patented invention, and that from this security the defendant had received moneys amounting to more than 100,000*l.* The bill also alleged that the representation of the affairs of the partnership, upon the faith of which he had entered into agreement for dissolution, were altogether inaccurate, and that the sum of 10,000*l.* was not a fair and adequate compensation for his share of the partnership concern. It prayed that the agreement might be set aside, and that accounts of the partnership assets should be taken; and that the defendant should be charged with all his receipts in respect of the partnership property, including the said debts of 32,000*l.* and 70,000*l.*; and alternatively, that if it should be thought that the said agreement should not be wholly set aside, it might be declared that the said debts owing by Swayne & Bovill and Swayne & Co., ought not to be included in the said agreement; and that the defendant might account for and pay one equal moiety of the sums received by him in respect of such debts.

The interrogatories of the plaintiff required the defendant to set forth a full account of all the partnership debts and liabilities at the date of the dissolution, and also a full account of all sums received on account of the two debts of 32,000*l.* and 70,000*l.* mentioned in the bill.

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The defendant, by his answer, which was very long, stated that there had been no concealment of the affairs of the partnership, the books of which had always been open to the free inspection of the plaintiff.

He set forth in general terms a history of the partnership affairs, adding that, except so far as therein stated, and so far as the books of account of the partnership shewed further details, he was unable to render account.

As to the alleged debts of 32,000*l.* and 70,000*l.*, he denied that he received anything in respect of them, but he set forth a history of the transactions subsequent to the dissolution by means of which the invention which formed a security for the debts became valuable. He asserted that the security was valueless at the date of the dissolution,—but whatever its value was, it was intended to be included in the agreement for dissolution,—but became most valuable by means of considerable costly litigation which had been undertaken at his expense and risk, and also by means of a prolongation of the patent which had been obtained, and in which, under an agreement with the patentee, he took an interest in consideration of his paying the expense of obtaining such renewal as well as that of the litigation referred to. He admitted that he had received sums exceeding the amount of the debts of 32,000*l.* and 70,000*l.*, but contended that he was absolutely entitled to the sums so received, and refused to give any account of them. He then proceeded as follows: "And I further say that I am upwards of sixty-eight years of age, and am not a professional accountant, and that I believe it would require long and continuous labour of a professional accountant and considerable expenditure of time and money to ascertain from the said books such of the various particulars inquired after in the interrogatories and parts of interrogatories referred to in this paragraph of my answer as can be ascertained therefrom and are not in this my answer set forth. And I further say that the agreement for dissolution, dated the 2nd day of November, 1861, referred to in the plaintiff's bill, was entered into for the express purpose, amongst others, of avoiding and rendering unnecessary the taking of the account of the late partnership; and I humbly submit and insist that it would be oppressive and unreasonable, and could lead to no satisfactory or useful result to require me to go through the said books myself, and that it would lead to great and useless expense if I were to employ an accountant so to do, inasmuch as I could only state the result which such accountant had arrived at, the accuracy of which result I should not be able to test; and I also humbly submit that I ought not to be required to answer further any of the interrogatories or parts of interrogatories referred to in this paragraph of my answer."

To this answer the plaintiff excepted, first, for its not giving any account of the sums received in respect of the two debts in question; secondly, for its not containing an account of the partnership affairs as required.

Other facts stated in the pleadings at great length are shortly mentioned in their Lordships' judgments.

Mr. Glasse and *Mr. Everitt*, for the plaintiff, cited *Robson* v. *Flight* (33 Beav. 268); *Drake* v. *Symes* (Johns. 647; 2 De Gex, F. & J. 81; 29 L. J. Ch. 349); *Swabey* v. *Sutton* (1 Hem. & M. 514); *Brookes* v. *Boucher* (31 L. J. Ch. 821); in support of the contention that as the foundation of the suit rested on the facts which they sought to discover, the exceptions were necessary.

Sir R. Palmer, *Mr. Little* and *Mr. Ford North*, for the defendant, contended that the details of accounts such as those asked for could not be material to the only questions in controversy which could be decided at the hearing, namely, whether the deed was to be supported, and whether it included the two debts from Swayne & Bovill and Swayne & Co. That the admissions in the answer were amply sufficient for the purposes of this contention; and the accounts, if ever taken at all, must be taken under a decree. They cited *Clegg* v. *Edmonson* (22 Beav. 125; 26 L. J. Ch. 673); *Kay* v. *Hargreaves* (14 L. T. 281); *De la Rue* v. *Dickinson* (3 Kay & J. 388); *Lett* v. *Parry* (1 Hem. & M. 517); *Mansell* v. *Feeney* (2 Jo. & H. 320); *White* v. *Barker* (5 De Gex & Sm. 746); the answer in which last case was very similar to the present, and was supported.

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Mr. Glasse, in reply.

LORD JUSTICE SELWYN.—This is an appeal from an order of Vice Chancellor Malins, by which he has overruled exceptions taken by the plaintiff to the answer of the defendant for insufficiency. The plaintiff and the defendant, who are brothers, appear to have carried on an extensive business for a great number of years in partnership together. For some time the books and accounts of the business were under the management of the plaintiff, but for some years before the dissolution of the partnership it appears that one of the clerks was appointed to have the principal superintendence of the books, and that that state of things continued until the year 1861, when the dissolution of the partnership took place, and when a certain instrument was executed regulating the terms of the dissolution, the object of this suit being to set aside that agreement.—[His Lordship stated the effect of the agreement and the prayer of the bill.]

Now, the answer having been put in, and being necessarily a very long answer, it comes before the Court upon two exceptions, and the point principally in dispute relates to the second of those two exceptions. It will be more convenient to take them in the order in which they stand, and to deal in the first instance with the first exception [which his Lordship stated].

Now the answer which the defendant in substance gives to that—for I think it is not necessary to occupy the time of the Court in reading it in detail—is this: he says, I have not received anything in respect of the debt at all, but I have entered into certain transactions with the persons named in this interrogatory and exception, by virtue of which I have received certain large sums of money, and the sums I have received in respect of the subsequent transactions, which, in my view, were not received at all in respect of the original debt, were of such an amount as to exceed the sum owing on the original debt. That is in substance what the defendant says—I deny any receipt at all in respect of the debt mentioned in the exception, but I tell the story of the subsequent transactions, and admit that the sums I have received in respect of those subsequent transactions are more than the whole amount of the debt. In my judgment, under those circumstances, the principle upon which the Lords Justices acted in the case of *Clegg* v. *Edmonson*, upon which,—I only speak from recollection,—they did not pronounce any absolute judgment, but under a strong expression of opinion from them, the parties agreed that the matter should stand over, and that the cause should be heard by their Lordships, as an original cause in the first instance; but the principle which was there laid down, though not in a formal judgment, and which has been followed by the present Lord Chancellor, when Vice Chancellor, was this: that where, with respect to any particular account the plaintiff's right to the account is denied, but the defendant in his answer, without prejudice to the denial of the right, gives to the plaintiff such an admission as is sufficient for all the objects and purposes of the suit up to and including the decree, the defendant ought not to be compelled to give further details respecting the account. Applying that principle to the present case, the principal object of the plaintiff's suit is to shew that by surprise, misrepresentation and concealment, he was induced to enter into the agreement of November, 1861, and that one of the principal subjects upon which he was so surprised and deceived was the value of the debts, and that these particular debts were represented to him, and believed by him, to be of little or no value, whereas in truth they turned out to be of very great value. Of course, for the purpose of the decree, an admission which amounts in substance to this, that if the sums the defendant has received are to be taken to be received in respect of the debt, they amount to more than the whole debt, is in substance an admission that the debt represented to be a bad debt was a good debt, and consequently that admission is sufficient for all the purposes of the plaintiff up to and including the decree. I think, if the matter rested there, upon the principle to which I have alluded, the answer must be taken to be sufficient. But then a further contention has been raised

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on behalf of the plaintiff, and authorities have been cited in support of the proposition, that the plaintiff in cases of this kind has a further right, and even although he may obtain an answer and an admission sufficient to enable him to obtain a decree, he has the further right of requiring such answer and admission as will save the expense of any further inquiries, and will enable him to obtain at the hearing a final settlement of the whole matter. But I think, in this case, even supposing that that which has been termed the alternative case had been pleaded separately, clearly and distinctly, so as to give a proper foundation for the case which is so secondly put forth—which, in my judgment, it is exceedingly doubtful whether we could hold it so upon this bill—even assuming it had been so pleaded, it is obvious in a case like this no such final decree could be made with respect to those debts at the hearing of the cause, because even if we adopt the charge contained in the bill, and treat the defendant as being a trustee in respect of these debts, and all sums received on account of them for the partnership, the result would be that the defendant would have all the rights that a trustee possesses, in respect of the sums so received, and it appears upon the pleadings that the sums he has received have been received by means of very large expenditure incurred on his behalf. First of all, at his own cost, he has obtained the extension of the patent; he has defended the patent, and if he is to be treated as a trustee he must be allowed, as every trustee is, all sums properly expended by him for the defence and the sustenance of the trust estate; and in the present case this trust estate, assuming it to be such, is one which has been acquired, maintained and defended at the expense of the defendant, and of course an account of those expenses would be necessary before any such decree could be made. Therefore, I think that second contention on the part of the plaintiff has no application to the circumstances of the present case, because no such final decree could be made, for under no circumstances would the plaintiff be entitled to an absolute decree for that asked for by this exception, namely, the sums received by the defendant. Therefore, I think, both technically and substantially, the first exception is answered, and consequently must be overruled.

With respect to the second exception, which is the principal matter in dispute between the parties, it is material to observe, first, what is the question which is said to have remained unanswered, because that which is sought for by the second exception is not, as was attempted to be argued, a summary or balance-sheet, or a statement of the amount of capital, or of the amount of the liabilities, or of the difference between those two amounts. If any question of that kind had been asked, and the Court had seen that there was an attempt on the part of the defendant to evade answering, even as to his belief as to matters so simple and easy of being ascertained, the Court would have known how to deal with such an attempted evasion. The counsel properly abstained from troubling the Court with going at length through the interrogatories; we must take it that no such question is asked, or if it is asked, not being included in the exceptions, it must be treated as having been fully answered. That which we have to deal with is the matter included in the exceptions, and that is, that the defendant is asked to "set forth a full, true and particular account, and all particulars of all the debts and liabilities of the said partnership at the date of the said agreement, of the 2nd of November, 1861, and a like account and particulars of all the property, assets, debts, credits and effects of the partnership, and the value thereof respectively, and of each particular item thereof." I think that in cases where the particular account of a very extensive business is asked for in that manner, the principle upon which the Court has, not only in recent decisions, but always acted, has been to consider the circumstances of each particular case, and to inquire what useful object could be attained by compelling the defendant to put in an account where it is unusually long, complicated and involving a great deal of labour and trouble; and I think that the more strict the Court is in compelling a full answer, the more stringent its powers are and its

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requisitions, the more necessary it is that the Court should be vigilant in seeing that the process of the Court is not made use of in an oppressive manner as against the defendant. Lord Redesdale in his book, at page 312, says, that " In the case of an account required, wholly independent of the title, the Court has declined laying down any general rule, deciding ordinarily upon the circumstances of the particular case. Thus to a bill stating a partnership and seeking an account of transactions of the alleged partnership, the defendant by his answer denied the partnership, and declined setting forth the account required, insisting that the plaintiff was only his servant, and the Court, conceiving the account sought not to be material to the title, overruled exceptions to the answer for not setting forth the account. And where a plea has been ordered to stand for an answer, with liberty to except to it as an insufficient answer, the Court has sometimes limited the power of excepting so as to protect the defendant from setting forth accounts not material to the plaintiff's title, where that title has been very doubtful." In like manner in the case which we were referred to of *White* v. *Barker*, which was a case before Sir James Parker, than whom few, if any, higher authorities could be cited with respect to any matter relating to equity pleading, in that case the Vice Chancellor says, " If the question were as to the technical and formal sufficiency of this answer, it is very possible that the Court would allow this exception. In this case these defendants were required by the bill to set forth the accounts in question in the suit with a measure of detail which they said on their oath would involve a most oppressive amount of labour, and would also occupy much time, and it is urged by these defendants that the plaintiff himself, by exercising a certain amount of labour and attention, would be able to obtain all the information which he seeks. Now, the Court is bound to consider what object the plaintiff would gain by compelling these defendants to incur the labour he requires of them. These defendants have stated where the materials may be found for obtaining the information sought, namely, in the books and papers mentioned in the schedule to their answer. They say that the plaintiff has always had access to these documents, and that they have been investigated by his accountant. It is not alleged by the plaintiff that anything has been fraudulently or erroneously inserted or omitted. No object would be gained by compelling these defendants to give all the accounts in detail in the manner asked for by the bill.

Now, it was attempted in argument to distinguish that case from the present by saying that in the present case the accounts which are sought for by this interrogatory are material for the purpose of establishing the case of surprise and misrepresentation which is alleged by the bill, and consequently that they are the foundation of the title of the relief of the plaintiff, and that that was not the case in *White* v. *Barker*. But on reference to *White* v. *Barker*, it will be found that there the plaintiff sought a declaration that a particular business was the same business as had been carried on by the intestate during his life, and it asked for a declaration that that business ought to be considered as having been carried on by the defendants for the benefit of the estate, and for the consequential account. It is obvious, therefore, that the accounts there sought were very material for the purposes of shewing the circumstances under which the business was carried on, and for the purpose of proving the identity of the business upon which the title of the plaintiff in that case to the declaration sought by the bill, was dependent. I think, therefore, that that case is an authority in point upon the present case, and if we take the rule as expressed by Lord Redesdale, that in these cases of laborious accounts the Court must look at the particular circumstances of each case, or, to express it in the language of Sir James Parker, we must inquire what object would be gained by the plaintiff by compelling the defendant to do that which he is required, at great expense and trouble to do, and then look at the circumstances of the present case, I think we shall find the circumstances are stronger in favour of the defendant than those which existed in *White* v. *Barker;* because, in the first

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place, if we look at the bill itself, we find it stated by the plaintiff, at the bottom of page 3. of the bill, that "nothing but the fullest investigation of the books and accounts by a professed accountant, and the fullest information on the part of the defendant, would have enabled the plaintiff to discover how the affairs of the partnership itself stood." That is a statement with respect to the time at which the dissolution took place, namely, the 2nd of November, 1861, which is the precise time which is mentioned, and in respect of which the account sought for this second exception comes down. The exception is to ask for an account of all the debts and liabilities of the partnership at the date of the agreement of the 2nd of November, 1861, and then if we turn to the account given by the defendant, after referring in the sixth page of his answer to the 39th interrogatory, he says that he has "set forth to the fullest and best of my knowledge, recollection, information and belief, answers to all such of the aforesaid inquiries, and such particulars thereof, as can be answered without setting forth at great length and with unnecessary prolixity, accounts of transactions of great magnitude, and extending as to many of the inquiries over a great number of years"; and he says he is at present unable to set forth any other account. Then he mentions the fact of the order having been obtained under which the books are now deposited in London, this being a Liverpool business, and under an order obtained by the plaintiff himself. Then he says, "I am upwards of sixty-eight years of age, and am not a professional accountant, and that I believe it would require long and continuous labour of a professional accountant and considerable expenditure of time and money to ascertain from the said books such of the various particulars inquired after in the interrogatories and parts of interrogatories referred to in this paragraph of my answer as can be ascertained therefrom." Therefore, when we look at the object to be gained by the plaintiff, one can understand that if he had asked any of those precise and particular questions to which I alluded at the outset of my observations upon this exception, he might, and probably would have obtained something which was material for the purpose of the suit up to and including the decree; but he has either not thought fit to ask any such question, or if he has asked it, he has admitted that he has obtained a sufficient answer to that question. But it appears to me that no useful object could be attained by the plaintiff by obtaining a precise answer to the very particular and minute interrogatory of setting forth all the particulars of "all the debts and liabilities of the partnership, and a like account of all the property, assets, debts, credits and effects of the partnership, and the value thereof respectively, and of each particular item thereof." That would, in truth, be nothing more than setting out a long account copied from these books, of which the defendant, in fact, knows no more than the plaintiff, books to which the plaintiff himself had access up to the very day of the date of the dissolution of the partnership, and which, for a period some years prior to the dissolution of the partnership, had been kept by the plaintiff himself. I think, therefore, that no useful object would be answered by a mere setting out the accounts in those books, and that every object would be answered by an inspection of those books, which he is at liberty to see at any time, and that consequently the defendant has done all that is incumbent upon him when, in answer to an interrogatory framed like this, he has given the statements which are contained in his answer. I think, therefore, that this exception, like the other, must be overruled; and although at the present stage of the cause, it is not for the Court to speculate upon the probability of the success of the suit, it is, I think, sufficient to say that the nature of the case alleged by this bill and the character of the interrogatories are not such as to induce the Court to depart from the usual rule of making the costs follow the event. I think, therefore, in this case the order of the Vice Chancellor must be affirmed, and the appeal dismissed with costs.

GIFFARD, L.J.—There are two exceptions in this case. The first of the exceptions refers to a debt owing from Swayne, Bovill & Co., and goes to an amount received in respect of that debt and the amount received in respect of

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the securities for that debt. The answer in respect of this matter says, that nothing has been received in respect of the debt; but says further, that the debt has been given up; that patents which to some extent formed a security for the debt have been taken by the defendant; and that more, for the answer amounts to that, has been received upon those securities than the total amount of the debt. Now, if we take the main part of the case made by the plaintiff's bill, it is quite clear that this debt could only form one item in a very large account, and that, at the hearing of the cause, even if you had the exact amount which had been received, you could not possibly get any specific sum of money. That being so, I think, upon that ground, with reference to the main part of the case, the answer is abundantly sufficient.

Then, if we come to the second part of the case, which is this—if I do not succeed on the first, at all events this debt ought to have been excluded from the agreement altogether, and is a distinct and separate matter; taking the second part of the case, it is quite clear that, even if the plaintiff could succeed, very large allowances must be made to the defendant in respect of his expenditure upon these patents which he has incurred; and therefore, even on the second part of the case, no specific amount could, by possibility, if these questions were specifically answered, be recovered by the plaintiff. But I go even further than that, for I say that on this bill, framed as it is, the utmost that the plaintiff could recover would be one-half of the total amount of the debt which Swayne, Bovill & Co. owe; and there is abundant admission on the face of the answer to give him one-half of the total amount, even if at the hearing of this cause he should be held entitled to that sum. Therefore I am clearly of opinion that the first exception is sufficiently answered.

With respect to the second exception, it is material to look to the terms of that exception. Now the terms of that exception are these, "Let the defendant set forth a full, true and particular account and all particulars of all the debts and liabilities of the said partnership at the date of the said agreement of the 2nd day of November, 1861, and a like account and particulars of all the property, assets, debts, credits and effects of the partnership, and the value thereof respectively, and of each particular item thereof." That is a very wide and roving question, not dealing with even a balance-sheet, or dealing with results, or dealing with anything specific at all; but really, and in substance, asking for that which one would naturally expect to be contained in the partnership books; and if not contained in the partnership books, one would naturally expect there would be no record of anything of the sort. What have we in the defendant's answer? The defendant refers to the books. He says that they have been produced; that the plaintiff himself kept them up to a given time; that the plaintiff has had full discovery with respect to them; that, as to a large part of them, they have been deposited with the clerk of records and writs, and there remain deposited; that, as to the rest of them, they are in constant use, but the plaintiff can see them. He says that he is willing to be bound by the books; and he says further, "that, save by the examination and inspection of the said books, I have no means whatsoever of obtaining or giving any further or other knowledge or information than such as is contained in this my answer, with respect to any of the particulars inquired after in any of the interrogatories or parts of interrogatories referred to in this paragraph." In my opinion that is a sufficient answer, even without going to the case of *White* v. *Barker*. I am satisfied, however, that the decision in *White* v. *Barker* is a very sound decision. I am satisfied that, in all matters of this sort, the Court must look at the particular circumstances of each case, and, looking at the particular circumstances of each case, must judge for itself what is and what is not reasonable. For these reasons I think that the decision in the Court below was right, and that this appeal ought to be dismissed with costs; and further, I do not at all hesitate to say this most distinctly; namely, that though the allowance of these exceptions might be a matter of vexation, expense and trouble to the defendant, I am satisfied that their allowance would in no way tend to assist the plaintiff in the due prosecution of this suit.

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STUART, V.C., Feb. 15, 16, 1869.

DEAR v. VERITY.

38 L. J. Ch. 297; 20 L. T. 268; 17 W. R. 567: affirmed, [1869] E. R. A.; 38 L. J. Ch. 486; 21 L. T. 185; 17 W. R. 716 (L. JJ.).

Written Agreement to Grant a Lease—Parol Variation of the Contract—Uncertainty—Specific Performance.

LANDLORD AND TENANT.—*An agreement to grant a lease of certain premises was contained in three letters. The letters specified the term and the amount of rent; and stipulated that the intended lessee (the plaintiff) was "to do all the painting, papering, repairing, decorating, &c. during the term." The intended lessor (the defendant) refused to grant a lease upon the footing of the agreement. He contended that an essential part of it was, that the plaintiff had verbally undertaken to expend 1,000l., in a particular manner, in improving the premises, and that he would allow covenants to compel him to do so to be inserted in the lease; and that the plaintiff had not performed that part of the agreement, but had objected to such covenants; and further, that the agreement, as stated by the plaintiff, was too vague and uncertain for this Court to enforce:*—Held, *that the plaintiff was, upon the facts of the case, entitled to a decree for specific performance, and with costs.*

Clarke *v.* Grant (14 Ves. 519), Clowes *v.* Higginson (1 Ves. & B. 524), *and* Taylor *v.* Portington (7 De Gex, M. & G. 328), *observed upon.*

The object of this suit was to obtain a decree for the specific performance, by the defendant, of an agreement to grant a lease of a certain house called Vale Lodge, and the gardens, paddocks and outbuildings thereof, in the parish of Winkfield, in the county of Berks.

The plaintiff was an upholsterer in London. The defendant was the owner in fee of Vale Lodge. In May, 1865, the defendant entered into a written agreement with a Mr. Frederick John Owen to let Vale Lodge to him for a term of seven years from the 25th of March then last, at a rent of 110*l.* Mr. Owen took possession of the house, and furnished it with goods hired from the plaintiff. In August, 1865, the plaintiff called on the defendant, and told him that Mr. Owen had got into trouble, and had finally left Vale Lodge, adding, that he was uneasy on account of his furniture there. The plaintiff then endeavoured to arrange with the defendant for a lease of the house, and told him that, if he had it, he would lay out 1,000*l.* in enlarging it. He stated that the improvements which, in his opinion, were required for it were the building out the dining-room to twice its then present size, and raising the house a storey; and that those improvements would cost 1,000*l.* at least. Some correspondence afterwards ensued between the parties; and on the 27th of September, 1865, the plaintiff and the defendant met at the office of a Mr. Mason, a house agent, at Windsor. The plaintiff then wrote and handed the following letter to the defendant:

"27/9/65, Vale Lodge, Winkfield, Berks.

"Dear Sir,—I make you an offer of 90*l.* per annum for your house, on a lease of three, seven, fourteen, twenty-one or forty-two years, at my option; I agree to commence rent from the 29th of September, 1865; and I agree to do all repairs, painting, papering, decorating, &c. myself.

Yours truly,

"W. Dear.

"To C. F. Verity, Esq."

The defendant read that letter, and remarked that he should prefer the word "agree" to be used instead of the word "offer." Accordingly, in compliance with the defendant's request, the plaintiff then wrote on the fly-leaf of

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the sheet of paper, on which that letter was written, another one, which was as follows:

"27/9/65, Vale Lodge, Winkfield, Berks.

"Dear Sir,—I agree to take this house, on a lease of three, seven, fourteen, twenty-one or forty-two years, at my option. Rent to commence from the 29th of September, 1865. I further agree to do all the painting, papering, repairing, decorating, &c. during the term of lease; and I further agree to pay for the said lease, not to exceed, say eight guineas.

"William Dear.

"To C. F. Verity, Esq.

"N.B.—You are not to come upon me or my goods for any previous rent.

"W. Dear.

"C. F. Verity, Esq."

The defendant, on receiving that letter from the plaintiff, wrote and handed to him another, which was as follows:

"27th Sept., 1865.

"Dear Sir,—Vale Lodge, Winkfield, Berks,—I agree to accept your terms for this house as per your letters, dated the 27th of September, 1865.

"Charles F. Verity.

"To Wm. Dear, Esq."

The plaintiff alleged that, in pursuance of the agreement contained in the aforesaid letters, he entered into the possession of the premises on the 29th of September, 1865, and still was in such possession of the same. He also averred, that in full faith and reliance that the agreement would be performed by the defendant, he had laid out and expended upwards of 500*l.* in alterations and repairs of the premises, and had painted, papered and decorated the residence at considerable cost.

Some further correspondence then took place between the parties with reference to the lease itself, and the defendant wrote to the plaintiff as follows:

"7, Wellington Square, 25th Nov., 1865.

"Dear Sir,—Absence from home has prevented me from answering your note of the 23rd instant before, and previous to that, press of business, from seeing you, which I wished to do, in order to agree upon the form of words to be put in the draft lease, as touching the alterations and improvements. . . . I am faithfully yours,

"Charles F. Verity.

"W. Dear, Esq."

The plaintiff alleged that the defendant wished to import into the proposed lease terms binding the plaintiff to execute certain alterations and improvements in the premises not comprised in the three first above-stated letters. To those terms the plaintiff declined to accede; and when applied to by the defendant for the rent due at Christmas, 1866, refused to pay it until he had received his lease. The defendant then wrote to the plaintiff to say that it was most ridiculous that he should receive no rent for his place till the lease was signed, and that if the plaintiff point blank refused the covenants for alterations and improvements, of course, in justice, the defendant was entitled to receive rent at the rate of 110*l.* per annum, instead of 90*l.*; the reduction having been made by the defendant in consideration of the improvements and additions to be made by the plaintiff.

The plaintiff, by his bill, then alleged that he had prepared a lease of the premises, in pursuance of the terms of the agreement, and that such lease had been tendered to the defendant for execution by him; but that he, although requested so to do, absolutely refused to execute the same.

The bill prayed *(inter alia)* that the agreement so made and entered into by or between the plaintiff and the defendant, in the three first above-stated letters contained, for a lease of the said house and premises might be specifically performed by the defendant, the plaintiff being willing to perform the same so

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far as it remained on his part to be performed; that proper directions might be given for settling a lease of the said premises from the defendant to the plaintiff, pursuant to the terms of the said agreement; and that the defendant might be decreed to execute such lease, and to pay to the plaintiff his costs of this suit.

The defendant's case was, in substance, that the plaintiff had verbally agreed to expend 1,000*l*., as hereinafter particularly mentioned, on the property; that the lease was intended to contain covenants with respect thereto, binding on the plaintiff; and that the defendant had signed the aforesaid letter, dated the 27th of September, 1865, on the faith, and on the faith only, of that arrangement being carried out.

The defendant by his answer stated as follows:

"Whilst we [*i. e.* the plaintiff and defendant] were at Windsor as aforesaid, the plaintiff made further proposals to me for a lease of the premises, and I ultimately agreed to grant him a lease thereof, at a rent of 90*l*. a year, for the term mentioned in a letter of his, dated the 23rd of September, 1865, on condition that the plaintiff should forthwith build out the dining-room as aforesaid, and raise the house a storey, in the manner suggested by him at our former interviews, and should expend the sum of 1,000*l*. at least in such improvements."

The plaintiff's said last-mentioned letter of the 23rd of September, 1865, was as follows:

"Upholstery, Estate and House Agency Establishment, 30 and 31, St. George's Place, Hyde Park Corner, S.W. London, 23/9/65.

"Dear Sir,—Vale Lodge,—I make you an offer for this house, 85*l*. per annum, rent to commence from 29/9/65. If you accept these terms on a lease for three, seven, fourteen, twenty-one or forty-two years, at my option, I am ready, and will do all repairs and alterations, painting and papering, &c. This offer will only be kept to by me on consideration of your accepting me before four o'clock this day. I am, dear Sir, yours truly,

"W. Dear.

"— Verity, Esq."

The defendant, however, refused that offer, as well as a subsequent one which was made to him by the plaintiff.

With reference to what took place at Mr. Mason's office, when the first three letters were written and signed, the defendant stated as follows:

"Before leaving Windsor to go to Vale Lodge the plaintiff went into the office of Mr. Mason for the purpose, as he stated, of putting into writing the agreement which we had entered into. I went with him, and the plaintiff thereupon wrote a few lines on a sheet of note-paper and handed it to me. I read what had been so written by the plaintiff, and said, as the fact was, that I thought we had come to Mr. Mason's to have an agreement prepared for us both to sign; that what the plaintiff had so written was no agreement at all; that it did not contain any provisions as to the plaintiff's laying out 1,000*l*. in building out the dining-room and raising the house a storey, and I handed back the sheet of paper to the plaintiff. The plaintiff thereupon wrote the second letter, dated '27/9/65,' as aforesaid, and said that with a note of acceptance from me it would constitute an agreement between us. I objected to this letter, as I had done to the first, that it did not contain any provisions as to the plaintiff's building out the dining-room and raising the house a storey, and laying out the said sum of 1,000*l*. In answer to my objection the plaintiff said, all that will be put in the lease; we are not writing out a lease now, and cannot put everything in an agreement. All I want is something settled to save my furniture being taken for rent, or used words to that effect. After this explanation, Mr. Mason, who was present and heard the discussion between us, stated that it would be all right; that the plaintiff knew more about such matters than I did; that the rent was a good one, considering the outlay the plaintiff was going to make on the property; and I, ultimately, on the faith of the plaintiff's statement that provision should be made by the lease for the expendi-

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ture of 1,000*l.* by him in the improvements which he had agreed to make, wrote and signed at the dictation of the plaintiff the letter dated the '27th of September, 1865,' as aforesaid, and handed it to the plaintiff. I believed that the plaintiff, when I handed back to him the said sheet of paper on which the said first letter was written by him, had destroyed it; and I was not aware until the bill in this suit was filed that the letter, dated the 27th of September, 1865, referred to any letter other than that which was dated the '27/9/65,' as aforesaid. Until I went to Mr. Mason's office I did not know that he and the plaintiff were acquainted with each other. I afterwards discovered that the plaintiff had for some time prior to the said 27th of September been in communication with the said Mr. Mason with reference to Vale Lodge, and that he had in fact instructed him to let Vale Lodge for the plaintiff. The plaintiff at and for some time prior to the said 27th of September was in possession of the said house and premises, having been let into such possession by the said Frederick John Owen."

The defendant further stated, that the said house and premises, as the same were, in the occupation of the said Frederick John Owen, were well worth 110*l.* a year, and he should have had no difficulty in getting another tenant for the same at that rent. He also stated that the letter written by him on the 27th of September, 1865, did, in fact, refer only to the plaintiff's letter which was dated "27/9/65"; and he deposed that the final letter "s" to the word letters in his letter of the 27th of September, 1865, was not written by him, but had been added to that word since he wrote the letter.

The defendant had sued the plaintiff at law for, and had recovered a sum of 157*l.* for rent due to him from the 29th of September, 1865, to the day of payment thereof. The defendant denied having had a lease submitted to him, in accordance with the agreement; and by the last paragraph of his answer submitted that "the three first above-stated letters did not contain in themselves a valid and binding agreement for a lease of the said premises, according to the terms therein respectively alleged to be contained." He said "It was a term of the agreement entered into between the plaintiff and me, that the lease to be granted by the defendant should contain a covenant on his part forthwith to expend the sum of 1,000*l.* at the least in building out the dining-room and raising the house a storey higher. This covenant was, in fact, the consideration for my agreement to grant the said lease to the plaintiff for so long a term as forty-two years, determinable only at his option; and at a rent lower by 20*l.* than that at which I had let the same to Mr. Owen."

The plaintiff by his evidence, denied that he ever offered to lay out 1,000*l.*, or any other specific sum, in repairs and alterations upon the said premises. He denied the other allegations of the defendant in his answer, as to the reduction of the rent, and said that he had originally taken possession of the house when Owen left it, with the view solely of looking after his furniture, which was there, but he was not a tenant of Owen's.

Several witnesses were examined, and some of them were cross-examined in open Court, as to the matters in issue in the cause.

Mr. Mason's deposition was of importance. He was examined *ex parte* on replication filed, and he swore that he was concerned for neither the plaintiff nor the defendant. . . . They appealed to him as to the bargain they were making, as to letting the house, and his impression was that the rent spoken of was 90*l.* He refused to give any opinion on the matter; but his impression at the time was, that it was plenty of money for it; 70*l.* or 80*l.* was a reasonable rent at that time. He thought the plaintiff considered he was making a good bargain. Nothing passed in his presence as to the plaintiff laying out 1,000*l.* in improving and enlarging the premises. He would not have recommended a customer of his to give 90*l.* a year for the house, on a repairing lease. He never said "that it would be all right; that the plaintiff knew more about such matters than the defendant did; that the rent was a good one considering the outlay the plaintiff was going to make on the property," or anything to that effect.

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Mr. Greene and *Mr. Cottrell*, for the plaintiff, contended: 1. That there was no sufficient evidence to shew that the expenditure by the plaintiff of the 1,000*l.* on the repairs and improvements was a condition precedent to the granting of the lease; and in fact it was not. 2. But if it was, then he had spent 500*l.* towards it, and offered by his bill to perform all that was requisite on his part towards the agreement. 3. But the expenditure of the 1,000*l.* formed no part of the agreement contained in the letters. 4. That that agreement was clear and distinct in its terms, and one which this Court would enforce. 5. That, under all the circumstances of the case, the defendant could not call upon the plaintiff to execute a lease with such covenants as those which he proposed; and, 6, therefore the plaintiff was entitled to the relief which he prayed by his bill.

Mr. E. K. Karslake and *Mr. Rowcliffe*, for the defendant, contended: 1. That there was evidence to shew that the expenditure by the plaintiff of the 1,000*l.* was either a condition precedent to the granting of the lease or an essential part of the agreement for it. 2. That it was in fact the true consideration for it, and that otherwise the defendant would not have consented to have parted with his valuable property on the terms to which the plaintiff sought to bind him. 3. If the parol undertaking to expend the 1,000*l.* did not form part of the agreement, then there was, in fact, nothing more in the letters than an offer by the plaintiff and an acceptance of that offer, but no contract. 4. But if there was a contract, the terms of it—especially as to "all the painting, papering, repairing, decorating," &c.—were too vague for this Court to enforce. 5. If, however, the Court should not be disposed to decide the case in favour of the defendant, it would not decide against him, but would remain neutral, and leave the plaintiff to his remedy (if any) at law.

The following authorities were referred to in the course of the arguments: *Clarke* v. *Grant* (14 Ves. 519); *Clowes* v. *Higginson* (1 Ves. & B. 524, 530); *Taylor* v. *Portington* (7 De Gex, M. & G. 328); *Winch* v. *Winchester* (1 Ves. & B. 375); *Ricketts* v. *Bell* (1 De Gex & Sm. 335); *The Wycombe Railway Company* v. *Donnington Hospital* (L. R. 1 Ch. Ap. 268); *Baxendale* v. *Seale* (19 Beav. 601; 24 L. J. Ch. 385); *Swaisland* v. *Dearsley* (29 Beav. 430; 30 L. J. Ch. 652); *Micklethwait* v. *Nightingale* (12 Jur. 638 (1848)); *Martin* v. *Pycroft* (2 De Gex, M. & G. 785; 22 L. J. Ch. 94: overruling 21 L. J. Ch. 448); *Myers* v. *Watson* (1 Sim. N.S. 523).

STUART, V.C.—This is a case in which there is evidence of a clear contract in writing between the plaintiff and the defendant, signed by both.

The defence is rested upon the ground that there is an uncertainty in the terms of the written agreement from the use of the language as to "painting, repairing, decorating," &c. I am of opinion that there is no uncertainty whatever occasioned by those words. They must have a reasonable interpretation, and being so interpreted they import what can be made perfectly certain. No doubt a decision of the Lords Justices has been reported—I mean the case of *Taylor* v. *Portington*—in which there were very remarkable words in an agreement for a lease. They were introduced as importing a condition into the agreement, viz., that the lease would be granted if the plaintiff put the "premises into thorough repair, and the drawing-room were handsomely decorated according to the present style."—"Paint is required both inside and outside, although perhaps for some parts one coat might be sufficient." The Master of the Rolls seems to have held—properly, I think—that there was no uncertainty in those words. The Lords Justices, however, came to a different conclusion. Their conclusion, which is to be treated with every respect, is founded upon the particular circumstances of the case. But where a question arises whether particular expressions are certain or uncertain in their meaning, and one man of judgment and experience considers the language to be certain in its meaning, while two others consider that it is uncertain, the uncertainty cannot be very great. The case of *Taylor* v. *Portington* is a very strong decision; because, when a Judge has determined that to his mind the meaning

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is certain, and has decreed specific performance to be enforced in his chambers, it is a very strong thing for the Court of appeal to decide that the agreement is too uncertain to be performed, and to reverse the former decree. Perfect certainty is a thing very seldom attained in agreements. The painting of a house, as a condition or the essential part of an agreement, could not be considered the agreement. An agreement to paint a house with two coats of paint could not be considered as uncertain, although it is clear that as to the colour, quality of the paint and other circumstances, you may, if you are so determined, introduce into the agreement an element of uncertainty. But in these cases what the Court looks at is whether, according to the plain and sensible interpretation of the language used, as language is ordinarily understood, the real meaning and intention of the parties can be seen. In this case, to my mind, there is no uncertainty whatever.

But the defence is also based upon the doctrine which has been so often discussed, and upon which there are so many decisions. It is this: whether, where there is a written agreement, certain in its terms, the Court should refuse to perform that, on account of some evidence of collateral circumstances; or, which is a different case, from some evidence of a parol understanding between the parties, importing into the contract a term which is not to be found in the written agreement. It is very difficult to follow the distinctions that have been made by some of the Judges, according to their reported language. The last case cited, on behalf of the defendant, was one of *Clowes* v. *Higginson*, a case much discussed and much commented upon. With respect to that case, Sir Edward Sugden, in his excellent treatise, has noticed as a criticism on the elaborate judgment of Sir Thomas Plumer, that that Judge did not distinguish between two sets of cases which have occurred in these Courts—*Sugd. on Vend. and Pur.* 13th ed. 132. One set of cases is this: where there is a clear and distinct written agreement, and a defence is made that that agreement ought not to be performed because of some collateral circumstances which shew fraud, or mistake, or surprise; that is one class of cases in which, upon adequate evidence, the Court would refuse specific performance. The other set of cases is of an entirely different kind, namely, this: where parol evidence is sought to prove that the agreement in writing is not the real agreement between the parties; or, in other terms, that there was something by parol which is of the essence of the written agreement, and not expressed in it. Those two sets of cases are essentially different.

In the present case, the facts stated in the defendant's answer make it difficult to understand upon which of those grounds specific performance is resisted. It may be taken, perhaps, that, upon the whole, both those grounds are insisted on. Both may be legitimately the matter of parol evidence. The first case cited, for the defendant, was that of *Clarke* v. *Grant*. Mr. Karslake very properly relied upon the reported judgment in that case. But the case is one in which the reported judgment, unless it be read with the strictest reference to the remarkable circumstances of the case itself, would be wholly unintelligible. In that case there was an agreement, in writing, by a public body to grant a lease to the defendant of half an acre of land, and that half acre was expressly defined in the agreement. But it was proved, by the strongest parol testimony, that antecedently to the written agreement, which clearly defined what part of the close was to be the half acre to be leased to the defendant, there was a parol understanding that he should be at liberty to choose, for the purpose of the lease, such part of the close as he pleased. There was the most distinct evidence of the parol agreement. But, if the case had rested on the mere parol agreement, I see nothing in it to shew that Sir William Grant, who decided it, would have acted as he did. The material and guiding fact of that case is this: not only was the agreement by parol to give the defendant the choice of the particular piece of land clearly proved to have been so made, but it was acted upon; for we find that the defendant was put into possession, not of the half acre mentioned in the agreement, but of the other

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half acre which he had chosen according to the parol understanding. Not only that—not only was he so put into possession and enjoyment of the half acre—but he had been six years in that enjoyment and possession, upon the parol modification of the written agreement before the bill in the suit was filed against him. That was the ground of Sir William Grant's decision; and it would have been monstrous had he decided the case otherwise than he did, possession having followed the parol agreement. Because, possession and part performance are, according to the established doctrines of this Court, matters which will relieve the case from the obstacle of the Statute of Frauds. I mention the facts of that case to shew how very easy it is, upon a doctrine so extremely difficult, and depending upon such refined circumstances as that involved in the present case, to fancy others are applicable, which, however, when thoroughly understood, afford no countenance to the arguments they are advanced to support. It appears to me that the case of *Clarke* v. *Grant* has not the slightest application to the present one; for the defendant here relies upon a parol agreement, or a parol representation so acted upon as to amount to a parol agreement. But there is not the possession for that length of time —there is not the waiver—and there are not the circumstances which justified the decision in the case of *Clarke* v. *Grant*. I do not think it necessary to pursue the authorities further, because this case is, as I shall presently shew, so very clear on the facts and the evidence as to leave no doubt in my mind. Where there is a clear written agreement which can be the subject of performance by the Court, and it is sought to add to it an additional term made by a parol understanding, there must be, at least, certainty as to the terms of the parol agreement. It is perfectly evident to any man that reads accurately and attentively the answer of the defendant in this case, that there was here no parol agreement at all. The parol agreement alleged is this: that the plaintiff was to make alterations and improvements to the amount of 1,000*l*. According to the statements in the answer, the expenditure of 1,000*l*. is of the very essence of what the defendant calls the parol agreement. He does not deny having signed the agreement in writing; he does not deny having discussed the terms accurately. What took place was this: the plaintiff was determined to bring the matter to a point; the parties met at the house of Mason; they went there for the purpose of making an agreement, because the plaintiff was removing his furniture, and would have removed it entirely unless the matter was then concluded. The plaintiff accordingly wrote one letter, the terms of which are the same as those of the second, except that in the second letter no amount of rent was mentioned. I think it is hardly necessary for me to observe—for it was not, and could not have been, a very prominent topic of the defence—that the second letter, which does not mention the amount of the rent, was written by the plaintiff at the instance of the defendant. It seems to me wholly unimportant to notice that, because it is part of the defendant's case that the agreement was that the rent should be 90*l*. a year. In the 7th paragraph of his answer he says, "I ultimately agreed to grant him a lease thereof at a rent of 90*l*. a year": 90*l*. a year is the rent mentioned in the first letter; and, according to the evidence of the plaintiff, the first letter was objected to by the defendant, not because it omitted mention of the 1,000*l*., but because it was a mere offer. The intention of the parties seems to have then been to repeat the terms in another letter, and to substitute the word "agree" for the word "offer." The second letter of the plaintiff was written on the fly-leaf of the same sheet of paper as the first. The letter of the defendant is an acceptance by him, not indeed of the terms to which he said he would agree, but of terms which he thus refers to: "I agree to accept your terms for this house, as per your letters, dated the 27th of September, 1865." I do not think it is worth while to notice the conflicting evidence about the word "letter"; the attempt that was made to prove that the word was not "letters," but "letter"; and that both letters were not those referred to. I think that the preponderance of the evidence, and an inspection of the writing

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shew that the word was "letters." But even supposing it were, as the defendant's solicitor describes it, "letter," that single word "letter" would not introduce any uncertainty upon the question of the rent. The first letter, therefore was written out, and the plaintiff's account of it is, that the defendant objected to its being in the form, "I offer," instead of "I agree." Accordingly it is certain, and part of the defendant's own case, that a second letter was written, in which everything was included, except the stipulation as to the 1,000*l*. The defendant says in his answer, that he objected to the first letter because it did not contain a stipulation as to the 1,000*l*. Why then, when the second letter was written, was there no stipulation in it as to the 1,000*l*.? If there were discussions as to the 1,000*l*. (of which there is no evidence, except the defendant's own statement on oath), the inference would be that the parties had not agreed upon the clause as to the 1,000*l*. The defendant says, "I said, I thought we had come to Mr. Mason's to have an agreement prepared for us both to sign; that what the plaintiff had so written was no agreement at all." Both parties are agreed upon that; but the defendant adds, "that it did not contain any provisions as to the plaintiff's laying out 1,000*l*. in building out the dining-room and raising the house a storey, and I handed back the sheet of paper to the plaintiff. The plaintiff thereupon wrote the letter set out in the 3rd paragraph of the bill in this cause, and said that with a note of acceptance from me it would constitute an agreement between us." No mention there of the 1,000*l*. The defendant then says, "I objected to this letter, as I had done to the first, that it did not contain any provisions as to the plaintiff's building out the dining-room and raising the house a storey, and laying out the said sum of 1,000*l*. In answer to my objections the plaintiff said, 'all that will be put in the lease; we are not writing out a lease now, and cannot put everything in an agreement. All I want is something settled to save my furniture being taken for rent,' or words to that effect." What am I to understand from that language? Necessarily, that they had not agreed that he should lay out 1,000*l*. And why, because he signs this very document after that discussion, and there is no mention in it of the 1,000*l*. Then the defendant says that Mr. Mason was present and heard the discussion. If he did, he must have heard the 1,000*l*. mentioned. But Mr. Mason swears he heard nothing of the kind. Then the defendant's own statement is, "I ultimately, on the faith of the plaintiff's statement that provision should be made by the lease for the expenditure of 1,000*l*. by him in the improvements which he had agreed to make, wrote and signed at the dictation of the plaintiff, the letter dated the 27th of September, 1865." There was then no agreement at all as to the 1,000*l*.; it was to be matter of subsequent discussion on the lease. Upon that statement of the case by the defendant, it is perfectly clear that there was an agreement made between the parties; and that, as to the 1,000*l*., although the defendant had first objected to sign the agreement because there was no mention of that sum, he ultimately signed it, and agreed to leave the question as to the 1,000*l*. for subsequent discussion.

Accordingly, neither party doubted that there was a complete agreement between them. The next documentary evidence was a letter written by the defendant to the plaintiff. What does the defendant say in that letter? Having been pressed as to delay in not approving of a draft lease, he says, "Absence from home has prevented me from answering your note of the 23rd instant before, and previous to that, press of business, from seeing you, which I wanted to do, in order to agree upon the form of words to be put in the draft lease, as touching the alterations and improvements." There is not a word there as to the 1,000*l*. But suppose that letter had referred to the 1,000*l*., the delay was in order that they might agree upon the terms of the lease. But it is perfectly plain that there would have been a complete agreement without agreeing upon that; and that ultimately they did not agree upon it.

The facts of this case appear to me to exclude the application of any of

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the doctrines which have been referred to in the authorities cited; and, in my opinion, the plaintiff has clearly established his case. He is therefore entitled to a decree for specific performance, and with costs.

HATHERLEY, L.C., Feb. 19, 24, 1869.

In re THE SOUTH ESSEX ESTUARY RECLAMATION COMPANY; *Ex parte* PAINE AND LAYTON.

38 L. J. Ch. 305; L. R. 4 Ch. 215; 17 W. R. 275.

See, *In re Capital Fire Insurance Company*, [1884] E. R. A.; 53 L. J. Ch. 71; 24 Ch. D. 408; 49 L. T. 697; 32 W. R. 260 (C. A.); *In re Hawkes*, [1898] E. R. A.; 67 L. J. Ch. 284; [1898] 2 Ch. 1; 78 L. T. 336; 46 W. R. 445 (C. A.).

Documents, Production of—Solicitor's Lien—Companies' Act, 1862, *s.* 115.

COMPANY.—*The Court has jurisdiction, under the Companies' Act*, 1862, *s.* 115, *to order, at the instance of the official liquidator, production of documents relating to a company in process of liquidation, which are in the possession of the solicitor to the company, notwithstanding the claim of the solicitor to a lien which may be prejudiced by such production.*

Mr. Layton and his late firms of Tyrrell & Paine, and Tyrrell, Paine & Layton were the solicitors and parliamentary agents employed for obtaining, in 1852, the act of incorporation of the South Essex Estuary and Reclamation Company, which was ordered to be wound up on the 24th of April, 1868. As such agents they had in their possession the Parliamentary Subscription Contract, a document by which the persons who signed it agreed to take shares to a specified amount in case the proposed company's act passed, and which before the present practice of requiring a deposit was required by the standing orders as evidence of the *bona fides* of the promoters. The official liquidator, appointed on the winding-up of the company, applied to Messrs. Paine & Layton to deliver up or to give liberty to him to inspect this and the other documents concerning the company in their possession, with a view to ascertaining, among other things, whether those who signed the contract had, in fact, subsequently become shareholders. But Messrs. Paine & Layton refused, on the ground that they claimed a lien on these documents for 279*l.* 3*s.* 4*d.* as the balance due to them for work done by their old firms as solicitors and parliamentary agents, in 1851 and 1852, in obtaining the South Essex, &c. Company's Act. The official liquidator thereupon took out the ordinary summons for the production of documents; but on an objection to the form of the summons, which was allowed by the chief clerk, he took out a fresh summons, under the Companies' Act, 1862, s. 115, in the form specified in the General Order under that act, section 54. The summons was returned on the 12th of January, 1869, when Mr. Layton, being examined before the chief clerk, said that he was unable to state from memory the names of those who signed the subscription contract, and declined to refresh his memory by referring to the contract or the other documents which he had with him at chambers, on the ground that his lien on them would be worthless if the liquidator were allowed thus to extract the information contained in them. The chief clerk adjourned the matter into Court; and on the 23rd of January Vice Chancellor Malins ordered the documents in question to be produced for the purposes of the examination. Messrs. Paine & Layton appealed.[1]

(1) Companies' Act, 1862, s. 115. "The Court may, after it has made an order for winding up the company, . . . require any officer of the company (or other person connected

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Mr. Fischer, for the appellants, contended that the discretionary power of the Court under the act to compel the production of documents, was qualified by the condition that such production should not be prejudicial to the lien of the possessor. The old Joint-Stock Companies' Winding-Up Act, 1848, s. 66, was very similar in its terms to the provision relied on in the act of 1862, and no such production had been allowed under the act of 1848 as was now sought—*In re the Oxford and Worcester Extension and Chester Junction Railway Company* (13 Jur. 691; 1 De Gex & Sm. 728; 18 L. J. Ch. 247); *In re the Oriental Commercial Bank (Limited); Ex parte Langford and Marshall* (heard July 26, 1867). He also referred to *Hope* v. *Liddell* (7 De Gex, M. & G. 331; 24 L. J. Ch. 691); *Kemp* v. *King* (2 Moo. & R. 437); *Doe* v. *Ross* (7 Mee. & W. 102; 10 L. J. Ex. 201); *Lambert* v. *Buckmaster* (2 B. & C. 616; 2 L. J. K.B. 93); *Ex parte Bowden and Abbott* (2 Deac. & C. 182); *Ex parte the Assignees of Markby* (11 L. T. 250).

[The LORD CHANCELLOR referred to *In re the Cameron's Coalbrook Railway Company* (25 Beav. 1).]

Mr. Cotton and *Mr. Sturges*, for the official liquidator, argued that there were two questions: first, how the case stood under section 115; and secondly, how it stood if that provision left the general law unaffected. The case was one which had not often come before the Court. In one of the few instances when it had, the Vice Chancellor (Giffard) and, on appeal, the Lords Justices had required a solicitor to produce documents in his possession at the requisition of assignees—*Simmonds* v. *the Great Eastern Railway Company* (L. R. 3 Ch. Ap. 797). They cited also *Lockett* v. *Cary* (3 N.R. 405).

Mr. Fischer, in reply, distinguished the case of *Simmonds* v. *the Great Eastern Railway Company*. That case was founded on Lord Eldon's decision in *Ross* v. *Laughton* (1 Ves. & B. 349).

The LORD CHANCELLOR (*Feb.* 24) said that, under the old Winding-up Acts, a solicitor could not have been directed, at the instance of an official manager, to produce books or papers on which he claimed a lien for services done by him to a company. Those acts did not interfere at all with the rights of creditors in this respect. But it appeared from the frame of the act of 1862 that the intention was to introduce a different rule; nor, indeed, was it in itself an unreasonable view that the legislature should have meant to confer this jurisdiction on the Court in order to give it increased opportunities of obtaining information as to the affairs of a company which was being wound up by it. The only difficulty arose under the provision of section 115, that, where a lien was claimed on the papers, "production should be without prejudice to such lien," it being apparent that the production must prejudice the lien. But all that was intended by the reservation was, that the power to enforce production was not to be construed as taking away otherwise the right to the lien. The Vice Chancellor's order must therefore, his Lordship was of opinion, be affirmed; but the case was one of first impression, and consequently there would be no costs.

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with the company) to produce any books, papers, deeds, writings or other documents in his custody or power relating to the company. . . . Nevertheless, in cases where any person claims any lien on papers, deeds, writings or documents produced by him, such production shall be without prejudice to such lien, and the Court shall have jurisdiction in the winding-up to determine all questions relating to such lien."

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JAMES, V.C., Feb. 26, 1869.

MARLING *v.* THE STONEHOUSE AND NAILSWORTH RAILWAY COMPANY.

38 L. J. Ch. 306; 17 W. R. 484.

Compare, *Goodford* v. *Stonehouse and Nailsworth Railway*, [1869] E. R. A.; 38 L. J. Ch. 307; 20 L. T. 137; 17 W. R. 515 (V.C.).

Bills for Specific Performance—Parties—Railway worked under a Traffic Agreement.

COMPULSORY PURCHASE.—*A railway company agreed to purchase land, and they had constructed their line of railway over it, but had not paid the whole of the purchase-money. The line was worked by another company under a traffic agreement, and the net profits were divided between the two companies. The vendor filed a bill against both companies for specific performance, for a declaration of lien, and for an injunction against both companies continuing in possession of the land or interfering with it, and for a receiver*:—Held, *following* The Bishop of Winchester *v.* the Mid Hants Railway Company (37 L. J. Ch. 64), *that the second company were properly made defendants.*

This was a bill to compel specific performance of an agreement by which the defendants, the Stonehouse and Nailsworth Railway Company (hereinafter called the Stonehouse Company), had agreed to purchase certain pieces of land belonging to the plaintiff, which by their act they were authorized to take. They had taken possession and had constructed their railway, which was now open to public traffic, over the land in question; but a part of the purchase-money was still unpaid, and they alleged that they had no funds to pay it. Under an agreement between the Midland Railway Company and the Stonehouse Company, which was sanctioned by parliament, the former company were, at all times after the Stonehouse and Nailsworth Railway was open for public traffic, to work the railway and to take half the net profits.

The Midland Company were made defendants to the bill, which prayed specific performance, and that the plaintiff might be declared entitled to a lien for his purchase-money, and for an injunction restraining both companies from continuing in possession of the land in question, or interfering with it so long as any part of the purchase-money remained unpaid, and for a receiver.

Mr. Kay and *Mr. Fry*, for the plaintiff.

Mr. Winterbotham, for the Stonehouse Company.

Mr. Druce and *Mr. Speed*, for the Midland Company.—We are not parties to the contract, nor have we any interest in the land. We are therefore improperly made parties to the suit.

Mr. Kay, in reply.—*The Bishop of Winchester* v. *the Mid-Hants Railway Company* (37 L. J. Ch. 64; L. R. 5 Eq. 17) shews that the Midland Company are necessary and proper parties.

JAMES, V.C.—The Midland Railway Company seem to me to be in a similar position to lessees, so far as this bill is concerned, and I therefore consider that they are properly made parties.

A decree was then made similar to that in *The Bishop of Winchester* v. *the Mid Hants Railway Company.*

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MALINS, V.C., March 12, 1869.

PEATFIELD v. BARLOW.

38 L. J. Ch. 310; L. R. 8 Eq. 61; 20 L. T. 217; 17 W. R. 516.

Followed, *Cockayne* v. *Harrison*, [1873] E. R. A.; 42 L. J. Ch. 660; L. R. 15 Eq. 298; 21 W. R. 520 (M.R.).

Costs, Order for Payment of—Fund in Court—Solicitor and Client—London Agent.

SOLICITOR.—*Where an order of Court in the usual form directed payment of costs out of a fund in Court to the London agent, it was nevertheless held that the client of the country solicitor might set off a debt due from such solicitor to himself, the client, against the costs. Such an order creates no independent right or lien upon the fund in favour of the town agent as against the client.*

Quære—*whether express notice by the town agent to the client would disentitle the latter from obtaining a sufficient discharge from the country solicitor.*

By a decree made in the case of *Peatfield* v. *Barlow*, in June, 1867, the costs of the defendant Barlow and his wife were ordered to be taxed and paid out of a fund in Court to Messrs. Few & Co., who had acted in the suit as London agents for Barlow's solicitor, Mr. Esam, of East Retford. These costs were never paid to Messrs. Few, but in June, 1868, at which time Esam executed a deed for the benefit of his creditors, there was a sum of 228*l.* 4*s.* 8*d.* in his hands standing to the credit of Barlow's account. This sum (being in excess of the amount of his costs in the suit) Barlow directed to be applied and set off in payment of such costs.

Barlow, with his wife, now petitioned that the amount of costs so accounted for by him to Esam might be apportioned out of the fund in Court and paid over to him.

Mr. Schomberg, for the petition, admitting that it was a case in which one of two innocent parties must suffer, argued that the payment of Esam by way of set-off was sufficient satisfaction of the costs under the order, and that Barlow was entitled to be recouped out of the fund in Court. He relied on *Waller* v. *Holmes* (1 Jo. & H. 230; 30 L. J. Ch. 24); and also cited *Ward* v. *Hepple* (15 Ves. 297); *Moody* v. *Spencer* (2 Dowl. & Ry. 6; 1 L. J. K.B. 1).

Mr. J. Pearson and *Mr. Bardswell*, for Messrs. Few, contended: 1, That the order of June, 1867, which was drawn up in the usual form and had been made by the Court in Barlow's presence, was express notice to him that the costs were to be paid into the hands of Messrs. Few, and not to Mr. Esam; 2, That the petitioners could not now come and ask the Court in effect to vary the terms of that order. Moreover, the alleged payment to Esam was not in fact a payment specifically made in respect of these costs at all, but merely an arrangement by way of set-off between Esam and his client, in consequence of the act of bankruptcy. Such a mode of payment could be no satisfaction to Messrs. Few, nor could it disentitle them to the benefit of the order. So long as there was a fund in Court, Messrs. Few were entitled to assume that their costs were safe, and that the Court would assist them in enforcing their lien.

MALINS, V.C. (without calling for a reply).—This petition raises a point of considerable importance to London agents and country solicitors, as well as to those suitors who employ country solicitors having London agents. By the decree in the cause of *Peatfield* v. *Barlow*, dated the 3rd of June, 1867, it is ordered that the costs of the defendant Barlow and his wife, the present petitioners, should be paid to Messrs. Few & Co. It appears that Mr. Esam, of East Retford, was Mr. Barlow's solicitor, and that Messrs. Few were

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Mr. Esam's London agents, and in that character only had they anything to do with the cause. It also appears that Mr. Barlow, as is not unfrequently the case with solicitors and their clients in the country, had from time to time certain sums of money standing to his credit in the hands of his solicitor, Mr. Esam, which by arrangement between them carried interest. Nothing took place until the 23rd of June, 1868, on which day Esam executed a formal deed of assignment for his creditors under the Bankruptcy Act. At that time there was in his hands this sum of 228*l*. 4*s*. 8*d*. belonging to Barlow; now, although this was a debt carrying interest, it is clear that Barlow had the right at any time to say to Esam, "You have that sum of money in your hands belonging to me; I wish you to apply it in payment or part payment, as the case might be, of my costs in the cause of *Peatfield* v. *Barlow*." That beyond all question was Barlow's strict right, and that right to have the fund applied in payment of these costs was not affected by Esam's virtual bankruptcy.

But it is contended that the order of the 3rd of June, 1867, being in its form a direction to pay the costs to Messrs. Few, gave them a new and independent right as against Barlow. But why did the order direct payment to them? Solely as a matter of convenience to the Court, because their names appeared on the record as agents of Mr. Esam, Barlow's solicitor, and only as such agents were they to receive the money.

Indirectly, no doubt, London agents are the agents of the principal in the suit, but the order directs the payment to them merely as agents of the solicitor for whom they act.

If it were otherwise, a person in the country employing a solicitor in whose hands he might have deposited a large sum of money as ample security for any costs likely to become due, after arranging that such money should go against such costs, might suddenly find himself called upon to pay the costs twice over, because there had been an order to pay the costs to the London agents, creating (as is now contended) a new right in them, although the country client had never heard of the London agents, and knew no one but his country solicitor, who was, in fact, the only person employed by him. I am unable to see any distinction between such a case and the present, and therefore I cannot accede to the respondent's argument. Mr. Barlow employed Mr. Esam; Esam, therefore, was the only person who had a claim against him, and Barlow having once paid him, Messrs. Few & Co., as merely representing Esam, could have no further or better right than Esam himself had, and that is the rule laid down in the cases cited by Mr. Schomberg—[His Honour referred to *Waller* v. *Holmes*.]—It may be that, if Messrs. Few & Co. had given Mr. Barlow notice not to pay any money to Mr. Esam without providing for their costs, that would have disentitled Mr. Barlow from afterwards paying such costs to Mr. Esam, but, in my opinion, no notice could have deprived Barlow of his right to set off the money in Esam's hands. I therefore come to the conclusion that, although in point of form the costs were diected to be paid to the London agents, such payment was directed to be made to them not as independent solicitors, or as having any independent right, but in respect of their position as it appeared upon the record, namely, as agents of Mr. Esam, who was alone the solicitor of Mr. Barlow. Therefore, according to the prayer of the petition, the costs directed to be paid to Messrs. Few & Co. must be deemed to have been satisfied to the extent of the sum set off for payment thereof by Barlow. As it is a novel point, and the enforcement of an extreme right, I shall make no order as to costs.

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LORD ROMILLY, M.R., March 3, 1869.

GRISSELL v. MONEY.

38 L. J. Ch. 312.

Building for Public Purposes—Sale by Order of Court.

MORTGAGE.—*The Court will give effect, by sale, to a charge on a building used as a drilling-hall for a volunteer corps.*

Darke v. Williamson, 25 Beav. 622, *distinguished.*

The defendant was the commanding officer and the plaintiff was one of the captains of a volunteer rifle corps; and in 1861 certain land and buildings were demised to them for a term of years.

The plaintiff who was a manufacturing engineer, under an agreement with the corps, incurred certain expenses in executing works necessary to prepare the buildings comprised in the lease for use as a drilling-hall, and being unable to obtain payment of the expenses so incurred he filed a bill against the present defendant to recover the sum due, and on the 22nd of April, 1868, obtained a decree declaring that he was entitled to a charge on the premises for the sums of money and costs therein mentioned.

The present bill was filed to give effect to this charge by means of a sale of the premises or a competent part thereof.

Mr. Jessel and *Mr. Kekewich* appeared for the plaintiff.

Mr. Southgate and *Mr. Simpson* argued, on the authority of *Darke* v. *Williamson* (25 Beav. 622), that the Court would not direct a sale of property which was used for public purposes.

The MASTER OF THE ROLLS.—*Darke* v. *Williamson* is not in point. In that case I declined to give any lien except one upon the deeds; and I pointed out how such a limited lien might be beneficial. But in the former suit between the present parties my object was to give an effective charge upon the property, and that charge must be enforced in the ordinary way.

HATHERLEY, L.C., Jan. 25, 1869.

HAWKINS v. MALTBY.

38 L. J. Ch. 313; L. R. 4 Ch. 200: affirming, L. R. 6 Eq. 505 (M.R.): see s.c., [1868] E. R. A. 61; 37 L. J. Ch. 58; L. R. 4 Eq. 572; 17 L. T. 51; 15 W. R. 1075 (V.C.): partly affirmed and partly reversed, [1868] E. R. A. 64; 37 L. J. Ch. 61; L. R. 3 Ch. 188; 17 L. T. 397; 16 W. R. 209 (L.C.).

Vendor and Purchaser—Sale of Shares—Sub-Purchase—Custom of Stock Exchange—Transfer in Blank.

STOCK EXCHANGE.—*On the 21st of March, the plaintiffs, through their broker, sold forty shares in a limited company on the Stock Exchange, at the price of 202l. 10s., for the 30th of March; and on the 26th of March the defendant, through his brokers, purchased one hundred such shares, at a price amounting to 145l. for forty; no numbers being specified in either case. On the 28th of March, the plaintiffs, by direction of intermediate purchasers, and in accordance with the custom of the Stock Exchange, executed and delivered to their brokers a transfer to the defendant of the forty shares, a blank being left for the consideration, which was afterwards filled up with 145l., the price at which the defendant bought. The defendant paid the plaintiffs the 145l., the difference between that price and 202l. being paid by the intermediate purchaser; and the transfer and certificates were sent to and retained by the defendant.*

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The defendant never registered the transfer, and the plaintiffs, having been compelled to pay calls on the shares, filed their bill against the defendant for specific performance and indemnity:—Held, *following the decision in* Coles *v.* Bristowe (38 L. J. Ch. 81) *that he was entitled to a decree.*

The suit of *Hawkins* v. *Maltby* (reported 37 L. J. Ch. 58) was instituted by the plaintiffs, for the purpose of compelling the defendant specifically to perform a contract for the purchase of shares in the Imperial Mercantile Credit Company.

The facts of the case, which are fully set out in the former report, were shortly these:

On the 21st of March, 1866, the plaintiffs instructed their brokers, Messrs. Crowley Brothers, to sell forty shares in the Imperial Mercantile Credit Company, and Messrs. Crowley did, on that day, sell them to James Mackenzie, a broker, for 202*l.* 10*s.*, the sale to be completed on the 30th of March; and on the 22nd of March the usual sale-note was received by the plaintiffs from their brokers. On the 26th of March a call of 5*l.* per share was made, and, in consequence, the shares fell in the market. On the same day, but whether before or after the call was made did not appear, the defendant's brokers purchased for him one hundred shares in the same company, at a price amounting to 145*l.* for forty shares. In these hundred shares were included the forty shares sold by the plaintiffs, which, in accordance with the custom of the Stock Exchange, had been re-sold from time to time after they had been sold to Mackenzie, until they were ultimately bought for the defendant; and when the time arrived at which, in accordance with the custom of the Stock Exchange, it was necessary that the name of the ultimate purchaser should be disclosed to the vendor's brokers, the name of the defendant was given to them as the purchaser, and the plaintiffs executed a transfer to him, a blank being left for the consideration, which was afterwards filled up with 145*l.*, the price paid by the defendant, the plaintiffs receiving from Mackenzie the difference between that sum and the price for which they sold. The defendant accepted the transfer and the certificates, but did not cause the transfer to be registered; and the company having been ordered to be wound up, the plaintiffs, whose names still remained on the register by reason of the non-registration of the transfer, were compelled to pay calls. Thereupon they filed their bill against the defendant for specific performance and indemnity; but the contract having been therein described as a contract by the defendant to purchase the shares from the plaintiffs at the price of 202*l.* 10*s.*, the Lord Chancellor (Chelmsford), upon an appeal from a decree of Wood, V.C., dismissing the bill with costs, held that there was a fatal variance between the contract as alleged and the contract proved, and on that ground dismissed the appeal without costs, but without prejudice to any new bill that the plaintiffs might be advised to file.

The plaintiffs then filed another bill, in which the consideration was alleged to be 145*l.*, the price at which the defendant bought the shares.

The Master of the Rolls made a decree for specific performance and indemnity, and the defendant appealed.

Mr. Southgate and *Mr. Bush* argued the case on behalf of the appellant.

Mr. Townsend, who, with *Mr. Jessel*, appeared for the plaintiffs, was not called upon.

The Lord Chancellor, after referring to his former decision in this case and to the judgment of Lord Chelmsford on the appeal, said he acquiesced in the view taken by his Lordship, that the defendant had, by his delay, precluded himself from repudiating his contract on the ground of the call being overdue; and upon this point, having regard to the dates, he held that he had himself decided erroneously. The only question then was, whether there was a binding contract between the plaintiffs and the defendant. With regard to this, the case was entirely governed by *Coles* v. *Bristowe*, and the appeal must therefore be dismissed with costs.

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LORDS JUSTICES, March 13, 1869.

THE BRITISH EQUITABLE INSURANCE COMPANY *v.* THE GREAT WESTERN RAILWAY COMPANY.

38 L. J. Ch. 314; 20 L. T. 422; 17 W. R. 561: affirming, [1869] E. R. A. 140; 38 L. J. Ch. 133; 19 L. T. 476; 17 W. R. 43 (V.C.).

Referred to, *Hoare* v. *Bremridge*, 1872, L. R. 14 Eq. 522; 27 L. T. 368 (V.C.): affirmed, [1873] E. R. A.; 42 L. J. Ch. 1; L. R. 8 Ch. 22; 27 L. T. 593; 21 W. R. 43 (L.C. & L. JJ.).

Insurance on Life—Misrepresentation by Assured—Voidance of Policy—Jurisdiction.

INSURANCE.—*In July*, 1863, *B. negotiated for the insurance of his life in the plaintiffs' office, and in filling up the usual declaration as to his health and habits of life, stated that he could not remember when he was last ill, and that he was then and always had been enjoying good health. After examination by the medical officer of the company, he was accepted as a first-class life. In August preceding the completion of the contract B. became alarmed about his health, and went to consult a physician other than his ordinary medical attendant, who warned him that he was in a dangerous state of health, and prescribed for him. B. never communicated this circumstance to the company. In September the premium was paid and the policy effected. On the receipt for the premium was indorsed a condition that if any variation should have taken place in the health of the assured since the date of the medical examination and before actual payment of the premium, the receipt should be void. Eight months afterwards B. died; it was not proved satisfactorily of what disease*:—Held, *that the non-communication to the company of his change in health and visit to the physician was fraudulent, and vitated the policy.*

The Court has undoubted jurisdiction to entertain cases of this description.

Decree of Malins, V.C. *affirmed.*

This was an appeal by the Great Western Railway Company from a decree of Malins, V.C. The case is reported 38 L. J. Ch. 132, from which report and from the judgments of their Lordships as given below, the facts of the case fully appear.

Mr. J. Pearson and *Mr. T. Stevens*, for the appellants, in addition to the cases cited in the Court below, referred to *Anderson* v. *Fitzgerald* (4 H.L. C. 484); *Hodgson* v. *Murray* (2 Sim. 515).

Mr. Glasse and *Mr. C. J. Shebbeare*, for the plaintiffs, were not called upon.

Mr. Rowcliffe, for the widow and administratrix of John Bird.

SELWYN, L.J.—We entertain no doubt whatever that the Vice Chancellor has arrived at a correct conclusion in this case. The question is one purely of fact. The jurisdiction of the Court in cases of this description is fully established, and has been constantly exercised. The case depends upon the validity or invalidity of a policy of insurance effected by one John Bird with the plaintiff company. The negotiation for it commenced in June, 1863, with a proposal in the form adopted by the company. The third question contained in the form is this: "When last ill, and the nature of illness," and the answer is, "Cannot remember." The fourth question is, "Whether now and ordinarily enjoying good health," and the answer is, "Yes, and always so." Now, that proposal having been made, an examination took place in the usual way by the medical officer of the company, and the report being favourable as to the health of John Bird, a letter was written by the company on the 19th of August accepting the proposal, and stating that the premium was payable to the company on or before the 9th of September, and that, until the premium was actually paid, the company would not be liable to any risk, and that any alteration of the

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health of the person proposed for assurance since the date of the medical examination would render the policy invalid, unless such alteration were disclosed in writing to the company and the receipt of the premium subsequently sanctioned in writing by the company's agent. On the 8th of September Bird sent a cheque for the amount of the premium, and shortly afterwards received the policy, dated the 11th of September, 1863. The receipt, which was dated the 19th of August, although it was not sent till after the transaction was completed, was expressed to be subject to the conditions indorsed upon it, one of which conditions was, "If any variation shall have taken place in the health of the assured since the date of the medical examination, and before actual payment of the amount within expressed to be received, this receipt shall be void."

These conditions so expressed in the letter, and so in substance repeated in the receipt, were admitted at the bar fairly and properly to have at least this effect, that if in the intermediate time, as was put in the argument—an extreme case—the person whose life was proposed to be insured had suffered from a paralytic stroke, and had not communicated the fact to the office, the policy subsequently issued would be void. The question therefore here is simply brought to this, whether there was any such alteration in the state of John Bird's health, or even in his belief as to the state of his health, between the time when he gave the answers to which I have before referred and the time when the premium was paid and the policy issued, as ought to have been communicated to the company? Upon that I think the evidence is perfectly clear. We have first the fact clearly established that during the interval he did become alarmed as to the state of his health, and in consequence thereof, and also at the request of Dr. Davies, his usual medical attendant, travelled forty miles to Cardiff on the 17th of August to consult there a Dr. White. I think that fact indisputably proves that at that date John Bird was alarmed about the state of his health and believed himself to be seriously ill. No doubt, if Dr. White had at that interview told Bird that there was nothing serious in his case, and that his alarm was groundless, it might have been argued with probable success that everything in connexion with his consulting Dr. White became immaterial, and was unnecessary to be communicated to the company. But no such argument can be used consistently with the facts in this case.—[His Lordship went carefully through the evidence, and continued:]—So far therefore from its having been the case that Dr. White treated Bird's case as being one not of a serious character, it is, to my mind, indisputably proved by the evidence which I have read that he treated it as being a dangerous case; and although he might not have explained to Bird himself what the exact nature of the disease was, it appears to me clear that he did not conceal from John Bird the opinion which he formed as to the serious nature of his complaint whatever it might have been, and he certainly took a course which, I think, few medical men would take unless they believed the case was serious, he wrote a letter to Dr. Davies; and further, so far from Bird disregarding his advice, it is clear that he did act for some considerable time under it, that he had the prescription which Dr. White gave him made up, and that he took the medicine which was so prescribed for him.

These facts being clearly proved, there can be no doubt that the statement of John Bird, which I have read, and which was contained in the answers to the questions put by the office,—that he was well, and had always been well, and that he could not recollect that he had had any illness, was no longer true at the time when the premium was paid. And they are, in my opinion, facts of such gravity and importance that they ought to have been communicated to the company; but no such communication was made.

The next question is, whether John Bird was justified in not making that communication by reason of Dr. Davies having told him that he considered Dr. White was wrong. That is the way in which the question has been argued. In the first place, it is not clear that Dr. Davies ever made such a statement

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to John Bird; and even if he did, when we take into consideration the fact that, as soon as John Bird became really alarmed about his health, he was not satisfied with Dr. Davies's opinion, but went to consult Dr. White, it cannot, I think, be said that we must assume that John Bird attached such importance to the opinion of Dr. Davies as that, although he had taken other steps and was acting under Dr. White's advice, still he would disregard everything which he had heard from him, and treat it as altogether a mistake.

Subsequently John Bird became more seriously ill, and died a few months afterwards. There was no *post-mortem* examination, nor was the cause of his death accurately ascertained; but that, in my judgment, is a matter which it is unnecessary to enter into. It is proved beyond all reasonable doubt that at the time when the money was paid and the policy issued, John Bird knew that his two answers to the third and fourth questions, to which I have referred, were no longer true, and as I said before, I can have no doubt that the difference between these statements and the facts as they then existed within his knowledge were of such a grave character that they certainly ought to have been communicated to the company. Under these circumstances, therefore, I think it is quite clear that the policy is a void policy, and one which the office was entitled to file a bill to have cancelled and delivered up; and considering the very serious consequences to insurance companies of disputing claims upon any other than very clear grounds, as I have formed a very clear opinion in this case that they were right, I feel bound to state my opinion that, in my judgment, they were perfectly justified in resisting this claim, that there was no foundation for this appeal, and that it must be dismissed, with costs.

GIFFARD, L.J.—I was surprised, I must say, to hear the question of jurisdiction argued in this case. If there is any one thing clearer than another, it is that, in such a case as this, this Court has jurisdiction. In some cases, no doubt, of this character it will allow the question to go to a jury; but I must say, if ever a case was plain this case is plain, and there is no reason why it should go to a jury.

The facts are as simple as possible. The period of the interview with the first medical man was the 5th of August; no illness was then discovered, and probably Mr. Bird felt no illness that day. Then there were the answers to the two questions, which the Lord Justice had read. After this a caution was sent to Mr. Bird that this must be considered a continuing statement till the premium was really paid and accepted. What occurs? On the 17th of August Mr. Bird finds himself ill; he goes to Dr. White and explains the symptoms to him; and as the evidence distinctly proves, is told in plain terms that it is a very serious and dangerous illness. Now, we are told that that is a circumstance which is not to be disclosed to the insurance office. I have no hesitation in saying that Mr. Bird was bound to disclose that to the insurance office. Without wishing for a moment to put a hypercritical construction on conditions annexed to policies, I must say that as between man and man, even as between men of the most ordinary understanding, there cannot be the slightest doubt that the suppression of that fact was fraudulent, and therefore the decision below was right, and this appeal must be dismissed, with costs.

LORD ROMILLY, M.R., Dec. 5, 1868; Jan. 11, 1869.

In re BROWNE'S WILL.

38 L. J. Ch. 316; L. R. 7 Eq. 231.

Marriage Settlement—Covenant to Settle after-acquired Property.

SETTLEMENT. — *Where an interest in property existing at the date of a marriage, is increased in value by the death of other persons, such increment is*

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not after-acquired property within the meaning of a covenant in a marriage settlement.

On the death of Mrs. Browne, in 1842, each of her daughters became entitled to one-tenth of four Tontine debentures.

On the marriage of Anna Maria Browne, one of the daughters, in 1844, with Thomas Ingle, some of her property was settled, not including her interest in the debentures. The settlement also contained a covenant "that all and singular the moneys, stocks, goods and chattels, and other personal estate which at any time or times during the said intended marriage the said Anna Maria Browne, or the said Thomas Ingle in her right, shall become possessed of or entitled to by transmission, gift or otherwise, and whether in possession or expectancy, shall" be asigned to the trustees of the settlement.

A similar settlement was made on the marriage of another of the daughters of Mrs. Browne with W. S. Carter, in 1849.

On the marriage of Juliana, another daughter of Mrs. Browne, with Roger Kynaston, they covenanted by their marriage settlement that in case "any personal property of the value of 200*l.* or upwards at any one time (except jewels, &c.) shall at any time or times, during the said intended coverture, be given or bequeathed to or in any manner vest in the said Juliana Browne, or in the said Roger Kynaston in her right, then and in such case and so often, they, the said Roger Kynaston and Juliana Browne, shall and will, at the costs and charges of such property, make and execute all such acts and assurances as shall be necessary for duly and effectually assigning or transferring the same unto and vesting the same in" the trustees of the settlement.

The owners of each of these debentures were entitled to a yearly payment during the life of a certain person. The sum originally payable on each debenture was 7*l.* 10*s.* a year. The payment increased on the death of persons on whose lives annuities, payable on other debentures, depended. The income from the four debentures at the time of the respective marriage settlements was small; but, the person on whose life they depended having become one of a few survivors out of many such persons, in 1868 the income was large. Certain trustees in whom they were vested paid into Court, under the Trustees' Relief Act, the moneys they had received in respect of the shares of Mrs. Ingle, Mrs. Carter and Mrs. Kynaston in the bonds, which amounted to 1,873*l.* 2*s.* 4*d.*

This was a petition by those three ladies and their husbands for payment of that sum.

Mr. Jessel and *Mr. Montague Cookson*, for the petitioners, said, the interest of the ladies in the Tontine debentures was a present interest. At the time of the marriages the increase in value of that interest was not in the nature of a reversion. Such covenants only extended to property acquired after marriage. *Wilton* v. *Colvin* (3 Drew. 617; 25 L. J. Ch. 850); *Archer* v. *Kelly* (1 Dr. & Sm. 300; 29 L. J. Ch. 911). The distinguished *Grafftey* v. *Humpage* (1 Beav. 46; 8 L. J. Ch. 98); *In re Hughes's Trusts* (4 Giff. 432), as relating to reversions, and *Ex parte Blake* (16 Beav. 463), as relating to property not vested at the time of the marriage, and *Maclurcan* v. *Lane* (5 Jur. N.S. 56), as depending on the construction of the word "accrue."

Mr. Gregory, for trustees of the debentures.

Mr. Eddis, for the trustees of the marriage settlements, said, at the time of the marriages the settlors were entitled to their shares in the debentures, but they had been assigned to them, and they therefore actually acquired them after these marriages. In the third settlement the words "shall in any manner vest" would include an increase in the value of the property.

The Master of the Rolls (*Jan.* 11) said,—With respect to Mrs. Ingle's settlement, he was of opinion that the debentures were not within the terms of the covenant. It was clear that the covenant related only to after-acquired property. The lady was at the time possessed of and entitled to the property. The fact that, from the nature of the property and the accident of the long

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life of the *cestui que vie*, the property became yearly more valuable did not affect the question, any more than if at the time of the settlement she had been possessed of a mine which subsequently became of very great value. The case was concluded by *Archer* v. *Kelly*.

The case of Mrs. Carter was similar to the first case.

Mrs. Kynaston's case was somewhat different; but the words "shall in any manner vest" pointed to a future acquisition of property, not to an increase in value. If he were to hold otherwise it must include every species of payment of interest or dividend which might become due after the marriage.

No part of the Tontine debentures was included in any of the covenants.

LORD ROMILLY, M.R., Feb. 20, 1869.

In re THE ESTATES INVESTMENT COMPANY; *Ex parte* PAWLE.

38 L. J. Ch. 318; 20 L. T. 100; 17 W. R. 391: affirmed, [1869] E. R. A.; 38 L. J. Ch. 412; L. R. 4 Ch. 497; 20 L. T. 589; 17 W. R. 599 (L. JJ.).

Company — Winding-up — Fraudulent Misrepresentation — Agreement to abide Result of a Suit by one Shareholder.

COMPANY.—*R. filed a bill against a company to be relieved of shares, on the ground of misrepresentation. The company agreed with P, who asked also to be relieved of shares, to be bound by the result of R.'s bill. The company was wound up; afterwards, on R.'s suit coming to a hearing, a decree was made in his favour*[1]:—Held, *that P. ought to be treated as if he had filed a bill before the winding-up, and his name was removed from the list of contributories.*

Pawle took shares in the Estates Investment Company on the faith of a prospectus which has been decided to contain fraudulent misrepresentations.[1] On discovering the fraud, Pawle and eighteen other shareholders repudiated their contracts, required the company to relieve them of the shares, and refused to pay a balance of 4*l*. per share not then paid. The company brought actions against twelve of them for so much of the allotment money as they had not paid, which were stayed by the Judge to abide the result of proceedings to be taken in equity to relieve the defendants at law of their shares.

The repudiating shareholders acted together, employed the same solicitor and arranged that one of them only should file a bill against the company to get relieved of his shares, and they should all contribute to the expense of such proceedings. A bill was accordingly filed by Ross,[1] one of them; and it was agreed between them and the company that they should not be prejudiced by not taking separate proceedings. The assent of the company was contained in a letter from their solicitor to the solicitor of the repudiating shareholders in these words: "it is understood that your clients, the other allottees, are not to be prejudiced by their not taking proceedings pending the decision in Ross's case."

Before the suit of Ross could be heard, an order was made to wind up the company on the petition of the secretary as creditor. The case was ultimately decided in favour of Ross, and his name was removed from the register of shareholders.

This was a summons to remove the name of Pawle from the list of contributories.

Mr. Jessel, Mr. Swanston and *Mr. Everitt*, for the applicant, said that in this company it had been decided that where active legal proceedings to set aside a voidable contract to take shares had been commenced before the winding-up order, the applicant had a right to be relieved of his shares—*Ross*

(1) *Ross* v. *the Estates Investment Company* (36 L. J. Ch. 54; 37 L. J. Ch. 873).

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v. *the Estates Investment Company* (37 L. J. Ch. 873; L. R. 3 Ch. Ap. 682); and here, the company having agreed that Pawle should not be prejudiced by not taking active steps himself, he ought to be in the same position as if he had actually instituted procedings.

Mr. Southgate and *Mr. Higgins*, for the official liquidator, said, that in no case could the shareholder be relieved of shares he had taken under a voidable contract, unless he commenced active proceedings to set aside the contract before the winding-up—*In re The Cleveland Iron Company; Ex parte Stevenson* (16 W. R. 95); *The Anglo-Danubian Steam Navigation Company; Ex parte Walker* (37 L. J. Ch. 651; L. R. 6 Eq. 30). It was a question between the creditors and the dissentient shareholders—*Oakes* v. *Turquand* (36 L. J. Ch. 949; L. R. 2 E. & I. Ap. 325). And the arrangement, that a suit should not be instituted if the directors had power to bind the company to it, could not affect the creditors.

The MASTER OF THE ROLLS said: Mr. Jessel, I will not trouble you in this case, although it is a case of considerable importance, and not one which has exactly come before the Court before, yet I think that the principle of equity which applies to it is very clear, and I think that it has been established that a person who finds that he has been deceived by a prospectus must take proceedings to rectify the register forthwith, or at least within a very short time, and if he delays at all, or if he is guilty of any laches in that respect, he cannot rectify the register. It has been held that he must proceed at once. I think I held, in the case of *Scholey* v. *the Venezuela Railway Company* (14 W. R. 786), that one of the directors who had stood by to see the result of the cause of *The Venezuela Railway Company* v. *Kisch* (36 L. J. Ch. 849; L. R. 2 E. & I. Ap. 99), and had not filed his bill until after that cause was over, was to be kept upon the register,—that he could not run the chance whether it was successful or not and shape his course accordingly. All that, as far as it goes, is in favour of the official liquidator's contention in the present case; but in this case there are say twenty shareholders who immediately upon the discovery of anything wrong, apply to the directors and say we have been deceived by the prospectus, and we require our names to be taken off the register,—we insist on our names being taken off, and the directors refuse, and thereupon it is necessary to institute proceedings, and then the directors and shareholders agree that it is idle to have twenty Chancery suits for the same purpose, and agree to be bound by the proceedings in that one suit. Thereupon the directors assent to that and say, "Let one of these bills be filed, and all the others shall abide the result of that suit."

Then there having been a winding-up order in the meantime, is the company to say that the nineteen whose names did not appear must all fail? Now the reason why they failed in the other cases was, they were guilty of laches, but what possible laches is there where all the twenty act together and where it is agreed that one person only shall be the representative of the whole set, and that they shall all abide by the decision in that one particular case? It is idle to say that the directors have not authority to consent to that. They had as much authority to do that as they had to institute any suit or to defend any suit, or to compromise any suit which might be instituted against them. Observe what that would lead to. I do not know what the facts are in this case, but what would it lead to if they thought that the case was going against them, and they wanted to have a large number of shareholders to contribute towards winding-up? As soon as the case was determined against them, that moment, and before the others could take any proceedings in the case, they might get their own secretary to apply for a winding-up order or get someone to apply for a winding-up order which they would not resist being made compulsory, which would thereupon fix all the other persons on the list, and that in spite of their own undertaking that they should not be prejudiced, and that they would all stand in the same situation. In such a case, I think it is impossible to say that the repudiating

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shareholders have been guilty of laches, which would induce this Court to visit them in the same manner as if they had neglected to institute proceedings themselves.—(His Lordship then stated the facts, and said:)—Then the only matter to be considered is whether the doctrine of *Oakes* v. *Turquand* applies to this case, and makes it ineffectual as against the creditors of the company. What I have done on all occasions has been to protect the creditors of the company as much as possible; but that may be pushed too far, because it is not desirable that you should leave creditors to do this, that by wilfully shutting their eyes they can be able to obtain credit from a failing company or the like, or to give credit which it would not be proper to give if they knew the real facts of the case. They were bound to know the proceedings which were taking place with respect to this matter, which seem to have been of a very public character; nay more, when the decision was against them in this case, the company seems to have sent printed circulars to all the shareholders informing them of the fact; and I think that it is too strong to say after that the creditors are entitled to say all these dissentient allottees who have not paid their allotment money against whom all calls have been suspended and all proceedings have been stayed,—I think that it is too much to say that they must be made personally liable to the creditors in respect of not having proceeded otherwise than by the one representative case. It is clear that the shareholders could not say so, and I do not think that the creditors are entitled to say so. I am of opinion, therefore, that all the persons who are included in that proceeding, who join in that proceeding *bonâ fide*, that all those persons are excluded from the list of contributories.[2]

MALINS, V.C., Feb. 20, 1869.

In re THE GENERAL PROVIDENT ASSURANCE COMPANY (LIMITED).

38 L. J. Ch. 320; 17 W. R. 514: see also, [1869] E. R. A.; 38 L. J. Ch. 583, 17 W. R. 1006 (V.C.).

Company—Winding-up—Mortgage—Power to Mortgage in Prescribed Form—Equitable Mortgagee invalid—30 & 31 *Vict. c.* 131. *s.* 37.

COMPANY.—*A charge upon the assets of a company will not bind the company unless created in the mode and executed with the formalities prescribed by their articles of association. B. advanced money to a company upon the deposit of certain title-deeds, accompanied by a memorandum of charge signed by the general manager, but not under the seal of the company, nor executed with other requisite formalities. There was evidence that the manager had been authorised by the directors to effect the loan and sign the memorandum, but no entry of any resolution for that purpose was made in the books of the company. In the winding-up B.'s claim was disallowed.*

This was a summons, adjourned from chambers, on behalf of Messrs. Brandon, in the winding-up of the General Provident Assurance Company, seeking to enforce a claim for 150*l.*, which had been advanced by them to the general manager of the company shortly before the winding-up, upon the deposit of certain deeds, accompanied by the following memorandum of charge, addressed to Mr. H. Brandon:—

"15, Essex Street, Strand, London,
"Feb. 6th, 1868.

"Dear Sir,—In consideration of your advancing this company 150*l.* on security of the lease, No. 8, New Bridge Street, Blackfriars, we hereby deposit

(2) This case has been affirmed, on appeal, by the Lords Justices, April 15.

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with you the said lease and agreement for demise of the said premises to the Northern Insurance Company, to secure to you the repayment on the 6th day of May next of the said 150*l.*, and interest at 10*l.* per cent. from this date. In default of payment all the usual powers of sale. Yours truly,

"Thomas Heywood, General Manager."

It was stated by Heywood, in his affidavit, and not contradicted, that he had been authorized by the directors at a board meeting to negotiate for the loan with Messrs. Brandon (who were the company's solicitors), and to sign on behalf of the company such memorandum as might be required. But there was no entry or record of the transaction in the company's books, nor any minute of the board meeting or of such authority having been given by the directors; nor had any of the special formalities prescribed by the company's articles for effecting a valid mortgage been observed.[1]

The company was shortly afterwards wound up, and under the circumstances above stated the chief clerk had disallowed Messrs. Brandon's claim.

Mr. A. E. Miller, in support of the summons, submitted the case to the Court, and claimed in default of payment to be let into possession of the property.

Mr. J. N. Higgins, for the official liquidator.—The articles of the company require special formalities: a resolution of the board, the seal of the company, and the signature of two directors countersigned by the secretary. The present applicants merely produce a memorandum of deposit under the hand of the general manager, who had no power to charge the property of the company, and no record of the alleged transaction is to be found in the books of the company. It is impossible for the liquidator to admit such a claim against the company in the absence of the necessary proofs of its validity. He referred to—*The Companies' Act*, 1862, 25 & 26 Vict. c. 89. s. 43 (Register of mortgages), and s. 67. (Evidence of proceedings at meetings); and cited—*In re the London and Mediterranean Bank* (37 L. J. Ch. 905; L. R. 3 Ch. Ap. 651).

Mr. A. E. Miller, in reply.—The argument on the other side imports negative terms into the company's articles which are not to be found there. Although a particular mode of effecting a legal mortgage is prescribed, the articles nowhere say that no security shall be valid unless executed in the prescribed mode; and the Court will not allow this claim to be defeated by the mere omission of certain forms any more than the ordinary right of an equitable mortgagee with deposit of deeds is defeated by the absence of a complete legal title. The books of the company may be taken as evidence against them, but not in their favour; and the non-entry of this transaction in the present case is sufficiently accounted for by the fact of the winding-up taking place immediately afterwards; there are, in fact, no minutes of later date than January, 1868. But we have uncontradicted evidence of the authority given to the manager by the directors to effect this loan, and we produce the deeds as well as the memorandum of deposits signed by him; such a contract binds the assets of the company under the provisions of 30 & 31 Vict. c. 131. s. 37, having been entered into "with a person acting under the authority (both express and implied) of the company." At any rate, we are entitled to retain the deeds.

(1) The articles of association contained the following clauses:—

"13. The directors may, from time to time, as in their judgment they may deem expedient, by a resolution of the board, borrow any sum or sums of money for the purposes of the company, and the directors may raise any such sum or sums aforesaid by mortgage of or charge upon all or any part of the company's estate or effects, or by debentures, bonds, bills of exchange, promissory notes or other security."

"69. All policies, deeds, mortgages, charges, debentures, bonds and other securities made and executed on behalf of the company may be made in such form and contain such powers, &c., as the directors shall think fit, and in addition to being sealed with the seal of the company shall be signed by two directors and countersigned by the secretary or actuary, and when so sealed, signed and countersigned shall be valid securities and conclusive, and enforceable against the company without the necessity of proving any other matter than their being executed in the manner hereby prescribed."

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Mr. Shapter (as *amicus Curiæ*) referred to—*The Liverpool Borough Bank* v. *Turner* (2 De Gex, F. & J. 502; 30 L. J. Ch. 379).

MALINS, V.C.—I have no doubt whatever that Messrs. Brandon did advance this sum of 150*l.* to the company at a time of pressure, when it was in great difficulties and on the eve of its dissolution, and common honesty requires that they should be paid. But this is a public company, and nothing is more clearly settled than that they can only bind themselves in the manner prescribed and permitted by law. Now, Messrs. Brandon were not only solicitors, and therefore familiar with the general provisions of the Companies' Act, but they were also solicitors of this very company, and must be taken to have been fully acquainted with its rules and regulations. No money could be raised for the purposes of the company except as authorized by their articles of association, and in my opinion those articles distinctly imply that unless securities be created and executed in conformity with the provisions there specified, they are not valid securities.—[His Honour read the 13th and 69th articles.]—Mr. Shapter has been good enough to refer me to the case of *The Liverpool Bank*, but even without the assistance of that case, I should have come to the same conclusion that these forms and conditions ought to have been complied with; as they have not been complied with in the present instance. I cannot decide that this memorandum, signed only by the general manager, is sufficient to bind the assets of the company; nor can I attend to any evidence for the purpose of proving that there was a loan when there are no minutes in the books of the company, as required by the act of parliament, to shew that such was the case. There ought to have been a resolution of the board followed by the sealing, signing and countersigning of the memorandum in the mode prescribed by the articles of association. In the absence of these, I cannot give any direction upon the assumption that this is a valid mortgage. The present application must therefore be dismissed, with costs, but that will not prejudice any lien that Messrs. Brandon may establish upon the deeds in their hands.[2]

STUART, V.C., Feb. 24, 25, 1869.

COOK *v.* ADDISON.

38 L. J. Ch. 322; L. R. 7 Eq. 466; 20 L. T. 212; 17 W. R. 480.

Trusts and Cestui que Trust—Settlement—Conflicting Interests in the Trustee—Confusion by the Trustee of the Trust Funds with his own—Liability of the Trustee.

TRUST AND TRUSTEE.—*No trustee of property having a right, the exercise of which conflicts with his duties as trustee, can, even with the consent of his cestuis que trust, enforce his own right to their detriment.*

A trustee, with power to invest the trust property in leasehold or chattel personal securities, or upon the personal security of any person, advanced, at the request of his cestuis que trust, some of the trust property to two ladies on the security of mortgages (with the usual covenants) of a leasehold house in which the ladies were living, and of the furniture in it. The trustee was also the lessor of the house. The mortgagors became insolvent, paid no rent, and no part of the principal or interest on the loan. The trustee, as lessor, determined the lease by entry, and then sold all his interest in the leasehold premises and the furniture; but he thereby so mixed up the trust property with his own that it was impossible to distinguish the one from the other, or to pronounce with certainty how much of the proceeds of the sale was his, and how much belonged to the cestuis que trust. The advance had been made at 5l. per cent.

(2) The matter was subsequently compromised between the parties.

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After some delay, the trustee replaced the principal money of the loan, but invested it against the wishes of his cestuis que trust in 3l. per cent. Consolidated Bank Annuities, the dividends on which, however, were paid to them:— Held, *that the trustee was bound to make good to the trust estate the whole of the money advanced on the loan, with all interest due thereon at the rate of 5l. per cent. per annum, to be computed up to the date of the decree; and that he must pay the costs of the suit.*

The plaintiff in this suit was a Mrs. Cook. The defendants were Captain Addison and Mr. M. H. Tatham, the trustees of the settlement made on the plaintiff's marriage with Mr. Cook; and Mr. Cook.

The bill in the suit prayed that, so far as might be necessary, the trusts of the settlement might be carried into execution under the direction of the Court; that the amount payable by the trustees, or either of them, to the plaintiff in respect of interest on a sum of 520*l.* might be ascertained; that the trustees might be decreed to make good and pay such sum to the plaintiff; the appointment of new trustees of the settlement; and that the defendants, the trustees, or one of them, might be ordered to pay the costs of the suit.

The facts of the case were these: In the month of June, 1860, William Ford demised a house, No. 36, Cavendish Square, to Captain Addison for a term of twenty-one years, at the yearly rent of 310*l.* Captain Addison furnished the house, and, in October, 1860, underlet it to Lucy and Rebecca Strutton, as yearly tenants, at a rent of 410*l.* In and prior to 1864, the plaintiff (then Mrs. Newton, a widow) was on very friendly terms and resided with those ladies. She was then entitled to certain properties for her life, and absolutely; and being desirous of affording the Misses Strutton some pecuniary assistance, offered to advance them a sum of 500*l.*, to enable them to purchase from Captain Addison the furniture in the house. That offer was accepted by the Misses Strutton. At that time, Captain Addison did not stand in any fiduciary relation towards the plaintiff.

By the settlement, dated the 5th of October, 1864, and made between Henry Cook, of the first part, the plaintiff (therein described as Penelope Newton), of the second part, and Captain Addison and Mr. Tatham (hereinafter called the trustees), of the third part, the dividends, interest and annual produce of certain moneys, stocks and funds, or other personal estate, therein called "the settlement funds to which the plaintiff was entitled for her life under a settlement made on her former marriage with Mr. Newton," were assigned to the trustees upon trust during the joint lives of the plaintiff and Henry Cook, to pay the said interest, dividends and annual produce to the plaintiff for her sole and separate use, free from the debts, control or engagements of Henry Cook, but without any power of anticipation; and after the death of Henry Cook, in case the plaintiff should survive him, then, during the remainder of her life, to pay unto, or permit and empower her or her assigns to receive and take the same interest, dividends and annual produce. By the settlement the plaintiff also assigned to the trustees: 1, one-fourth share of the whole, to which she was entitled as one of the next-of-kin of a deceased daughter by the said former marriage of the said "settlement funds"; 2, a sum of 657*l.* 1*s.* 6*d.* remaining unreceived of the share of the plaintiff as one of the next-of-kin of her said deceased daughter of the funds comprised in the will of her then late husband; and 3, one-fourth share of the whole, to which the plaintiff claimed to be entitled as one of the next-of-kin of her said deceased daughter of a certain fund called the King's Farm Estate Fund:—To hold the same, as to No. 1, in reversion immediately expectant on the decease of the plaintiff, and in the meantime subject to her life estate or interest first thereinbefore assigned, so far as the same related to the interest, dividends and annual produce of the same share; and as to the sum of money and part or share, Nos. 2. and 3. in possession; and as to all the said shares, sum of money and premises (Nos. 1, 2. and 3.) lastly thereinbefore assigned upon trust (as to Nos. 2. and 3.), after getting in and

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investing the same as therein mentioned, to stand possessed of the same, and the dividends, interest and annual proceeds thereof, upon trust, to apply and dispose of all the dividends, interest and annual proceeds of the last-mentioned trust premises, as well during the joint lives of Henry Cook and the plaintiff as during the life of the plaintiff, if she should survive him, in the same manner as was thereinbefore directed concerning the interest, dividends and annual produce first thereinbefore expressed to be assigned; and (as to No. 1.) as soon as the same should have been got in and invested in manner therein mentioned, to stand possessed of the same and the dividends, interest and annual proceeds thereof, and also of the stocks, funds, shares and securities in or upon which the sum of money, share and premises (Nos. 2. and 3.) should or might for the time being be invested, and the dividends, interest and annual proceeds of the last-mentioned stocks, funds, shares or securities, upon trust, in case Henry Cook should survive the plaintiff, during the remainder of his life to pay unto or permit and empower him and his assigns to receive and take all the said dividends, interest and annual proceeds of the trust moneys, stocks, funds, shares and securities the trusts of which were then being declared, and should stand possessed of all the last-mentioned trust funds from and after the death of the survivor of Henry Cook and the plaintiff, upon certain trusts therein mentioned, in favour of the plaintiff or her appointees or next-of-kin according to the Statute of Distributions, as if she had died intestate and the widow of Mr. Newton. By the settlement, it was also agreed and declared that it should be lawful for the trustees or trustee for the time being thereof, at any time or times after the solemnization of the said then intended marriage, with the consent of the plaintiff during her life, and after her decease, then by and of the proper authority and at the discretion of such trustees or trustee, to call in, sell, transfer or dispose of all or any part or parts of the said stocks, funds or securities which for the time being should be vested in such trustees or trustee, or should be subject to any of the trusts of the settlement, and to lay out and invest the principal moneys to arise by such calling in, sale, transfer or disposition in the names or name of such trustees or trustee for the time being in or upon any of the parliamentary stocks or public funds of Great Britain, or at interest upon Government, or real, *or leasehold or chattel personal securities in England*, Wales or Ireland, or in or upon the stocks, funds, shares, loan notes, debentures, mortgages or securities of any company incorporated by act of parliament, or of any foreign government or state, *or upon the personal security of any person*, to be from time to time in like manner altered, varied and transferred for or into new or other stocks, funds, shares or securities of the same or the like nature, when and so often as occasion might require, or such trustees or trustee should think proper.

Henry Cook and the plaintiff married shortly after the date of the settlement.

By an indenture of under-lease, dated the 20th day of March, 1865, Captain Addison demised the hereditaments and premises No. 36, Cavendish Square aforesaid, to Lucy Strutton and Rebecca Strutton for a term of nine years and one quarter of a year wanting ten days, from the 25th of March, 1865, at the yearly rent of 310*l.* payable quarterly. That under-lease contained a power of re-entry on non-payment of the rent reserved for twenty-one days, or on breach of any of the covenants on the part of the lessees.

In the month of April, 1865, the plaintiff and Henry Cook signed a document, whereby, after reciting the aforesaid power of investment in the marriage settlement, Henry Cook and the plaintiff signified and declared their consent to the trustees lending 520*l.*, part of the trust funds in their hands as such trustees as aforesaid, to Lucy Strutton and Rebecca Strutton, spinsters, and to the repayment of such sum of 520*l.* with interest at the rate of 5*l.* per cent. per annum, being secured by two indentures already prepared, but not then executed, and which were in the document now in statement, said to be respectively expressed to be made between the said Lucy Strutton and Rebecca Strutton of the one part, and the trustees of the other part. The document

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stated that by the first of those indentures the repayment of the said sum of 520*l*. and interest was to be secured by the joint and several covenants of the said Lucy Strutton and Rebecca Strutton, and that all the furniture, works of art, plate, plated articles, glass, china, books and household effects and articles of use and ornament in or about the messuage and premises No. 36, Cavendish Square aforesaid, were to be assigned by the said Lucy Strutton and Rebecca Strutton to the trustees, subject to a proviso for the redemption of the same on the repayment of the said sum of 520*l*. with interest as aforesaid:—And that by the second of the indentures, for further securing the repayment of the said sum of 520*l*. and interest, the messuage and premises No. 36, Cavendish Square aforesaid, with the appurtenances, were to be demised to the trustees for the term of nine years and one quarter of another year wanting ten days, except the last day of the said term.

The trustees then advanced the sum of 520*l*. out of the trust funds to the Misses Strutton.

By an indenture, dated the 30th of April, 1865 (the first of the two last-mentioned indentures), and made between Lucy Strutton and Rebecca Strutton of the one part, and the trustees of the other part, duly registered, in consideration of the said sum of 520*l*., the said Lucy Strutton and Rebecca Strutton accordingly assigned the said furniture and other articles in the house to the trustees by way of mortgage to secure the repayment to them of the said sum of 520*l*. and interest at 5*l*. per cent. at the time and in the manner therein mentioned. And that indenture declared that if default was made in payment of the said sum of 520*l*. or the interest, or any part thereof respectively, on the day therein mentioned, it should be lawful for the trustees, at any time or times after such default, without any further consent on the part of the said Lucy Strutton and Rebecca Strutton, to sell the premises thereby assigned, or any part or parts thereof, in manner therein mentioned. And it was also thereby declared that the trustees should not execute the power of sale thereinbefore contained unless and until they should have given a notice in writing to Lucy Strutton and Rebecca Strutton to pay off the moneys for the time being owing on the security of that indenture or have left a notice in writing to that effect at the house No. 36, Cavendish Square aforesaid; and default should have been made in payment of such moneys or some part thereof for one calendar month from the time of giving or leaving such notice, or unless and until some half-yearly payment of interest should have become in arrear for the space of twenty-one days after the day on which the same should become due.

By another indenture of even date therewith (the second of the two indentures) and made between the same parties and for the same consideration, the said Lucy Strutton and Rebecca Strutton accordingly demised the hereditaments and premises comprised in the hereinbefore-stated indenture of under-lease of the 20th of March, 1865, to the trustees for the residue then to come of the said term of nine years and one quarter of another year wanting ten days expressed to be granted by such last-mentioned indenture except the last day thereof, subject to the same or a like proviso for redemption concerning the premises by the indenture now being stated, demised as aforesaid, as was contained in the last hereinbefore stated indenture, concerning the furniture and chattels or effects by such last-mentioned indenture assigned, and with, under and subject to the same or the like power of sale and other powers, provisoes, agreements, covenants and declarations concerning the premises by the indenture now being stated demised and otherwise, as were contained in the last hereinbefore stated indenture concerning the furniture, chattels and other effects thereby assigned, and otherwise, so far as the same were applicable or capable of taking effect. And the indenture now being stated contained the usual covenant for entry and quiet enjoyment if default should be made in payment of the said sum of 520*l*.. or any interest or any part thereof respectively on the day thereby appointed for payment thereof.

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Out of the sum of 520*l.* so advanced by the trustees to the Misses Strutton those ladies paid Captain Addison 500*l.* as the purchase-money of the furniture.

The Misses Strutton continued to occupy the house in Cavendish Square until January, 1867, when they fell into pecuniary difficulties. They never paid any of the 520*l.* or the interest theron. With respect, however, to that, the answer of Captain Addison stated that he had made repeated applications to the Misses Strutton for the interest; but they, in reply thereto, asked, with the sanction, as he was by them informed and believed, of the plaintiff, for time to pay the same. The plaintiff expressed a wish that their request should be complied with, and communicated such her desire, both to Captain Addison and the Misses Strutton. But for the plaintiff's direction, that "the ladies should not be troubled in the matter"; and "should only pay the interest if they could do so without inconvenience to themselves," Captain Addison would have taken steps to recover it on or before the month of January, 1867. The answer also stated that Captain Addison had repeatedly advised the calling in of the loan and interest; and had in the same month of January, 1867, so expressed his opinion to his co-trustee.

In March, 1867, they abandoned the possession of the house, leaving the sum of 155*l.* for two quarters' rent then due, and respectively more than twenty-one days in arrear, to Captain Addison for the same.

Under the power of re-entry given to Captain Addison by the hereinbefore-stated indenture of under-lease of the 20th of March, 1865, he re-entered the said hereditaments and premises in Cavendish Square and determined the under-lease thereof.

The trustees then instructed their house-agents to procure a new tenant for the house, and to sell the furniture and effects therein, and for that purpose to view and value the same. The agents did so; and through them a Mr. Fowler offered to purchase both the premises and the furniture and effects. Captain Addison accordingly agreed with Mr. Fowler to assign to him the residue of the term, viz., fourteen years and a quarter then vested in himself; and in consideration of that Mr. Fowler agreed to pay 100*l.* by way of premium, 250*l.* towards the expenses of putting the premises into thorough repair, and 550*l.* for the furniture and effects. Captain Addison put the premises into repair at the cost of 304*l.* 7*s.* 7*d.* On the 20th of May, 1867, he received from Mr. Fowler 550*l.*, 250*l.* and 100*l.*, less 19*l.* 7*s.* 6*d.* deducted by Mr. Fowler by way of compensation for having been prevented by the unfinished repairs from taking possession of the house for twenty-one days from the time originally fixed. The total amount paid by Mr. Fowler to Captain Addison was a sum of 880*l.* 12*s.* 6*d.* Out of that sum Captain Addison paid for valuation charges 25*l.*, for commission 66*l.* 12*s.* 6*d.* and for law expenses 10*l.*; making together the sum of 101*l.* 12*s.* 6*d.* He, therefore, claimed to be allowed the following sums out of the 880*l.* 12*s.* 6*d.*, viz., the aforesaid 304*l.* 7*s.* 7*d.*, 101*l.* 12*s.* 6*d.* and 155*l.* for the two quarters' rent, making together 561*l.* 0*s.* 1*d.* But he subsequently abandoned the claim for the 155*l.*, and there then remained the sum of 474*l.* 12*s.* 5*d.* towards discharging the 520*l.*, and interest at 5*l.* per cent.

Some correspondence ensued between the plaintiff and Captain Addison and the trustees. The plaintiff declined to accept the 474*l.* 12*s.* 5*d.* in satisfaction of the loan; and ultimately Captain Addison, without her consent, and after he had been requested by her and her husband to lay out that amount in stock of the Great Indian Peninsular Railway, invested it in a sum of 500*l.* 5*s.* 3*d.*, 3*l.* per cent. consolidated Bank annuities, in the joint names of himself and his co-trustee, for the sole benefit of the plaintiff.

On the 21st of November, 1867, Captain Addison, out of his own moneys, invested in the like stock a sum of 45*l.* 7*s.* 7*d.*, which was added to the 474*l.* 12*s.* 5*d.*, and so made up the exact sum of 520*l.*

The plaintiff received the dividends on the funds so invested, but this did not appear to be in evidence. By her bill in this suit, however, she claimed to be paid for interest in respect of the 520*l.* the following sums, viz., for two

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years' interest from the 30th of April, 1865, to the 30th of April, 1867, at 5*l.* per cent. per annum, the sum of 52*l.*; also for interest, at the rate of 5*l.* per cent. per annum, on the 520*l.*, from the 30th of April, 1867, to the 12th of August, 1867, when the 474*l.* 12*s.* 5*d.* was invested in the 3*l.* per cent. consolidated Bank annuities, the sum of 7*l.* 8*s.* 6*d.*; and lastly, a sum for interest on 45*l.* 7*s.* 7*d.*, the difference between the said sums of 474*l.* 12*s.* 5*d.* and 520*l.* from the 12th of August, 1867, to the date of the investment thereof as aforesaid.

Mr. E. K. Karslake and *Mr. Charles Hall*, for the plaintiff.—Captain Addison, as the trustee of the 520*l.* lent to the Misses Strutton and their mortgagee of the lease granted by him to them to secure the repayment of that money at 5*l.* per cent., was not justified in determining the lease as he had; because he thereby destroyed the security to which he and his co-trustee were bound to resort. By so exercising his rights as a landlord to the prejudice of his duties as a trustee, he had been guilty of a great breach of trust. Moreover, he had so mixed up the moneys received by him from Mr. Fowler with his own that it was now impossible to distinguish the one from the other. It was no answer to the plaintiff's claim to be repaid a sum of 520*l.* with interest at 5*l.* per cent. to say that there was a sum of 520*l.* invested in consols at 3*l.* per cent.; and that too against her wishes. Upon the whole case she was clearly entitled to be repaid by the trustees the sum of 520*l.* with interest after the rate of 5*l.* per cent. per annum till repayment, and to the other relief which she prayed by her bill. Why Captain Addison had not paid the above-mentioned two years' interest it was impossible to understand—*Tennant* v. *Trenchard* (38 L. J. Ch. 169).

Mr. Dickinson and *Mr. F. H. Daly*, for Captain Addison, relied in the first instance upon the very full power of investment contained in the settlement; and secondly, upon the express directions of the plaintiff when a feme sole, and afterwards of her and her husband, to advance the 520*l.* to the Misses Strutton, as an indemnity to the trustees against any claim for losses which might thereby accrue to the plaintiff. As to the non-payment of the interest, it was clear from the answer of Captain Addison that the plaintiff had no right to complain of his conduct in that respect. Then with regard to the sale of this property to Mr. Fowler, these mortgagors were insolvent. Had Captain Addison exercised his strict rights as a mortgagee of this property, it would not have produced as much as it did. He took, in conjunction with his co-trustee, the best steps he could to realize the utmost value for it, by selling the house and the furniture together. Then, again, Captain Addison was himself only a lessee of the house. It was clear that there had been breaches of covenant on the part of his underlessees. Had the term been allowed to continue it could not have been sold at all on that account; or, at least, not without indemnifying the purchaser against those breaches. But Captain Addison, by adopting the course he did, was enabled to confer on the purchaser a better title than he otherwise could have done. Moreover, he had made no improper deductions from the amount which he had received from Mr. Fowler; he had abandoned his own claim, as landlord; and now, the whole of the 520*l.* had been replaced. Not only had all that been done, but the plaintiff had actually received the dividends on the invested capital. Whatever other remedies (if any) the plaintiff might have against Captain Addison, it was impossible, after such an acquiescence on her part, that she could be heard, in this Court, to complain of any breach of trust by him. She had, in fact, no such right here; and the bill ought to be dismissed, with costs—*Brewer* v. *Swirles* (2 Sm. & Giff. 219; 23 L. J. Ch. 542).

Mr. Wickens was for Mr. Tatham, who did not appear to have altogether approved of what had been done by Captain Addison in the management of the trust property.

Mr. Hanson was for Mr. Cook.

STUART, V.C.—The subject-matter of this suit is very small in amount, and it is greatly to be regretted that there has been any litigation about it. The conduct of these trustees, whether it was wise and according to the rules of

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this Court, or not wise, was I believe honest and good in its intention; but, unfortunately, there seems to me, on the part of Captain Addison, to have been a very great miscarriage.

The trust property consisted of a mortgage of an under-lease. The immediate reversion of that under-lease was in Captain Addison himself. The nature of the mortgage security gave to the trustees, Captain Addison and Mr. Tatham, a power of sale. The property itself, besides the under-lease, also consisted of certain furniture; and that furniture, secured by a bill of sale, was in the same house which was the subject-matter of the mortgage. The mortgage was in such a form as to leave the mortgagors liable to all the covenants in the under-lease, and of course to give the trustees all the rights depending upon those covenants. Although the Court deals indulgently with trustees whose conduct appears to be honest, yet there are certain rules with regard to the security of trust property which the Court will not allow to be transgressed with impunity.

Some observations were made at the bar, as to whether this was a case of breach of trust, or one in which it was thought that the trustee could be made liable on some other footing. But the real nature of the case is this: that Captain Addison, being the owner of the immediate reversion from which the under-lease was granted, had, therefore, a right in it, the exercise of which conflicted with his duty as trustee of it. The strict performance of the rights of the mortgagees under the security would obviously have been to have put in force the power of sale in it. But it was very properly suggested on the behalf of Captain Addison that that might have been an improvident way of proceeding; for, although he had the immediate reversion, he himself held under the owner of the ultimate reversion, from whom his original rights proceeded. That being so, it is quite obvious that if the owner of the immediate reversion exercises any right which destroys the real subject-matter of the security, he puts himself in a position of considerable danger. It is also perfectly certain that if a trustee or agent, or a person in any fiduciary character, so deals with the trust property as to confound or mix it in any manner with his own, he becomes liable in a very serious way. Lord Eldon, in the case of *Lupton* v. *White* (15 Ves. 432), stated very clearly the principle upon which the Court acts; and in a note to that case there is a passage by Mr. Justice Blackstone, where he draws the distinction between the principle of the civil law and the law of England in that respect. Wherever the property of another person is mixed by a person in a fiduciary character with his own property, whether it be trust property or not trust property, if the two things are so mixed and confounded together that they cannot exactly be separated, there arises a right in the owner of the property thus mixed with other property to recover entirely the whole amount of his property.

Now, in this case it is perfectly plain that when Captain Addison exercised his right of re-entry, there was an end to the under-lease. There was an end to all right to sue upon the covenants, and therefore there was, in fact, a determination of that property which was the specific property comprised in the mortgage. No doubt that was honestly done, and I believe with the best intention; but the result has been that the entirety of his interest, including his reversionary interest, and what he acquired by the forfeiture of the lease, was extinguished; although it was so put an end to by means of a transaction, which I believe to have been honestly intended for the benefit of both himself and his *cestuis que trust*. What was done was this: a bargain was made with the person who bought the entire interest of Captain Addison, and the trust estate was confounded with that. The result and the inconvenience of the mode of proceeding which Captain Addison adopted appeared immediately; because, getting from Mr. Fowler a certain sum as the premium for a lease [which was a lease of much longer duration than the under-lease, the subject of the security,] getting a premium for what Mr. Fowler took from him, getting also from Mr. Fowler a sum in respect of the repairs of the property, he obviously had in his hands money which represented property, as to which it was almost impos-

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sible to say how much of it belonged to the *cestuis que trust*, and how much to himself. It was, at all events, so difficult to determine that question that first of all he himself proposed to give much less than he ultimately agreed to invest as the amount of the trust property.

I do not think it is worth while to go minutely into all the details of the claims and the correspondence. He, however, gave way gradually; and, first of all, he abandoned the claim which he made to retain the two quarters' rent due to him as owner of the immediate reversion. The rent due to him as owner of that reversion would be part of the property, which in any event more strictly belonged to him; but so complete was the merger and confusion of the mortgaged property with his own, that finally he invested a sum of 520*l.* in the funds, which was the whole amount of the principal money secured by the mortgage. If he had invested the whole principal money, and paid the proper interest to the tenant for life, that would have been right. But he did not do so. He invested that money in consols, not, according to the trusts, "with the consent of this lady," and not even with the assent of his co-trustee; but, against the lady's express wishes, he put it into the names of himself and his co-trustee. He was so far right as to the principal money; but as to the interest, it is impossible to say he was at all correct in what he did.

It was suggested that, because this lady wished the mortgagors not to be pressed for the interest, therefore this demand now made is an ungracious one, and one that ought not to be made at all. This Court can, however, only look at what the trust fund is. The trust fund is composed of the principal money and the interest. The interest has remained unpaid since the 30th of April, 1865, and it seems to me that that interest is just as much covered by the security and the covenants of the mortgagors as the principal; and why any separation was made between the two, or why Captain Addison unfortunately occasioned this suit, by refusing to pay this lady that interest, it is impossible to see. My opinion is, that that interest is part of the trust fund, and that the whole of the money received from Mr. Fowler by Captain Addison was his own money, so far as it represented his rights in reversion, and the money of the trust estate, so far as that was concerned. But the two were so mixed up together that it is impossible to distinguish them:—to say, for instance, as to the repairs, what proportion of the 250*l.* for them ought to have been attributed to the rights under the underlease, or how much was money payable by the mortgagors, or money for which Captain Addison was himself liable under his covenants with the lessor, under whom he held.

Upon the whole, the case is one in which, by an unfortunate course of proceeding in realizing the trust property, this trustee, wilfully and against remonstrance, has mixed up the property of the trust estate, principal and interest, with property which he claimed for himself, no doubt, at first, as to a greater part than he now claims. But he has so mixed up the properties that it is impossible to distinguish how much is strictly attributable to the trust estate. If a distinction could be made, I believe it would be found that the amount paid by Mr. Fowler, which is properly attributable to the trust estate, was quite enough to cover the interest as well as the principal; but on the doctrine laid down by Lord Eldon in the case of *Lupton* v. *White*, the Court will not inquire into that, there having been the merger and confusion of the trust property with that of the trustee. The *cestui que trust* is entitled to the trust estate, and that is the principal sum of 520*l.*, with interest at 5*l.* per cent. from the 30th of April, 1865. Therefore there must be a decree against Captain Addison to that extent.

Notwithstanding something which was said on the point, I cannot deal with this sum of 520*l.*, the principal which carries the interest, as entirely the property of this lady. It seems to be property covered by the trusts of this settlement, and she is not the only *cestui que trust* interested in the fund. Therefore, I think the proper decree of the Court will be, that Captain Addison should repay the sum of 520*l.*, the amount of the trust money, with interest at

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5*l.* per cent. from the 30th of April, 1865. If, Mr. Karslake, you were to adopt the investment in the consols, I think your client would have to pay the costs. But the fact is, that that investment was an irregular and improper one, and was made without the consent of Mrs. Cook. Indeed, in this case I ought not to take the consent of counsel as that of his client, even if he was willing to give it; because this lady has not, in fact, consented to the investment. She has, I am told, although it does not appear in the pleadings or the evidence, received some of the dividends. But she has not received any interest on the 520*l.*; and I think that her receipt of the dividends is not, under the circumstances of the case, such an acquiescence as can bind her, or Mr. Tatham either, in this matter. Mr. Tatham does not appear to have been an actor in the matters that gave rise to the confusion which has occasioned this suit. That being so, in adjusting what is really the most important question in the suit, it is necessary to consider what the conduct of Mr. Tatham has been, with reference to his co-trustee. There was an obvious difference of opinion between them as early as the month of April, 1867, before Mr. Fowler's money had been paid. It cannot be said, so far as I see from Mr. Tatham's answer, or from any evidence of his co-defendant Captain Addison, that Mr. Tatham has done anything to sanction the acts of Captain Addison which have occasioned this litigation. If that be so, I can come to no other conclusion than that the wilful and unfortunate conduct of Captain Addison has driven the plaintiff into this Court; and that, there being no default on the part of Captain Addison's co-trustee, Captain Addison ought to pay the costs of this litigation. I think he should pay the costs of the plaintiff; the plaintiff to pay those of Mr. Tatham, and recover them against Captain Addison. Those costs will be as between party and party. Mr. Tatham is entitled to his costs as between solicitor and client; and the difference between the solicitor and client costs and party and party costs must be recovered from the trust fund. I shall not give Mr. Henry Cook any costs; it is a thing of modern introduction to object to the husband being joined as co-plaintiff. With regard to the form of the decree, there will first be the declaration as to the liability of Captain Addison to make good the 520*l.*, with all interest remaining due thereon at 5*l.* per cent. from the 30th of April, 1865, credit being given for any sums that may have been paid in respect of it in the meantime; there will then be an appointment of two new trustees, and an order to pay the money to them, with the interest to be computed up to the date of the decree; and the costs to be as already directed.

MALINS, V.C., March 1, 1869.

In re THE CHELTENHAM AND SWANSEA RAILWAY CARRIAGE AND WAGON COMPANY.

38 L. J. Ch. 330; L. R. 8 Eq. 580; 20 L. T. 169; 17 W. R. 463.

See, *Bowden* v. *Russell*, [1877] E. R. A.; 46 L. J. Ch. 414; 36 L. T. 177 (V.C.).

Contempt of Court—Publication by a Newspaper without Comment of a Winding-up Petition before the Hearing in Court—Costs.

CONTEMPT OF COURT.—*A newspaper published without comment the contents of a petition which had been filed in this Court for the winding up of a company, but which had not yet come on for hearing*:—Held, *that the publishers were in contempt, and must pay the costs of a motion to commit.*

This was a motion to commit the printers and publishers of the *Bristol Daily Times and Mirror* for printing and publishing statements contained in a petition for winding up the Cheltenham and Swansea Railway Carriage and Wagon Company.

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The petition, which contained grave charges of fraud and misconduct against the directors, was presented by a shareholder on the 11th of February, but had not yet come on for hearing.[1]

The whole petition (with the exception of one paragraph stating the number of shares held by the petitioner) was published in the *Bristol Daily Times and Mirror* of the 25th of February, without any comment beyond a short preface stating the fact of its presentation in this Court.

No notice of the intended motion had been given, but the parties moved against having now submitted by their counsel at the bar, and undertaken not to repeat the offence,—

Mr. Cotton and *Mr. Millar*, for the company, in support of the motion, did not press for a committal, but claimed costs on the ground that the statements thus published, being entirely *ex parte*, were calculated to prejudice the merits of the respondents' case before the hearing in open Court. They referred to *Roach* v. *Hall* (2 Atk. 469); *Matthews* v. *Smith* (3 Hare, 331); *Cann* v. *Cann* (3 Hare, 333, n.).

Mr. Glasse and *Mr. Rigby*, contra, argued that the winding-up petition was in fact a public document, being accessible to all creditors and contributories of the company at any time after its presentation; therefore the mere republication of its contents without comment was innocent, and did not bring the parties within the jurisdiction of the Court for contempt. It had been copied into this journal merely in the way of business, as a matter of local interest, and not with any intention of creating prejudice. The rules of the Court as affecting the liberty of the press were far less stringent now than at the date of Lord Hardwicke's decision. They referred to *Daw* v. *Eley* (38 L. J. Ch. 113; 7 L. R. Eq. 49); *Tichborne* v. *Mostyn* (7 L. R. Eq. 55, n.; 2 L. J. Notes of Cases, 249).

MALINS, V.C.—This is a motion on behalf of the directors of a company to commit the proprietors of a newspaper for publishing *in extenso* a petition presented in this Court for the winding up of the company. The publication is introduced by a short preface, stating the name of the petitioner and the circumstances of its presentation in this Court, but for the present purpose I shall treat it as a simple publication of the petition unaccompanied by any comments, although the petition itself contains grave and serious charges with reference to the conduct of the directors. The broad question is, whether it is allowable for the publishers of a newspaper to print proceedings pending in the Court before such proceedings have come on to be heard. The principle, I take it, is equally applicable to any bill, or answer, or petition which may be filed in this Court, the statements therein contained being necessarily *ex parte* and unaccompanied by any evidence or pleadings on the other side. It has been argued that this being a winding-up petition is an exceptional case, because under the act advertisement is necessary, and copies of the petition may be obtained from the solicitor on application. But although every contributory or creditor is entitled to have a copy of the petition, is it not open to the public indiscriminately, nor is it the duty of the solicitor to furnish copies to all persons, whether strangers or not, who choose to apply and pay a certain fee; on the contrary, it is his duty to ascertain that the applicants are either creditors or contributories of the company.

There is nothing in the act or in the rules which sanctions the publication of a petition of this kind any more than a bill in Chancery. It is said that there was no intention to prejudice the parties by this publication; but it is a sound rule that you can only judge of men's intentions by their acts. In this case I must infer that the publishers did not print these charges of fraudulent conduct against these directors unknowingly and unwittingly; whether they be true or false will have to be decided on evidence. But, if you once allow such publication as this, any person might file a petition in

(1) Note.—The petition has since been heard and dismissed, with costs.

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this Court in order that the proprietor of a newspaper might print and publish it, and thus it would become the vehicle of grievous injury to an individual character. I cannot accede to any arguments urged in excuse for such a course. The principle laid down by Lord Hardwicke in the case cited appears to me in every way applicable to the present case. It is in these words: "Nothing is more incumbent upon Courts of Justice than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes before the cause is finally heard. It has always been my opinion, as well as the opinion of those who have sat here before me, that such a proceeding ought to be discountenanced."—2 *Atk.* 469.

That is the passage cited by Lord Hatherley, when Vice Chancellor, in the *Tichborne case*, and adopted by him as the rule of the Court. The case of *Cann* v. *Cann*, although very meagrely reported, goes to the same effect and entirely commends itself to my judgment. The case of *Daw* v. *Eley* is scarcely applicable to the circumstances of the present case, although it illustrates the same principle. It appears to me that whenever a newspaper, either on its own motion or at the instigation of others, publishes the proceedings in a cause before the hearing, it tends to prejudice that cause in the minds of the public. The present case falls within the rule, and I must regard the publication of this petition as a contempt of Court. A committal is not asked for, nor should I have been willing to order it, seeing that no notice was given of the intended motion; but there must be the usual order against the publishers as to the costs of this application.

JAMES, V.C., March 10, 11, 1869.

TURNBULL *v.* GARDEN.

38 L. J. Ch. 331; 20 L. T. 218.

See, *Queen of Spain* v. *Parr*, [1870] E. R. A.; 39 L. J. Ch. 73; 21 L. T. 555; 18 W. R. 111 (V.C.). Considered, *Morison* v. *Thompson*, [1874] E. R. A.; 43 L. J. Q.B. 215; L. R. 9 Q.B. 480; 30 L. T. 869; 22 W. R. 859 (Q.B.). See, *Baring* v. *Stanton*, [1877] E. R. A.; 3 Ch. D. 502; 35 L. T. 652; 25 W. R. 237 (C. A.); *Bartram* v. *Lloyd*, 1903, 88 L. T. 286 (K.B. D.).

Principal and Agent—Secret Profit made by Agent—Custom of Army. Agents.

ARMY AND NAVY. PRINCIPAL AND AGENT.—*The plaintiff, residing in India, employed the defendant, an army agent and accoutrement maker, as her agent in England, and authorized him to provide her son, who was about to proceed to India as a cornet, with a reasonable outfit, and accordingly the articles composing such outfit were paid for through the defendant; but the tradesmen allowed him a discount off the invoiced prices, having increased their prices with reference to such allowance, while the defendant charged the full prices against the plaintiff, and the defendant alleged that this was the universal practice as between tradesmen and army agents, but the plaintiff had no actual knowledge of such practice*:—Held, *that the defendant must account to the plaintiff for the discounts allowed him.*

The defendant was an army agent, accoutrement maker and army contractor, carrying on business under the firm of Garden & Son, and was employed by the plaintiff's late husband, Lieut.-Col. Turnbull. On his death, in 1858, the plaintiffs employed the defendant as her agent, and as such he received various moneys coming to the plaintiff in England, and made payments thereout on her account. The bill alleged that, according to the usual course of the business of army agents, the defendant relied for his remuneration exclusively upon the use of the balances from time to time in his hands.

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In 1859 the plaintiff sent her son Sydney to England to be educated, and on the 23rd of November, 1859, she wrote to the defendant as follows: "As I have sent my younger son by the last steamer, I beg that you will have the kindness to supply him with any moneys that he may really want, but not to give him money for anything that you consider unnecessary." In 1865, the plaintiff authorized the defendant to supply her son with a proper outfit as a cornet in a cavalry regiment proceeding to India. The authority was as follows: "Mr. Sydney will be coming out in April; you can supply him with his outfit, regimentals, &c., and I hope, in consideration of our long acquaintance, you will do everything as reasonably as possible."

The defendant supplied an outfit, and his bill in respect thereof amounted to 700*l*.

In October, 1866, the plaintiff returned to England, and deposited some money at the head office of the London and Westminster Bank, situated in the city of London; and on the 5th of March, 1867, the defendant commenced an action against the plaintiff, in the Lord Mayor's Court, to recover 93*l*., which he claimed as due on the balance of accounts, and attached the deposit by process of foreign attachment to answer the claim. The plaintiff thereupon filed her bill praying a general account against the defendant, and for an injunction to restrain the further prosecution of the action.

The case made by the bill was, that in the account delivered to the plaintiff she was charged with sums alleged to have been paid on her behalf, which in fact had not been so paid. In support of this allegation the following instances were given in the evidence.

The bill for Mr. Sydney Turnbull's outfit contained the following charges: 197*l*. 8*s*. 6*d*. as paid to Mr. Williams, a tailor; 40*l*. 17*s*. 6*d*. as paid to Mr. Fagg for boots, and 113*l*. 8*s*. 6*d*. as paid to Messrs. Daw for a gun and ammunition. The goods furnished by Mr. Williams were ordered by Mr. Sydney Turnbull himself, without any previous communication with the defendant. An estimate had before the order been given to Mr. Sydney Turnbull amounting to 179*l*. 4*s*., and Mr. Williams was informed that on the goods being delivered the defendant was authorized to pay for them; but on calling upon the defendant he learned that the defendant would require to be allowed a discount of 15*l*. per cent., and Mr. Williams protested against this demand, but not successfully, and eventually, with Mr. Sydney Turnbull's knowledge and consent, he revised the prices marked in the estimate, and thus increased his bill to 197*l*. 8*s*. 6*d*., the amount charged to the plaintiff, for which he received the defendant's acceptance of a three months' bill for 167*l*. 17*s*. 6*d*.

The amount actually paid to Mr. Fagg was 34*l*. 14*s*. 6*d*.

The gun and ammunition were ordered by Mr. Sydney Turnbull without any prior communication with the defendant, and the amount paid to Messrs. Daw for them was 88*l*. 8*s*. 6*d*.

The bill of complaint stated the facts as to Mr. Williams's account, and charged that there were other such cases, the particulars of which the defendant refused to disclose and the plaintiff was unable to discover.

On behalf of the plaintiff evidence was also adduced to shew that many of the articles supplied to the plaintiff's son exceeded the limits of a reasonable outfit.

The plaintiff had no actual knowledge of the defendant's practice of requiring discounts from the tradesmen paid through him; but the defendant, by his answer, alleged that this practice was according to the established and well-known custom of army agents, and that their remuneration to a great extent depended upon it.

Mr. Druce and *Mr. Graham Hastings*, for the plaintiff.—It is clear that the defendant while acting as agent for the plaintiff has by his principal's money made a secret profit, and it is equally clear that for all such profit he must account—*Bentley* v. *Craven* (18 Beav. 75); *Ritchie* v. *Couper* (28 Beav. 344). With regard to the unreasonable character of some of the articles

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supplied to the plaintiff's son, who was at the time an infant—*Ryder* v. *Wombwell* (38 L. J. Ex. 8; L. R. 4 Ex. 32) is a case in point.

Mr. Kay and *Mr. Blackmore*, for the defendant.—What the defendant has done is in accordance with the every-day practice in every trade and business; a practice of which the defendant must have been aware, and without which no business could be carried on. If I order from a bookseller a book which he has not in his stock, he procures it from the publisher at the trade price and sells it to me at the retail price. So of everything which I order, the retailer gets it at one price and sells it to me at a higher price, and I know very well that the retailer gets his living in this very way. Here the plaintiff is charged in account with the prices at which the articles would be supplied to the general public, although the defendant's business enables him to procure them at a lower price. If the plaintiff had herself ordered the goods she would have had to pay the prices which the defendant has charged against her.

In reply to a question from the Vice Chancellor,

Mr. Druce said, that in strictness the plaintiff was entitled to require the defendant to shew as to each item that it was a reasonable charge, but he would be content with a declaration in a negative form, and therefore, imposing the burden of proof on the plaintiff, disallowing such items as were unreasonable.

JAMES, V.C.—In this case the plaintiff, Mrs. Sarah Turnbull, is a widow lady, who has for many years employed the defendant, Mr. R. S. Garden, as her agent in this country for the purpose of receiving the income which was receivable by her in this country, and for the purpose of making payments out of it by her authority. Mr. Garden carries on the business, not only of an army agent, but that of accoutrement maker. I do not know whether this is a full description of his trade. In the course of the year 1867 he caused an attachment to be lodged in the city of London, upon some moneys of the plaintiff in a bank there, to meet a claim of his for a balance of 97*l.* odd, being the result of the cash accounts between him and the plaintiff, the balance upon the receipts on her account,—the debts due to him in his own trade as an accoutrement maker, and payments made by him on her account. She has challenged that account in two or three very important particulars. She says, "There was no such balance as that of 97*l.* due from me, because, in the account which you have rendered to me, you have charged me most extravagant sums for payments made on account of my son, a young cornet who had gone out to India, and as to whom I had written to you to tell you to furnish him with the necessary outfit"; and she says, "That was the only authority I gave you in addition to the earlier authority," an authority which is, no doubt, relied upon by the defendant, and which accompanied the young man when he came to this country, to give him such moneys as were really necessary for him, without going to any extravagant expenditure.

That being the authority, Mr. Garden charged the plaintiff, Mrs. Turnbull, as having paid altogether in respect of the outfit of this young man a sum very nearly amounting to 700*l.*, a sum, certainly, which is very startling if supposed to be the cost of a reasonable and proper outfit, which an agent, acting with a due regard to the interests of his employer, would have thought of ordering and sanctioning on behalf of the son of a widowed mother, whose means do not seem to have been, at all events, of a very colossal description. The amount is certainly startling.

Probably the startling extent of the outfit which was furnished to the young man is, to a considerable extent, explained by that which appears with reference to the other charge which the plaintiff makes. The plaintiff says, "In addition to this you have, in my account, charged against me, as money actually paid, moneys which were never paid on my account. You have charged me with a payment to Mr. Daw of 113*l.*; you never paid him any such sum. You have charged me with a payment to Mr. Fagg of 40*l.*; you never paid him any such sum. You have charged me a very much larger sum as paid to Mr. Williams, a tailor; but you never paid him any such sum." The

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defendant says, "True it is I never did pay any such sums; but I was authorized to charge you more than I actually paid,—to represent to you that I had paid what I had not paid,—I was authorized to do all this by the custom of my trade or profession of army agent." It is not the first time that we have heard in these Courts of a custom of this kind. I recollect one case, before the Master of the Rolls, where a custom was alleged by a commission agent in Liverpool of taking his customer's good flour and mixing it with bad flour for the purpose of making a profit. There was another case where a commission agent said it was the custom in his particular trade in Lancashire, not only to charge a commission, but also to alter the invoices by making them higher than what was really paid. That custom did not meet with the approbation of this Court. One might give a great many more instances of customs of that kind; but if there be such a custom as that which is alleged in this case, the sooner that custom is put an end to the better it will be for all persons concerned; and if that custom is carried into effect by the practice, of which there is some trace in this case, of sending in invoices of one sum to the agent and another invoice to be shewn by the person who has received it to the customer, the sooner that is put an end to, I think, the better, with reference to another branch of the law. In this particular case there is some trace of it, although there is no evidence shewing that Mr. Garden has ever received more than one invoice.

The case which Mr. Garden's witnesses make is this: they say there is a trade discount which is known all over the world, in this particular trade and every other trade; that is to say, there is a discount which the one tradesman allows to the other which would not be allowed to the customer. That is put in this way in the affidavit of Mr. Goody: "I say that it is the general, established and well-known and universally recognized custom in the trade of military tailors and outfitters for them to be allowed trade discount by other tradesmen for goods paid for through them, but supplied by such other tradesmen, and to charge their customers with the full amount charged or invoiced by such other tradesmen to or on account of such customers, and to receive and retain such trade discount as and for their own profit; and I believe that if the plaintiff in this suit had personally purchased and paid for the goods supplied by other persons than the defendant, but paid for by or through him, she would not have been allowed such discount, but would have been charged the full amount which she has been charged." If the case had been brought simply within that principle, that is to say, if it were a mere division of profit between the tradesman and the commission agent, it would stand upon a very different footing. According to that, the charge paid by a gentleman buying an article for himself would have been one thing, while a person in the position of a commission agent going to order it, and receiving a share of the profit as a consequence of giving the order, would have been dealt with on a very different footing.

What appears in this case shews the danger of allowing even the smallest departure from the rule that a person who is dealing with another man's money ought to give the truest account of what he has done, and ought not to receive anything in the nature of a present or allowance without the full knowledge of the principal that he is so acting. The danger of allowing the smallest departure, even to the extent these witnesses have carried it, is shewn in this case. For what does happen with regard to an item in this case? There is the gunmaker, who says, "My price for the guns was 86*l*., but before I had executed the order I was told I should have to send them in to the defendant, and the defendant gave me to understand that he should require 15*l*. per cent. discount on this order, and I immediately increased the price and charged 100*l*. instead of 86*l*., in order that I might give him the discount." That is clearly not a trade discount. It is simply making up a fictitious account against the customer, who has ultimately to pay it, in order that the person who is paying it may pocket the difference at the expense of his employer. The same thing

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occurred in the case of Mr. Williams, who, having been called upon to make an allowance of 15*l.* per cent. to the defendant, says that he was astonished at the demand, and did not make it in the sense of a trade discount, which he would not have made to any other person, a division of profit between one tradesman and the other. He says, "Having received that intimation from the defendant, I immediately added to the bill 15*l.* per cent., in order that I might take it off in his favour," and Mr. Fagg says, "I allowed him the discount."

These cases all shew that this was a profit taken by the defendant dealing as the agent for the plaintiff, intended to be concealed, and actually concealed from the plaintiff, who had not the slightest knowledge of any custom of the trade that such deduction would be made. I think the items of charge complained of were utterly unwarranted, and that the plaintiff was fully entitled to come into this Court to be relieved from any attachment in respect of a balance of her account based on such charges as these, and I again repeat that the sooner this mode of doing business is put an end to the better for all parties concerned. I am of opinion that the plaintiff is entitled to an account as prayed by the bill from the 17th of January, 1865, on taking which account all discounts so charged must be disallowed against the defendant; and, having regard to the circumstances under which this very large outfit was supplied under such an order as that which was furnished by the plaintiff to him, there ought to be a reference to chambers to inquire how much of that ought to be disallowed in respect of the outfit, having regard to the terms of the authority and any subsequent recognition by the plaintiff of the things charged.

The plaintiff having been driven to come into this Court in consequence of the attachment in the Lord Mayor's Court, and having obtained relief upon the ground upon which I hold her to be entitled to relief, and in consequence of the impropriety of the charges made against her in respect of the sums alleged to have been paid but in truth not paid to other persons, I hold she is entitled to all the costs of the suit up to the hearing except as to one part of the case, which seems to have been put into the bill without any foundation whatever, viz., a charge with regard to an advance on jewellery of the plaintiff's daughter, as to which the case has wholly failed. Some expense has been incurred by the evidence given on the one side and on the other as to that part of the case, and the plaintiff must pay the defendant his costs of that part of the suit, and those costs will be set off against the costs which I have ordered him to pay to her.

MALINS, V.C., June 8, 9, 10, 11, 12, Dec. 22, 1868.

THE ATTORNEY GENERAL *v.* THE EARL OF LONSDALE.

38 L. J. Ch. 335; L. R. 7 Eq. 377; 20 L. T. 64; 17 W. R. 219.

See, *Attorney General* v. *Terry*, 1874, L. R. 9 Ch. 423; 29 L. T. 716 (L. JJ.); *Orr-Ewing* v. *Colquhoun*, 1877, 2 App. Cas. 839 (H.L.).

Riparian Owners — Navigable Tidal River — Obstruction — Private and Public Injury — Injunction.

WATER.—*The rights of a riparian proprietor against adjoining or opposite riparian proprietors are not greater in respect of a tidal than in respect of a non-tidal river.*

Plaintiff and defendant were opposite riparian proprietors on the banks of a navigable tidal river:—Held, *that the defendant could not, for the protection of his own soil or otherwise, construct a jetty projecting into the bed of the river, whereby the tidal water was thrown with greater violence upon the plaintiff's shore, and the public navigation of the river was or might be impeded; and that a suit by information and bill to restrain the erection of such a jetty*

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was properly constituted:—Held, *also, that the fact of the river traffic having been almost entirely superseded by local causes did not affect the right of the public to have the navigation conserved.*

This was an information and bill filed, at the relation of and by George Gill Mounsey against the Earl of Lonsdale, to restrain the Earl from constructing a jetty into the bed of the river Eden, near its entrance to the Solway Firth.

The relator, and plaintiff, was seized in fee of a freehold estate, called Rockliffe Demesne, part of which, known as the Demesne Marsh or Speird, adjoined the river Eden, and consisted of a large tract of unenclosed marsh land extending along the north bank of the river.

The defendant was owner of an estate, which had been purchased by his father in 1811, on the south side of the river, exactly opposite to the plaintiff's marsh, extending nearly half a mile to the east, and known as the New Sandsfield Estate.

The Eden, flowing in a westerly direction, falls into the Solway Firth about six miles below, and is a public navigable tidal stream for some distance above the Rockliffe and New Sandfield estates; the width of the river at the point in question being about 200 yards. The mouth of the Eden, facing west by south-west, is not protected by any natural bar, and at the rising of the tide the water sweeps over the Solway Firth, an expanse of level sand about three miles in width, with great force and rapidity, rushing into the channel of the river with an immense volume, and forming what is known in the district as a "bore" or wall of water 3 or 4 feet high. It was stated that at times, when strong westerly winds prevailed, the speed with which this volume of tidal water advances is as fast as a swift horse could gallop.

The river is also subject to periodical floods caused by the rain-water descending from the mountains of Cumberland and Westmoreland, in which it takes its rise. To prevent the mischief caused by this violent action of the water the plaintiff and defendant, as well as their predecessors in title, had from time to time constructed protection works or "bulwarks" along the banks of the river, many of them, and particularly those erected on the defendant's bank, projecting for some distance into the bed of the stream.

The information described at great length the nature and effect of these works, and a great mass of scientific and other evidence was adduced at the hearing in support of the allegations contained in the pleadings on either side as to the extent of injury which the acts of one owner had caused or were calculated to cause to the property of the other; a large number of maps and plans also were produced, exhibiting the changes that had, in course of time, taken place in the channel of the river. It will be sufficient, however, for the purpose of this report to state, that complaints had for many years past been made by the plaintiff with reference to certain piers or jetties erected by the defendant and his father, which, as the plaintiff alleged, had had the effect of throwing the water with greater violence upon his land, and thereby destroying it to a greater extent than it would have been destroyed or washed away simply by the natural action of the tidal and flood waters; but no proceedings were taken until the institution of this suit, in 1864. In the month of September, in that year, the plaintiff received information that the defendant was again commencing the erection of works similar to those erected in previous years, but upon a more extensive scale; the plaintiff accordingly went to the spot and ascertained from the defendant's agents and workmen, as the fact was, that they were engaged in constructing a new bulwark or solid jetty, which was to be carried out into the bed of the river to the length of 100 yards, obliquely, from the green ground on the southern bank, at a uniform height of between 9 and 10 feet above the low-water level.

The plaintiff thereupon wrote to the defendant a letter of remonstrance, calling upon him to "countermand the execution of a work which if proceeded with would cause immediate and irreparable damage." To this letter the

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plaintiff received no reply, but finding that the construction of the jetty was being hurried forward with increased speed, he forthwith, on the 6th of October, filed his bill, alleging that the new jetty would far surpass in magnitude and height any work that had ever been erected on the river Eden near Rockliffe or New Sandsfield, and that its necessary effect would be to cause a fresh encroachment upon the tidal channel of the river and to force the entire volume of the tidal and flood waters into the northern half alone of the tidal waterway.

The motion for an injunction was heard before Vice Chancellor Kindersley, as vacation Judge, on the 13th of October, 1864. It was then stated, on behalf of the defendant, that he had no intention to carry the jetty further than 88 yards in an oblique direction (being 53 yards measured perpendicularly) from the south bank of the river, to which distance the piles had already been driven into the bed of the river; and upon the allegation that very great damage would be done to the new works if compelled to remain in their then incomplete state, the motion was ordered to stand over till the hearing of the cause.

The plaintiff, being still desirous of avoiding further litigation, then offered to submit the matter to the arbitration of some impartial engineer. With this view, on the 17th of October, he wrote to the defendant the following letter: "My Lord, I regret that your Lordship left unnoticed my remonstrances respecting your new works at New Sandsfield. Those works were of such a character, and were being carried on so rapidly that I had no alternative than either to submit to the enormous loss and expense they must inevitably cause me, or apply to the Court of Chancery for an injunction. In adopting the latter course, I beg to assure your Lordship that it was and is furthest from my wish to interfere in any way with any works your Lordship may think fit to erect for the protection of your property so long as such works are merely protective, and not calculated to injure my property or the navigation of the river. Of such protective works I have never complained. I am now informed that one of your Lordship's agents stated, before the Vice Chancellor, on Thursday, that he believed it was no longer your Lordship's intention to carry out the new bulwark to the extent of the original plan of which I complained, and that the bulwark is now intended to terminate at a point which is about 15 yards short of its originally extended extremity. I trust that this statement was correct, and that the modification, however slight, will be adopted and adhered to by your Lordship. In a work, however, of such magnitude as the present such a modification can but slightly alleviate the injurious effects of the bulwark, and even with such modification, I submit to your Lordship that the magnitude and position of the present works are such that it is impossible to ascribe to them a merely protective character, or to disguise the injury they must inevitably cause to the navigation of the river and the opposite shore. Before, therefore, your Lordship is put to the expense of completing so costly a work, and to avoid further litigation, I venture to suggest it for your Lordship's consideration whether the protection of your Lordship's property may not be secured by works of a less aggressive character and less calculated to injure the navigation of the river and my lands, and whether your Lordship would consent to further modify the present plan so as to render the works innocuous. I for my part am willing to refer the question of the apprehended injury by the present works to my property and the navigation of the river to a neutral and impartial engineer, who can visit the place, and I shall be ready to abide by his decision as to the works which may be necessary for the protection of your Lordship's property without injury to my own and to the navigation of the river. Trusting that your Lordship will entertain this proposition as being reasonable, I remain, your most obedient servant,

"G. G. Mounsey.

"The Right Honourable the Earl of
Lonsdale, Whitehaven Castle."

To this letter the defendant, through his solicitor, replied that he could not consent to any modification of the plans except under the advice of his own

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engineer, who prepared them, and that he did not recognize the necessity for any such reference as the plaintiff had proposed.

Further correspondence ensued, but without any settlement of the matter in dispute.

The plaintiff then amended his original bill, and alleging injury to the public navigation of the river, filed the same as an information and amended bill on the 26th of January, 1865, praying thereby that the defendant might be restrained by injunction from constructing or continuing to construct the new bulwark or jetty so as to divert the tidal or fresh waters of the river Eden, or any part thereof respectively, from their accustomed channels or courses as the same respectively existed when the said new jetty was commenced against or upon the plaintiff's said demesne, marsh or speird, or any part thereof, or otherwise to the injury of the plaintiff, or so as to injure or interfere with the free use and navigation of the said river as a public navigable stream or highway, or from constructing any other bulwark, jetty or other work which should have the effect of diverting such water or interfering with or obstructing such free use and navigation of the said river in manner aforesaid, and from allowing the said new jetty or any part thereof, or any piles, stakes, stones, planks or other materials to remain in the bed or channel or any part of the course of the said river, so as to divert and obstruct such water or such free use and navigation of the said river respectively in manner aforesaid, or otherwise to the injury of the plaintiff and his said land, or the said navigation.

The defendant, by his answer, set out the changes that had from time to time been produced on the southern bank of the river, chiefly by the action of the tide, though to a considerable extent also by the injurious effect, as he alleged, of the plaintiff's protective works, and justified the erection of the new jetty as a necessary and proper protection to his estate, denying that it was in fact or could be injurious to the plaintiff's property or to the navigation of the river.

With reference to the navigation, the information stated that there still existed a public port at Rockcliffe for the purposes of local traffic, and that up to the year 1823 New Sandsfield was the port of Carlisle, and was called Port Carlisle, having been constituted a public harbour by the Crown in 1769. It appeared, however, that of late years the navigation had been almost entirely superseded by the introduction of railways and other local causes, and the defendant alleged in his answer that the traffic upon the river had for all practical purposes ceased.[1]

(1) The following affidavits, in support of this part of the case, were referred to by his Honour, as indicating the extent to which the river might still be used as a public highway.

The plaintiff deposed: I have always used and still use the river for the conveyance of stones and materials for the use of my estates, and it will at all times be a very great inconvenience to me if the navigation be so seriously interfered with as to deter ship or barge owners from coming up the river. In 1848 to 1850, for instance, when I rebuilt the aforesaid sea-wall, I had many cargoes of stone landed near the spot; any other mode of conveyance would have cost treble the expense. I have since had occasional cargoes brought up. In the year 1863 I had several cargoes, and I have since that time occasionally had more. In fact, whenever I have building work going on for the improvement of my estates, which does not require an expensive stone, it is very much cheaper for me to have it brought by the river than by the railway; but what I most require river-borne stone and materials for is the protection of my marsh and grounds against the tides.

George Irving, a master mariner, deposed: For many years past I have been in the habit of navigating the Solway Firth and tidal waters flowing into the same, and am well acquainted therewith. The tides run very strong up the Solway Firth, and on the shores of the estuary and the rivers flowing into it and up those rivers, and great caution and an intimate acquaintance with the sands and shores is requisite to enable vessels to be safely navigated therein. The strong run of the tide and the shifting nature of the sands render the navigation very dangerous without almost constant observation of the channels." Then, after speaking to his actual experience of the inconvenience he had sustained in former years from the jetties previously erected on the defendant's bank, and particularly in the summer of 1863, when he was employed by the plaintiff to carry stones up the river—he continued, "I have lately been at the place again, and have viewed the same. There is now erected, a little higher up the river than the before-mentioned jetties, another of vastly greater bulk and dimensions, projecting much further

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Sir R. Palmer, Mr. Glasse and *Mr. Mounsey*, for the plaintiff.—The plaintiff's case rests on private and public injury. With regard to the first, the law is now settled, and one riparian owner cannot encroach upon the alveus of a stream without the consent of the opposite owner; neither is he entitled to use the soil, though held in severalty, in such a manner as to interfere with the natural flow of the stream, and the onus of proving that the act complained of is not an encroachment falls on the party doing it—*Bickett* v. *Morris* (L. R. 1 Sc. Ap. 47); and *Farquharson's case*, there cited; *Menzies* v. *the Earl of Breadalbane* (3 Bligh, N.S. 414). It is not, therefore, necessary for the plaintiff to shew material injury, though we submit the evidence is sufficient to establish the case set up, namely, that the direct and immediate consequence of the new jetty must be to throw the action of the stream with greater violence upon the plaintiff's bank, and thereby cause a greater loss and washing away of his soil than heretofore; and that is a wrong which this Court will restrain—*Menzies* v. *the Earl of Breadalbane*, ubi supra; *The King* v. *Trafford* (1 B. & Ad. 874; 9 L. J. M.C. 66). The plaintiff's right as riparian owner is not affected by the fact of its being a tidal river. *The King* v. *Russell* (6 B. & C. 566), overruling in effect *The King* v. *Ward* (4 Ad. & E. 384; 5 L. J. K.B. 221); *Miles* v. *Rose* (5 Taunt. 705); and it is immaterial in whom the soil is vested, whether it belongs to the Crown or to the defendant, as alleged in his answer—*The Attorney General* v. *Johnson* (2 Wils. C.C. 87). Then as to the navigation, it is clear that this jetty, being on considerably greater height, and extending over a much larger proportion of the tidal waterway than any of the jetties previously erected by the defendant, must cause a material obstruction. If the plaintiff were to erect a similar jetty on the opposite northern bank the river would be almost dammed across. At high tide if the water flows over the jetty it will form a sunken reef, and cause great danger. However insignificant the traffic may now appear to be, yet this has always been a public highway; and it would be a dangerous doctrine to introduce that the Court may cease to protect an existing public right because, from local circumstances or otherwise, the public at any particular time are not materially interested in maintaining it. The Attorney General is not required to prove actual injury or damage provided there be an invasion of right—*Brown* v. *Gugy* (10 Jur. N.S. 525). Lastly, the suit is properly constituted, whether in its original form as a private bill or in its present form as an information by the Attorney General at the relation of the plaintiff. The injury being to the public generally and to the plaintiff individually, the latter was entitled to maintain a bill without the Attorney General—*Spencer* v. *the London and Birmingham Railway Company* (8 Sim. 193; 7 L. J. Ch. 281).

Mr. Jessel, Mr. Wickens and *Mr. Davey*, for the defendant.—The plaintiff has no substantial case. In the conflict of evidence the Court cannot assume that the erection of this jetty will injure the plaintiff's land; and having regard to the changes that have taken place in the bed of the river, the alleged injury, even if it could be presumed, is incapable of appreciation, and would not sustain this bill. The strict rights of riparian owners, as laid down in *Bickett* v. *Morris*, ubi supra, do not apply in the case of a tidal river. That was a special case of a non-tidal river. The Eden here is an estuary, or an arm of the sea, within the definition given in *Vin. Abr.*, tit. 'Perog. of King,' xvi., 574, pl. 5, "Every water which flows and re-flows is called an arm of the sea so far as it flows." But all owners of land exposed as the defendant is to the inroads of the sea have a right to erect such works as are necessary for their protection, even although

into the channel. In my opinion it is far more dangerous to the navigation of the river than the other two, not only by reason of the greater danger of getting foul of it, but also of the greater obstruction it causes in the flow of the tide up the river. I should say that for vessels going up to Rockliffe and parts above it is most perilous, and may well prevent anybody from venturing thither. Both in going up and coming down, and whether loaden or unloaden, there certainly would be great danger of getting foul of it and being staved in." He then referred to the works on the plaintiff's bank as being of an entirely different character, and not projecting into the channel, or interfering with the navigation of the river.

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they may be prejudicial to others—*The King* v. *the Pagham Commissioners* (8 B. & C. 355). Then again, the soil of this river is in the Crown, and the defendant being presumably a grantee under the Crown is justified in any user of the soil not inconsistent with the rights of the Crown. But the Attorney General is not here as representing the Crown but the public, and therefore he must prove nuisance, which must first be determined by a jury at common law as a question of fact—*The Attorney General* v. *Burridge* (10 Price, 350); *The Attorney General* v. *Cleaver* (18 Ves. 211). "Not every erection in a river is to be deemed a nuisance simply because it encroaches on the water highway" —*Hale de Portibus Maris*, p. 85. There must be a substantial damage arising from the violation of a legal right—*Holyoake* v. *the Shrewsbury and Birmingham Railway Company* (5 Rail. Cas. 421); *Wintle* v. *the Bristol and South Wales Railway Company* (10 W. R. 210). But how can public injury be alleged in respect of the navigation of a river upon which all traffic has for many years ceased? The Attorney General is not properly before the Court, there being in fact no public right in question. We submit that the plaintiff fails both in respect of the information and the bill, and the suit must be dismissed with costs.

Sir R. Palmer, in reply, cited *The Attorney General* v. *Richards* (2 Anst. 603); *The Attorney General* v. *Parmeter* (10 Price, 378); *The Queen* v. *Betts* (16 Q.B. Rep. N.S. 1022).

[In addition to the authorities already mentioned the following cases were considered in the course of the argument upon the general question of jurisdiction, as to whether or not the injury and nuisance were sufficiently material to call for the interference of the Court: *The Attorney General* v. *the Sheffield Gas Company* (3 De Gex, M. & G. 304; 22 L. J. Ch. 811); *Crossley* v. *Lightowler* (36 L. J. Ch. 584; L. R. 2 Ch. Ap. 478); *The Rochdale Canal Company* v. *King* (2 Sim. N.S. 78; 20 L. J. Ch. 675); *Wood* v. *Sutcliffe* (2 Sim. N.S. 163; 21 L. J. Ch. 253); *Tipping* v. *the St. Helen's Company* (L. R. 1 Ch. Ap. 66); *The Attorney General* v. *the Electric Telegraph Company* (30 Beav. 287; 31 L. J. Ch. 329); *Lillywhite* v. *Trimmer* (36 L. J. Ch. 525).]

MALINS, V.C. (*December* 22).—After stating the facts and the nature and object of the suit, and particularly referring to the plaintiff's letter of the 17th of October, 1864, as having an important bearing upon the result of the case, proceeded: The plaintiff's case is rested on two points: first, the injury to his property caused by the defendant's jetty; and secondly, the obstruction or injury to the navigation of the river. The first question therefore is, as to the extent of the injury which the plaintiff has sustained or is likely to sustain from the erection of the jetty. On this point the evidence is most conflicting. On the part of the defendant it is sworn that it is absolutely impossible that the plaintiff can ever sustain any injury from the jetty. On the part of the plaintiff it is sworn that the inevitable effect of it will be to throw the tidal waters on to his land with such additional force that it will be washed away and destroyed to an extent never before experienced. There is a great mass of evidence. The case is, in fact, greatly overlaid on both sides.—[His Honour then read the evidence of the principal witnesses on each side with reference to the alleged injury to the plaintiff's property.]—In this remarkable conflict of evidence I am obliged to look at the probabilities of the case, and apply the principles of common sense so as to form the best opinion I can.

Now, the plaintiff, by his own admission, has always been subject to a gradual washing away of some parts of his land, and although I come to the conclusion that this new jetty has a tendency to throw, and probably does throw, the tidal waters upon his land with somewhat greater force than before, yet, considering that it does not extend quite so much as one-third of the distance across the river at high water, and that every ton of water which it impedes or displaces is thrown into contact with at least two tons which not being so impeded continue their natural flow, I am not satisfied that the extent of the injury sustained or likely to be sustained by the plaintiff in consequence of the

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erection of the jetty is or will be such as to call for the interference of this Court. If, therefore, the case rested solely upon that ground, I think that the evidence fails to prove such a material injury to the plaintiff's property as to bring it within the authorities such as the *Sheffield Gas Company's case* and others which were cited upon this point.

But the case does not rest merely on the actual extent of the injury sustained, or likely to be sustained, by the plaintiff. He and the defendant are opposite riparian owners, and have all the rights attaching to such ownership. Assuming this not to be a tidal river, or that the rights of riparian proprietors on tidal and non-tidal rivers are the same, the law is now settled that no riparian proprietor can, without the consent of the opposite proprietor, encroach upon any part of the alveus of the stream. On this point the recent case of *Bickett* v. *Morris*, in the House of Lords, is conclusive. Although that is a Scotch case, the principle is equally applicable to England. It was a case in which there were two opposite riparian proprietors on a non-tidal river. The respondents had given the appellant permission to erect certain works in the bed of the river, and the question was, whether the appellant had not exceeded his licence; the Court was thus called upon to decide the broad question, how far one riparian proprietor could, in opposition to the wishes of the others, encroach upon the alveus.

The result of the decisions in the Court of Sessions is thus stated, at page 49 of the report: "A riparian proprietor is not entitled to erect a building, or make any change in the alveus of a stream, without the consent of the opposite proprietor; for the alveus is not the common property of the opposite owner, but each is absolute proprietor to the *medium filum fluminis*, which constitutes the line of division between them." This principle was completely affirmed by the decision of the House of Lords upon the appeal.—[His Honour here referred at length to the judgments of Lords Chelmsford, Cranworth and Westbury in that case, and continued]—Now these judgments are so important upon the question raised before me that I have gone to greater length than usual in citing them, because they contain the principles which have been urged on behalf of the plaintiff, but which, it is said on the other side, have no application to the present case. The same principle of law was, in fact, laid down by the House of Lords in *Menzies* v. *the Earl of Breadalbane*. That was a case in which a proprietor of land on the bank of a river having commenced the building of a mound which, according to the opinion and report of an engineer, would, if completed, in times of ordinary flood throw the waters of a river on the grounds of an opposite proprietor so as to overflow and injure them, was restrained by perpetual interdict from the erection of any further works. That also was a Scotch case, but Lord Eldon, at p. 418, expressly lays down the rule as applicable to England. "It is clear," he says, "beyond the possibility of a doubt, that by the law of England such an operation could not be carried on. The old course of the flood-stream being along certain lands, it is not competent for the proprietors of those lands to disturb that old course by a sort of new water-way to the prejudice of the proprietor on the other side." Then a little further on he says,—and this observation applies to the argument of Mr. Jessel, who pressed upon me that the plaintiff in this case was unable to distinguish what is the course of the river; on principle, I conceive the course of the river to be that course which the water actually from time to time takes; I have nothing to do with its future course, or with how much of it has been diverted. I am bound to take the course of the river to be that within which the water has flowed, and within which it now flows: so Lord Eldon expresses himself,—"The ordinary course of the river is that which it takes at ordinary times. There is also a flood-channel; I am not talking of that which it takes in extraordinary or accidental floods, but the ordinary course of the river in the different seasons of the year."

Unless, therefore, the fact of the Eden being a tidal river distinguishes the present case, these authorities are conclusive against the defendant, for it is

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admitted that this jetty is a solid pier extending eighty-eight yards obliquely and fifty-three yards perpendicularly into the alveus of the river. Does the fact of the river being a tidal one make any difference? I am of opinion that it does not. It was strongly contended by the learned counsel for the defendant, that the place where the jetty is erected is an estuary, and therefore an arm of the sea, and that the defendant has consequently all the rights of protecting his land which he would have if it had been on the sea-shore. The case of *The King* v. *the Pagham Commissioners* was cited to shew that the proprietor of land on the sea-shore has a right to erect any works on his property for the purpose of protecting it against the inroads of the sea, although such works may be injurious to a neighbouring proprietor; and that case is undoubtedly a conclusive authority for that proposition.—[His Honour read passages from the judgment of Lord Tenterden (8 B. & C. 360).]

But is this principle applicable to a riparian proprietor on a navigable river? It must be borne in mind that the greatest work of man must be insignificant when compared with the acts of the sea, but that is not so with reference to a navigable river. If the principle contended for were sustained, it would follow that every riparian proprietor on a navigable river, however distant from the sea, and however gentle the flow of the tide, might throw any works into the alveus which he deemed necessary for his protection, however injurious such works might be to the adjoining or opposite proprietor. Take the Thames, for example: any riparian proprietor between Vauxhall Bridge and Teddington, where the tide ceases, might construct such works, and so obstruct the navigation, because the Thames is up to that point a tidal river, and therefore an estuary or "arm of the sea" within the definition given in *Viner's Abridgment*, xvi. p. 574, edit. 1793.

But I find no authority for such a proposition; on the contrary, all the authorities tend in the opposite direction. Take the case of *The King* v. *Russell*, which was an indictment of the proprietors of the celebrated Wallsend Collieries for erecting staiths in the river Tyne for the purpose of shipping coals; the direction of Mr. Justice Bayley, who tried the case (which direction was afterwards confirmed by himself and Mr. Justice Holroyd on motion for a new trial), was that a proprietor would be justified in encroaching on the bed of a river if the jury were of opinion, as they were in that case, that some public benefit would arise from such encroachment. The jury were of opinion that it had the effect of causing a better and cheaper supply of coals, and on that ground it was held that the proprietors were justified, and the indictment was not sustained. Lord Tenterden, however, took an entirely different view of that case, and subsequent authorities have established his opinion as the law of the land, and not the opinions of Mr. Justice Holroyd and Mr. Justice Bayley. Lord Tenterden says—I read only one passage from his judgment, and I read this because the contrary opinions of Mr. Justice Holroyd and Mr. Justice Bayley are clearly overruled in the next case which I shall mention —with reference to the erection of these staiths he says: "I take it to be clear that the passage of such vessels is in certain seasons at least of wind and tide rendered less free and commodious, that the water-way is in some degree narrowed at present, and may possibly, and not improbably, be further narrowed in process of time by the gradual accumulation of sand and silt carried to the opposite side of the river. The erections were made and maintained for the private convenience of the owners of particular collieries; all who think proper to purchase their coals from these collieries have a right, under a particular act of parliament, to be supplied in turn by application at some office at Newcastle. The owners of the collieries cannot choose to whom they will vend, but they may choose at what seasons they will vend, and whether they will vend at all, and seasons may occur when they have no commodity to vend. It was proved that coals put into vessels from these staiths are less broken and come to market in distant places in a somewhat better state than those which are brought to the vessel's side in keels or barges, and so undergo a double ship-

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ment or removel. But I think it may well be doubted whether they come to the market at any cheaper rate or at a rate so much cheaper as to be worth consideration when all arrive at a market. I should apprehend those which are found in the best state will fetch the best prices, and so the advantage as far as price is concerned will be to the owners of the staiths and collieries, and not to the public. Admitting, however, that there is some public benefit both from the price and condition of the coals, still I must own that I do not think that those points could properly be taken into consideration in the question raised by this indictment. That question I take properly to have been whether the navigation and passage of vessels on this public navigable river was injured by these erections."

Then we come of the case of *The King* v. *Ward*, which was an indictment for erecting an embankment in the harbour of Cowes, on the Medina, a tidal river. The jury found that an impediment had been erected, and afterwards, when pressed by the Court, they explained their verdict by saying "that they considered it to be a nuisance, but that the inconvenience was counterbalanced by the public benefit arising from the alteration made by the defendant." The question then was, whether that amounted to a verdict of guilty. Lord Denman, C.J., in delivering the judgment of the Court, says, with reference to the case of *The King* v. *Russell*, "Lord Tenterden's dissent must be allowed to detract greatly from the authority to be ascribed to the decision given at Nisi Prius, which his Lordship was evidently anxious to sustain if possible; and when it appears that Holroyd, J. founds his support of the direction on a distinction which excludes the general principle now contended for, and avowed by Bayley, J., the case of *The King* v. *Russell* will appear to rest on the single authority of that learned Judge, acting at Nisi Prius, and satisfied on reflection with the course which he had then taken. It is observable also that of the distinguished counsel who opposed the rule for a new trial in *The King* v. *Russell*, and who have addressed us on the present occasion, none have maintained that the direction there given was altogether conformable to law." Then, further on, he adds, "Lord Tenterden's judgment in *The King* v. *Russell* plainly shews what his deliberate view of the law was, and that the advantage gained ought to be closely connected with the inconvenience resulting, or rather with that which would have been an inconvenience if it were not absorbed in the superior advantage." And finally he gives his opinion that if the navigation of the river was in any way encroached upon, that was a nuisance which could not be excused from any public benefit arising from it. Both these were cases in which the navigation was impeded in tidal rivers; but it does not appear to have been suggested, either at the bar or upon the Bench, that the parties indicted for the nuisance had any greater right in that respect than they would have had if the rivers in question had been non-tidal. In *The Attorney General* v. *Johnson*, which was an indictment for erecting certain works on the river Thames, at Westminster, between high and low-water mark, Lord Eldon expresses this opinion: "I take it to be clear that *primâ facie* the subject has a right to use that which may be called the water-highway, and which *primâ facie* includes the water between high and low water-mark when it covers the soil, and that those who have enclosed that soil are *primâ facie* bound to shew that they can take it away without injury to Her Majesty's subjects." He then goes on to consider another point, namely, "whether an act may be rightly and properly done which, if improperly done, would be a nuisance"; and ultimately decides that the works in question, having been done without proper authority, must be prohibited.

Upon principle, therefore, and upon authority, I am of opinion that a riparian proprietor on a tidal or navigable river has no greater right against an adjoining or opposite riparian proprietor than such a proprietor on a private or non-tidal river; and the defendant cannot justify the erection of the jetty in question on this ground.

It was then contended that the soil of all navigable rivers being, as it

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unquestionably is, in the Crown, the defendant, as grantee of the Crown, is entitled to the soil of this river at the point in dispute, and that such ownership justified the erection of the jetty, being done upon his own soil. The evidence, I think, establishes, and it may at all events be assumed, that the soil of the river is in the defendant. But it is, in my opinion, clear that such ownership affords no justification for what he has done. I find the law thus laid down in *Williams* v. *Wilcox* (8 Ad. & E. 314, 333; 7 L. J. Q.B. 229), which was an action of trespass for throwing down a weir appurtenant to a fishery in the Severn, the justification being that the weir was wrongfully erected across part of a public and navigable river. Lord Denman, in delivering the judgment of the Court says: "It is clear that the channels of public navigable rivers were always highways. Up to the point reached by the flow of the tide the soil was, presumably, in the Crown, and above that point, whether the soil at common law was in the Crown or in the owners of the adjacent lands (a point perhaps not free from doubt) there was at least a jurisdiction in the Crown, according to Sir Matthew Hale, to reform and punish nuisances in all rivers, fresh or salt, that are a common passage not only for ships and greater vessels, but also for smaller, as barges or boats"—*De Jure Maris*, part 1., c. 2. In either case the right of the subject to pass up and down was complete. In the *Bann Fishery case* (Davies's Rep. 57), where the reporter is speaking of rivers within the flux and reflux of the tide, it is stated that this right was by the King's permission for the ease and commodity of the people; and if this be the true foundation, and if the same may be also properly said of the same right in the higher parts of rivers, still the permission supposed must be coeval with the monarchy and anterior to any grant by any particular monarch of the right to erect a weir in any particular river. It is difficult, therefore, to see how any such grant made in derogation of the public right previously existing, and in direct opposition to that duty which the law casts on the Crown of reforming and punishing all nuisances which obstruct the navigation of public rivers, could have been in its inception valid at common law."

So, again, in *The Attorney General* v. *Burridge*, which was an information to prevent a grantee of the Crown from erecting a building at Portsmouth between high and low water-mark, the defendant attempted to justify on the ground that a licence had been obtained from the Crown; but it was decided that there could be no such right of obstruction, and that neither the Crown itself nor its grantee has power to erect or authorize the erection of buildings between high and low water which may and do impede the navigation of the river. The same principle was also established in *The Attorney General* v. *Parmeter*, and again in *The Queen* v. *Betts*, the indictment there being for erecting a bridge over the Witham, a navigable river. It was only on the ground that the jury found that the bridge was not a nuisance that the indictment was not sustained.

It was not and could not be disputed by the defendants' counsel that the Eden is a navigable river, but it is said that the traffic upon it has so much diminished in consequence of the construction of railways in the neighbourhood, that it can no longer be regarded as of importance. Mr. Jessel used the expression, "Trade there is none; navigation there is none." I am, however, bound to regard the river as a highway, which all Her Majesty's subjects are entitled to use whenever it may suit their convenience; events which it is impossible to calculate upon may add to the use of the river; so that the navigation, which is now no doubt trifling, may become of very great importance. In addition to these considerations the evidence of the plaintiff proves that there is even now a traffic which renders its preservation as a public highway by no means unimportant—[His Honour read the passages above set out from the affidavits of the plaintiff and George Irving, and also referred to the evidence of Mr. Boyd, C.E. upon this point, and proceeded:]—The navigation therefore is, in my opinion, shewn to be of sufficient importance, and the plaintiff has a clear right to have it maintained.

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I think the suit was properly constituted for the purpose of preventing the continuance of the public and private injury of which the Attorney General and the plaintiff complain. The plaintiff might perhaps have maintained the suit without the Attorney General, on the principle of *Spencer* v. *the London and Birmingham Railway Company*, inasmuch as the act complained of, although a public nuisance, causes a distinct and particular injury to himself. I had occasion to consider this point in *Cook* v. *the Corporation of Bath* (L. R. 6 Eq. 177), and there I followed the decision in *Spencer's case*, and held that the plaintiff had a right to sue without the Attorney General in respect of a public nuisance which was also a particular injury to himself.

Being, therefore, of opinion that the various justifications set up by the defendant for the erection of this jetty fail, I think the plaintiff, although he has not established a case of very material injury, is in strictness entitled to the relief which he asks, and must have a decree in substance according to the prayer of the bill. The defendant having persisted in proceeding with the erection of the jetty, notwithstanding the repeated remonstrances of the plaintiff, and the very reasonable offer made by his letter of the 17th of October, 1864, I do not see any ground upon which I can relieve the defendant from the costs of this suit. I may add that though the defendant has raised many objections to the plaintiff's defensive works or bulwarks, I am satisfied that they have not been materially enlarged or altered for much more than twenty years, and that they do not interfere with the natural flow of the tide; it was not therefore, in my opinion, reasonable on the part of the defendant's agents to insist on any question as to those works being referred to arbitration, as they did in answer to the plaintiff's proposal of the 17th of October. With reference to these maps and plans with which I have been supplied, I have examined them repeatedly, but seldom have I seen a case with more waste of expense and labour than these maps evidence, for they only go to shew a point that could not be in dispute; namely, that the river has shifted and encroached sometimes on one side and sometimes on the other, and has receded sometimes from one side and sometimes from the other. In my opinion, for all practical purposes, every map beyond the first was utterly useless.

HATHERLEY, L.C., Jan. 25, 1869.

CRAVEN *v.* BRADY.

38 L. J. Ch. 345; L. R. 4 Ch. 296; 17 W. R. 505: affirming, [1867] E. R. A. 1012; 36 L. J. Ch. 905; L. R. 4 Eq. 209; 15 W. R. 952 (M.R.).

Not followed, *Carr* v. *Atkinson*, [1872] E. R. A.; 41 L. J. Ch. 785; L. R. 14 Eq. 397; 26 L. T. 680; 20 W. R. 620 (V.C.). Followed, *In re Kelly's Settlement*, 1888, 59 L. T. 494 (Ch. D.).

Will—Construction—Forfeiture on Marriage—Acceleration of Remainder.

CONDITION. WILL.—*A testator appointed real estate under a power, and devised other real estate to the use of his wife and her assigns for life, and after her decease he devised the same estates to his son in fee, with an executory gift over, and with a proviso that if his wife should make or do any matter or thing whereby she should be deprived of the rents and profits, so that her receipt alone should not be a good and sufficient discharge, her life estate should cease as on her death. By a codicil he revoked the devise in remainder in fee to his son, and substituted other limitations to take effect on the decease of his wife. The wife having married again without making any settlement of her life interest:*— Held, *affirming the decision of the* Master of the Rolls, *that there was a forfeiture of her life interest, and the estates in remainder were accelerated.*

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This was an appeal from a decision of the Master of the Rolls, reported 36 L. J. Ch. 905.

General Dyson having a general power of appointment by deed or will over certain real estate, made his will, dated the 3rd of December, 1854, and thereby appointed the same, and also devised all his other real estates to the use of his wife and her assigns for and during the term of her natural life, and from and immediately after her decease he gave and devised the same unto his son, A. H. F. Dyson, and his heirs, with an executory devise over in case he should die under the age of twenty-one without leaving issue him surviving. And the testator declared his will and mind to be that in case his said wife should sell, release or charge her said life estate of and in the said real estate, or should make or do any matter or thing whereby, or by means whereof, she should be deprived of the rents and profits of the same so that her receipt alone should not be a good and sufficient discharge for the same, then and in such case it was his will, and he did thereby declare that her life estate and interest in the said hereditaments should cease and determine as fully and effectually as it would by her actual decease. And he gave and bequeathed the residue of his personal estate upon trust to get in and invest the same, and upon further trust to permit and suffer his said wife to receive the interest, dividends and annual produce thereof for and during the term of her natural life, but so long only as her receipt alone should be a good discharge for the same; and immediately after the decease of his said wife, or her ceasing to be entitled to the same by reason of her receipt alone not being a discharge for the same, upon trust for his child or children as therein mentioned.

By a codicil, dated July, 1859, the testator revoked the appointment and devise in favour of his son A. F. H. Dyson, and appointed and devised all and singular the real estate by his said will appointed and devised respectively, after the decease of his said wife, unto and to the use of his said son A. F. H. Dyson for life, with remainder to his first and other sons in tail, with remainders over.

By a second codicil, dated May, 1860, the testator, after revoking the residuary bequest of personal estate contained in his will, gave and bequeathed all the rest, residue and remainder of his personal estate upon trust to collect, get in and receive the same, and to pay his debts, &c., and to invest the residue or surplus of the same residuary personal estate in manner therein mentioned, and to pay unto his wife, or permit and suffer her to receive the interest, dividends and annual proceeds of his said residuary estate, stocks, funds and securities for and during the term of her natural life, for her sole, separate and inalienable use and benefit, independently of any future husband, and so that she might not have power to deprive herself of the benefit thereof by any mode of anticipation, and so that accordingly her receipt alone should be a sufficient discharge for the same interest, dividends and annual produce, or any part thereof; and from and immediately after the decease of his said wife, the residuary estate, stocks, funds and securities should be in trust for his children.

The testator died in February, 1861, and in August, 1866, his widow married the defendant Brady without making any settlement of the life interest in the real estate given by the will of her first husband.

The suit was instituted by the trustees of the will and the infant son of the testator against Mr. and Mrs. Brady and the persons entitled in ultimate remainder, the question being whether Mrs. Brady had by her second marriage without making any settlement of her life interest, incurred a forfeiture thereof.

The Master of the Rolls was of opinion that a forfeiture had been committed and that the estate of the son was accelerated.

From this decision the defendants Mr. and Mrs. Brady appealed.

Mr. Kay and *Mr. M'Naghten*, for the appellants, contended that the clause of forfeiture in the will was not intended to apply to the case of a second marriage, which the testator did not, as appeared by the second codicil, intend to prohibit. But if the clause of forfeiture in the will were held to apply to

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the second marriage, the limitation over was revoked by the first codicil, and no new limitation substituted to take effect except on death.

They referred to *Rochford* v. *Hackman* (9 Hare, 475; 21 L. J. Ch. 511).

Sir R. Baggallay and *Mr. Montague Cookson*, for the plaintiffs, and *Mr. Wingfield*, for other parties, were not called upon.

The LORD CHANCELLOR.—I cannot have any doubt upon the question in this case. I am sorry for it, because the parties have been misled in not sufficiently considering the terms and scope of the will. The testator, no doubt, gives a life estate to the lady and her assigns in the first place; but then, after the other limitations in remainder, he declares that in case she shall sell, release or charge her life estate of and in the said real estates, or shall do, make or execute any deed, matter or thing whereby or by means whereof she shall be deprived of the rents and profits of the same, or the power or right to receive or have control over the same, so that her receipt alone shall not at all times be a good and sufficient discharge for the same, then and in such case her life estate and interest in the said hereditaments shall cease and determine as fully and effectually as it would by her actual decease.

What has happened is the lady's marriage, and by that event, of course, no settlement or arrangement having been made for her to receive the rents to her separate use independently of control, and to give a good discharge, the husband becomes entitled to receive the rents, and she is deprived of all control over the property. Everything the testator has provided against has happened, and I cannot conceive a second marriage to be out of the category of events against which the testator was providing. If he could have been asked, I think he would have said, that was an event against which he was exceedingly anxious to guard. He has used words of large effect for the express purpose, as it seems to me, of taking in all the cases that did not occur to his mind at the moment, and for the purpose of avoiding the dangerous enumeration which is so apt to prove defective.

Surely it would be frustrating the testator's intention altogether if, where the whole object and scope of the will is that the testator's wife shall have the actual receipt of the property, I were to hold that the liability to be deprived of it by marrying a man who may desert her and squander the property (though I do not suppose that would be likely to occur in the present case), is not a case against which the testator has provided. I think that would be very far from being the leading intention expressed by this testator, that his wife shall have the personal benefit of the property, and shall not deprive herself of that personal benefit; and the circumstance of his giving it to her and her assigns, in the first instance, does not bind me to say that the words which are here used are too indefinite to deprive the wife of the actual and positive right of assignment given by the earlier part of the will; though I am not clear that an assignment to a trustee for the purpose of protection, with a declaration that her receipt should be a good discharge for the rents, would not have been good.

It is said, however, that the words in the will and codicil used in dealing with the personal estate shew that the testator's intention was, that a second marriage was to be excluded from the class of cases which should work a forfeiture. As to the personal estate, the testator by his will gives her the income for life, and declares that she shall receive the dividends during the term of her natural life, but so long only as her receipt alone shall be a good discharge for the same, and upon her ceasing to be entitled to it he gives it over. And when he comes to deal with the personal estate by the codicil, he revokes the gift in the will, and directs that the trustees shall pay unto his said wife, or permit and suffer her to receive the interest, dividends and annual produce of his said residuary estate, stocks, funds and securities for and during the term of her natural life, for her sole, separate and inalienable use and benefit, independently of any future husband; and so that she may not have power to deprive herself of the benefit thereof by any mode of anticipation, and accordingly her receipt alone shall be a sufficient discharge for the same interest,

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dividends and annual produce, or any part thereof; and immediately after the decease of his wife the property is to go over. All that can be said is, that having limited the property in one way by the will itself, and having been advised that, in respect of the personal estate he has not with sufficient clearness directed what he wishes to be done, he in this codicil makes a more elaborate and clear limitation of all the purposes which he intends to effect. But can I say that his declaration, as to his personal estate, of an intention to provide for it more clearly and distinctly than he had done by his will, indicates anything as regards the real estate, or have I a right to take it into consideration in contemplating that disposition of his real estate, which he does not touch or refer to? The only argument was, that in the second codicil he contemplated the second marriage of his wife, and that is an indication that, in the limitation of the real estate in the will, the intention was to confine it to the particular mode of charging which he there introduced. But it may be quite true that he contemplated the second marriage of his wife, in the limitation of the income of the real estate, without in the least intending to deprive her of the income in the event of her second marriage. I do not think that was his intention. All that you gather from the second codicil is, that he has no objection to her marrying again, but that does not help the argument in any way. I do not think he indicates the least desire that she shall not marry again; but the leading and governing feature of the will is an anxious desire that she shall have the sole control over the property; and the words of the will would be perfectly satisfied as to the real estate, by her executing a deed on her second marriage empowering her to receive the rents, and making her receipt alone a sufficient discharge; so that nothing I gather from the second codicil, contemplating the possibility of a second marriage, militates against the construction that she is to have those rents for her own sole use. All that can be said is, that he has expressed it more fully and clearly with reference to the personal estate than he has done with reference to the real estate. But if the words as to the real estate be capable of having the same effect, namely, that whatever act she did she was to guard against depriving herself of the income, they may have their full effect exactly in the same manner, notwithstanding its having been provided more fully and completely in words by the limitation of the personal estate. It would not be sound argument to say that, though the testator has used words in the will which would have given effect to his intention with regard to his real estate, that intention is not to have that effect given to it, because by the codicil something different is to take place with respect to the personal estate.

As to the argument upon the effect of the first codicil under which the substituted limitations over are to take effect on death only, that cannot possibly supersede the doctrine of *Rochford* v. *Hackman*. In that case Vice Chancellor Turner held, that if you have a life estate, with a series of limitations over, and then a proviso that, in certain events, that life estate is to be determined as if by death, then on the happening of those events the limitations over are accelerated, and take effect accordingly in the same manner as if the person in whose favour the life estate is given were dead. Here the testator has given the lady an estate for life, with a series of limitations over, and a proviso determining her life interest in certain events; and all he has done by the codicil has been to sweep away those limitations, and introduce a new set of limitations to take effect upon her decease. The effect can be no other than to substitute the second for the first set of limitations, and they must be read as if they had occurred in the will.

The appeal, therefore, must be dismissed, but I suppose the costs are not asked for.

Sir R. Baggallay.—I shall be satisfied if the costs are dealt with in the same way as they were in the court below. They will then be paid by the receiver.

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JAMES, V.C., Feb. 10, 1869.

WARE *v.* GARDNER.

38 L. J. Ch. 348; L. R. 7 Eq. 317; 20 L. T. 71; 17 W. R. 439.

Voluntary Settlement—13 *Eliz. c.* 5.—*Trader*—*Subsequent Creditors.*

BANKRUPTCY. FRAUDULENT CONVEYANCE.—*A trader, by a voluntary settlement, settled all his property, present and future (reserving to himself a control over the settled property), upon his wife, for her seperate use for life, with remainder to himself for life, with remainder to his children. Five years afterwards he became bankrupt. In a suit by his assignees to set aside the settlement, although some evidence was adduced to prove that the trader was in solvent circumstances at the date of the execution of the settlement:*—Held, *that it was void as against his creditors under the stat.* 13 *Eliz. c.* 5.

Bill by the assignees in bankruptcy of Richard Gardner deceased, to set aside a voluntary post-nuptial settlement.

Gardner, who carried on the trade of a builder in Exeter, on the 13th of March, 1861, executed an indenture of settlement whereby, in consideration of his natural love and affection for his wife and children, he purported to grant and assign absolutely to a trustee "the several messuages or dwelling-houses, hereditaments, goods, chattels, moneys, policies and effects" enumerated in the schedule thereto, upon trust to pay the income thereof to his wife Charlotte Gardner, for her separate use, free from his debts, &c., for her life, with remainder to Richard Gardner for his life, with remainder upon trusts for the benefit of the children of Richard and Charlotte Gardner. The schedule comprised seven freehold houses, subject to a mortgage, and "all other freehold, leasehold or other hereditaments now or hereafter to belong to or be bought or otherwise acquired by the above-named Richard Gardner, all stock-in-trade, implements, utensils, customers, credits or book debts and ready money or other personal property of or belonging to or hereafter to be acquired or belong to him in his trade of builder, but which the trustee or trustees for the time being under the above-written indenture is or are to suffer to remain under the control of the said Richard Gardner during his life." Gardner continued to carry on his business till the 18th of August, 1866, when he was adjudicated a bankrupt, and the plaintiffs were appointed creditors' assignees of his estate and effects. The mortgage upon the seven freehold houses comprised in the schedule to the settlement had been satisfied prior to Gardner's bankruptcy. Gardner died on the 3rd of September, 1866, and thereupon his widow and children served on the plaintiffs a notice of the settlement interdicting them from interfering with the property comprised therein. Under these circumstances the plaintiffs instituted this suit. Gardner's widow, by her answer, alleged that the settlement was made on the consideration of her husband having possessed himself of all her property, but this defence was abandoned at the bar. The widow's answer also stated her belief that at the date of the settlement her husband was in solvent circumstances, and the settlement was not made with the intention to defeat or delay his creditors. One of Gardner's sons also proved that he was in the habit of paying all his bills at once, and of keeping a sufficient sum in hand to meet all ordinary liabilities. The plaintiffs adduced some slight contradictory evidence upon this point, but neither the arguments of their counsel nor the judgment of the Vice Chancellor rested upon it.

Mr. Druce and *Mr. Morris*, for the plaintiffs.—The only question was as to the intention of the settlor—*Holmes* v. *Penney* (3 Kay & J. 90; 26 L. J. Ch. 179), *Barrack* v. *M'Culloch* (3 Kay & J. 110; 26 L. J. Ch. 105), *Warden* v. *Jones* (2 De Gex & J. 76; 27 L. J. Ch. 190). A man could not be heard to say that a voluntary settlement of all his property, past, present, and future, was not made with the intention of defeating the rights of his creditors.

Mr. Kay and *Mr. W. W. Karslake*, for the defendants, the widow and

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children of the settlor.—The only creditors at the date of the deed were the mortgagees, whose security was sufficient, therefore there could have been no intention of the settlor to delay or defraud his creditors by the execution of this deed. Gardner had no expectation of ever failing, and he did fail merely from a temporary cause. There was a difference between the cases where a voluntary settlement was impeached by creditors whose debts existed at the date of its execution and where such a deed was impeached by subsequent creditors—*Spirett* v. *Willows* (3 De Gex, J. & S. 293; 34 L. J. Ch. 365). The words in the statute pointed to a *mens rea*, and an actual guilty intent must be made out. And where there were no unsecured creditors at the time of the execution of the deed who could be prejudiced by it, no such intent could be presumed—*Lush* v. *Wilkinson* (5 Ves. 384), *Stephens* v. *Olive* (2 Bro. C.C. 90), *Skarf* v. *Soulby* (1 Mac. & G. 364; 19 L. J. Ch. 30), *Battersbee* v. *Farrington* (1 Swanst. 106), *Lord Townshend* v. *Windham* (2 Ves. sen. 10), *Jenkyn* v. *Vaughan* (3 Drew. 419; 25 L. J. Ch. 338), *Olliver* v. *King* (8 De Gex, M. & G. 110; 25 L. J. Ch. 427).

JAMES, V.C. (without calling for a reply) said: In 1861, Richard Gardner had carried on the trade of a builder in Exeter. Being such trader, and minded to continue to carry on his business and incur such debts as were incurred in the ordinary course of trade, he, on the 13th of March, 1861, executed a voluntary post-nuptial settlement, whereby the property comprised in the schedule thereto was assigned to a trustee, upon trust to pay the annual income to his wife for her life, for her separate use, free from the debts, control and interference of the settlor, with remainder to the settlor during his life, and from the death of the survivor upon trusts for the benefit of the children. The schedule comprised all the property of the settlor and all his subsequent property; but the trustee was to permit the settled property to remain under Gardner's control during his life. Gardner continued to trade, and became bankrupt in August, 1866. The question was, whether by this deed he could have had any other intent than to delay and hinder his creditors? His Honour was clearly of opinion that he did execute it with that intent, and that this settlement was within the very words of the statute of the 13 Eliz. c. 5. The plaintiffs were therefore entitled to a declaration that the settlement was void, with the usual consequential directions, and the defendants must pay the costs of the suit.

JAMES, V.C., March 12, 15, 16, 19, 24, 1869.

EARL OF DUNDONALD *v.* MASTERMAN.

38 L. J. Ch. 350; L. R. 7 Eq. 504; 20 L. T. 271; 17 W. R. 548.

Distinguished, *Plumer* v. *Gregory*, [1874] E. R. A.; 43 L. J. Ch. 616; L. R. 18 Eq. 621; 31 L. T. 17 (V.C.). Considered, *Cleather* v. *Twisden*, [1885] E. R. A.; 54 L. J. Ch. 408; 28 Ch. D. 340; 52 L. T. 330; 33 W. R. 435 (C. A.).

Partnership—Firm of Solicitors—Business entrusted to one Member—Liability of other Members in respect of his Acts.

PARTNERSHIP.—*The plaintiff retained a firm consisting of three members as his solicitors. Their principal business under such retainer was to make arrangements with the plaintiff's creditors, and one member, by whom the plaintiff's business was almost exclusively managed, received large sums for the purpose of making payments to creditors and others, and misappropriated some of such funds*:—Held, *that all the members of the firm were jointly liable in respect of these misappropriations.*

The plaintiff, on the death, in 1860, of his father, the celebrated Earl of Dundonald, became absolutely entitled, amongst other things, to an estate in Trinidad and a manufactory of lubricating grease, and also entitled to a claim

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upon the Brazilian Government for naval services rendered by his father, subject to certain trusts in favour of his brothers and others.

In 1864, the plaintiff, not having been able to realize his property, was under circumstances of temporary embarrassment and desirous of obtaining professional assistance. For this purpose the defendant Brutton, a member of a firm consisting of the defendants Masterman, Upfill & Brutton, was recommended to him, and accordingly, on the 2nd of November, 1864, Brutton was introduced to the plaintiff, and the plaintiff through the defendant Brutton retained the firm as his solicitors.

The plaintiff's affairs were entrusted to Brutton. Once or twice the plaintiff or his wife called at the defendants' offices and saw one of the other defendants in consequence of Brutton's absence, and occasionally Brutton in the plaintiff's presence consulted one of his partners as to the plaintiff's business. With these exceptions, Brutton had the entire management of the plaintiff's affairs, which involved a good deal of correspondence and many personal interviews. Brutton's private house was much nearer to the plaintiff's house than the defendant's offices, and the plaintiff and his wife frequently saw Brutton at his private house and sent letters to him there. Brutton also wrote several letters dated from his private residence. The acquaintance between the plaintiff and Brutton in time became more intimate, and many of the letters which passed between them were expressed in familiar and sometimes even playful terms, and frequently the same letter mixed up matters of business with other matters.

The plaintiff, by Brutton's advice, executed a trust deed, which was dated the 2nd of November, 1864, and made between the plaintiff of the first part, the defendants Masterman and Brutton of the second part, and the several persons, companies and firms whose names and seals were expressed to be set and affixed to the schedule thereto, or who had in writing assented thereto, being creditors of the plaintiff, and thereinafter called the creditors, of the third part. The deed recited a contract entered into by the Trinidad Petroleum Company (Limited) with the plaintiff for the purchase of the Trinidad estate and a patent for making petroleum for 50,000*l*., and assigned the benefit of the contract and the said sum of 50,000*l*. to Masterman and Brutton, together with full powers to use the plaintiff's name in order to carry out the contract. And it was declared that the said William Stanley Masterman and William Courtenay Brutton, and the survivor of them, his executors or administrators, should stand possessed of all moneys which should be received by them or him under or by virtue of the now stating deed, upon trust in the first place to pay and retain all costs and expenses which should be incurred in or about investigating the affairs of the plaintiff, or otherwise in relation to the premises, and in the next place (so far as the same might extend) to pay and satisfy rateably and without preference (administering assets, however, in like manner as in bankruptcy) to and amongst the whole of the creditors of the plaintiff, and to pay the ultimate residue (if any) of the said moneys to the plaintiff, his executors, administrators or assigns. And it was thereby declared that the said William Stanley Masterman and William Courtenay Brutton, and the survivor of them, by themselves or himself, or by their or his firm, might act as solicitors and attorneys in execution of the trusts and powers of the deed, and should be entitled to charge and be paid all costs, charges and expenses in respect of business transacted by them or him in relation to the said trust estate in the same manner as if they or he were not or was not trustees or a trustee, any rule of any Court of law or equity to the contrary notwithstanding.

The deed of the 2nd of November, 1864, was not executed or assented to in writing by any creditor, and the deed was treated as a mere arrangement for enabling the trustees to make terms with the creditors, and as a revocable instrument, and accordingly was, to some extent, disregarded.

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Early in 1866, the plaintiff, by Brutton's advice, executed a mortgage, in which Lady Dundonald concurred, to raise 1,500*l.*, which was paid to Brutton.

The purchase-money for the Trinidad estate was by a subsequent contract reduced from 50,000*l.* to 16,000*l.*, payable by instalments, and as the plaintiff then contemplated going to Brazil to urge his claim on the government, Brutton procured his signature to an authority empowering him to receive the instalments.

The plaintiff went to Brazil, and shortly before starting he, under Brutton's advice, executed a second trust deed which was dated the 20th of March, 1865, and expressed to be made between the plaintiff of the first part, the defendants Masterman and Brutton of the second part, and the several persons, companies and firms whose names and seals were mentioned to be set and affixed in the schedule thereto, or who had in writing assented thereto, being creditors of the plaintiff, of the third part; and by it the plaintiff assigned to the defendants Masterman and Brutton all the moneys which he might receive in respect of his claim upon the Brazilian Government, to hold upon trusts substantially identical with those declared by the previous deed of the 2nd of November, 1864.

The deed of the 20th of March, 1865, was not executed or assented to by any creditor, and was, to some extent, disregarded.

At the same time the plaintiff, by Brutton's advice, executed a power of attorney, and thereby constituted Lady Dundonald and Brutton his attorneys to receive moneys, pay debts and act generally in his name.

The plaintiff, during his stay in Brazil, remitted 5,695*l.* by means of a bill payable to the joint order of Lady Dundonald and Brutton. The latter procured the Countess's indorsement and discounted the bill, and received the proceeds thereof.

This 5,695*l.* was subject to the trusts of the will of the plaintiff's father, whose sole executor the plaintiff was. Accordingly, on the Countess's receiving the bill, Brutton attended her at Ryde and advised her as to its proper application, informing her that for this purpose she should indorse and deliver the bill to him in order that he might get the same discounted, and duly apply the proceeds pursuant to the trusts of the will. Accordingly, in a portion of the defendants' bill of costs, which was headed, "The Executorship of the late Earl Dundonald," the defendants made the following charge in relation to the bill and the trusts, to which the proceeds thereof were applicable under the will:

"1865, July 15th.—Having been requested by Lady Dundonald to attend her ladyship at Ryde on the matters of this executorship, journey there accordingly, and discussing the position of the affairs of the late Earl, and the distribution of the proceeds of bills for 5,000*l.* sent by your Lordship to Lady Dundonald to discharge the debts due from the late Earl's estate, and to pay legacies specially bequeathed out of the money, and fully advising as to the course to be adopted and taking instructions (proportion of journey, the same being divided with the general business), engaged all day until late in the evening. £5 5 0

"Paid railway and expenses . . . . . 3 7 6"

The bill of costs also contained (among the general charges) an item of 1*l.* 1*s.* for the same attendance, and an item (in reference to the bill) of 2*l.* 2*s.* for sundry attendances on the 18th of July, 1865, which item was in part as follows:

"And subsequently (attending) on the manager of the National Bank, discussing terms for discounting the Brazilian bill, engaged all the morning, £2 2 0."

The plaintiff withdrew his retainer from the defendants in February, 1866, and on the 2nd of March, 1866, they dissolved partnership, and some time afterwards delivered to the plaintiff a bill of costs, made out in the names of Masterman, Upfill and Brutton, and divided into various heads. It included,

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but not under a separate head, all the business done in relation to the Trinidad and Brazilian funds, and that business was mixed with business relating to the plaintiff's other affairs, not merely in the bill, but also in very many items of it. The total amount of the bill of costs was 1,311*l.* for which the defendants threatened to sue the plaintiff. Of the proceeds of the bill for 5,695*l.*, and other monies coming from the plaintiff, Brutton had misappropriated a large amount. The present suit was instituted against all the members of the firm of Masterman, Upfill & Brutton, seeking to make them all liable as accounting parties in respect of Brutton's acts, and to restrain all proceedings at law to recover the 1,311*l.* claimed as due upon the bill of costs.

The main ground of defence was, that the plaintiff had by his conduct released the defendants Masterman and Upfill from all responsibility for Brutton's acts.

The plaintiff, after he started for Brazil, executed a deed of release and indemnity, which was set up by the defendants Masterman and Upfill as a bar to so much of the bill as related to the matters comprised in it. This deed was dated the 17th of April, 1865, and made between the plaintiff of the one part, and the defendants Masterman and Brutton of the other part, and after reciting that 1,500*l.* had been received by Masterman and Upfill from the Petroleum Company, and that two bills for 1,000*l.* each, accepted by the company, and 774*l.*, part of the said sum of 1,500*l.*, had been given to Keane, a creditor of the plaintiff's, and that Masterman and Brutton had also, at the request of the plaintiff, paid to him out of the said 1,500*l.*, the sum of 350*l.* to enable him to proceed to Brazil to prosecute his claim against the Brazilian government, and had also out of the said 1,500*l.* retained, at the request of the plaintiff, 300*l.* on account of their costs and charges of and incident to the deeds of the 2nd of November, 1864 and the 20th of March, 1865, and to the trusts respectively therein contained, and otherwise on behalf of the plaintiff, and that 17*l.* or thereabouts, residue of the said sum of 1,500*l.*, then remained in their hands, the plaintiff thereby ratified the payment and retention of the said several sums of 814*l.*, 350*l.* and 300*l.*, and every act done by Masterman and Brutton under or by virtue of the said deeds of the 2nd of November, 1864, and the 20th of March, 1865, or either of them, or in the execution of the trusts or powers contained in the same respectively, or either of them, or otherwise in relation to the premises, and released Masterman and Brutton from all claims by or on account of the said sums so paid and retained as aforesaid, or of anything done under the said deeds, or either of them, or otherwise in relation to the premises, and covenanted with them to indemnify them from all actions, suits and claims by reason of the said sums so paid or retained as aforesaid, or of anything done in relation to the premises.

Mr. Amphlett and *Mr. Bagshawe*, for the plaintiff.—The sole question is, are the defendants Masterman and Upfill liable in respect of the acts of their co-partners? The firm, not any individual member, was retained by the plaintiff, and the business done by Brutton was clearly within the ordinary scope of a solicitor's duties. *Atkinson* v. *Mackreth* (35 L. J. Ch. 624; L. R. 2 Eq. 570). All the partners are, therefore, liable in respect of Brutton's acts. *Marquise de Ribeyre* v. *Barclay* (23 Beav. 107; 26 L. J. Ch. 747). In cases such as *Bourdillon* v. *Roche* (27 L. J. Ch. 681), where co-partners were held not liable, they were unaware of the receipt of the money by the defaulting member of the firm. It is true that the plaintiff corresponded almost exclusively with Brutton, but that does not impair the liability of the whole firm. *St. Aubyn* v. *Smart* (L. R. 5 Eq. 183); *Blair* v. *Bromley* (2 Ph. 354; 16 L. J. Ch. 495).

Mr. Garth and *Mr. Cottrell*, for Masterman.—It is not in the ordinary course of a solicitor's business to receive his client's money—*Harman* v. *Johnson* (2 El. & B. 61; 22 L. J. Q.B. 297); *Viney* v. *Chaplin* (2 De Gex & J. 468; 4 Drew. 237; 27 L. J. Ch. 434). As to the Trinidad moneys, the plaintiff has expressly released the defendants from liability.

Mr. Druce and *Mr. Freeman*, for Upfill, claimed the benefit of the argument

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on behalf of Masterman. They also urged that as to all moneys subject to the trust deeds, Upfill was *functus officio* as soon as they reached the hands of the trustees, Masterman and Brutton—*Coomer* v. *Bromley* (5 De Gex & Sm. 532).

Brutton did not appear.

Mr. Amphlett was called upon to reply as to the effect of the release only.—The release relates to matters of account, and is clearly erroneous on the face of it. In fact it is no more than a settled account which, having regard to the relationship between the parties, the plaintiff is entitled to open—*Lawless* v. *Mansfield* (1 Dru. & W. 557).

JAMES, V.C. (*March* 24).—This is a suit by the client of a firm of solicitors against the several members of that firm.

The principal question is, whether the two partners are liable to account for a very large sum of money received by a third partner, who has absconded, and which was misapplied by him.

There is little dispute as to the facts, which lie within a short compass.

The plaintiff was, in the year 1864, embarrassed by the pressing demands of several creditors. He had, however, very considerable unrealized assets. These comprised and were to a great extent composed of claims in respect of a Trinidad estate, and his share and interest in large claims of his deceased father, the celebrated Lord Cochrane, against the Brazilian government. He was desirous of rendering the property available for relieving himself from his embarrassments by distribution amongst all his creditors, and preventing its being attached and seized by the more importune and impatient of the body, who had commenced or threatened legal proceedings. He was recommended to avail himself for this purpose of the services of an eminent firm of solicitors, to all of whom he had previously been a stranger. He accordingly applied to them as such solicitors to undertake the management and settlement of his affairs.

They accepted the task. The extent to which their professional services were necessary and were given is shewn by the fact that the bill of costs from November, 1864, to February, 1866, amounts to no less a sum than 1,311*l.*

As is usual in such cases, one member of the firm had the almost exclusive conduct of the business of the client, and that member appears to have acquired his almost unbounded confidence. His acquaintance with him, however, began with his professional retainer, and although their constant, almost daily, intercourse naturally led them to an intimacy amounting to friendship, it never appears to have lost its purely professional character. Their relations continued throughout those of client and solicitor; and, so far as appears, their interviews and their correspondence were treated as professional matters, for which the usual professional charges were made for the benefit of the firm, and duly recorded in the business memorandum and diaries kept by him as a member of the firm.

As part of the arrangements made for the settlement of the plaintiff's affairs, he executed trust deeds, vesting his Trinidad and Brazilian property in trustees upon trust for his creditors, and two of the members of the firm, Mr. Masterman and Mr. Brutton, were the trustees of those deeds, so as to keep the entire management and control in the firm itself. Having regard to the circumstances and the objects of the plaintiff, the professional advice under which this was done was proper and right. It was not desirable that any third person should have any right to interfere with the client and his own solicitors. But it was because they were his solicitors, and it was because they were partners in the firm of Masterman, and in that character only, that Mr. Masterman and Mr. Brutton were appointed to and accepted the office of trustees for the plaintiff.

Besides the arrangement as to the Trinidad and Brazilian funds, it became necessary to raise a sum of 1,500*l.* by way of mortgage on some property in England to discharge the pressing claims of two creditors, Faber and Keane. This was raised, and the claims were paid. All the transactions connected with the raising and paying this money are charged in the bill of costs, the money

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itself actually passing through the hands of Mr. Brutton in the ordinary course of professional business, and beyond all question as a member of the firm.

The Trinidad matter was arranged. Very large sums in money and bills were received by Mr. Brutton under a written authority prepared by him and charged for in the bill of costs. The greater part of these moneys was paid to a Mr. Sheridan, who had heavy paramount claims to the fund; and a sum as the balance, after satisfying the charge, was paid to the credit of the account of Messrs. Masterman and Brutton as the trustees of the trust deed.

It was then considered necessary or advisable that the plaintiff should proceed personally to the Brazils to prosecute his claims, and a sum of 350*l.* was paid to him out of the trust moneys to defray the necessary expenses of that visit to that country. Before he left he executed a power of attorney, not to the firm, but to Mr. Brutton and to Lady Dundonald as his joint attorneys, to act for him in his absence.

Nothing was ever done under the power, but it is considered a material part of the *res gestæ*, as shewing, as is suggested, that the plaintiff was dealing with Mr. Brutton, not as a member of the firm, but in an independent capacity, and making him and another person, not a member of the firm, his joint agents to the exclusion of the firm as such.

The plaintiff's case as to this, however, is, that he acted in this, as throughout, under the professional advice of Mr. Brutton, and as part of the arrangement for the settlement of his affairs, which had been and still remained confided to the firm. The charges for this power of attorney are contained in the bill of costs of the firm.

What took place thereupon is shewn by the bill of costs and the affidavit of Lady Dundonald. In the bill of costs is the following entry—[His Honour read the entry of the 15th of July, 1865, under the head "The Executorship of the late Earl of Dundonald," given above]. Lady Dundonald's account is this: "During my husband's absence in Brazil, he obtained and remitted to this country a bill of exchange for 5,695*l.* 6*s.* payable to the joint order of the said William Courtenay Brutton and myself. I received no particular instructions from my husband as to the said bill or the application of the money produced by it. I understood that the proceeds of the said bill were to be applied, by or under the advice of the said William Courtenay Brutton, as the representative of his firm, in paying or compounding for the claims of the creditors and legatees of my husband's late father; and any surplus was to be applied by them, with my husband's other funds in their hands, in effecting a composition with my husband's other creditors, whereby he was to be released and enabled to return to this country without molestation by his creditors, to avoid which he remained some time at Paris after his return from Brazil. The obtaining of my said husband's release from his debts was the principal business the said firm of solicitors had in hand. I acted entirely under the advice of the said William Courtenay Brutton, as such solicitor as aforesaid, in indorsing and handing to him, as I in fact did, the first, and afterwards the second, part of the said bill of exchange; and in leaving him as I did to receive and apply as he thought fit for the purposes aforesaid the proceeds of the said bill, which I understood from him he was to get, and in fact did get discounted. I understood that my husband had communicated to him, the said William Courtenay Brutton, his directions as to any particular details which he wished attended to in the application of the money for the purposes aforesaid, but left the general management of the matter to the said William Courtenay Brutton, as the representative of the firm; and I was not competent to give, and did not give, directions or instructions on the subject."

Of course, the advice given by Mr. Brutton was the advice of the firm. Under that advice the bill was given into the hands of Mr. Brutton for the purpose of satisfying the executorship obligations and of handing the net surplus to the trustees. The bill of costs contains the following entry: "And subsequently attending on the manager of the National Bank, discussing terms for

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discounting the Brazilian bill, engaged all the morning, 2*l.* 2*s.*" As the result of that arrangement with the bank, Mr. Brutton obtained the proceeds of the bill, which constitutes the sum now principally in question. The business of the executorship was professionally undertaken by the firm, and there is a very long and very heavy bill of costs of the firm for this professional business, principally in endeavouring to settle and to ascertain the amounts payable to the various claimants. A part of this sum was paid to the account of the trustees. The residue was to a great extent misappropriated by Mr. Brutton. The partners contend that Mr. Brutton alone, and not they, are answerable for the amount. The case of *Harman* v. *Johnson* is relied on as an authority in their favour. In that case the marginal note is as follows: "The receipt of money by one of a firm of attorneys from a client professedly on behalf of the firm for the general purpose of investing it as soon as he can meet with a good security, is not an act within the scope of the ordinary business of an attorney, so as, without further proof of an authority from his partners, to render them liable to account for the money so deposited, such a transaction being part of the business of a scrivener, and attorneys as such not necessarily being scriveners. But if money be so deposited with one partner for the purpose of its being invested on a particular security, the other partners are liable to account for it, such a transaction coming within the ordinary business of an attorney." The second part of that case is a very important qualification of that which is supposed to be the doctrine laid down in the first part. In truth, the mode in which the question arose there was, that Lord Campbell in charging the jury had given, as he afterwards thought, too general a direction to them, intimating his opinion that money received by an attorney, a member of a firm, under any circumstances, was received by the firm through his hands. But it is important to observe that all the Judges expressly mention and decide that money received by a partner for the purpose of being invested on a particular security is within the ordinary business of the firm, and as such the firm would be answerable for that which is done by one partner with respect to it.

There is another case, of *Viney* v. *Chaplin*, which was principally relied on for an expression of Lord Justice Turner, that it was no part of the ordinary duty of a solicitor to receive purchase-money belonging to his client, and that the deed of conveyance comes into his hands for a wholly different purpose. But this would hardly have arisen if it had not been a very common practice of attorneys to receive money on behalf of their clients on the completion of mortgage and purchase transactions; and what was decided there was, that an attorney as such has not as against his client authority to receive that client's money; but it does not touch the question as to whether, when the authority is given to receive it, it is not a part of the business of one partner of the firm to receive it on behalf of the firm.

The case on the other side which was referred to is the case of *St. Aubyn* v. *Smart*. The marginal note is as follows: "The plaintiff being entitled to a fund in Court, gave the firm of solicitors who had acted for him in the matter a joint and several power of attorney to receive the money from the Accountant General. The plaintiff sent the power to B, one of the partners, who received the money and signed the receipt in his own name. B. paid the money into his own private banking account, and shortly afterwards absconded with it. The letters on the subject of the power of attorney and the cost of stamping it were charged for in the bill of costs of the firm. Upon a bill seeking to make S, the other partner, liable to repay the money, but not praying for an account,—Held (affirming the decree of Vice Chancellor Malins), that the money must be treated as having come into the hands of the firm in the course of their business as solicitors, and that S. was liable for its repayment with interest."

Lord Dundonald was cross-examined before me in order to elicit from him admissions of intimate relations and confidence in Mr. Brutton personally, to the exclusion of the firm.

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In the cross-examination Lord Dundonald adhered to the statements in his affidavit that he throughout dealt with Mr. Brutton, not as a personal friend, not as a distinct and separate agent, but in that character in which alone he first established relations with him, viz., as the particular member of the firm by whom the personal conduct of the professional business which he required had been undertaken.

The question is, then, whether it is possible to treat the money so paid in the course of the professional business which was undoubtedly the professional business of the firm, under professional advice which was undoubtedly the advice of the firm, as paid otherwise than to the firm. I hold that it is impossible so to treat it, however hard it may be on innocent parties. It is surely within the ordinary every-day practice of a firm of solicitors or attorneys to receive moneys from a client for the purpose of satisfying the demands of the creditors whom they are employed to arrange with. It is surely within the ordinary every-day practice of a firm of solicitors and attorneys to receive from a client, an executor, moneys, sometimes to pay the demands of government, sometimes to pay legatees, and sometimes to pay into Court, in short, to receive money for any specific purpose connected with the professional business they have in hand, just as in *Harman* v. *Johnson* the Court held it was within the ordinary business of such a firm to receive moneys for the purpose of making a specific investment on mortgage.

The visit of Lord Dundonald to Brazil was so far successful that he obtained a net sum, after many heavy payments in that country, of about 5,500*l*. This money, however, did not belong to him, but to the estate of his father, of which he was executor, and it was only the net balance which would remain after satisfying the claims of other members of the family that was applicable to the purposes of the trust deed. He sent a bill for the amount to this country, indorsed to Lady Dundonald and Mr. Brutton, and the bill was transmitted to Lady Dundonald herself. At the same time he wrote letters to Mr. Brutton, containing directions as to the application of this fund, first, for satisfying the demands upon it in the executorship, and then for the application of it for the purposes of his own trust deed. These letters are relied on by the defendants as shewing that the plaintiff relied personally on Mr. Brutton. They are, however, produced by the defendants as documents in the possession of the firm as such. The business directed to be done was all connected with the original business of settling the claims of the plaintiff's creditors, and necessarily required professional advice, assistance and labour, which could not have been undertaken by Mr. Brutton except for the firm.

In truth, in this particular case, the firm, through Mr. Brutton, had received the 1,500*l*., had received and paid the large amounts received from the Trinidad property. If it was within the ordinary business of the firm so to receive moneys *cadit quæstio*, for what one partner does in the ordinary business of the firm is done by the firm. Of course it is possible that a client may so have acted, may so have lent himself to one member of the firm as to preclude him from enforcing such liability against the other members. But in this case how is it possible to attribute any such acting to Lord Dundonald? He was in Brazil, and cannot be prejudicially affected by the fact that his wife indorsed the bill to the member of the firm through whom the firm advised and directed her what she ought to do with that bill.

It is unfortunate, no doubt, for the other members of the firm. But that is a misfortune which arises from their original confidence in him. They held him out to the world as a person for whom they were responsible.

All the profit arising from the transaction by him of the plaintiff's business resulted to the firm, and the firm must bear the consequence of any miscarriage by him, whether by negligence or dishonesty, in the conduct of the business.

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LORDS JUSTICES, Jan. 19, 20, 30, 1869.

KEATES *v.* LYON.

38 L. J. Ch. 357; L. R. 4 Ch. 218; 20 L. T. 255; 17 W. R. 338.

See, *Master* v. *Hansard*, [1877] E. R. A.; 46 L. J. Ch. 505; 4 Ch. D. 718; 36 L. T. 535; 25 W. R. 570 (C. A.). Distinguished, *Birmingham Joint Stock Co.* v. *Lea*, 1877, 36 L. T. 843 (V.C.). Followed, *Renals* v. *Cowlishaw*, [1879] E. R. A.; 48 L. J. Ch. 830; 11 Ch. D. 866; 41 L. T. 116 (C. A.). See, *Nottingham Brick Co.* v. *Butler*, [1886] E. R. A.; 55 L. J. Q.B. 280; 16 Q.B. D. 778; 54 L. T. 444; 34 W. R. 405 (C. A.); *Collins* v. *Castle*, [1888] E. R. A.; 57 L. J. Ch. 76; 36 Ch. D. 243; 57 L. T. 764; 36 W. R. 300 (Ch. D.); *Osborne* v. *Bradley*, [1904] E. R. A.; 73 L. J. Ch. 49; [1903] 2 Ch. 446; 89 L. T. 11 (Ch. D.); *Reid* v. *Bickerstaff*, [1909] E. R. A.; 78 L. J. Ch. 753; [1909] 2 Ch. 305; 100 L. T. 952 (C. A.).

Covenants, when Binding on Land.

VENDOR AND PURCHASER.—*A, being the owner of a building estate, sold a plot of it to B. who, by the conveyance, entered into restrictive covenants with A. as to the mode of using the land. A. afterwards contracted for the re-purchase, and the land was conveyed by B. to C. as mortgagee of A. During the interval, A. sold several other plots of the same estate to various persons, but it did not appear whether he entered into any arrangement with them as to the user of the land. The mortgagee foreclosed:*—Held, *affirming the decision of the* Vice Chancellor of the Duchy of Lancaster, *that the land was not bound by the restrictive covenants entered into by B; and the land being sold without any condition as to these covenants, the title was forced upon the purchaser.*

This was an appeal from a decision of the Vice Chancellor of the Chancery Court of the County Palatine of Lancaster, by which his Honour declared that an objection to title which had been taken by a purchaser of a certain piece of land which had been sold under the decree of the Court was invalid. The property was a building property near Birkenhead, called the Clifton estate. The title, so far as material, was as follows: William Sharp, in the year 1841, purchased the property in question, and in the deed of conveyance, dated the 27th of August, 1841, was contained a covenant by Sharp with the vendor not to carry on any nuisance on the property except the making of bricks. Upon this deed were indorsed a number of memoranda, shewing that Sharp sold parts of the property to various persons, at various dates, ranging from August, 1842, to March, 1843; amongst these was one of a conveyance, dated the 2nd of November, 1842, to J. Langton. By this deed Sharp covenanted to complete certain recently-constructed roads, and Langton covenanted with Sharp, his heirs, executors and administrators that he would divide the land so purchased into five lots of a minimum specified size, and would not erect upon any of them any building except villas of a specified description.

The details of the covenant are not material.

Another indenture, dated the 10th of November, 1842, conveyed to Langton another part of the property, and contained restrictive covenants on the part of the purchaser similar in character to those in the deed of the 2nd of November, 1842.

By each of these deeds Sharp covenanted to produce the deed of the 27th of August, 1841. Whether the conveyance to the other purchasers from Sharp contained similar restrictive covenants did not appear.

By a deed dated the 19th of February, 1846, Sharp, after reciting that he had purchased the lands therein mentioned (including the land which Langton had purchased from him, and which he had re-purchased), conveyed all his interest therein to Lyon and Ryder, upon ordinary mortgage trusts, to secure

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the sum of 500*l.*, and on the following day Langton conveyed the land which was comprised in the deeds of the 2nd and 10th of November, 1842, to Lyon and Ryder, upon trusts of the mortgage-deed of the preceding day. The property, therefore, became vested in Lyon and Ryder, as mortgagees of Sharp. Subsequently, in the year 1853, the mortgagees foreclosed.

Lyon and Ryder were the trustees of the will of Joseph Lyon, and as such trustees became entitled to the property absolutely under the foreclosure.

The present suit was a suit for administration of Joseph Lyon's estate, and under the decree the property in question was sold.

The conditions of sale took notice of the restrictive covenants contained in the deed of the 27th of August, 1841, and precluded any objection on that account. They were silent as to the restrictive covenants contained in the deeds of the 2nd and 10th of November, 1842. The appellant purchased. The objection which he raised, and which his Honour overruled, was that the land was subject to these restrictive covenants.

Mr. Little and *Mr. Robinson*, for the appellant.—The land is subject to these covenants because they were entered into for the benefit of the whole estate which Sharp had laid out for building. Every purchaser from Sharp is entitled to the benefit since the purchases may be considered as simultaneous, but at least every purchaser under a conveyance by Sharp, subsequent to the 10th of November, 1842, is so entitled.—They cited *Child* v. *Douglas* (Kay, 560; 5 De Gex, M. & G. 739: reported on the hearing 2 Jur. N.S. 950); *Whatman* v. *Gibson* (9 Sim. 196; 7 L. J. Ch. 160); *Mann* v. *Stephens* (15 Sim. 377); *Western* v. *M'Dermot* (36 L. J. Ch. 76; L. R. 2 Ch. 72); *Tulk* v. *Moxhay* (18 L. J. Ch. 83; 2 Ph. 774).

Mr. Hall and *Mr. North*, for the respondent.—The title shews that Sharp retained the land in his possession, subject only to the covenants on his part as to the roads which he granted to Langton. Sharp was absolute owner, and became so again on his re-purchase from Langton. The question in these cases depends upon the general character of the dealing with the property. If there be a general scheme that the land shall be dealt with in a restricted manner then all the various owners who have notice of the scheme are bound; *Western* v. *M'Dermot* was a case of that kind. When there is no general scheme, or no notice of a general scheme, but each purchaser merely covenants with the vendor, the benefit of such a covenant does not pass to every other subsequent purchaser of parcels of the land remaining in the vendor's possession. *Child* v. *Douglas* is the authority most nearly applicable, and that is distinguished by the fact of a general concurrence of the parties. Moreover, the covenant is entered into with heirs, executors and administrators: how can the benefit of this run with land, when assigns are not mentioned?

Mr. Little, in reply.

The judgment of the Court was delivered by—

Selwyn, L.J., who, after stating the facts and the nature of the objection raised by the purchaser, said: In support of the objection it has been contended that the benefit of the restrictive covenant contained in the conveyance to Langton was a benefit reserved to Sharp in respect of the unsold portion of the property comprised in the deed of the 27th of August, 1841, and that it was so attached to the land that it passed by his subsequent conveyances of other portions of the same property to other purchasers, and consequently that although (as was admitted), as between Sharp and Langton, those covenants were effectually put an end to by the deed of the 20th of February, 1846, no arrangement between Sharp and Langton could deprive the purchasers between the dates of the conveyances to and re-conveyance from Langton of the benefit which they had obtained or of their right to enforce the covenants, and consequently that a title to the lots in question, unfettered by the covenants, could not be made without the concurrence of the intermediate purchasers.

The general principle upon which the Court deals with cases relating to the burden and incidence of covenants and stipulations, restrictive of the free

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use of land, may be gathered from the observations of Lord Cottenham in the case of *Tulk* v. *Moxhay*, where he says, "That this Court has jurisdiction to enforce a contract between the owner of land and his neighbour, purchasing a part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed. It is said that the covenant being one which does not run with the land this Court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased"—of course the price will be affected by the covenant. And again he says, "That the question does not depend upon whether the covenant runs with the land is found from this, that if there was a mere agreement and no covenant the Court would enforce it against a party purchasing with notice of it, for if an equity is attached to property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased." The questions which have arisen with respect to the devolution of the benefit of covenants of this kind have been decided upon similar principles, and equally without reference to any technical distinctions depending upon the covenants running or not running with the land. Thus, in *Whatman* v. *Gibson*, where the owner of a particular piece of land, on which a row of houses was intended to be built, executed a deed reciting that it had been laid out, and was intended to be dealt with in a particular manner, and declared that it should be a general and indispensable condition of the sale of all or any part of that land that the several proprietors for the time being should observe and abide by the several stipulations and restrictions therein contained, and that he himself would at all times observe the like restrictions and stipulations, and those restrictions and stipulations were also enforced by mutual covenants. although the question afterwards arose between subsequent purchasers of different portions of this piece of land, it was held, that the one was bound by and the other was entitled to enforce the covenants, for, as the Vice Chancellor of England observed, "It is quite clear that all the parties who executed this deed were bound by it, and the only question is whether, there being an agreement, all persons who come in as devisees or assignees under those who take with notice of the deed are not bound by it. I see no reason why such an agreement should not be binding in equity on the parties so coming in with notice. Each proprietor is manifestly interested in having all the neighbouring houses used in such a way as to preserve the general uniformity and respectability of the row."

And in *Coles* v. *Sims*,[1] which was also a case of mutual covenants relating to a particular piece of land let out in plots for the erection of a row of houses to be built in a particular and uniform manner, the present Lord Chancellor, then Vice Chancellor, after quoting the passage to which we have just referred in the judgment in *Whatman* v. *Gibson*, says, at page 69, "Therefore taking the deed between Jones and Shewell alone, these two parties having clearly agreed with each other that the property should be let out in a particular way, all those who come under them are bound in equity under their covenants, if they had notice of them." Again, in the case of *Western* v. *M'Dermot*, certain pieces of land in the city of Bath, including the sites of certain houses called Brock Street, were included in a deed of conveyance, dated the 20th of December, 1766, by which, in consideration of a perpetual rentcharge reserved to himself, Sir Benet Garrard, the owner of the property, conveyed it to John Wood in fee, and Wood thereby covenanted to pay the rentcharge, and within ten years to build houses upon the piece of land thereby conveyed according to the plan thereto annexed, and Sir Benet Garrard entered into certain restrictive covenants relating to certain portions of land defined in the deed, and it was provided that every conveyance of any house to be so built should contain covenants similar to those contained in that deed, and the conveyances by

(1) Kay, 56; 23 L. J. Ch. 37 : affirmed, 5 De Gex, M. & G. 1; 23 L. J. Ch. 258.

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Wood under which the plaintiff and the defendant derived their title, and to all of which Sir Benet Garrard was a party, did in fact contain such covenants, and also covenants by the purchasers with Sir Benet Garrard and Wood, and each of them, and each of their heirs and assigns, against building upon the gardens of the houses beyond a certain height, and the Lord Chancellor, Lord Chelmsford, considered himself to be relieved from the necessity of considering the question whether the covenant against building beyond a certain height did or did not run with the land, because it was admitted on the part of the defendant that he having purchased his house with notice of the restrictive obligation attached to it, a Court of equity would interfere to prevent its violation of it. "This, indeed," he adds, "could not be disputed after the cases of *Tulk* v. *Moxhay* and *Coles* v. *Sims*."

These cases were (with the exception of *Mann* v. *Stephens* (15 Sim. 377) and *Child* v. *Douglas*, to which we shall presently refer) the only cases cited in support of the appellant's contention, and in all of them the judgment of the Court is based upon clear evidence of intention and contract, supported by mutual covenants and relating to a particular and distinct portion of land agreed to be laid out and dealt with according to a prescribed plan.

The case of *Mann* v. *Stephens* differs from those we have been discussing in the particular that there was there no general building scheme or plan affecting the property in respect of which the question to be decided arose; but in that case the owner in fee of three houses and of an adjoining piece of land sold one of the houses, and at the same time covenanted with the purchaser that the piece of land should be for ever thereafter used in a particular way, and that no building except a private house or ornamental cottage should be erected thereon, and afterwards sold the piece of land to another person, and caused the purchaser to enter into a similar covenant with him as to the user of the land. The house ultimately vested in the plaintiff, and the piece of land in the defendant, who had actual notice of the covenant entered into by his predecessor in title, but who notwithstanding began to build a beershop and brewery on part of the land. The plaintiff applied for an injunction to restrain this breach of the covenant, and though it was argued on behalf of the defendant that there was no privity between the plaintiff and the defendant, and that the burden of the covenant did not run with the land, the Vice Chancellor of England granted the injunction, on the ground that the defendant had purchased with notice of the covenant, and on an appeal from an order to commit the defendant for breach of the injunction, the Lord Chancellor held that the injunction was properly granted, though he varied it by omitting some words from the covenant as being too indefinite. In *Mann* v. *Stephens* the covenant respecting the user of the land was contained in the deed by which the house was conveyed, and was therefore plainly intended to benefit the owner of the house for the time being, and the decision was based on the ground that the restriction upon the user of the piece of land in question was known to the defendant at the time of his contract for the purchase.

In the case now before us it is not shewn that the vendor Sharp had made any representations, or was bound by any contract or covenant excepting these covenants against nuisances contained in the deed of 1841 and those relating to the roads, and it is clear that at and immediately after the date of the conveyance to Langton, in November, 1842, he was perfectly at liberty to deal with the rest of his estate as he might think fit, subject only to the covenant to which we have just alluded, and that he was also at liberty to enter into any arrangement with Langton by which the restrictive covenants affecting the land conveyed to him might be altered or put an end to, and the question we have to decide is, whether he must be taken to have deprived himself of this power merely by reason of his having sold and conveyed to purchasers certain portions of his remaining property. It is true that in such cases the Court does not require any particular form of deed or covenant, for, as Lord Cottenham has observed, it would enforce a contract if proved by a mere agreement; but

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so far as the question may turn upon the intention of Sharp, the vendor, it is not altogether immaterial to observe, that although in both the conveyances to Langton, in November, 1842, Langton is made to covenant for himself, his heirs and assigns, the covenant in both cases is entered into with Sharp, his heirs, executors and administrators only.

The case of the appellant is not, in our judgment, strengthened by the circumstance that notices of several of these intermediate conveyances by Sharp are indorsed upon the deed of the 27th of August, 1841, for as these conveyances extend only to small portions of the property, and as the title-deeds were retained by the vendor, it was only an ordinary and proper precaution on the part of the purchasers (who appear in several instances to have taken covenants to produce) to stipulate that notice of the fact of part of the property having been sold or conveyed should be indorsed on one of the principal title-deeds so retained. There is no trace of any such contract or arrangement as that which existed in all the cases to which we have been referred, nor has any attempt been made to explain or define the limits within which the benefits of the restrictive covenants are supposed to have been confined, nor whether it must be taken to be confined to lands held under the same title, or of the same tenure, or whether it would extend to lands subsequently acquired by the vendor, and be so attached to them as to pass under a conveyance of any part of such subsequently-acquired lands, nor whether, if the covenants had been affirmative, any and which of the intermediate purchasers could have enforced the specific performance of such covenants. The only attempt at such a definition was made by the appellant's counsel when relying upon a particular passage of the judgment in *Child* v. *Douglas*. They argued that the Court invariably regard stipulations of this kind with reference to the benefit of the property which is reserved by the vendor, and consequently that they are attached to such reserved property, and therefore pass by every conveyance of any part of the property.

But it is obvious that such a definition does not meet all cases, for cases might be put in which a vendor might lawfully and reasonably insist upon such covenants, even when the conveyance comprised the whole of the property to which he was entitled at the date of the covenant, as in the case of the purchase and sale of a strip of land adjoining a large park by a person who had at the time no interest in the park, but who hoped to inherit or purchase it. Assuming the vendor of the strip of land afterwards to purchase or inherit the park, and to sue the purchaser for breach of the covenant, the purchaser of the strip of land would in a Court of equity be unable to justify a violation of the covenant by reason of the injury sustained by the vendor having arisen only in consequence of his subsequent acquisition of the park.

We think that an owner of land in the position in which Sharp stood in the year 1842 cannot be presumed to have intended to fetter himself in the exercise of the power which he indisputably possessed of dealing with the whole of his estate as he thought fit; and as, notwithstanding the sale of some portions of land, his power of dealing with what he retained remained unaffected, it is, under the circumstances of this case, very difficult to see how any distinction is to be drawn between his power of dealing with the land so retained and with that which he resumed by the purchase from Langton; and if it were to be held that a mere conveyance of a small portion of the remaining land amounts to evidence of such an intention on the part of the vendor, the rule cannot be confined to conveyances in fee, but must be extended to alienations for lives and years; and the present case affords a remarkable instance of the inconvenience which would result from such a rule, for as there appear to have been some twenty conveyances of small pieces of land between the 2nd of November, 1842, and 1846, the concurrence of all these purchasers, and of all persons claiming under them, would be necessary to any such arrangement as that which was effected in 1846; and as it would be extremely difficult, if not impossible, to obtain the concurrence of all those persons, the practical

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result would be to render a portion of the property inalienable, excepting under very onerous and depreciating conditions.

The appellant has mainly relied upon the case of *Child* v. *Douglas*, and it has been said that that case goes further than any of the other decided cases, and has established such a rule as that to which we have alluded; but it must be observed that in *Child* v. *Douglas* the land had been laid out for building purposes; and in the contract entered into between the vendors and the defendant Douglas was contained a stipulation that Douglas should not erect any buildings within six feet of certain projected roads. The plaintiff Child was a subsequent purchaser of another and neighbouring portion of the land so laid out, and on the occasion of his purchase he had been required to enter into, and had entered into, a covenant not to erect any building within six feet of one of the same roads, called Houghton Place, and it appeared that upon the negotiation of the plaintiff's purchase his agent was informed, in reply to inquiries as to the conditions on which the laid was to be sold that the purchasers would not be permitted to build nearer than six feet to Houghton Place, and a plan of the land was shewn to him, on which a building line was drawn which indicated that the buildings were to be six feet distant from the causeway of that street. The Vice Chancellor granted the injunction, upon an interlocutory application to restrain the building of a wall 15 feet high, but his order was discharged by the Lords Justices on appeal; and in delivering judgment Lord Justice Knight Bruce said that his opinion was adverse to the case of the plaintiff upon three of the four questions involved in the cause, and one of those questions was whether, if there was such a covenant or contract not to build (as mentioned in the case) which was binding on the defendant, the plaintiff was a person who was entitled to sue upon it or enforce it. The motion was directed to stand over till the hearing, and the defendant was put under an undertaking not in the meantime to carry the wall higher than 15 feet 6 inches, and to abide by any order the Court might make as to his removing what he had or should have built. The cause afterwards came on to be heard before the Vice Chancellor, and it is reported 2 Jur. N.S. 950, when the bill was dismissed, and in delivering judgment his Honour said that he entertained no doubt that there was no intention to vary the original contract, or that there was in fact a breach of the contract. But he said that a main question was as to the right of the plaintiff to sue, and this is the question upon which his doubts arose; and he said, "There would be no doubt but that this Court would interfere in a proper case without noticing the difficulty whether in point of legal form the party could sue or not. In *Mann* v. *Stephens* the whole case was brought before the Vice Chancellor of England, but it was not put upon the question of the covenant running with the land or not, but on the question whether or not there was a substantial agreement between the parties." And the Vice Chancellor concludes his judgment by saying, "I have not been able to come to a conclusion perfectly satisfactory to my own mind what are the rights of parties *inter se*, each of whom has covenanted with the landlord, but who have neither covenanted with each other nor taken any covenant from the landlord to themselves; and I have felt additional doubt from the different view taken by the Court above and shewn so distinctly by the Lords Justices allowing the defendant to complete that wall when almost the only question before me is whether I shall order that wall to be pulled down or dismiss the bill. It does not appear to me that I ought to interfere so far in a case where I still hesitate and where so much hesitation has been shewn in the Court above, and I must suffer what has taken place to turn the balance (for that is all that is required) in the defendant's favour, having great doubt both as to the law and as to the application of it."

Having regard to the circumstances to which we have already alluded as existing in the case of *Child* v. *Douglas*, and which are not to be found in the present case, to the reversal of the order made upon the motion, and to the final dismissal of the bill by the Vice Chancellor, notwithstanding the under-

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taking given by the defendant and to the judgments delivered on those occasions, we think that the case of *Child* v. *Douglas* cannot be considered as having established any such new or general rule as that which has been contended for by the appellant, and we think such a rule is unsupported either by principle or authority and would greatly interfere with the free alienation of land estates.

We think, therefore, that the appellant's objection to the title fails, and the appeal motion must be refused with costs.

JAMES, V.C., March 5, 1869.

MAITLAND v. THE CHARTERED MERCANTILE BANK OF INDIA, LONDON AND CHINA.

38 L. J. Ch. 863.

Distinguished, *Union Bank of Canada* v. *Cole*, [1878] E. R. A.; 47 L. J. C.P. 100 (C. A.).

Bill of Exchange—Open Letter of Credit—Bill drawn under it—Rights of Bill-holder—Mercantile Usage.

BANKER AND BANKING COMPANY.—*A bona fide holder of a bill of exchange drawn under an open letter of credit, and taken by him on the faith of such letter of credit, has a right of action at law against the grantor of the letter of credit in case of his refusal to accept the bill.*

M. & Co., by their bill of complaint, averred that, according to the ordinary course of dealing in reference to letters of credit granted to foreign firms, the foreign firm could only obtain letters of credit upon the guarantee of some English firm, and that the foreign firm stipulated to use the letters of credit only for the purpose of buying goods to be consigned to England, and to transmit the bills of lading to the English firm as a security for the repayment of the bills of exchange drawn under the letters of credit by a mail not later than that which carried the bills of exchange. Open letters of credit were granted to F. & Co., a China firm, on the guarantee of M. & Co., an English firm, and F. & Co., in fraud and violation of their agreement with M. & Co., drew bills under them not protected by shipping documents and indorsed them for value to the C. Bank, who had no actual notice of the agreement between F. & Co. and M. & Co.:—Held, *that the C. Bank were entitled to require the grantors of the letters of credit to accept the bills, and that M. & Co. had no equity to restrain them from procuring such acceptance:*—Held, *also that in reference to "open" letters of credit, no such custom exists as M. & Co. averred; and that even if there were such a custom, the rights of the C. Bank as bona fide holders for value could not be affected by the mere constructive notice of the agreement between M. & Co. and F. & Co. which the custom would imply.*

The plaintiffs were London merchants, carrying on business under the firm of Maitland & Co., and since the beginning of 1861 had been the correspondents of three successive partnerships, which for the purposes of the present case may be considered as one continuous partnership, carrying on business at Shanghai, in China, under the firm of Fletcher & Co. At the request of Fletcher & Co., the plaintiffs procured for them from the National Bank of Scotland marginal letters of credit, that is, letters of credit written in the margin of blank bills of exchange. By them Fletcher & Co. were authorized to draw for a specified amount on Messrs. Glyn & Co., the London agents of the National Bank.

The following is a copy of one of the letters of credit, and the rest were

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similar. The words printed in italics were subsequently filled in by Fletcher & Co.

No. 39.
11325 Credit for £2,000 stg. in duplicate. 4907.
National Bank of Scotland, Edinburgh,
24th June, 1864.

To Messrs. Fletcher & Company, China.

I hereby, for the National Bank of Scotland, authorize you to draw the annexed Bill of Exchange at six months' sight for two thousand pounds sterling on Messrs. Glyn & Co., bankers, in London, who will honour the same in conformity with its tenor if presented along with this letter of credit within one year from this date.

Thos. Anderson, Secretary.
Jno. J. Shearer, P. Manager.

First of Exchange for *£2,000* sterling No. $\frac{39}{4907}F.$

Place & date of drawing, *Shanghai, 5th April*, 1865.

Six months after sight pay this first of Exchange (second of the same tenor and date not being accepted or paid), to our order, the sum of *Two thousand pounds sterling*, which charge to the National Bank of Scotland as per annexed Letter of Credit.

To Messrs. Glyn & Co.,
Bankers, London.

Drawer signs here, *Fletcher & Co.*

When the plaintiff's firm first arranged with the National Bank of Scotland that the bank should grant marginal letters of credit to Fletcher & Co., they agreed with the bank to give security and to be liable for the amount of all bills which might be drawn by Fletcher & Co. on Messrs. Glyn & Co., and they also wrote and sent to Fletcher & Co. a letter, dated the 26th of November, 1861, which was as follows:

"As we have to give Messrs. Glyn & Co. (who will accept for the National Bank) security before their acceptance is given to your draft, we look to you to send us the documents by the same mail as you draw, and you will please be good enough to advise Messrs. Glyn & Co. and ourselves when you draw."

Subsequently to the year 1861 the National Bank of Scotland from time to time issued, on the plaintiffs' guarantee, marginal letters of credit in favour of Fletcher & Co. In the month of April, 1864, the plaintiffs, on their behalf, applied for and obtained marginal letters of credit to a considerable amount, and to induce the bank to issue these letters of credit the plaintiffs' firm wrote and sent to the manager of that bank a letter, dated the 5th of April, 1864, which was as follows:

"In consideration of your issuing marginal credits on the 8th instant for 10,000*l.*, on the 24th inst. for 10,000*l.*, and thereafter monthly, so long as you think fit for the like sum of 10,000*l.*, or for any additional sum which may be agreed upon, authorizing Messrs. Fletcher & Co., of Hong Kong and Shanghai, to draw bills of exchange upon your London agents, Messrs. Glyn, Mills & Co. we, in addition to the obligations already undertaken by us on their behalf, bind ourselves to hand Messrs. Glyn, Mills & Co. or yourselves, before acceptance of said drafts, securities in the form of bills of lading and policies of insurance in value equal to the amount thereof, and we hereby jointly, and each of us severally, guarantee and agree to pay you from time to time the amount of each of the bills of exchange so to be drawn the day before its maturity, and to free you from all cash advances in respect of all or any such bills. Should we require the documents before maturity of the bills, you are to agree to deliver them upon application upon our replacing the same by other satisfactory security or by payment of the bills under rebate at the Bank of England minimum rate. Your charge to us for the credit to be 1%."

The memoranda annexed to the bills which had been obtained by the plaintiffs for Fletcher & Co., prior to July, 1864, required that the bills should be presented within a year from the date of the respective credits under which they were drawn, but in the month of July, 1864, the National Bank agreed to extend the time thus limited on receiving from the plaintiffs' firm the following letter, dated the 26th of July:

"In consideration of your having agreed at our request to honour the drafts to be issued by Messrs. Fletcher & Co., merchants, China, under your marginal

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credits to be granted in future in their favour, if negotiated within a year from the dates of such credits, in the place of the existing terms, which require each draft to be presented for acceptance within that time and without prejudice to the obligations undertaken by us in our letter of guarantee, dated the 3rd of April last, but in corroboration thereof, we hereby conjointly, and each of us severally, engage not only to see the drafts so to be negotiated paid at maturity, but in the event of their not maturing within twenty-one months from the dates on which the relative credits were issued, we agree to consign the amounts of such drafts into the bank whenever called upon by you to do so, and likewise to relieve you from all cash advances connected therewith."

Several letters of credit were issued to Fletcher & Co. on the footing of this letter.

The plaintiffs alleged that it was agreed and arranged between them and Fletcher & Co. that the marginal letters of credit obtained by the plaintiffs from the National Bank of Scotland should be employed to raise money to pay for goods purchased in China for the purpose of being consigned to the plaintiffs, and that whenever drafts were drawn in pursuance of the letters of credit Fletcher & Co. should remit to the plaintiffs by the mail leaving China for England next after the date when the drafts were drawn bills of lading for goods of sufficient value to provide for and indemnify the plaintiffs from liability in respect of such drafts.

In the month of June, 1865, the defendants, the Chartered Mercantile Bank of India, London and China (hereafter called the Chartered Bank), who had an agency at Shanghai, received from their manager there five drafts, numbered from 4907 to 4911, for 10,000*l.* in all, which had been drawn by some members of the firm of Fletcher & Co. in the name of the firm under the letters of credit .

The bill alleged that the plaintiffs very shortly before the bill was filed had ascertained, as the fact was, that these drafts for 10,000*l.* were not drawn for or on account of any business transaction of Messrs. Fletcher & Co., and that they were drawn by some of the members of that firm, in fraud and violation of the agreement between the plaintiffs and Fletcher & Co., and that the Chartered Bank at the time when they took the drafts had notice that they were not drawn for any purpose for which the marginal letters of credit could properly be used.

The bill also alleged that no notice was sent to the plaintiffs or to Messrs. Glyn & Co. by Fletcher & Co. that the drafts for 10,000*l.* had been drawn.

The circumstances under which these drafts for 10,000*l.* had been drawn were alleged by the bill to be the following:

In the year 1863, James Gilfillan, a clerk to Fletcher & Co., purchased a steamer on account of himself, James Webster and another for 11,000*l.*, of which one-third was paid by Webster and the remaining two-thirds by money which Webster borrowed from the Shanghai branch of the Chartered Bank on the security of two promissory notes, one made and the other indorsed by him. Gilfillan subsequently purchased Webster's interest in the steamer, and accordingly procured the Chartered Bank to give up these two promissory notes to Webster in exchange for another promissory note for 25,000 taels (equal to about 8,000*l.*), which Gilfillan indorsed and delivered to the Chartered Bank. The last-mentioned note was renewed at maturity, and the renewal fell due in March, 1864, when Gilfillan borrowed from the Chartered Bank 10,000 taels additional for purposes connected with the steamer, and to secure this sum, as well as the prior debt of 25,000 taels, he indorsed and delivered to the Chartered Bank a promissory note for 35,000 taels.

The promissory note for 35,000 taels was twice renewed, and the second of the notes given by way of renewal fell due on the 25th of April, 1864. At this time the papers relating to the steamer were required to be produced in the British Consular Court at Shanhai for the purpose of certain legal proceedings, which had been instituted by Gilfillan with reference to the steamer, and

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Gilfillan, in order to obtain the papers from the manager of the Shanghai Branch of the Chartered Bank, induced Archibald Campbell, a member of the firm of Fletcher & Co., to indorse in the name of the firm a promissory note for 45,000 taels, dated the 25th of April, 1864, which had been signed by Gilfillan and, so far as the plaintiffs could ascertain, by one Laidlaw. Campbell indorsed the note, in order to guarantee that the papers relating to the steamer should be returned to the manager of the Shanghai Branch of the Chartered Bank, and Gilfillan received from him the papers of the ship on delivering to him the last-mentioned note indorsed in the name of Fletcher & Co.; and of the amount of the note, 35,000 taels were applied in satisfaction of the note for 35,000 taels which became due on the 25th of April, 1864, and the remainder was paid to Gilfillan.

The promissory-note for 40,000 taels became due in the 28th of July, 1864. Before it became due Gilfillan had left Shanghai for England, having appointed Laidlaw his attorney to act for him with reference to the steamer. The papers relating to the steamer were not returned to the manager of the Shanghai Branch of the Chartered Bank, and when the last-mentioned note became due Laidlaw proposed to give to the Chartered Bank a mortgage on the steamer, but it was contrary to the regulations of the bank to take mortgages on ships; and the manager of the Shanghai branch accordingly declined to take a mortgage of the ship, and required Laidlaw to procure as security for the amount due a promissory note of Fletcher & Co. and some collateral security, and accordingly one of the members of that firm, at Laidlaw's request, signed the name of the firm to a promissory note for 40,000 taels, dated the 25th of July, 1864, drawn in favour of the Chartered Bank, and Laidlaw delivered to the manager at Shanghai of the Chartered Bank the last-mentioned promissory note for 40,000 taels as security for the amount due by Gilfillan, and also gave some further security for payment of the last-mentioned sum. Afterwards and before the last-mentioned note for 40,000 taels became due, a member of the firm of Fletcher & Co., at the instance of Laidlaw, signed the name of his firm to seven drafts on Messrs. Glyn & Co. in favour of the Chartered Bank for 14,000*l*. The last-mentioned drafts on Glyn & Co. were some of the bills with marginal credits attached, which had been procured by the plaintiffs on behalf of the firm of Fletcher & Co. under the circumstances before stated, and included the five drafts numbered from 4907 to 4911.

The seven drafts were signed, in order that they might be delivered to the manager of the Shanghai branch of the Chartered Bank, as security for the sum of 40,000 taels due by Gilfillan; and Laidlaw delivered them to the manager as collateral security for the 40,000 taels, and obtained from him the collateral security originally given to secure payment of that sum. The promissory note for 40,000 taels, dated the 26th of July, 1864, fell due in the month of January, 1865. It was not then paid, but at the instance of Laidlaw, a member of the firm of Fletcher & Co. signed, by way of renewal, in the name of his firm a promissory note for 40,000 taels, and the last-mentioned note was given to the manager at Shanghai of the Chartered Bank. This last-mentioned note was payable a month after date, but it was arranged between the manager of the Chartered Bank and Laidlaw that, if necessary, it should be renewed, and, in fact, the last-mentioned note had not been paid.

The Chartered Bank alleged that, on the 5th of April, 1865, Fletcher & Co. paid the sum of 8,000 taels, part of the said sum of 40,000 taels; and that the Chartered Bank thereupon delivered up to Fletcher & Co. two of the drafts on Messrs. Glyn & Co., but that the sum of 32,000 taels, residue of the 40,000 taels, was still due, and the Chartered Bank retained and now held the five drafts numbered 4907 to 4911, and claimed a right to enforce payment thereof.

The bill contained the following allegation as to the practice relative to letters of credit granted to a foreign firm. "The course of dealing and practice relative to the issue and user of marginal letters of credit is well established, and was well known to the manager of the Shanghai branch of the Chartered

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Bank at the time when he took the several drafts on Messrs. Glyn & Co., which were delivered to him as aforesaid. Whenever such marginal letters of credit are granted by a bank in the country in favour of a firm carrying on business abroad, the bank granting the letters of credit requires the security of some firm carrying on business in England for the repayment of any money which may be paid in respect of such draft; and the marginal letters of credit are, according to the usual practice, sent to the foreign firm to enable it to raise funds for buying produce to be consigned to England; and the usual practice is, that a firm holding such marginal letters of credit, one or two days before the mail leaves for England, draws under the credit drafts for an amount sufficient to raise the sum required to pay for any produce which it may be about to consign to England. The foreign firm then sells the said drafts, and the purchaser sends them to England for acceptance by the then next mail, and the drawer sends by the same mail notice of the drafts, and also the bills of lading of the consignments purchased with the proceeds of the drafts."

It appeared, however, that there were two kinds of marginal credits in use amongst merchants, viz., "open credits" and "documentary credits." The difference between them is explained in the following passage from the answer of the Chartered Bank. "We deny that the course of dealing and practice relative to the issue and user of marginal letters of credit is correctly stated in the 26th paragraph of the plaintiff's bill; and, on the contrary, we say that the course of dealing and practice relative to the issue and user of such marginal letters of credit differ considerably in different parts of the mercantile world, and the terms of such issue and user depend upon the actual agreement between the parties, and upon the terms apparent on the face of such marginal letters of credit. We believe it is a common, but by no means an invariable practice, that when such marginal letters of credit as in the plaintiff's bill mentioned are granted by a bank in this country, in favour of a firm carrying on business abroad, the bank granting the letters of credit requires the security of some firm carrying on business in England for the repayment of any money which may be paid in respect of any draft drawn under such letter of credit; but if the credit of the foreign firm were good, such security would not in all cases be considered necessary; and, accordingly, whether such security is given or not depends on the credit and standing of the firm in whose favour such letters of credit are granted. We believe the marginal letters of credit which are issued in this country, according to the usual practice, are sent to the foreign firm, not merely to enable it to raise funds for buying produce to be consigned to England, but as a guarantee to the purchasers of the bills of such foreign firm that such bills will on presentation be accepted, and also to give more complete facilities for raising money to the foreign firm in whose favour such marginal letters of credit are issued. Marginal letters of credit are usually either 'open credits' or 'documentary credits.' 'Open credits' are, on the face of them, engagements on the part of the party giving such credits to accept the drafts drawn under such credits unconditionally, except that generally there is a certain limit as to the time within which the credits are to be available; whereas 'documentary credits' are engagements to accept bills drawn under them subject to a condition or proviso on the face of the credit that the drafts, when presented for acceptance, are to be accompanied by bills of lading or shipping documents. The credits granted by the National Bank of Scotland are 'open credits.' It is a common, but by no means uniform practice, that any firm carrying on business at Shanghai, or elsewhere in China, which holds such marginal letters of credit as in the plaintiffs' bill mentioned, one or two days before the mail leaves for England, draws under the credit drafts for an amount sufficient to raise the sum required to pay for any produce which it may be about to consign to England, and sells or discounts the said drafts. But we say that such marginal letters of credit, if 'open credits,' are frequently used by the firms in whose favour they are granted for other purposes than raising money for the purchase of produce, and, in fact, to enable such firms to raise money for their general purposes as

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upon any other security; and it is not the custom or practice for the banks or other persons who discount or purchase the drafts drawn under such marginal letters of credit, and they do not consider it is, and we submit it is not their duty to inquire into the authority under which such drafts are drawn."

The drafts in question in the present case were not accompanied by any shipping documents.

The bill prayed that the five drafts, numbered 4907 to 4911, now held by the Chartered Bank, might be delivered up to be cancelled, and that the Chartered Bank might be restrained from selling or negotiating them, or presenting them for acceptance, and that Glyn & Co. might be restrained from accepting them.

The main contention of the plaintiffs at the hearing was that, under the circumstances above stated, the Chartered Bank had constructive notice of the agreement between the plaintiffs and Fletcher & Co., and of the fact that the bills of exchange in question were drawn in fraud and violation of that agreement. The case made by the pleadings that the Shanghai manager had actual notice that the bills were improperly drawn was not relied upon.

Mr. Cotton and Mr. Methold, for the plaintiffs.—The case of *Ex parte the Asiatic Banking Corporation* (L. R. 2 Ch. Ap. 391; 36 L. J. Ch. 222) will be relied upon against us. But that case does not amount to a decision that the indorsee of a bill drawn under a letter of credit has a right of action at law against the grantor of the letter of credit, and the contrary is laid down in *Chitty on Bills* (10th edit. p. 193); *Scott* v. *Pilkington* (2 Best. & S. 11, see p. 43; 31 L. J. Q.B. 87). If then the Chartered Bank have only an equity as against the National Bank, it is clear that they must be taken to have known the usual course of dealing in reference to the bills in question, and that they were guaranteed by some English firm. But Fletcher & Co. indorsed the bills in question to them in a manner and for purposes at variance with the usual course of mercantile dealing. This ought to have put the Chartered Bank on inquiry, and as they made none they are affected with constructive notice. That inquiry would have disclosed the agreement between Fletcher & Co. and the plaintiffs, and that the use Fletcher & Co. were making of the bills was in fraud and violation of that agreement—*Whitbread* v. *Jordan* (1 You. & C. 303; 4 L. J. Ex. Eq. 38). We submit, therefore, that we are entitled to the relief that we ask.

Sir R. Palmer, *Mr. Willcock* and *Mr. Bowring*, for the Chartered Bank.

Mr. De Gex and *Mr. Stirling*, for Fletcher & Co.

Mr. Druce, for Glyn & Co.

Mr. Druce and *Mr. Morris*, for the National Bank.

The defendants were not called upon.

JAMES, V.C.—I am of opinion that the plaintiffs' bill entirely fails. The truth is this bill was drawn before the decision in the case of *Ex parte the Asiatic Banking Corporation*, which seems to me entirely to dispose of every question in this cause. In truth, independently of the decision which was arrived at in that case, if this had been a matter entirely new, I should myself have had no hesitation whatever in holding that the contract in this particular case was a contract with all the world; that is to say, that the marginal note which was put upon the face of the bill of exchange purporting to be addressed to Fletcher & Co., and signed by Mr. Anderson, the secretary of the National Bank, and which was in these words, "I hereby, for the National Bank of Scotland, authorize you to draw the annexed bill of exchange, at six months' sight, for 2,000*l.* sterling, on Messrs. Glyn & Co., bankers, in London, who will honour the same in conformity with its tenor if presented along with this letter of credit within one year from this date," was intended to be a representation or a promise to any person who should become in due course the holder of that bill of exchange, that the bill would be duly honoured; and therefore according to that class of cases to which reference is made in the case of *Ex parte the Asiatic Banking Corporation* it would be clearly a contract with the owner,

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which would be a legal contract, the right of which would attach with the bill of exchange, and in that sense the contract is negotiable and assignable with the bill of exchange. In truth, in the case that I refer to, though there may have been other grounds upon which the decision proceeded, yet both the learned Judges seem to me to have indicated a very clear opinion that if it had been necessary so to decide, they would have decided, that there was a legal right of action which enured to the person who was the holder of the bill drawn under the letter of credit. That being so, it appears to me that the holder of this bill of exchange is, as between himself and all persons who are liable upon that bill of exchange, in exactly the same position as if the bill had been accepted by the National Bank of Scotland, or had been accepted by the plaintiffs, Maitland & Co., upon some private arrangement between them and Fletcher & Co. that the bill was to be used only for partnership purposes. But it is quite a novelty to me to have it suggested that the negotiability of a negotiable instrument is to be affected by any private arrangement of that kind, which the parties do not choose to put upon the face of the document. That distinction seems to me to be actually expressed in the paragraph of the answer which draws a wide distinction between an open letter of credit and a documentary letter of credit. If it were intended to limit Fletcher & Co. in the use of this letter of credit as between themselves and the world at large to a use for mercantile purposes connected with the purchase of goods, it would have been very easy to have expressed upon the face of the document that it was to be accepted if presented accompanied by bills of lading, or other documents representing mercantile transactions.

Then, how does the matter stand with regard to the facts of the case? What the plaintiffs have to do is to shew that there was something fraudulent as against them in respect of the mode in which these particular bills got into the hands of the Chartered Mercantile Bank. What actually took place was, that these bills were given for the purpose of releasing other documents which had been already deposited by Fletcher & Co. in their hands, and in satisfaction of a promissory note on which Fletcher & Co. were liable; and then it is suggested that you ought to go back to all the former history from the commencement of the transaction, to shew what possible defences there might have been in respect of that promissory note as between Fletcher & Co. and the Chartered Bank. Of course it is impossible that the plaintiffs can go into the history of all the previous transactions of Fletcher & Co. in China, for the purpose of saying this thing might have been impeached, or that thing might have been impeached; and therefore when these bills were given actually in exchange for documents of great value to Fletcher & Co., and in satisfaction of documents upon which Fletcher & Co. were liable, the plaintiffs cannot be admitted to impeach them by saying that if the whole thing were opened from the beginning to the end, we could shew there was something irregular in the origin of the transaction. I hold that it is impossible to deal with a negotiable instrument upon any such footing as that. All the Chartered Mercantile Bank have to shew is, that they did give value to Fletcher & Co. at the time when they took these documents. They did give value to Fletcher & Co. by giving up the promissory-notes, and by giving up the other documents which were apparently of equal value, or, at all events, of the same kind of value with these bills which they took. Therefore, there being a legal right of action in respect of this document in the nature of the right of an indorsee upon a bill of exchange, I hold that all they have got to shew is that they have given the same value as would enable them to sustain an action as indorsees of the bill of exchange against the acceptors. Being of opinion that the document is assignable at law, and that it has been well assigned to the Chartered Mercantile Bank of India for value, so that they are holders of it for valuable consideration, and that there was no fraud on their part connected with the transaction, the bill fails, and must be dismissed with costs.

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Mr. Cotton.—As regards Fletcher & Co., it is clear that it was an improper user between the plaintiff and them.

JAMES, V.C.—That is not the case here. You do not seek any relief against Fletcher & Co., and the bill must therefore be dismissed with costs as against all the defendants.

JAMES, V.C., Feb. 10, 1869.

SLADE *v.* BARLOW.

38 L. J. Ch. 369; L. R. 7 Eq. 296; 20 L. T. 10; 17 W. R. 366.

Followed, *Giffard* v. *Williams*, [1869] E. R. A.; 38 L. J. Ch. 597; L. R. 8 Eq. 494; 21 L. T. 575; 18 W. R. 56 (V.C.): varied, [1870] E. R. A.; 39 L. J. Ch. 735; L. R. 5 Ch. 546; 21 L. T. 575; 18 W. R. 776 (L. JJ.). Approved, *Ward* v. *Ward*, 1870, 21 L. T. 699 (V.C.).

Partition Suit—Adverse Legal Title—Sir J. Rolt's Act—Action at Law—Statute of Limitations.

PARTITION.—*Plaintiff in a partition suit sought to recover from the defendant possession of an undivided share of real estate, which the plaintiff claimed under an adverse legal title, the question being, whether the estate had passed by a specific devise or by the residuary devise in a will*:—Held, *that the Court had no jurisdiction to try a question of adverse legal title in a partition suit, and the bill was ordered to be retained, with liberty to plaintiff to bring such action as he might be advised.*

The time within which such an action must be brought under the Statute of Limitations had expired, but the Court refused to direct the defendant not to set up the statute as a defence to the action.

Motion for decree. The suit was for a partition of certain copyhold lands at Hornsey.

Jeremiah How having been admitted as tenant, according to the custom of the manor of Brownswood, to certain copyhold lands at Hornsey, duly surrendered the same to the uses of the will. Subsequently, in 1831, he took from the New River Company, in exchange for part of his said copyhold lands, another piece of copyhold land, and he was duly admitted as tenant thereof, but he never surrendered the same to the uses of his will.

The said Jeremiah How, by his will, dated January, 1833, devised to his son Samuel James How, in fee, according to the custom of the manor, all his copyhold estate at Hornsey which he had surrendered to the uses of his will, with the appurtenances, and he devised his residuary real estate to his three sons, Jeremiah How, Thomas How and Samuel James How, and his daughter Alice Slade.

The testator died in 1834, seised for an estate of inheritance of the copyhold land he had taken from the New River Company, and which had never been surrendered to the uses of his will. Shortly afterwards Samuel James How entered into possession of this piece of land. The defendant, Frederick Barlow, claimed as a purchaser under him. The land had been enfranchised some years before the institution of this suit.

The plaintiffs, who claimed as the heirs-at-law of Alice Slade, by their original bill alleged that on the testator's death the legal estate in the said piece of land devolved upon his three sons as his heirs-at-law, but that Alice Slade was entitled in equity to one undivided fourth of the same land. Subsequently the plaintiffs amended their bill, and claimed that Alice Slade and the three sons of the testator became entitled to the piece of land under the residuary devise as tenants in common.

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Mr. Kay and *Mr. Charles Hall*, for the plaintiffs.

Mr. Joshua Williams and *Mr. Shebbeare* took a preliminary objection, that there was no equity in the case. The suit was merely instituted to determine an adverse legal title. In *Bolton* v. *Bolton*, an unreported case, decided by Stuart, V.C., and affirmed by the Lords Justices, a similar bill to this had been retained for a year, with liberty to the plaintiff to bring an action.

Mr. Kay, in reply, relied upon Sir John Rolt's Act. It would be idle to send the case to law: the question was one of construction, and after determining that question in a common law Court, they would have to come back here for a partition.

JAMES, V.C. (without calling upon the defendant's counsel) said, he should follow the order in *Bolton* v. *Bolton*. It would be using Sir John Rolt's Act for an indirect purpose if the Court were, under colour of a suit of this kind, to determine legal questions as to the legal title of a claimant adverse to the party in possession. The bill must be retained for a year, with liberty to the plaintiffs to bring such action as they might be advised.

Mr. Kay said there would be this difficulty. The litigation had been begun in time, but since the bill was filed the time allowed by the Statute of Limitations had elapsed, and that statute might be pleaded in bar of any action. He asked that the defendant might be directed not to plead the statute in any action.

Mr. Williams referred to the recent case of *Sutton* v. *Smith* (Weekly Notes, 1869, p. 19).

JAMES, V.C. said he had no jurisdiction to give any such direction as asked. Here there was litigation. A partition suit was based on the assumption that there was no litigation, but that two or more persons were together entitled to property. The bill was retained merely because it might be determined at law that the plaintiffs had become entitled as tenants in common. But the position of the parties in proceedings at law could not be altered by an order retaining the bill.

JAMES, V.C., Feb. 26, 1869.

MARSON v. THE LONDON, CHATHAM AND DOVER RAILWAY COMPANY (2).

38 L. J. Ch. 371; L. R. 7 Eq.546: further considering, [1868] E. R. A. 507; 37 L. J. Ch. 483; L. R. 6 Eq. 101 (V.C.).

Followed, *Falkner* v. *Somerset Railway*, [1873] E. R. A.; 42 L. J. Ch. 851; L. R. 16 Eq. 458 (L.C.). Explained, *Grierson* v. *Cheshire Lines Committee*, [1875] E. R. A.; 44 L. J. Ch. 35; L. R. 19 Eq. 83 (V.C.).

Lands Clauses Consolidation Act, 1845, *s.* 92.—*Form of Decree.*

COMPULSORY PURCHASE.—*Form of decree in a case where a railway company, having taken part of the curtilage of a house, were decreed to take the whole house and curtilage.*

This case is reported in 37 L. J. Ch. 483. It now came on for further consideration.

By a decree at the hearing, it was declared that the defendants, the London, Chatham and Dover Railway Company, were bound to purchase the whole of the copyhold premises to which the plaintiff, Thomas Frederick Marson, was admitted tenant on the 9th of December, 1861; and which premises were comprised in the indenture of lease of the 28th of December, 1864, in the plaintiff's bill mentioned. And that the plaintiffs were not bound to sell a part of the said premises to the company, they being able and willing to sell and

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make a title to the whole thereof. And it was ordered, that an inquiry be made whether a good title could be made to the said premises. And the further consideration of the cause was adjourned.

The chief clerk had certified that a good title could be made.

The only question which now arose was as to the proper form of decree.

Mr. Druce and *Mr. Bardswell*, for the plaintiffs.

Mr. Amphlett, *Mr. Kekewich* and *Mr. Horsey*, for the defendants.

The following is the decree as eventually settled:

This COURT doth order that the defendants, the London, Chatham and Dover Railway Company, do forthwith take all necessary and proper proceedings under the provisions of the Lands Clauses Consolidation Act, 1845, for the purpose of ascertaining the amount to be paid by the said defendants, the London, Chatham and Dover Railway Company, to the plaintiffs, Frederick Boyd Marson and Thomas Fish Marson, as the value of the whole of the copyhold premises in the bill mentioned; and it is ordered that the defendants, the London, Chatham and Dover Railway Company, do pay to the plaintiffs, Frederick Boyd Marson and Thomas Fish Marson, the value of the said copyhold premises within one month after such value shall have been ascertained in manner aforesaid; and thereupon it is ordered that the plaintiffs, Frederick Boyd Marson and Thomas Fish Marson, do execute a proper conveyance and surrender of the premises to the said defendants, the London, Chatham and Dover Railway Company, such conveyance to be settled by the Judge in case the parties differ. And this Court doth declare that the plaintiffs, Frederick Boyd Marson and Thomas Fish Marson, are entitled in the mean time to a lien on the said copyhold premises for the value thereof so to be ascertained as aforesaid; and it is hereby referred to the taxing Master to tax the costs of the defendants, James Parsons and Charles Alfred Potter, of this suit; and it is ordered that the plaintiffs, Frederick Boyd Marson and Thomas Fish Marson, do pay to the said defendants, James Parsons and Charles Alfred Potter, the amount of the said costs when so taxed; and it is hereby referred to the said taxing Master to tax the costs of the plaintiffs, Frederick Boyd Marson and Thomas Fish Marson, of this suit; and it is ordered that the defendants, the London, Chatham and Dover Railway Company, do pay to the plaintiffs, Frederick Boyd Marson and Thomas Fish Marson, their costs of this suit, and also such further sums as the plaintiffs, Frederick Boyd Marson and Thomas Fish Marson, shall pay to the said defendants, James Parsons and Charles Alfred Potter, for their said costs as aforesaid; and it is ordered that, in case default be made by the defendants, the London, Chatham and Dover Railway Company, in paying to the plaintiffs, Frederick Boyd Marson and Thomas Fish Marson, the value of the said copyhold premises when so ascertained as aforesaid, within the time appointed for that purpose as aforesaid, the plaintiffs are to be at liberty to apply to this Court with respect to the possession of the copyhold premises, or to the enforcing of their said lien; and any of the said parties are to be at liberty generally to apply to this Court, as they may be advised.

JAMES, V.C., March 6, 1869.

HALDANE *v.* ECKFORD.

38 L. J. Ch. 372; L. R. 7 Eq. 425; 20 L. T. 389; 17 W. R. 570.

Practice—Production of Documents by Plaintiff—Defendant in Contempt.

DISCOVERY.—***A defendant in contempt for non-compliance with orders of the Court is, nevertheless, entitled to an order for the production of documents by the plaintiff to support his case under an inquiry directed by the decree.***

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Adjourned summons taken out by the defendants for the production of documents by the plaintiff.

The plaintiff was one of the executors of the testator, for the administration of whose estate the suit had been instituted. The defendants were two others of the testator's executors, and were resident in Jersey. A decree had been made directing inquiries at chambers as to the testator's domicil and next-of-kin. The defendants required certain documents in the possession of the plaintiff to support their case under these inquiries, and took out this summons requiring the plaintiff to make the usual affidavit as to documents. The plaintiff opposed the application upon the ground that the defendants were in contempt, by reason of their disobedience to orders of the Court requiring them to execute certain powers of attorney to enable a receiver appointed in the suit to get in the testator's outstanding estate.

Mr. Eddis, for the defendants, in support of the application, said, they required the production of the documents for their defence. It had been decided that a defendant in contempt could have an order for the production of documents by a plaintiff—*Wilson* v. *Bates* (3 Myl. & Cr. 197; 7 L. J. Ch. 131); *Fry* v. *Ernest* (12 W. R. 97; 9 Jur. N.S. 1151).

[JAMES, V.C. observed, that in both those cases the contempt was by reason of the party not being able to pay, not because he had wilfully refused to obey an order of the Court.]

Mr. Amphlett and *Mr. Crossley*, for the plaintiff, opposed the application.—The defendants had wilfully refused to execute certain orders of the Court. They were out of the jurisdiction, so that the orders could not be enforced. Under these circumstances, the defendants were not entitled to any indulgence from the Court—*Hewitt* v. *M'Cartney* (13 Ves. 560). The plaintiff had also obtained against the applicants an order for production of documents, with which they had not complied.

JAMES, V.C. (without hearing a reply) said—Is it possible to say that because a man is in contempt he cannot have the evidence which he requires in support of his case? Here an inquiry has been directed in chambers as to the next-of-kin and domicil of the testator. It is the plaintiff who is going on with this inquiry, and it is impossible he can be allowed to go on with it, and yet preclude the defendants from bringing the evidence they require for the purposes of the same inquiry. The order will be for the plaintiff to make his affidavit as to documents within seven days after the defendants have made a sufficient affidavit as to documents; and that the plaintiff also produce the documents in his possession within seven days after the defendants have produced the documents in their possession.

LORD ROMILLY, M.R., March 17, 19, 22, April 16, 1869.

HEATH *v.* BUCKNALL.

38 L. J. Ch. 372; L. R. 8 Eq. 1; 20 L. T. 549; 17 W. R. 755.

Questioned, *Straight* v. *Burn*, [1870] E. R. A.; 39 L. J. Ch. 289; L. R. 5 Ch. 163; 22 L. T. 831; 18 W. R. 243 (L.J.). See, *Harvey* v. *Walters*, [1873] E. R. A.; 42 L. J. C.P. 105; L. R. 8 C.P. 162; 28 L. T. 343 (C.P.). Doubted, *Aynsley* v. *Glover*, [1874] E. R. A.; 43 L. J. Ch. 777; L. R. 18 Eq. 544; 31 L. T. 219; 23 W. R. 147 (M.R.): affirmed, [1875] E. R. A.; 44 L. J. Ch. 523; L. R. 10 Ch. 283; 32 L. T. 345; 23 W. R. 457 (L. JJ.). See, *Newson* v. *Pender*, [1885] E. R. A.; 27 Ch. D. 43; 52 L. T. 9; 33 W. R. 243 (C. A.).

Injunction—Ancient Lights altered and enlarged.

EASEMENTS AND PRESCRIPTION.—*If the owner of ancient lights so alters and enlarges them that they would, in course of time, impose an additional servitude*

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on neighbouring land, equity will not restrain the owner of the servient tenement from obstructing them.

The case of Tapling *v.* Jones *considered.*

The plaintiff being possessed of certain houses in Crutched Friars, in the city of London, which contained ancient lights, pulled them down and rebuilt them. The new building was more than twice the height of the old one, and it did not stand on precisely the same lines; for one of the walls was in part set back and in part set forward. None of the old windows were retained, except two, which were not of sufficient size or importance to support the case of the plaintiff; but some of the new windows coincided as to a small part of their area with the old ones; others, being in the wall built on the new lines, occupied in part the same relative positions, although in different planes; and the rest were entirely new. Thus the uninterrupted enjoyment of these windows would give the plaintiff a new easement over the adjoining land.

The defendants built upon the adjoining land in such a manner as materially to obstruct the access of light and air both to the new windows and the parts of the old ones still remaining; and the present bill was filed to restrain them from permitting the obstruction to continue.

Mr. Southgate and *Mr. Bagshawe*, for the plaintiff.—A sufficient obstruction is proved to give us a title to relief—*Clarke* v. *Clark* (35 L. J. Ch. 151; 1 Ch. Ap. 16); *Yates* v. *Jack* (35 L. J. Ch. 539; 1 Ch. Ap. 295); *Dent* v. *the Auction Mart Co.* (35 L. J. Ch. 555; L. R. 2 Eq. 238); *Stokes* v. *the City Offices Company* (11 Jur. N.S. 560); *Calcraft* v. *Thompson* (15 W. R. 387); *Lanfranchi* v. *Mackenzie* (36 L. J. Ch. 518; L. R. 4 Eq. 421); *Senior* v. *Pawson* (L. R. 3 Eq. 330); *Brook* v. *Archer* (Weekly Notes, Jan. 18, 1868); *Courtald* v. *Legh* (38 L. J. Ex. 45; L. R. 4 Ex. 126); *Battishill* v. *Reed* (18 Com. B. Rep. 696; 25 L. J. C.P. 290); *Wilson* v. *Townend* (1 Dr. & Sm. 324; 30 L. J. Ch. 25). And we are not deprived of our right by having rebuilt the house and made new windows—*Tapling* v. *Jones* (11 H.L. C. 290; 34 L. J. C.P. 342); *Hutchinson* v. *Copestake* (8 Com. B. Rep. N.S. 102); *Cooper* v. *Hubbuck* (30 Beav. 160; 31 L. J. Ch. 123); *Candy* v. *Arthur* (Weekly Notes, August 10, 1867). When a legal injury has been committed, this Court will interfere by injunction—*The Curriers' Company* v. *Corbett* (2 Dr. & Sm. 355; on appeal, 11 Jur. N.S. 719).

Sir Roundell Palmer, *Mr. Jessel* and *Mr. Rodwell*, for the defendants.—The plaintiff's house now receives more light than it did before the alterations, and no substantial injury is done. *Jackson* v. *the Duke of Newcastle* (10 Jur. N. S. 688; 3 De Gex, J. & S. 275; 33 L. J. Ch. 698); *Back* v. *Stacey* (2 Car. & P. 465); *Wynstanley* v. *Lee* (2 Swanst. 333); *Durell* v. *Pritchard* (35 L. J. Ch. 223; 1 Ch. Ap. 244); *Robson* v. *Whittingham* (35 L. J. Ch. 227; 1 Ch. Ap. 444). Even at law it is not immaterial that he has altered the mode of his enjoyment to the prejudice of the defendant—*Garritt* v. *Sharp* (3 Ad. & E. 325). But, admitting that he could obtain damages at law, he is not entitled to an injunction in this Court. The uninterrupted enjoyment of light coming to the new windows would give him new rights over the land of the defendant, and this cannot be prevented except by acts which will expose the defendant to an action at law. Equity, however, will not assist the plaintiff to acquire these rights. *Tapling* v. *Jones*, being a case at law, has not decided this question. In *Rundell* v. *Murray* (Jac. 316), Lord Eldon said—"A Court of equity frequently refuses an injunction where it acknowledges a right, wherever the conduct of the party had led to the state of things which occasions the application."

Mr. Southgate, in reply.

The Master of the Rolls (*April* 16).—This case involves a most important question—whether a man who has an easement over the land of his neighbour in respect of the access of light and air to a small window may, by erecting

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a large and entirely new building in which that small window is partially retained, acquire a perfectly new and distinct easement over his neighbour's land. The plaintiff's ancient lights consisted of, I think, four or five windows. He has erected an entirely new building, more than double the height of the old one; he has cut off more than three-fourths of each of the old windows, and made a new set of windows looking over the defendant's land; and the question is whether he can now prevent the owner of the servient tenement from building a house opposite to him. The mode in which a similar question was dealt with by Sir R. Kindersley in *The Curriers' Company* v. *Corbett* (2 Dr. & Sm. 359) seems to me very just. He says, "Where a house having ancient lights is burnt or pulled down and rebuilt, and the question arises whether the character of ancient lights which belonged to the windows of the old house attaches to those of the new house, it appears to me that the principle to be applied to the solution of the question is, to inquire whether the new windows would impose on the servient tenement either an additional servitude to that to which it was subjected when the old house existed, or a different servitude from that which previously existed. And it appears to me that it is not every trivial or immaterial change which would prevent the new windows from possessing the character of ancient lights possessed by the old windows. To deprive them of that character, the change must be material either in the nature or the quantum of the servitude imposed."

I do not understand *Tapling* v. *Jones* to overrule this doctrine, which appears to me to be founded on immutable and incontrovertible principles of equity. *Tapling* v. *Jones* decides that the alteration of the ancient light would not justify the owner of the servient tenement in obstructing what remains of that ancient light; but whether this unjustifiable obstruction is a matter to be estimated in damages or by injunction is, I conceive, a totally different matter. It may, no doubt, be laid down as a general axiom that where a man possesses a right of light and air over the property of another, the obstruction of which would be punishable at law in the shape of damages, a Court of equity will by injunction prevent that obstruction; but when the owner of the ancient light so deals with it as to alter its character and convert it into a totally different easement over his neighbour's land, into an easement which would prevent the owner of the servient tenement from enjoying his property as he might have done at any time before the ancient lights were so altered and converted, then I am of opinion that the owner of the servient tenement shall not be debarred by the injunction of this Court from the enjoyment of his land as heretofore. If in effecting such enjoyment he unavoidably interferes with the ancient light of the owner of the dominant tenement, the only compensation that owner can obtain is in damages. He is not entitled by the insidious use of his own property to acquire a portion of his neighbour's property.

In the present case, the servitude is entirely changed. The plaintiff is still entitled to compensation for the destruction of that which he previously enjoyed, but by his own act he has deprived himself of the right to call for the aid of a Court of equity. The bill, therefore, must be dismissed, reserving to the plaintiff the right to bring any action, as he may be advised.

LORD ROMILLY, M.R., April 23, 26, 1869.

GRAHAM *v.* JOHNSON.

38 L. J. Ch. 374; L. R. 8 Eq. 36; 21 L. T. 77; 17 W. R. 810.

Bond—Assignee for Value—Subsisting Equities—Forbearance to Sue—Consideration for Promise.

ASSIGNMENT. DEED AND BOND.—*A bond given for the purpose of enabling the obligee to raise money passes to an assignee for value, subject to the*

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subsisting equities in favour of the obligor, unless the intention with which it is given is expressed on the face of it.

CONTRACT.—*Forbearance to sue is a good consideration to support a promise only when the forbearing party has a right to sue in his own name, either at law or in equity.*

The plaintiff, an officer in the Bengal Cavalry, went to India in 1862, and being in pecuniary embarrassment, by the advice of Captain Shepherd, a common friend, he consulted the defendant Johnson, a barrister practising in India, whose acquaintance he had made in England, as to the means of discharging his debts. The result was, that he drew on his brother in England several bills of exchange, which were indorsed both by Captain Shepherd and by Mr. Johnson.

Shortly afterwards Mr. Johnson, being in similar difficulties, applied to the plaintiff for assistance, and the plaintiff at his request accepted several bills of exchange drawn upon him by Mr. Johnson, but without taking notice of either the number or amounts of the bills he accepted. Being requested to give a little further assistance he went to Mr. Johnson's chambers, where he signed a document produced by Mr. Johnson, as to the nature of which he did not inquire. At the same time, at Mr. Johnson's request, he sat down and wrote him the following letter:

"Wilson's Hotel, March 6, 1862.

"My dear Johnson,—As you have been my security for some thousands, and as by rights I should owe you a good deal of money not only for money paid, but for services performed; and also for our many long and confidential consultations, never forgetting our last, and your extricating me from the payment of the one thousand pounds to Colonel Harvey, and perhaps the bother of a Court of Inquiry, I repeat that for these reasons I am anxious to give you a promise in writing to pay you say Company's rupees 10,000 on demand, or 1,000*l*. I don't know much about business, so you draw it up in the way you may think most pucka on me, or if I go out my representatives. I am sorry to hear your business gets on so slowly. When do you think Mr. Public Works will stump up?

"Yours sincerely,

"T. C. Graham.

"P.S.—Of course you can, or promise in any way you like. I mean so that you can raise the wind on it."

The plaintiff did not know what the instrument was which he had signed before writing this letter. He understood it to be a means to enable Mr. Johnson to raise money, as in the case of the bills of exchange he had previously accepted. He afterwards discovered that it was a bond without condition for 10,000 rupees payable to Mr. Johnson.

When the plaintiff inquired what the document was, Mr. Johnson told him that he would never have to pay anything in consequence of it. In 1864, however, Mr. Johnson assigned the bond for its full value to Colonel Barlow, the other defendant, assuring him that the plaintiff had given it for valuable consideration. In October, 1865, Messrs. Johnston, Farquhar & Leech, Colonel Barlow's solicitors, wrote to the plaintiff requiring payment of it. The plaintiff was in Paris when he received the letter, and being without professional advice, he believed that though he had received no valuable consideration for it he was still liable to pay it. He therefore wrote to Messrs. Johnston, Farquhar & Leech, saying that he expected soon to receive a considerable sum of money under his father's will, and promising, if they would wait till that came into his hands, to pay the bond. Afterwards, being advised that he was not liable, he refused to pay; and in January, 1866, an action was brought against him by Colonel Barlow in the name of Mr. Johnson. He thereupon filed the present bill, praying that the bond might be declared void and be decreed to be delivered up; and that the defendants might be restrained from prosecuting the action.

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Mr. Southgate and *Mr. Cates*, for the plaintiff, urged that Colonel Barlow took the bond subject to the equities in favour of the plaintiff. They cited *The Athenæum Life Insurance Company* v. *Pooley* (1 Giff. 102; 3 De Gex & J. 294; 28 L. J. Ch. 119); *Cockell* v. *Taylor* (15 Beav. 103).

Mr. Jessel and *Mr. Hemming*, for Colonel Barlow.—There are exceptions to the rule that the assignee of a bond takes subject to the equities subsisting between the obligor and the obligee. *In re Agra and Masterman's Bank* (36 L. J. Ch. 222; 2 Ch. Ap. 391); *In re the Blakeley Ordnance Company* (37 L. J. Ch. 418; 3 Ch. Ap. 154); *In re the Natal Investment Company* (37 L. J. Ch. 362; 3 Ch. Ap. 355). The plaintiff having, as he admits, given Mr. Johnson a document to enable him to raise money, cannot now, when money is raised upon it, refuse to pay. But if we fail on this point, Colonel Barlow, having a claim enforceable at law, at the request of the plaintiff forbore to sue; and this forbearance is a sufficient consideration to support the plaintiff's promise to pay. *Lee* v. *Muggeridge* (5 Taunt. 36); *Forth* v. *Stanton* (1 Wms. Saund. 210).

Mr. Cracknall, for Mr. Johnson.—The bond is not void for want of consideration unless there was undue influence; and the facts in evidence do not amount to that . *Hunter* v. *Atkins* (3 Myl. & K. 113); *Kennedy* v. *Broun* (13 Com. B. Rep. 677; 32 L. J. C.P. 137).

Lord Romilly, M.R.—There are distinct cases against the two defendants. As to Mr. Johnson, it is clear that the plaintiff, when he signed the bond, thought it was such an instrument as he had given before. He assures the plaintiff that he cannot be made liable under it, and he cannot now treat it as a present of 1,000*l*. The plaintiff, therefore, might have compelled Johnson to deliver up the bond to be cancelled, and it was natural that he should take no steps till he was applied to for payment of it.

Against Colonel Barlow, however, the case is different. He paid money for the bond. The general rule undoubtedly is, that the assignee of a bond takes it subject to the equities subsisting between the obligor and the obligee at the date of the assignment. Is there anything to take the present case out of that rule?

First, it is said that, on the admission of the plaintiff, this document was given as a negotiable security. But that does not alter the character of the instrument nor deprive the obligor of his equities. The intention of the obligor in giving the bond cannot, when it is not expressed on the face of the instrument, alter its nature or effect. It is true that a bill is good in the hands of an indorsee without regard to the equities; and any instrument which expresses on the face of it that it is given for the purpose of raising money is enforceable by an assignee. This distinction was the ground of the decision in *The Agra and Masterman's Bank*, in favour of persons who had taken bills on the faith of an open letter of credit. The Lord Justice Turner said, "The letter is evidently, though not in terms yet in substance, addressed to the persons who were to negotiate the bills and to make advances on the faith of the letter." In the present case, however, the bond is in the ordinary form, not in the form of a negotiable instrument. I am of opinion, therefore, that Colonel Barlow took it subject to the equities subsisting between Mr. Johnson and the plaintiff.

Then does the correspondence between the plaintiff and Colonel Barlow's solicitors make any difference? On the faith of the plaintiff's letter from Paris, Colonel Barlow forbears to sue. But does that create a valid contract? I am of opinion that forbearance to sue is a good consideration only where there is a right to sue. I do not consider what would have been the effect if the plaintiff had in Paris given a bill which was now (instead of the bond) being sued on; for as it is, Colonel Barlow cannot sue in his own name at law, and he has no claim in equity. The question is, whether the plaintiff, having written this letter, not knowing that equity would restrain Colonel Barlow from suing unless he assumed the position of Johnson, thereby forfeited his equitable defence. I am of opinion that he did not. The plaintiff is entitled, therefore, to have the bond delivered up and the action restrained. But Colonel Barlow must not be made to pay costs.

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MALINS, V.C., Feb. 16, 17, 24, 1869.

GIBBINS *v.* EYDEN.

38 L. J. Ch. 377; L. R. 7 Eq. 371; 20 L. T. 516; 17 W. R. 481.

Approved, *Tomkins* v. *Coulthurst*, [1876] E. R. A.; 1 Ch. D. 626; 33 L. T. 591; 24 W. R. 267 (V.C.). See, *Eager* v. *Furnivall*, [1881] E. R. A.; 50 L. J. Ch. 537; 17 Ch. D. 115; 44 L. T. 464; 29 W. R. 649 (M.R.). Followed, *In re Smith*, [1886] E. R. A.; 55 L. J. Ch. 914; 33 Ch. D. 195; 55 L. T. 549; 35 W. R. 103 (Ch. D.).

Mortgaged Estates—Specific and Residuary Devise—Exoneration—Estate by Curtesy—Bankruptcy of Husband—Assignees.

EXECUTOR AND ADMINISTRATOR.—*A testator (before Locke King's Act) having two estates subject to the same mortgage, made a specific devise of one and a residuary devise of the other*:—Held, *that the residuary devise being specific both estates must bear the mortgage debt rateably.*

BANKRUPTCY. HUSBAND AND WIFE.—*A bankrupt, after obtaining his certificate of discharge, became entitled to an estate by the curtesy, but at the date of his discharge his wife was only tenant in fee in remainder expectant upon a life interest. The assignees now claimed the benefit of the husband's estate*:—Held, *that until the estate subject to the curtesy became vested in the wife in possession, the husband had no inchoate or transmissible interest which could pass to the assignees.*

Richard Claridge, by his will, dated the 30th of May, 1854, devised his Bugbrooke estate to his nephew James Bazeley in fee, and "all the rest, residue and remainder of his real estate, with all appurtenances to the same belonging," he devised to his wife for life, and after her decease to his niece Annie Bazeley and his nephew John Eyden, their heirs and assigns for ever as tenants in common.

The testator died on the same day. At the time of his death the only real estate belonging to him besides the Bugbrooke estate consisted of some land and premises at Heyford, which, together with the Bugbrooke estate, were subject to a mortgage in fee executed by the testator, in 1845, for securing 6,600*l.* and interest.

The testator's widow died in December, 1867. Upon her death the present suit was instituted for the administration of the testator's estate by his niece Annie Bazeley, then the wife of Thomas Gibbins, who, in April, 1866, had been adjudicated bankrupt, and had obtained his certificate of discharge in the following July.

Annie Gibbins died in July, 1868, after the commencement of the suit, having had issue by Thomas Gibbins, born previous to his bankruptcy.

All the testator's debts other than the mortgage had been paid out of his personal estate.

The questions which now came on for argument were, first, whether the mortgage debt of 6,600*l.* was to be borne rateably by the Bugbrooke and Heyford estates, or solely by the Heyford estate; secondly, whether the assignees in bankruptcy of Thomas Gibbins could claim the benefit of the estate by curtesy, to which he had become entitled upon his wife's death.

Mr. Cotton and *Mr. Crossley*, for the present plaintiff (a child of Thomas and Annie Gibbins).—A residuary devise is still to be regarded as specific; therefore the specific devisee cannot be in a better position than the residuary devisee in respect of this mortgage debt, which is charged on both estates, and must be borne rateably—*Hensman* v. *Fryer* (37 L. J. Ch. 97; L. R. 3 Ch. Ap. 420). The decision in *Brownson* v. *Lawrance* (37 L. J. Ch. 351; L. R. 6 Eq. 1), is not consistent with what is now the settled authority on this point; moreover,

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that case was decided with reference to Locke King's Act (17 & 18 Vict. c. 113), which does not operate upon this will.

Mr. De Gex, for John Eyden, in the same interest, cited *Mirehouse* v. *Scaife* (2 Myl. & Cr. 695, 706; 7 L. J. Ch. 22); *Emuss* v. *Smith* (2 De Gex & Sm. 722); *Pearmain* v. *Twiss* (2 Giff. 130; 29 L. J. Ch. 802); *Edwards* v. *Pugh* (2 Giff. 135 n.); 2 *Jarman on Wills* (3rd edit. 589).

Mr. Glasse and *Mr. A. E. Miller*, for James Bazeley, the devisee of the Bugbrooke estate.—By devising one of the mortgaged estates as "residue," the testator impliedly charged that estate with payment of the debt, in exoneration of that which was specifically devised. This is the express point decided in *Brownson* v. *Lawrance*, ubi supra. The gift being in its form residuary indicates an intention that the property which constitutes the residue shall be primarily liable, and that view is not inconsistent with the decision in *Hensman* v. *Fryer*, ubi supra, but proceeds upon a principle altogether distinct, the residue being only that which remains after payment of the debts—*Harris* v. *Watkins* (Kay, 438; 23 L. J. Ch. 540); *Francis* v. *Clemow* (Kay, 435; 23 L. J. Ch. 288); *Mirehouse* v. *Scaife*, ubi supra.

Mr. Dryden and *Mr. G. O. Morgan*, appeared for other parties interested under the will.

Mr. Cotton replied.

Upon the second point,

Mr. Osborne and *Mr. Shebbeare*, for the assignees in bankruptcy.—The estate by curtesy was inchoate at the time of the bankruptcy. The bankrupt was then married and had issue born; what was then a contingent interest or possibility has since ripened into a freehold estate for life by the death of his wife, and the assignees are entitled to the benefit—*Higden* v. *Williamson* (3 P. Wms. 132); *Jones* v. *Davies* (8 Jur. N.S. 592; 31 L. J. Ex. 116; 7 Hurls. & N. 507); *Bacon's Abridgment*, tit. 'Curtesy,' D.; *Ripley* v. *Woods* (2 Sim. 165); *Davidson* v. *Chalmers* (33 Beav. 653; 33 L. J. Ch. 622).

Mr. J. H. Palmer, for the bankrupt, Thomas Gibbins.—At the date of the bankruptcy the wife's interest was not in possession, but only in reversion expectant on the decease of the testator's widow; there could therefore be no existing interest in the husband, and the mere expectancy of an interest to be created only by operation of law could not be transmissible to his assignees—*In re Inkson's Trusts* (21 Beav. 310).

MALINS, V.C. (*Feb.* 24).—In this case the testator, Richard Claridge, being possessed of two estates, subject to a mortgage of 6,600*l.*, by his will (which came into operation before Locke King's Act), devised these estates in the following manner.—[His Honour read the words of the will to the effect above stated.]—The first question I have to decide is, in what proportion the mortgage debt is to be borne as between the devisees of the Bugbrooke and Heyford estates respectively. On behalf of those interested under the residuary devise, it is contended that the two estates must bear the debt rateably, according to their respective values, while, on the part of James Bazeley, who is the specific devisee of the Bugbrooke estate, it is contended that the Heyford estate must bear the whole debt in exoneration of that which was specifically devised.

It is admitted that if the Heyford estate had been devised by name as the Bugbrooke estate was, the two estates must have borne the debt rateably. On the other hand, there can be no question that before the Wills Act (1 Vict. c. 26.) every devise of land, whether given by name or passing by a residuary devise, was specific. But it was decided by Vice Chancellor Kindersley, in *Dady* v. *Hartridge* (1 Dr. & Sm. 236), and again in *Hensman* v. *Fryer* (35 L. J. Ch. 745) that since the Wills Act a residuary devise of real estate is no longer specific, because that act makes the will speak as if it had been executed immediately before the death of the testator. I confess I am unable to follow the reasoning of my learned predecessor. I cannot see any reason for a devise being less specific because the will speaks at one time instead of another. The same view was, however, adopted by the Master of the Rolls in *Rotherham* v. *Rotherham*

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(26 Beav. 465) and in *Bethell* v. *Green* (34 Beav. 302). But in *Pearmain* v. *Twiss* Vice Chancellor Stuart held the contrary, as also did the present Lord Chancellor, when Vice Chancellor, in *Edwards* v. *Pugh*. In this conflict of opinion the decision of Vice Chancellor Kindersley, in *Hensman* v. *Fryer*, was heard upon appeal before Lord Chancellor Chelmsford, in November, 1867, and on the 3rd of December in that year, the decree of the Vice Chancellor was reversed, the result of the decision on appeal being that a residuary devise of land is just as specific under the Wills Act as it was before.

It being thus settled that a residuary devise of real estate is still specific, the rights of the parties now before me are just the same as if the Heyford estate, instead of passing under the residuary devise, had been specifically devised by name; and it follows that the Bugbrooke and Heyford estates must bear the mortgage debt rateably.

The decision of the Master of the Rolls in *Brownson* v. *Lawrance* was much pressed upon me in behalf of exonerating the specific devisee, but that decision appears to me to have proceeded upon the ground that a residuary devise of real estate is not specific, as the Master of the Rolls had previously held in the cases to which I have referred; and though *Brownson* v. *Lawrance* was decided three months after Lord Chelmsford's decision in *Hensman* v. *Fryer*, the Master of the Rolls does not advert to that decision in his judgment. I cannot, therefore, treat the case as an authority in favour of the point here raised.

The remaining point for decision is as to the right of the assignees in bankruptcy of Thomas Gibbins to the benefit of his estate by the curtesy in the moiety of the Heyford estate to which his wife became entitled upon the death of the tenant for life, in December, 1867. Gibbins became bankrupt in April, 1866, and obtained his certificate of discharge on the 1st of July in that year. His wife, therefore, was only tenant in fee in remainder when he obtained his discharge. There is no doubt that all rights and interests in property, vested and contingent, to which a bankrupt is entitled at the time of his bankruptcy pass to his assignees. The cases cited by Mr. Osborne shew that clearly. But there can be no inchoate right to curtesy till the wife becomes entitled to an estate of inheritance in possession; and as the wife of Thomas Gibbins did not become entitled to such an estate till the 1st of December, 1867, more than a year after his bankruptcy and discharge, I am of opinion that his inchoate right first accrued then, and, consequently, his assignees are not entitled to the life estate to which he became entitled by curtesy upon the death of his wife, in July, 1868.

I think this case is in principle the same as *In re Inkson's Trusts*.

JAMES, V.C., March 1, 1869.

FIELDEN *v.* SLATER.

38 L. J. Ch. 379; L. R. 7 Eq. 523; 20 L. T. 112; 17 W. R. 485.

Distinguished, *Jones* v. *Bone*, [1870] E. R. A.; 39 L. J. Ch. 405; L. R. 9 Eq. 674; 23 L. T. 304; 18 W. R. 489 (V.C.); *Stuart* v. *Diplock*, [1890] E. R. A.; 59 L. J. Ch. 142; 43 Ch. D. 343; 62 L. T. 333; 38 W. R. 223 (C. A.). See, *Holloway Brothers* v. *Hill*, [1902] E. R. A.; 71 L. J. Ch. 818; [1902] 2 Ch. 612; 87 L. T. 201 (Ch. D.).

Injunction—Restrictive Covenant—Lessee without Notice—Evidence—Plaintiff's Right to read Affidavit of one Defendant against another—Parties.

LANDLORD AND TENANT.—*A grantee in fee subject to a perpetual rentcharge had entered into a restrictive covenant not to carry on a particular trade on the conveyed premises*:—Held, *that his lessee would be restrained from carrying on such trade at the suit of the original grantor, although such lessee had no notice that his lessor was bound by such a covenant.*

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On the hearing of a cause after replication a plaintiff will not be allowed to read an affidavit filed on behalf of one defendant, against another defendant, without notice:—Held, *also, that the original grantor having filed a bill to restrain the lessee from breach of a restrictive covenant contained in the original grant, the original grantee was not a necessary party to the suit.*

This was the hearing of a cause after replication filed. By an indenture, dated the 25th of April, 1854, John Fielden, who was seised in fee of one undivided eighth part of the land granted by the same indenture, and the plaintiff, who was seised in fee of the other seven undivided eighth parts of the same land, in consideration of a certain rentcharge, granted the same plot of land, on the westerly side of the New Market Place, in Blackburn, and certain messuages erected thereon, to four persons, of whom the defendant Slater was one, in fee; and by the same indenture the said grantees, for themselves, their heirs, executors and administrators, covenanted by a joint and several covenant with the plaintiff and the said John Fielden that they, the said grantees, " their heirs or assigns, or any of them, would not convert or make any of the buildings then erected, or which should thereafter be erected, upon the said plot of land, or any part thereof, into a smith's or tinman's shop, dye-house, stable, shippen or slaughter-house, nor use or occupy, or permit to be used or occupied, any of such buildings as fronted the said New Market Place as an inn, public-house or tap-room, or for the sale of spirituous liquors, or ale or beer, nor set up or exercise, or cause or suffer to be set up or exercised thereon any business or manufactory which might produce more smoke than a dwelling-house, or any disagreeable smell, or which might be considered as detrimental to the neighbourhood." Under the will of the said John Fielden and an indenture, dated the 20th of December, 1859, the plaintiff became absolutely entitled to the estate and interest of the said John Fielden in the said land and rentcharge. Under a deed of partition, dated February, 1858, the defendant Slater became solely entitled to one of the said messuages, being a dwelling-house and shop erected on the said piece of land, subject to the rentcharge. The said dwelling-house and shop fronted the New Market Place, and was known as 51, Albert Buildings. By an indenture of lease, dated the 1st of November, 1862, the defendant Slater demised to the defendant Sefton, who had been a yearly tenant of the same premises from the year 1857, the said dwelling-house and shop for a term of twenty-one years from the 12th of November, 1862. Such indenture contained no covenant restrictive of trading, except a covenant " that no offensive business, or occupation or nuisance, should be carried on or committed in the said premises; and that the same should be used as a dwelling-house and shop only." Such indenture of lease was prepared by the solicitors of the defendant Slater, and Sefton had no solicitor in the matter. Sefton stated in his answer that he had no notice that Slater was under any restrictive covenant as aforesaid. But Mr. Challis, the conveyancing and managing clerk to Messrs. Wilkinson, of Blackburn, Slater's solicitors, denied this statement, and swore that he had informed the defendant Sefton that he could not use the premises as a public-house or tap-room, or for the sale of spirituous liquors, ale or beer. In November or December, 1865, the defendant Sefton, who carried on upon the said premises the business of a grocer and cheesemonger, was appointed the agent in Blackburn of Messrs. W. & A. Gilbey, the well-known firm of wine and spirit merchants in London; and, in January, 1866, he commenced to expose for sale and sell wines and spirituous liquors as such agent of Messrs. Gilbey. He did not sell any such wines or spirits for consumption upon the premises, nor did he sell a less quantity than a single reputed quart bottle. In March, 1866, the plaintiff's agent called upon the defendant Sefton, and told him he was restricted from selling wines on the premises.

In March, 1868, the plaintiff filed this bill against Slater and Sefton to restrain the defendants from using or permitting to be used the said dwelling-house and shop as an inn, public-house, or tap-room, or for the sale of spirituous liquors, ale or beer, and for an inquiry as to damages.

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Mr. Kay and *Mr. Renshaw*, for the plaintiff.—There had been a clear breach of the covenant. The defendant Sefton had express actual notice of the covenant, but, even in the absence of express notice, he would have been bound by it. To prove that Sefton had express notice of the covenant they relied on an affidavit made by the said Mr. Challis, and filed on behalf of the defendant Slater, which the plaintiff had not given notice of his intention to read as against the defendant Sefton.

[JAMES, V.C. said, he did not see how the affidavit of one defendant could be read against a co-defendant without notice.]

In the case of *Lord* v. *Colvin* (3 Dr. 222; 24 L. J. Ch. 517), it was decided that a witness called on behalf of one defendant might be cross-examined by another defendant, and that the evidence so given would be common to all the parties; and in *Sturgis* v. *Morse* (26 Beav. 562), it was held that the evidence taken by any of the parties to a cause might be used by any of the other parties.

[JAMES, V.C.—That was on a motion for taxation.]

Independently, however, of actual notice, the defendant Sefton would be bound by constructive notice of the covenant. He was bound to inquire into his lessor's title, and not having done so was fixed with notice of the covenant. That point was decided in *Wilson* v. *Hart* (2 Hem. & M. 551: and on appeal, 35 L. J. Ch. 569; L. R. 1 Ch. 463); *Clements* v. *Welles* (35 L. J. Ch. 265; L. R. 1 Eq. 200); *Tulk* v. *Moxhay* (2 Phil. 774; 18 L. J. Ch. 83). If a grantee or lessee could grant an assignment or under-lease of the leasehold premises, and his assignee or under-lessee was not to be bound by the covenants contained in the original grant or lease, unless he had actually examined such grant or lease, covenants of this kind would be practically useless—*Parker* v. *Whyte* (1 Hem. & M. 167; 32 L. J. Ch. 520). This case came distinctly within the covenant—*Harms* v. *Parsons* (32 Beav. 328; 32 L. J. Ch. 247).

Mr. Amphlett and *Mr. Rowcliffe*, for the defendant Slater, submitted that he was unnecessarily made a party to this suit. He had done all that lay in his power to prevent the covenant being broken.

Mr. Druce and *Mr. Simmonds*, for the defendant Sefton, argued that the affidavit of Mr. Challis was not evidence for the plaintiff against Sefton, the plaintiff not having given notice to read it against him. The main question was, whether, in the absence of notice to Sefton, the plaintiff was entitled to an injunction. The covenant was not one running with the land—*Bristow* v. *Wood* (1 Coll. 480; 14 L. J. Ch. 50). In *Wilson* v. *Hart* the defendant knew that there was some restriction, but wilfully shut his eyes to what is was.

[JAMES, V.C., said Turner, L.J. ignored that fact in his judgment.]

The plaintiff had waited till the defendant's business in wine and spirits had become valuable before he filed this bill.

Mr. Kay replied.—The word "public-house" in stat. 11 Geo. 4. & 1 Will. 4. c. 64. s. 31. included a gin-shop. Slater was properly made a party to the suit—*Hodson* v. *Coppard* (29 Beav. 4; 30 L. J. Ch. 20).

JAMES, V.C., after stating the nature of the suit and reading the covenant in the indenture of the 25th of April, 1854, said, the defendant Sefton alleged that he became tenant of his premises for a term of twenty-one years, without any notice of the covenant contained in that indenture, except so far as he might be held to be fixed with constructive notice thereof by reason of his not having inquired into his lessor's title; and if it were necessary for the plaintiff to make out that the defendant had actual notice, he should be prepared to hold that the defendant Sefton had no such notice of the covenant. He was not prepared to hold that the plaintiff could, without notice, read the affidavit filed on behalf of one defendant after replication filed against a co-defendant. The decision in *Lord* v. *Colvin*, relied on by the plaintiff,—that a defendant might cross-examine a co-defendant's witness, and that when evidence was taken, whether it be in examination in chief or cross-examination, the whole was common to all the parties, so that a defendant might cross-examine a co-defendant,—must be taken in connexion with the following passage in the Vice Chancellor's judgment:

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"Under the present practice, when witnesses are examined before the Examiner, all parties are or at least may be present, and all parties know what the depositions of the witnesses are as they are given." And, until the case of *Lord* v. *Colvin* had been extended, he was not prepared to hold that a plaintiff could without notice read an affidavit filed on behalf of one defendant against another defendant. It was not necessary, however, for the plaintiff to prove actual notice. His Honour considered himself bound by the case of *Wilson* v. *Hart*, before the Lords Justices. For in that case Wood, V.C. had decided that a lessee who did not inquire into his lessor's title was bound by constructive notice of a restrictive covenant such as there was here, and that decision was affirmed on appeal. That case was a strong instance of legislative decision, but he was bound by it, and must hold, accordingly, that a person who took a lease without inquiring into his lessor's title was bound by his lessor's covenants just as if he had notice of the covenants. Then, what was the construction to be put upon the restrictive covenant in this case? He had been much pressed to put a limited meaning upon the words "for the sale of spirituous liquors," the contention being that these words were to be taken as in some sort *ejusdem generis* with the words preceding them, so as to mean the sale of spirituous liquors, as the same would be carried on in "an inn, or public-house or tap-room," and not to apply to the sale of spirituous liquors in bottles. Where the words of a covenant were plain it was not for the Court to go into nice distinctions, and if the acts complained of came clearly within the meaning of the covenant, the Court would not hesitate to apply the covenant to them. If one looked to the nature and object of the covenant, the defendant was plainly bound thereby not to sell spirituous liquors in any form or manner. Then it was said that no damage has been proved to have been sustained by the plaintiff. That was immaterial. The plaintiff was entitled to have his covenant enforced. There appeared to have been a considerable delay between the wrong being done and the filing of the bill, but the position of the defendants was not shewn to have been prejudiced by the delay. He was of opinion that the plaintiff was entitled to an injunction to restrain the sale of spirituous liquors. He was not satisfied that there was any ground for making Slater a party to this suit. His position was known to the plaintiff at the time of filing the bill. He never alleged that the plaintiff was wrong, and he gave Sefton notice of the restrictive covenant.

The bill must be dismissed against Slater, with costs. An injunction must be granted as against Sefton to restrain him from selling spirituous liquors; but, notwithstanding such injunction, the Court would allow him one month in which to sell off his remaining stock upon the premises.

JAMES, V.C., March 8, 9, 1869.

In re BURRELL; BURRELL *v.* SMITH.

38 L. J. Ch. 382; L. R. 7 Eq. 399; 17 W. R. 516.

Mortgagor and Mortgagee—Sub-mortgage—Disclaimer of Sub-mortgagor in Foreclosure Suit—Leasehold Estate forfeited to Lessor—Sub-mortgagee's Claim against Mortgagor's Estate.

EXECUTOR AND ADMINISTRATOR. MORTGAGE.—*B. mortgaged leasehold premises to D. to secure* 3,000*l. D. sub-mortgaged the debt, and demised the leaseholds for the term, less three days, to E, to secure* 1,200*l. B. died, and D. and E, in an administration suit against his executors, brought in a joint claim for* 3,000*l. D. again sub-mortgaged his debt and interest in the leasehold premises to L. C. Afterwards D. took from B.'s executors an assignment of B.'s equity of redemption, and released them from the debt. D. then executed an assignment to trustees for the benefit of his creditors. E. instituted a fore-*

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closure suit against D.'s trustees and L. C. The trustees disclaimed. A foreclosure decree absolute was made against L. C. The premises became forfeited to the lessors for non-payment of rent. E. took out a summons to enforce the claim brought in by him and D. against B.'s estate:—Held, *that neither the release of B.'s executors by D, nor the disclaimer by D.'s trustees, nor the foreclosure decree obtained by E, nor the forfeiture of the premises to the lessors, affected E.'s right to be paid his debt out of B.'s estate, and the estate being insufficient, he might prove against it for the* 3,000*l.*, *so that he did not receive more than the amount of his debt, interest and costs.*

Adjourned summons taken out on behalf of P. E. Eyton for enforcing a claim against the estate of T. H. Burrell, deceased.

By an indenture of lease dated March 24, 1860, Wason and other demised the Commercial Hotel, Liverpool, to Edward Deakin, his executors, administrators and assigns, for twenty-one years, from the 3rd of April, 1860, at the annual rent of 360*l.* On the 17th of July, 1862, Deakin, in consideration of 3,000*l.*, assigned the leasehold premises to T. H. Burrell for the residue of the term, and Burrell assigned, by way of mortgage, the same premises to Deakin for the residue of the said term to secure the said sum of 3,000*l.* and interest. On the 14th of April, 1863, Deakin, in consideration of 1,200*l.* advanced to him by Eyton, by indenture of that date, assigned, by way of sub-mortgage to Eyton, his mortgage debt of 3,000*l.* and interest, and demised to Eyton the leasehold premises for the residue of the said term of twenty-one years, except the last three days thereof. The indenture contained a power for Eyton to sue in Deakin's name for the debt of 3,000*l.*, and also a power of sale of the mortgaged premises. Notice of this mortgage was duly given to Burrell. Burrell died on the 1st of August, 1863, having by his will, dated the 9th of April, 1853, appointed the defendants, Henry Smith and Louisa Burrell, his executor and executrix, who duly proved his will on the 10th of December, 1863. On the 8th of December, 1863, the above suit, for the administration of T. H. Burrell's estate, was commenced by summons. On the 31st of December, 1863, the usual administration order was made thereon. On the 24th of January, 1864, the usual advertisements for creditors were directed to be published. In pursuance of such advertisements Deakin and Eyton entered a joint claim for the said debt of 3,000*l.* and interest, verified by the usual affidavit. The administration suit not having been heard on further consideration, that claim had never been satisfied. On the 3rd of August, 1864, Burrell's executors entered into a conditional contract for the sale of the leasehold premises to Deakin, in consideration of his releasing the testator's estate from the said mortgage debt of 3,000*l.*, and also for the sale to him of the furniture in the hotel for 900*l.* This contract was duly confirmed by an order of the Court, dated the 8th of August, 1864, and on the 15th of August, 1864, Deakin took possession of the furniture under it. On the 19th of January, 1865, Deakin paid the 900*l.*, the purchase-money for the furniture, into the bank to the credit of the cause, but he took no steps towards taking an assignment of the premises till the year 1866, when the defendants executed an assignment to him of the premises in the terms of the conditional contract, but such assignment was never executed by Deakin. Eyton was not a party in any way to this assignment to Deakin. On the 5th of December, 1864, Deakin further mortgaged his debt of 3,000*l.* to the Liverpool Loan Company (Limited), to secure 1,000*l.* and interest. On the 31st of July, 1866, Deakin executed an assignment to T. Rigby and S. Millington, as trustees, for the benefit of his creditors, which was duly registered under the provisions of the Bankruptcy Act, 1861. On the 6th of June, 1867, Eyton, under his title as sub-mortgagee, filed a bill in the Liverpool district of the Palatine Court of Lancaster for foreclosure of the mortgaged premises against Rigby and Millington and the Loan Company. By their answer in that suit Rigby and Millington disclaimed "all estate and interest whatever in the mortgaged debt of 3,000*l.*, and also all right and equity

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of redemption in or to the said mortgaged debt, and in or to the hotel and other premises demised by the said indenture of the 24th of March, 1860, and comprised in the plaintiff's said mortgage security of the 14th of April, 1863, and all other estate and interest, if any, in the property comprised in the plaintiff's said security." Thereupon the bill was dismissed as against them without costs, and a common foreclosure decree, dated the 12th of August, 1867, was made in respect of the sub-mortgage against the Loan Company. By his report, dated the 26th of November, 1867, in answer to the account directed by such decree, the Registrar found that there was due to the plaintiff, in respect of principal, interest and costs, the sum of 1,595*l.* 11*s.* 2*d.* On the 11th of June, 1868, the usual decree for absolute foreclosure was made against the Loan Company. The hotel had been closed since May, 1867, and was unoccupied and in a bad state of repair. The estate of T. H. Burrell was nearly insolvent. Eyton for some time paid the ground-rent for the hotel, to the amount altogether of 360*l.*, but some time since he had ceased to pay the rent, and the lessor had entered into possession of the hotel.

This summons was taken out by Eyton to enforce his claim of February, 1864, against Burrell's estate.

Mr. Druce and *Mr. F. H. Colt*, in support of the summons, submitted that the claim was a good one. The 3,000*l.* debt to Deakin was part of the plaintiff's security for his mortgage debt. The foreclosure decree could not affect this claim, since the three days at the end of the term were not within it, but always remained in Burrell and his trustees. The only effect of that decree had been to make the plaintiff the sole absolute owner of the 3,000*l.* due from Burrell, which he was now entitled to receive. The dealings between Deakin and Burrell's executors, which were subsequent to the claim of February, 1864, and to which Eyton was not a party, could not affect Eyton's rights. The liability to pay the rent was in Deakin's trustees, and Eyton was not in default by not paying it. Although there were many cases which might lead to a fallacious argument in this case, as *Lockhart* v. *Hardy* (9 Beav. 349; 15 L. J. Ch. 347), there was no case in which, where the estate had ceased to exist *aliunde*, and not by the mortgagee's default, the mortgagee had been held not to be entitled to the benefit of his covenant because the security had failed. They cited *Ex parte Peak; In re Brodie* (L. R. 2 Ch. 453). Here the difficulty was caused solely, first, by Burrell's executors not having paid the rent; secondly, by their having made an arrangement with Deakin. Eyton had a right to the whole 3,000*l.* as a security for his debt of 1,200*l.*; but, on the other hand, he could repurchase the estate, and was quite prepared to be redeemed.—They also cited *Tooke* v. *Hartley* (2 Bro. C.C. 125); *Seton's Decrees* (393).

Mr. Kay and *Mr. Cozens-Hardy*, for the defendants, Burrell's executors, argued, that the claimant had by his own acts put it out of his power to restore the defendant's estate. Eyton took every step in his suit to acquire the estate.

[The Vice Chancellor.—The disclaimer could operate only on the subject-matter of the suit, *i.e.*, the particular interest mortgaged to Eyton. As regards that interest its effect was equivalent to an absolute foreclosure.]

The effect of the disclaimer was equivalent to that of a fine; it was an assurance by record. Eyton took possession of the mortgaged property and paid the rent, and while in possession obtained a foreclosure decree. That decree put an end to the debt. *Palmer* v. *Hendrie* (No 2) (28 Beav. 341), shewed that when the mortgagee had taken possession of the estate he could not afterwards sue for the mortgage debt—*Perry* v. *Barker* (8 Ves. 527); *Walker* v. *Jones* (35 L. J. P.C. 30; L. R. 1 P.C. 50); *Schoole* v. *Sall* (1 Sch. & Lef. 176).

Mr. Boyle appeared for the defendants, Burrell's executors, who were in the same interest as the plaintiffs.

The Vice Chancellor said he could not hear him argue the case, but he would gladly hear any remarks he might offer as *amicus Curiæ*.

James, V.C. (without calling for a reply) said, Burrell was a debtor to Deakin for 3,000*l.* advanced to him upon mortgage. Deakin, by the indenture

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of the 14th of April, 1863, assigned his debt by way of sub-mortgage to Eyton, and also made to Eyton a sub-lease of the mortgaged premises for the residue of the term less three days. After Burrell's death a suit was instituted for the administration of his estate. In that suit Eyton took in a claim in the name of himself and Deakin for the 3,000*l*. In equity Eyton was the person entitled to the debt, and had power to release it, subject to Deakin's rights therein. By an arrangement made between Burrell's executors and Deakin the debt was purported to be released. To that arrangement Eyton was not a party. It was quite clear that, after an assignment of a debt and notice to the debtor of the assignee's claim, the debtor could not discharge himself without payment to the assignee. Eyton's right, therefore, was not affected by the release. He was a creditor who had never received anything in payment of his debt, nor been in any way satisfied. The question now to be decided was, whether, by the proceedings in the Court of the County Palatine, he had forfeited his rights. The result of those proceedings had been a decree for foreclosure absolute. The effect of that decree was only to bar Deakin's right to redeem. It did not bar Eyton's remedy for the payment of the debt. It did not in any way determine Eyton's rights to proceed against Burrell's estate. Nor did his possession of the premises and payment of rent. Then, it had been argued that Eyton had lost his right to enforce payment of the mortgage debt because he could not now restore the mortgaged estate. True, that he was not in a position to re-convey the estate, but he was in that position only because the person entitled by a title paramount had evicted him. He was in no default in respect of that eviction. He was under no obligation to pay the rent or perform the covenants of the lease. He was in the same position as if the property had been swept away by a flood or a fire. He had been deprived of the property which he held as a security by the default of his mortgagor, and not by any default of his own. Since there had been no default upon Eyton's part, and no satisfaction or release of his debt affecting his rights, he was entitled to receive out of the 3,000*l*. the amount due to him on his sub-mortgage for principal, interest and costs; and he might prove for the whole 3,000*l*. up to the extent of his debt.

Only one set of costs of this application to be allowed, none being allowed to the defendants, Burrell's executors, who need not have appeared.

STUART, V.C., Jan. 14, 21, March 16, 1869.

AUSTER *v.* HAINES.

38 L. J. Ch. 385; L. R. 4 Ch. 445; 20 L. T. 152; 17 W. R. 900.

Distinguished, *Egremont* v. *Thompson*, [1869] E. R. A.; L. R. 4 Ch. 448; 17 W. R. 900 (L.C.). Followed, *Scott* v. *Duncombe*, [1870] E. R. A.; 39 L. J. Ch. 644; L. R. 9 Eq. 665; 22 L. T. 540 (V.C.); *Powell* v. *Phillips*, 1871, 24 L. T. 128 (V.C.). See, *Peter* v. *Thomas-Peter*, [1884] E. R. A.; 53 L. J. Ch. 514; 26 Ch. D. 181; 50 L. T. 176; 32 W. R. 409 (Ch. D.).

Practice—Decree—Infants—Revivor—15 & 16 Vict. c. 86. s. 52.—Consol. Order XXXII, Rules 2, 3.

PRACTICE.—*A decree had been pronounced, and two orders on further consideration, and three certificates made, in an administration suit. Before the last of the orders was drawn up, it was discovered that a legatee, served with a copy of the decree, had since then had two children. An application was therefore made to the Court for the usual supplemental order, under the 15 & 16 Vict. c. 86. s. 52, to revive the suit, and so render the proceedings in it binding upon those children. But the Court, having regard to* Capps *v.* Capps (L. R. 4 Ch. Ap. 1), *declined to make the order.*

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This was an application, under the 15 & 16 Vict. c. 86. s. 52, and the Consol. Order xxxii, rules 2, 3, for the usual order to revive the suit or carry on the proceedings in it. The allegation or statement which was made in support of the application set forth as follows:

The suit was instituted for the administration of the estate of Samuel Haines. The plaintiffs in the suit were the executors and trustees of the testator's will, and the defendants were his heir-at-law and devisees.

On the 8th of June, 1863, the usual administration decree was made. A copy of it was served on Thomas Powell and Eliza his wife, who was a daughter of the testator, and on Reginald Harries Powell and Edith Maria Powell, their infant children.

On the 29th of July, 1864, an order was made giving Reginald Harries Powell and Edith Maria Powell leave to attend, by their guardian, the proceedings under the decree.

On the 6th of August, 1864, the chief clerk made his certificate in the cause; and on the 10th of December, in the same year, an order was made, on further consideration, directing a sale of the testator's real estate, and adjourning further consideration.

On the 1st of November, 1865, the chief clerk made a separate certificate as to the result of the sale.

On the 29th of July, 1868, the chief clerk made a general certificate in the cause as to the accounts and sale.

On the 14th of November, 1868, an order was made, on second further consideration, to tax costs, and to continue certain provisions for winding up the suit. After that order was made, but before it was finally passed and entered, it was for the first time discovered that Mrs. Powell had had two children since the decree in the suit was made and served upon her; viz., Blanche Amy Powell, born on the 16th of February, 1865, and Harold Harries Powell, on the 19th of October, 1868.

Mr. Dauney (*Jan.* 14) supported the application.—He said it was doubtful whether the last three above-stated orders and certificate would bind the last two infant children of Mr. and Mrs. Powell. Even if the common supplemental order, under the 15 & 16 Vict. c. 86. s. 52, was made, there might be a question whether they would be bound by the accounts taken under the decree—*Babington* v. *Molyneux* (June 19, 1868, Giffard, V.C., MS., unreported). If the usual statutory order was not sufficient, it would be necessary to file a bill for the purpose of bringing these infants regularly before the Court,—an expensive course which the parties were most anxious to avoid. He then referred to the 15 & 16 Vict. c. 86. s. 52, and the Consol. Order xxxii, rules 2, 3, and *Capps* v. *Capps* (L. R. 4 Ch. Ap. 1).

STUART, V.C. made the order asked for against the infants, and directed the cause to be set down for hearing again on further consideration, and to be in the paper, *pro forma*, on the first short cause day in the sittings after Term.

Some difficulty was experienced in the drawing up of that order. The registrar drew a distinction between the application for such an order, where the interest charged or transmitted was that of a defendant to the suit,—as in *Jebb* v. *Tugwell* (20 Beav. 461; 24 L. J. Ch. 670),—and where the interest was that of a person who had merely been served with notice of the decree. In *Jebb* v. *Tugwell* the common supplemental order was made, binding the interest of an infant born just before the decree, but, through inadvertence, not made a party to the suit. But the infant born in that case was the child of a defendant to the suit. Moreover, nothing had been done there since the decree was made in the case, the facts of which were known to the Court from having been recently before it.

Accordingly, the case was again (*Jan.* 21) mentioned to the Court.

STUART, V.C. considered that he had jurisdiction to make the order, and directed it to be passed. But, at a subsequent period of the day, said that although his impression was that the parties were entitled to an order to

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prosecute the suit against these infants, and such order might or might not be followed by an order for them to answer, still he would consider the matter further. The papers must be left with him, as the question was one of considerable importance with reference to the practice of the Court.

STUART, V.C. (*March* 16).—In this case the question is whether infants born since the decree, and not before the Court during proceedings subsequent to their birth, can be bound by an order of revivor and supplement on an allegation under the statute 15 & 16 Vict. c. 86. s. 52, or whether it is necessary to file a bill.

There is unfortunately a want of uniformity in the decisions. The case of *Capps* v. *Capps* has properly been cited as an authority to shew that in such a case an allegation under the statute is not sufficient, and that a bill is necessary.

In the present case, from some oversight, there is not sufficient accuracy in the allegation now presented to the Court, but it may perhaps be amended. So far as it goes, it states enough to make it probable that the two children of Thomas Powell and Eliza his wife are members of a class entitled as devisees or legatees; but the allegation does not shew that they are entitled to any interest under the will. There is nothing that indicates more than a transmission to the two after-born children (whose birth has enlarged the class and diminished the share of each of those previously born) of part of the right already existing in the children who have been parties in the previous proceedings. If this be so, I apprehend that a bill is not necessary, and that an order on the statutory allegation is sufficient.

The case of *Capps* v. *Capps* seems not consistent with this view, but the facts are not stated with sufficient fulness or precision in the Law Reports to make the case a guide. The reporter says that the order was applied for on "the usual allegation." It is not easy to understand what is meant by "the usual allegation." But it seems clear it was not a sufficient allegation. There is nothing to shew that the facts might not have been stated so as to justify an order to revive, and have the benefit of the proceedings against the infant co-heirs without a bill, if a guardian *ad litem* was appointed according to the statute and General Orders, and if that guardian did not shew cause against the order within twelve days pursuant to the General Order.

So far as I understand it, the ground for refusing the order in *Capps* v. *Capps* was the infancy of the heir. If so, the 32nd Consolidated Order as to revivor and supplement seems to have been overlooked by Lord Cairns.

According to that General Order an infant (who according to the words of the Order, is "a person under a disability other than coverture") may apply to discharge, or shew cause against the order within twelve days after the appointment of a guardian *ad litem*, and until such period of twelve days shall have expired the order to revive made on the statutory statement is to have no force or effect as against the infant.

According to the 52nd section of the 15 & 16 Vict. c. 86. the guardian *ad litem* of the infant can within the prescribed time shew as a ground for discharging the order any matter which would have been a defence to a bill of revivor and supplement.

I apprehend that the statutory allegation should state everything which it would be necessary to state in a bill of revivor and supplement. It would therefore appear that the statute and the General Order requiring a guardian *ad litem* to be appointed, and allowing twelve days to shew cause after he is appointed, is a protection as effectual to the infant as if the old and more expensive and cumbrous practice of a bill was resorted to.

Indeed, the object of the 52nd section of the act seems to have been that bills of revivor and supplement should be entirely put an end to. It is to be regretted that the 3rd rule of the General Order, by mentioning bills of revivor and supplement, countenances the notion that they are still necessary. That Order was framed long before the statute, and it was perhaps by an oversight that it was incorporated in the General Orders.

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It has been suggested that the usual order to revive does not extend to binding parties by proceedings had in the suit before they were born or made parties. That is true. But the words of the statute are not merely "the usual order to revive," but "the usual supplemental decree." According to the plain language of the statute, the usual supplemental decree may be obtained as of course on an allegation of the suit having become defective, and of the change or transmission of interest or liability. The birth of a child after the decree and proceedings under it, where that child acquires an interest which, according to the old form of proceedings by bill, it is sought to bind by the proceedings before its birth, seems to me within the scope of the 52nd section, as it is a case in which the suit has become defective and in which there has been a transmission of interest or liability. If so, the statute intended that the supplemental decree should be made on allegations, and not by bill.

Till the decision in *Capps* v. *Capps* this was the construction put upon the statute, and many orders have been made on that construction. In *Seton on Decrees*, 1170, the form of such orders, under the head of "birth of a child," is given. It is obvious that a departure from this construction of the statute by the decision in *Capps* v. *Capps* is likely to occasion serious expense and inconvenience by stamping with the character of irregularity many orders on which estates and the affairs of families have been dealt with by the Court.

In the present case the allegation must be made more perfect. Until that is done no order can be made.

STUART, V.C.—When the allegation is amended you must apply to the Lord Chancellor, for I do not intend to make any order.

The case was in consequence mentioned to the Lord Chancellor, who directed a bill to be filed on the ground that as the practice was settled by *Capps* v. *Capps* he would not disturb it, and the Vice Chancellor Stuart, on May 7, made the usual supplemental decree upon the bill so filed.

LORDS JUSTICES, Jan. 24, 1869.

WHITE *v.* SPRINGETT.

38 L. J. Ch. 388; L. R. 4 Ch. 300; 20 L. T. 502; 17 W. R. 336: affirming, [1868] E. R. A.; 16 W. R. 1032 (M.R.).

Followed, *In re Taylor*, 1885, 52 L. T. 839 (C. A.).

Will—Construction—Gift to Next-of-Kin according to the Statute, exclusive of A. where A. is sole Next-of-Kin.

WILL.—*The testator gave, in a certain event, all the residue of his estate to "the person or persons exclusive of my surviving grandchild, who, under the Statute for the Distribution of the Personal Estates of Intestates, would, immediately after the decease of the survivor of my other two grandchildren, be entitled to my personal estate." At the period in question the surviving grandchild was the sole next-of-kin*:—Held, *that the persons who would have been next-of-kin if the surviving grandchild had been dead at the period in question were entitled.*

This was an administration suit to administer the estate of Richard White, the testator in the cause, who, by his will, dated the 11th of May, 1852, gave all his real and personal estate to trustees, to be converted and held upon trust for all his three grandchildren, Sarah M. Hills, Mary J. Hills and Ellen Hills, who should survive their father, Robert Hills, and attain the age of twenty-five years, equally as tenants in common; and in case only one such grandchild should survive her father and attain the age of twenty-five years, then the whole to be in trust for such one grandchild. And in case none of them survived her father and attained the age of twenty-five years, then in trust for his next-of-kin,

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to be ascertained at the death of such survivor, in shares regulated by the Statute of Distributions. The will then continued: "Provided also, and I hereby further declare, that in case two only of my said three grandchildren shall depart this life in the lifetime of their said father, or under the age of twenty-five years, and the amount of my property to which the survivor of my said three grandchildren would thereupon become entitled shall exceed in amount or value the sum of 10,000*l*., then so much thereof as shall exceed that amount or value shall be held in trust for the person or persons, exclusive of my surviving grandchild, who, under the said Statute for the Distribution of the Personal Estate of Intestates, would, immediately after the decease of the survivor of my other two grandchildren, be entitled to my personal estate in case I had at such time died intestate." The testator died on the 21st of May, 1864, and his will was shortly afterwards proved. Robert Hills died in the testator's lifetime. Sarah M. Hills died on the 30th of July, 1865, and Ellen Hills died on the 12th of September, 1867, both unmarried, and under the age of twenty-five years. Mary J. Hills attained the age of twenty-one years in September, 1865, and in August, 1866, married P. A. Eagles.

At the death of Ellen Hills, Mrs. Eagles would have been the testator's sole next-of-kin according to the statute if he had died immediately afterwards. The plaintiffs were the persons who, if at the death of Ellen Hills, Mrs. Eagles had also been dead, would have been the testator's next-of-kin if he had died immediately after Ellen Hills.

Mr. and Mrs. Eagles, and the trustee of their marriage settlement, were defendants, and claimed the whole of the residue, which considerably exceeded 10,000*l*. The plaintiffs claimed the excess over 10,000*l*.

The Master of the Rolls, by the decree, which in other respects was a common administration decree, directed an inquiry who were the person or persons, exclusive of Mrs. Eagles, who, under the statute, immediately after the decease of Ellen Hills, would be entitled to the testator's personal estate in case he had then died intestate: thus in effect acceding to the plaintiff's contention.

Mr. and Mrs. Eagles now appealed.

Mr. Jessel and *Mr. Casson*, for the appellants.—The plaintiffs have no interest, and no one but Mrs. Eagles can have any beneficial interest under the will; therefore, the decree is improper. The result of the will and the events which have happened is that there is an intestacy. Mrs. Eagles is, therefore, entitled as sole next-of-kin; for a testator cannot exclude his next-of-kin unless he gives the property to someone else, which we say he has not done here. The construction of the proviso is this: it is a gift to all the members of a certain class except A. The fact is, A. is the only member of the class. The gift, therefore, fails. You cannot construe the gift in the alternative mode which the plaintiffs desire, viz., to all the members of a certain class, except A, and if A. be the only member of that class, then to another class ascertained in a separate manner. In seeking the next-of-kin according to the statute, you first exhaust the lineal descendants. Now Mrs. Eagles was the only lineal descendant. You do not come to collaterals till you have exhausted lineal descendants, yet the plaintiffs claim as collaterals, that is, as members of a class ascertained in quite a different manner from that in which the class containing Mrs. Eagles is ascertained. The statute is, in fact, exhausted as soon as you have arrived at Mrs. Eagles; and *Bullock* v. *Downes* (9 H.L. C. 1); *Withy* v. *Mangles* (10 Cl. & F. 215; 10 L. J Ch. 391), which are relied on, only prove that if a testator, by the context, clearly shews that he means something not ordinarily denoted by the words he has used, then and not otherwise you accept the extraordinary meaning so adopted by him. That does not apply here, because *non constat* from the will that there were no other children or grandchildren. Besides there might have been children of Sarah M. Hills and Ellen Hills, who might have been next-of-kin together with the survivor of the three named

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grandchildren. Again, there might have been children of Mrs. Eagles: would they have taken?

They also referred to *Lee* v. *Lee* (1 Dr. & Sm. 85; 29 L. J. Ch. 788); *Milne* v. *Gilbert* (5 De Gex, M. & G. 510; 23 L. J. Ch. 828); *Johnson* v. *Johnson* (4 Beav. 318).

Mr. Southgate and *Mr. Villiers*, for the plaintiffs, were not called upon.

Mr. G. R. Collins, for the executors.

SELWYN, L.J.—I accede to the argument, on behalf of the appellants, to this extent, that the current of modern decisions, and especially those in the House of Lords, has set strongly in favour of adhering strictly to the literal meaning of the words used by the testator in each case, without alteration or addition, and as far as possible without reference to other cases or other wills. I also agree that in the particular event which has been referred to, viz., of the two grandchildren who, dying first, having left children, there might have been at the death of the second of those two grandchildren a class of surviving children, composed of the children of the two grandchildren and the children of the living grandchild. But, I think, having made these admissions and adhering to the cases which have been decided, and especially those in the House of Lords, the conclusion which we must arrive at is the same as that to which the Master of the Rolls has come. For it is to be observed that the testator in the proviso in question has not said that where you have a class entitled to certain shares as next-of-kin, one particular person is to be excluded from a share in a fund so to be derived; but what he has said is that you are to look for an artificial class created by himself. They are not his next-of-kin according to the statute, because they would be the next-of-kin at the time of his death; but he creates for himself an arbitrary class to be ascertained in a particular manner, and the question of the persons who are to constitute that class is what we have to look to. It is true that he adopts the statute as one of the means by which that class is to be arrived at; but it is an arbitrary class created by himself, applying the statute to a particular time in order to arrive at that particular class of persons, and without any reference to any division of the estate or any exclusion of a particular person from taking a share. He says you are to ascertain the persons excluding his surviving grandchild. In considering who are the artificial class, you are to exclude from your consideration the surviving grandchild according to this arbitrary rule; in that case the statute would make the present plaintiffs the persons constituting the class. I think therefore that they were entitled to file the bills; that the decree was correct; and that the appeal must be dismissed, with costs.

GIFFARD, L.J.—I am of opinion that the plaintiffs answer the description contained in the testator's will of the "person or persons, exclusive of my surviving grandchild, who, under the said Statute for the Distribution of Personal Estates of Intestates, would immediately after the decease of the survivor of my two grandchildren be entitled to my personal estate in case I had at such time died intestate." I have no doubt that the object of these words was to exclude *Withy* v. *Mangles* and *Bullock* v. *Downes*, because, clearly if these words had not been in the will this particular grandchild would have taken. What the testator, in my opinion, meant was this: I mean my next-of-kin, but they are to be exclusive of my one surviving grandchild. That is, I mean those who are my next-of-kin to take; but I do not mean my surviving grandchild to take. In other words it is this: Putting my surviving grandchild out of consideration, as being at that time my sole or one of my next-of-kin, ascertain who, excluding her, my next-of-kin are. It was suggested as a very conclusive argument that they might have been the children of the two deceased grandchildren and the children of this actual living grandchild. I confess I do not think that there is anything in that argument, and for this reason: it is quite clear that the children of the two dead grandchildren would have taken, because they would have been next-of-kin; it is equally clear that

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the children of the living grandchild would not have taken, for they would not have been the next-of-kin while their mother was living. Putting that construction upon the will the whole thing is consistent. In my judgment, we should be going directly against the intention of the testator if we came to any other conclusion than that at which the Master of the Rolls has arrived.

JAMES, V.C., March 16, 1869.

In re THE OXFORD AND CANTERBURY HALL COMPANY (LIMITED), *Ex parte* MORTON.

38 L.J. Ch. 390; 17 W. R. 606.

Company—Winding-up—Calls—Creditor Contributory—Composition Deed Set-off—Companies' Act, 1862, *ss.* 74, 75, 77.

COMPANY.—*Shortly after the date of an order for winding-up the above company, M, who was the holder of a large number of shares in it executed and duly registered, under the* 192*nd section of the Bankruptcy Act*, 1861, *a deed of assignment to trustees for the benefit of his creditors. The deed contained a release extending to both past and future liabilities. M. claimed that the company was indebted to him to the amount of over* 8,000*l., and his trustees sent in a claim for the amount to the official liquidator. The official liquidator subsequently obtained two orders against M. to enforce the payment of two overdue calls, of which the one had been made before, the other after, the date of the deed of assignment. Upon an application by M. to have these orders discharged the Court sanctioned a compromise setting off the claims of M.'s trustees and the official liquidator against each other.*

Adjourned summons, taken out on behalf of Charles Morton, to discharge two orders for calls obtained against him by the official liquidator of the above-named company.

Morton was the holder of 2,050 shares of 15*l.* each, in the company, upon which he had paid ten guineas per share. In April, 1868, before the company was ordered to be wound up, a call of 1*l.* per share had been made.

On the 7th of May, 1868, an order was made for winding-up the company. On the 15th of July, 1868, Morton was settled on the list of contributories to the company. On the 30th of July, 1868, Morton executed a deed of assignment of his estate and effects to trustees for the benefit of his creditors, which was duly assented to by the requisite number of creditors, and registered under the 192nd section of the Bankrupcy Act, 1861. The deed contained a release to Morton extending as well to future as to past liabilities.

On the 30th of November, 1868, the official liquidator obtained against Morton an order for the payment of the overdue call of 1*l.* per share made in April. On the 19th of January, 1869, the official liquidator obtained a second order against Morton to enforce another call of 2*l.* per share, which had been made subsequently to the winding-up.

Morton claimed that at the date of the winding-up the company was indebted to him in the amount of 8,238*l.* 12*s.* 6*d.*, and since the winding-up the trustees, under his deed of assignment, had sent into the official liquidator a claim for this amount against the company. The liability of Morton in respect of unpaid and future calls at the date of the winding-up amounted to 9,225*l.* Morton took out this summons to have the two orders obtained against him by the official liquidator discharged.

Mr. Ince, in support of the application, said there could be no doubt as to the invalidity of the order to enforce the first call, which had become due before the winding-up order and the execution of the deed of assignment. That was a debt clearly covered by the release contained in the deed of assignment.

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The deed of assignment also comprised the second call, and the order for payment of that was equally invalid. Morton's liability in respect of unpaid calls was a debt which, in case of his bankruptcy, would have been provable against his estate—*Companies' Act*, 1862, *ss.* 74, 75; and under a deed of assignment for the benefit of creditors, as under an actual adjudication in bankruptcy, the assignees and assets of the debtor were liable under section 77. of the Companies' Act, 1861, to contribute in his stead to the assets of the company being wound up. Accordingly, the order was wrongly made as against Morton personally. Under section 95. of the same act the liquidator was empowered to prove and draw a dividend against the estate of a contributory, and he ought to have proved the company's claim against Morton's estate under his deed of assignment. The case of *Martin's Patent Anchor Company (Limited)* v. *Morton* (37 L. J. Q.B. 98; L. R. 3 Q.B. 306), in which a bankrupt was held liable to calls, was distinguishable from this, because there the bankrupt still continued to hold shares in the company three years after his bankruptcy before the company was wound up. The grounds upon which the decision in that case went had recently been commented upon by the Master of the Rolls in *Hastie's case* (38 L. J. Ch., p. 43; on app., 233; L. R. 7 Eq. 3). In that case the bankruptcy had come to an end by the discharge of the bankrupt before the winding-up order. The same point had also arisen in two recent cases—*In re the Richmond Hill Hotel Company; Ex parte King* (L. R. 3 Ch. 10: reversing 36 L. J. Ch. 719); and *Ex parte Pickering* (38 L. J. Bk. 1; L. R. 4 Ch. 58). But in both those cases the future liabilities of the contributory were not included in the composition-deeds. The proper order here would be for the official liquidator to come in and prove against Morton's trustees. He also referred to *Rossi* v. *Bailey* (L. R. 3 Q.B. 621; 37 L. J. Q.B. 204).

Mr. J. N. Higgins appeared for the trustees of the deed.

Mr. Druce and *Mr. Eddis*, for the official liquidator, admitted the validity of the deed of assignment, and did not oppose the contention that the official liquidator should prove under it against the trustees, so far as it was possible for him to do so. But there was a question whether future calls could be proved under such a deed. The previous cases had not decided this point. *Hastie's case* had been affirmed on appeal, (38 L. J. Ch. p. 233). If the official liquidator could prove under the deed, the same rule as to set-off would apply as in a case of bankruptcy—*In re Duckworth* (L. R. 2 Ch. 578); *Carralli and Haggard's claim* (L. R. 4 Ch. 174); and the official liquidator was ready to effect a compromise by a mutual set-off of Morton's claim against that of the company.

JAMES, V.C. said there must be an affidavit that the compromise would be for the benefit of the company. Mr. Morton must have his costs; for he had come to the Court merely to relieve himself from liability under the two orders which had been made against him personally. The order would be that, upon the trustees abandoning their claim against the official liquidator, and the official liquidator abandoning his claims against the estate of Morton, all further proceedings should be stayed.

JAMES, V.C., March 22, 23, April 16, 23, 1869.

WOLLASTON *v.* KING.

38 L. J. Ch. 392; s. c., [1869] E. R. A. 64; 38 L. J. Ch. 61; L. R. 8 Eq. 165; 20 L. T. 1003; 17 W. R. 641 (V.C.).

Power of Appointment—Invalid Execution—Election—Rule against Perpetuity.

ELECTION. PERPETUITY. POWERS.—*The rule as to election is to be applied as between a gift under any instrument and a claim dehors that instrument and*

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adverse to it, and is not to be applied as between one clause in an instrument and another clause in the same instrument.

A testatrix, under a settlement, had a special power of appointment amongst children, under which she validly appointed the income of a fund to a child A. for life, and expressed to give A. a general testamentary power over the corpus, which last-mentioned power was void as tending to perpetuity, and, subject to these dispositions, she appointed the residue of the fund to other children, who also took a share of the testatrix's own property:—Held, *that the other children could not be called upon to compensate out of their shares in the testatrix's own property those who would have benefited under the invalid power, if valid.*

Semble—*the doctrine of election cannot be applied so as to give effect to a disposition which transgresses the rule against perpetuity.*

By the marriage settlement of James William King and Caroline King, his wife, certain funds were vested in trustees, upon trust, as to the income, for James William King for life, and after his decease for Caroline King for life in case she survived her husband; and subject to these life interests the funds were directed to be held upon trust for the children of the marriage, as James William King and Caroline King should jointly appoint, and, subject to such joint appointment as the survivor should after the decease of the shorter liver by deed or will appoint; and as to so much of the trust funds as should not be in any way appointed, upon trust for the children of the marriage equally.

Caroline King survived her husband, and at the date of her will, which was executed after his death, a considerable part of the settlement funds remained unappointed, and she was entitled to other property as absolute owner. There were then living the five following children of the marriage, James Euseby King, Catherine Pennefather, Robert William King, Caroline Mary King and Marianne Augusta King.

Caroline King duly made and executed her will, dated the 7th of May, 1858, and after referring to the power given by the settlement, it was by such will expressed that the testatrix, in exercise of this and every other power, directed and appointed that, after her decease, the trustees of the settlement should stand possessed of so much of the trust funds as should be of the value of 5,000*l*., and either permit the same to remain in its then state of investment or vary the investment in manner therein mentioned, and should pay the income to James Euseby King until some event should happen whereby his personal receipt and enjoyment thereof would, but for the now stating proviso, cease, and upon such event happening, should during the residue of the life of James Euseby King pay the income to the testatrix's three daughters equally, and after the decease of James Euseby King should hold the *corpus* upon such trusts as James Euseby King should by his will appoint, and subject to such appointment upon trust for the testatrix's three daughters equally. The testatrix then appointed 8,000*l*. to each of her daughters, Caroline Mary and Marianne Augusta, and as to the residue of the settlement funds appointed the same between all her daughters equally. Out of her own property the testatrix gave certain plate and all her money at her bankers' to her daughters Caroline Mary and Marianne Augusta, and the residue to all her daughters equally.

The sum of the value of 5,000*l*., directed to be set apart by this will, was now represented by a sum of 5,469*l*. consols.

In 1866 James Euseby King made his will, which was inartificially drawn, but for the purpose of the argument it was admitted that it amounted to an exercise of all general powers of appointment in favour of Henry Coape and Jane Veitch and her two sons or some of them. James Euseby King appointed John Elliot Wilson his executor, and, as he was largely indebted at the time of his death, the executor contended that anything which thus passed to Henry

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Coape or the Veitches was subject to the claims of the creditors of James Euseby King.

The bill was filed, by the trustees of the settlement, for the purpose of obtaining a declaration of the rights of all parties. In the first instance, it was heard before Giffard, V.C., and is reported 38 L. J. Ch., p. 61. The Vice Chancellor decided that the power of appointment by will expressed to be given to James Euseby King was void, since, if written in the original marriage settlement, it would tie up the fund affected by it till the death of James Euseby King; that is, during the life of a person not in existence at the date of the settlement. On this ground his Honour held that such a limitation transgressed the rule against perpetuity. His Honour also decided that, on this failure of James Euseby King's power, the three daughters took under the ultimate appointment. It was then suggested that, as these three daughters took other benefits under Caroline King's will, both in the settlement funds and in the testatrix's own property, they might, on the principle of election, be required, if they chose to avail themselves of this failure of the testatrix's expressed intention, to make compensation out of the other benefits which they took under the will to the persons who would have benefited by the invalid power of appointment if valid; or, to put the proposition in other words, that they could not take such last-mentioned benefits without confirming the invalid power. Giffard, V.C. directed the suit to stand over, in order that the bill might be amended by introducing averments proper to raise this question; and it now came on for a second hearing accordingly.

Mr. Willcock and *Mr. G. N. Colt*, for the plaintiffs, the trustees of the settlement.

Mr. Druce and *Mr. Hughes*, for Mrs. Veitch and her children.—The question is, whether the power which the testatrix has attempted to give to James Euseby King is to be considered as swept out of the will to all intents and purposes, or whether it may be read as importing a condition into the gifts which the testatrix makes out of her own property to those who take by reason of the failure of her expressed intention. It may be admitted, in accordance with *Woolridge* v. *Woolridge* (Johns. 63; 28 L. J. Ch. 689), that where the donee of a power makes a valid appointment in favour of an object, a superadded, unauthorized condition is merely and utterly inoperative—*Rucker* v. *Scholefield* (1 Hem. & M. 36; 32 L. J. Ch. 94); *Langslow* v. *Langslow* (21 Beav. 552; 25 L. J. Ch. 610); *Churchill* v. *Churchill* (37 L. J. Ch. 92; L. R. 5 Eq. 44). But where an actual appointment is expressed to be made in favour of a non-object, and the person who takes by reason of the badness of such attempted appointment derives other benefits under the same instrument, the ordinary rule applies, that he shall not approbate and reprobate; and he must therefore, if he elects to hold to such other benefits, confirm the invalid appointment. *Blacket* v. *Lamb* (14 Beav. 482; 21 L. J. Ch. 46); and *Moriarty* v. *Martin* (3 Ir. Ch. Rep. 46),[1] are direct authorities in favour of this proposition, which is approved by Lord St. Leonards (Sugden on Powers, (8th ed.) 582), and is supported by the following cases—*Whistler* v. *Webster* (2 Ves. jun. 367); *Reid* v. *Reid* (25 Beav. 469, see p. 481); *Tomkyns* v. *Blanc* (28 Beav. 422). *Moriarty* v. *Martin*, it is true, went beyond this proposition, and so far is inconsistent with *Blacket* v. *Lamb* and *King* v. *King* (15 Ir. Ch. Rep. 479). But the limited proposition which we now contend for is expressly stated in the marginal note to *Blacket* v. *Lamb*, and approved of by the Judge who decided that case in the subsequent case of *Langslow* v. *Langslow*. An apparent exception to the proposition, not applicable to the present case, exists where the testator expressly states that he does not intend to do more than the power authorizes. This was the case in *Carver* v. *Bowles* (2 Russ. & M. 301), as pointed out in *Moriarty* v. *Martin*.

Mr. Amphlett and *Mr. Horton Smith*, for the executor of James Euseby

(1) Note by the reporter.—See also *Fearon* v. *Fearon* (3 Ir. Ch. Rep. 19).

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King, supported their contention, but insisted that the persons disappointed by the election of the daughters were the creditors of James Euseby King, inasmuch as he had, by exercising the general testamentary power, made whatever was subject to it his assets.

Mr. Kay and *Mr. J. N. Higgins*, for the three daughters.—A case of election cannot arise unless the person benefited by an instrument has or may have rights which are independent of the instrument, and of which the exercise would defeat some of its provisions. It may, therefore, arise as between an instrument and something *dehors* the instrument; but it never arises as between two parts of the same instrument. In the present case there is this additional reason why the daughters should not be required to confirm the invalid power given to their brother, that the power is bad as transgressing the rule against perpetuity; and the doctrine of election ought not to be applied to enable a person to do indirectly what the policy of the law condemns.

The case was partially argued in the sittings after Easter Term. In consequence of the lamented death of Mr. Druce, in the Easter Vacation, the Court which sat at Westminster on the first day of Easter Term immediately adjourned; and on the following day

Mr. Hughes replied.

JAMES, V.C. (*April* 23).—In this case a testatrix had a power of appointment over a considerable sum of money—a limited power of appointment in favour of the issue of the marriage, in contemplation of which the settlement containing the power was made. By a will, purporting to be, amongst other things, an execution of the power, she appointed a considerable portion of the settled fund to her son for life, with remainder to such persons as he should by will appoint. There was a general residuary appointment of the settled fund, subject to all the appointments made thereof, to her three daughters. The three daughters took other benefits under the will in the testatrix's own property. The son purported to exercise the power of appointment given by his mother to him. My predecessor held that the appointment, so far as it gave the son a testamentary, and only a testamentary power of appointment, was void as tending to a perpetuity, and he further held that the portion of the settled fund attempted to be subjected to that power went, not as an unappointed part to the objects of the original settlement, but under the residuary appointment in the mother's will to the three daughters. In this state of things, the question arose which I have now to determine. The persons who would have taken under the conjoint operation of the son's will and the mother's will, if they had constituted a valid appointment of the trust fund, insist that the daughters who take by reason of the mother having no power to make such disposition, taking also under the will property which the mother had the fullest power to dispose of at pleasure, ought to elect between the two benefits which they will take. The ordinary principle is clear, that if a testator gives property, by design or by mistake, which is not his to give, and gives at the same time to the real owner of it other property, such real owner cannot take both. And this principle has been applied where the first gift is made purporting to be in execution of a power, so that if, under a power to appoint to children, the donee of the power appoints to grandchildren, which is bad, and the children who are entitled to claim by reason of the badness of the appointment also take under the will other property, it has been held that the grandchildren are entitled to put them to an election.

But to this rule, so far as regards appointments, a notable exception is taken, viz., that where there is an appointment to an object of the power, with directions that the same shall be settled upon any trust or subject to any condition, there the appointment is held to be a valid appointment, and the superadded direction, trust or condition is void, and not only void but inoperative, to raise any case of election. This rule has not been followed in the Irish case of *Moriarty* v. *Martin*, which is said to have received the approval

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of Lord St. Leonards. Notwithstanding that case and that approval, I feel bound by the current of the English authorities.

I have endeavoured to extract from those cases a principle which I can apply to the decision of the case before me. The rule laid down by the Master of the Rolls in *Whistler* v. *Webster* (2 Ves. jun., p. 370) is in general terms: "That no man shall claim any benefit under a will without conforming so far as he is able and giving effect to everything contained in it, whereby any disposition is made shewing an intention that such a thing shall take place." This rule, expressed in these terms, was certainly not applied in the case of *Carver* v. *Bowles* and the cases which followed it. There it was clear that certain persons were intended to take benefits under the will, and other persons were allowed to take other benefits without conforming and giving effect to the first dispositions, and in fact defeating them. But why? The only intelligible principle which I can find is, that it was held that the failure of the first dispositions, so far as they failed, did under the will itself enure for the benefit of the legatees—that the legatees were allowed to retain both benefits, because they took both, as legatees under the will itself without calling in aid any other instrument or any adverse title. It results from this, that the rule as to election is to be applied as between a gift under a will and a claim *dehors* the will and adverse to it, and is not to be applied as between one clause in a will and another clause in the same will. It would seem a very strange thing that in construing the same instrument the Court, dealing with a clause in which a fund is expressed to be given partly to A. and the residue to B, should hold that the gift to A. being void, the testator's intention is that B. should take the whole, and then coming to another clause, in which another fund is given to B. and no mention of A. at all, should hold that there is an implied condition that B. should give back part of that which it was the testator's intention that he should take.

It is also material that the reason why the gift fails is that there was an attempt to create a power in violation of the rules of law; and I apprehend that it is not for the Court to aid such an attempt, either by the application of the doctrine of election or otherwise. The great difficulty, moreover, of applying the doctrine of election to such a case as this is strikingly exemplified in this particular instance by the conflicting claims which have arisen to the benefit which would arise from the application of that doctrine. The appointees named in the said will say, By the conjoint operation of the two wills, the mother has expressed her wish to give us certain benefits, which have been anticipated by the daughters. Let the daughters make it good out of the mother's estate. But the creditors of the son say, No, you never could have taken these benefits; nothing has ever been intercepted from you; it being a general power of appointment, and the son being largely indebted, any appointment made by him would, by the application of another rule of equity, have gone to his creditors.

There seems to me great force in this contention of the creditors in destroying any claims of the specific appointees, but that their own equity to compensation by reason of the doctrine of election is far too complicated and remote to entitle them to the interference of this Court. I, however, only rely on this conflict of claims as shewing the prudence of not extending rights under the implication of somewhat refined equities, like the doctrine of election, beyond the simple cases which have been decided, and which are sufficient to provide for all cases ordinarily likely to occur, and for all cases for which there is any substantial object in providing.

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LORDS JUSTICES, Jan. 18, 1869.

TOOTH *v.* HALLETT.

38 L. J. Ch. 396; L. R. 4 Ch. 242; 20 L. T. 155; 17 W. R. 423.

Distinguished, *Brice* v. *Bannister*, [1878] E. R. A.; 47 L. J. Q.B. 722; 3 Q.B. D. 569; 38 L. T. 739; 26 W. R. 670 (C. A.); *In re Toward*, [1885] E. R. A.; 54 L. J. Q.B. 126; 14 Q.B. D. 310; 52 L. T. 188 (C. A.); *Drew* v. *Josolyne*, [1887] E. R. A.; 56 L. J. Q.B. 490; 18 Q.B. D. 590; 57 L. T. 5; 35 W. R. 570 (C. A.).

Mortgage of Moneys to become due under Building Agreement—Right of Assignee of Mortgagor completing works.

ASSIGNMENT.—*H. contracted to build a house for* 870*l*. *When the time for completion had expired, the house being unfinished, H. made an equitable assignment to T. of* 200*l*., *part of the price remaining unpaid. H. afterwards made a general assignment of his estate (which was nil) to W. W, out of his own moneys, and, with the sanction of the employers, completed the house, for the sum remaining unpaid under the contract. The contract gave the employers the right to employ any builders to complete the house*:—Held, *that the payment by the employers to W. of the amount remaining unpaid was good against T.*

The question in this appeal from a decision of Vice Chancellor Stuart was, as to the rights of the plaintiff as equitable assignee of a building contract.

The contract in question was made on the 17th of March, 1866, between G. Hampton, a builder and the defendants; it was to build a house for 870*l*., and contained the following stipulations: that the house was to be completed by the 17th of July, 1866; that it was to be paid for as follows, 75 per cent. of the amount which the defendants' surveyor should from time to time certify as actually expended should be paid, and the balance paid at the expiration of three months from the completion and delivery in a state approved by the surveyor; that Hampton was to pay a fine of 10*l*. for every week after the 17th of July during which the works should remain incomplete, which fines the defendants were empowered to deduct out of any moneys due to Hampton; lastly, that the defendants should, after the 17th of July, be at liberty to employ other builders to complete the works, and the amount to be expended by them in so doing was to be recoverable from Hampton, and any moneys in the hands of the defendants due to Hampton might be applied in such last-mentioned payment.

The house was not finished on the 17th of July, and was still unfinished on the 29th of August; but at that time the defendants had paid Hampton 450*l*. on account of the work. On the 29th of August Hampton, in order to secure an antecedent debt, gave to the plaintiffs an order upon the defendants as follows: "I will thank you to pay to Messrs. Tooth & Co. 200*l*. due on my building account with you." This order was taken by one of the plaintiffs to the defendant Hallett, who told him that no money was then payable to Hampton, as 75 per cent. of the work as certified had been paid; that the time for completing the house according to the contract had passed, and therefore fines were being incurred, and that the defendants thought of exercising their power of employing another builder, but had hitherto forborne doing so from motives of kindness to Hampton, but that if they did so, there probably would be nothing coming to Hampton. The plaintiff expressed his hope that if the defendants employed another builder, they would employ the plaintiff. Afterwards, two sums of 30*l*. and 40*l*. were advanced by the defendants to Hampton to enable him to buy materials. Subsequently to which, on the 17th of September, Hampton executed a deed of assignment under the Bankruptcy Act, by which all his estate became vested in Woollett.

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On the 18th of September the defendants wrote to Woollett, declaring their intention to employ another builder, whereupon Woollett, who was a builder, with their consent, completed the house, expending money thereon out of his own pocket, and the defendants paid to Woollett the remainder of the 870*l.* then unpaid. Hampton had no estate, and therefore Woollett had no moneys in his hands as trustee.

The present suit was instituted in 1867 for the purpose of enforcing the alleged equitable assignment of 200*l.* made by the order of the 29th of August. The bill prayed for an account of the moneys which became due from the defendant to Hampton or his assignee in respect of the building contract, and declaration of a charge in favour of the plaintiffs upon those moneys for 200*l.*, and payment of that sum by the defendants to the plaintiffs. The Vice Chancellor dismissed the bill, whereupon the plaintiffs appealed.

Mr. De Gex and *Mr. B. B. Rogers*, for the appellant.—The plaintiffs had the first charge upon the moneys payable under the contract after the 29th of August. Woollett, at the best, was but a second mortgagee. Can, then, a second mortgagee, by expending money upon the mortgaged estate, acquire priority over the first mortgagee, unless the latter by acquiescence, gives the second mortgagee a right to deal with the estate in that manner? At all events, we are entitled to all profit made by Woollett; everything which he received beyond the amount of the actual outlay from his own pocket belongs to us.

[GIFFARD, L.J.—Do you say that Woollett made a profit? Did you ask the Vice Chancellor for an account as to this?]

We believe there may have been some small profit, though perhaps not much. *Myers* v. *the United Guarantee and Life Assurance Company* (7 De Gex, M. & G. 112), is quite different from the present case. The whole judgment there was founded upon notice to the first mortgagee. Here we had no notice; we should have been willing to complete the work ourselves. As to the relative position of first and second mortgagees in reference to outlay made beneficial for the estate, they also referred to *Garden* v. *Ingram* (23 L. J. Ch. 478); *Langton* v. *Langton* (7 De Gex, M. & G. 30; 24 L. J. Ch. 625).

Mr. Glasse and *Mr. Freeling*, for the defendants, were not called upon.

SELWYN, L.J.—I entirely concur in the judgment of the Vice Chancellor. The plaintiff claims as equitable assignee of moneys payable under a contract, by which Hampton, the assignor, had agreed to complete certain works and deliver them to the defendants on the 17th of July, 1866; and if this were not done, that certain penalties should be paid, and the defendants be at liberty to employ other builders. There was, therefore, no absolute property in Hampton in the thing expressed to be assigned, for it was subject to all these stipulations. Afterwards, on the 14th of September, the deed was executed by which all Hampton's property became vested in Woollett. The defendants then went to Woollett, expressing their intention to employ other builders. Now, under those circumstances, was anything due to Hampton capable of being made the subject of a valuable assignment? It was obvious that, if a third person were called in to complete the works, there might be nothing at all to pay to Hampton, because whatever had to be paid to such third person might be deducted from what was payable to Hampton. We have then to determine whether a prior assignee is in any better position as against Woollett than against some third person, because Woollett was a trustee under the creditors' deed, without, however, any estate in his hands. The defendants Hallett and his partner had a perfect right to employ whom they pleased; they were under no obligation to employ the plaintiff. The plaintiff does not press for an account as to the profit made by Woollett, which is at least believed to be small, if there were any. I cannot see any distinction between Woollett's position and that of a third person, who would, as appears to be admitted, have claimed quite as much as Woollett received.

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GIFFARD, L.J.—This is not the case of a mortgagor expending money upon a mortgaged estate, nor that of an assignee in bankruptcy expending money belonging to the bankrupt estate. It is simply that of a person expending his own money in completing this house. The plaintiff wishes to get the benefit of that expenditure, and to take from Woollett's pocket all that he has earned by expenditure, or to make Hallett & Co. pay over again what they have already paid in strict accordance with their right. It appears to me that nothing at all could be coming to Hampton under the contract. I think that it is not carrying out the principles of *Myers* v. *the United Guarantee and Assurance Company* and *Bristow v. Whitmore* (9 H.L. C. 391; 31 L. J. Ch. 467) to extend them to this case. The appeal must be dismissed with costs.

LORDS JUSTICES, April 24, 26, 1869.

HOLLAND *v.* HOLLAND.

38 L. J. Ch. 398; L. R. 4 Ch. 449; 21 L. T. 129; 17 W. R. 657: reversing, [1869] E. R. A.; 38 L. J. Ch. 252; 20 L. T. 58; 17 W. R. 565 (V.C.).

Distinguished, *Kidd* v. *Boone*, [1871] E. R. A. 263; 40 L. J. Ch. 531; L. R. 12 Eq. 89; 24 L. T. 356 (V.C.).

Trustee—Acceptance of Trust under Seal—Breach of Trust—Specialty Debt.

COVENANT. TRUST AND TRUSTEE.—*Where a trustee, by deed under his hand and seal accepted the trusts of a will, and afterwards committed a breach of trust and died insolvent:*—Held, *reversing the decision of one of the Vice Chancellors, that the cestuis que trust were not entitled to rank as specialty creditors in the administration of his assets.*

This was an appeal by the simple contract creditors of Frederick Cooke, a deceased trustee, from an order made by Vice Chancellor Stuart directing the names of the *cestuis que trust* to be placed in the list of specialty creditors in respect of certain breaches of trust committed by him.

The case is reported 38 L. J. Ch. 252.

The original trust was created by will, and F. Cooke was appointed a new trustee by a deed dated the 10th of December, 1859, whereby after reciting that the continuing trustee, in exercise of a power in that behalf in the will contained, proposed with the proper consents to appoint Cooke a trustee of the will in the place of a deceased trustee, and that Cooke had consented and agreed to become such trustee accordingly, as he did thereby testify and declare, it was witnessed that the continuing trustee appointed Cooke to be a trustee of the will, and the said F. Cooke did thereby testify and declare his said acceptance of the said trusteeship. Cooke executed this deed.

Cooke having retained in his own hands money subject to the trusts of the will, died insolvent, and a suit having been instituted for the administration of his estate, the Vice Chancellor held, varying the chief clerk's certificate, that the persons entitled under the will were entitled to rank as specialty creditors.

Mr. Charles Hall and *Mr. Speed*, for the appellants.—The cases of *Adey* v. *Arnold* (2 De Gex, M. & G. 432); *Wynch* v. *Grant* (2 Drew. 312; 23 L. J. Ch. 834), and *Isaacson* v. *Harwood* (37 L. J. Ch. 209; L. R. 3 Ch. 225), are conclusive that the mere execution by the trustee of the deed by which he is appointed, without any covenant to perform the trusts, will not give to a claim in respect of a breach of trust the character of a specialty debt. The Vice Chancellor was in error in supposing that in *Adey* v. *Arnold*, ubi supra, the trustee did not execute the deed. It appears by the report in 16 Jur. 1123, that he did execute it. In all cases in which a specialty debt has been held to be created, the deed has contained words that might be construed into a covenant; but here there is nothing but a mere acceptance of the trusteeship.

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Mr. Dickinson and *Mr. Davey*, for the respondents.—The acceptance of a trusteeship is a contract to perform the duties of the office, and if that contract is under seal, a breach of it constitutes a specialty debt—*Bac. Abr.* tit. 'Obligations,' (A.); *Turner* v. *Wardle* (7 Sim. 80). No particular form of words is necessary to create a contract—*Richardson* v. *Jenkins* (1 Drew. 477; nom. *Jenkins* v. *Robertson* (22 L. J. Ch. 874).

[SELWYN, L.J. referred to *Newport* v. *Bryan* (5 Ir. Eq. Rep. N.S. Ch. 119).]

They cited also *Benson* v. *Benson* (1 P. Wms. 129); *Wood* v. *Hardisty* (2 Coll. C.C. 542; 15 L. J. Ch. 328).

Mr. Hall was not called upon to reply.

SELWYN, L.J.—The case has been very fully and very ably argued on both sides. The first question which arises is a question upon the construction of the deed of the 10th of December, 1859, by which the testator, whose estate is being administered in this suit, was appointed trustee; and the question is, whether that deed is to be construed as containing nothing more than an appointment of the testator to a certain trusteeship on the one hand, and an acceptance by him of that trusteeship on the other, or whether it ought to be construed as containing a covenant, or words equivalent to a covenant, on his part to do some special act or to perform some duty. It has been argued that as the acceptance of the trust is twice referred to in the deed, it must be construed as if something more than a mere acceptance of the trust were intended, and something more than a mere acceptance of the trust must be implied. If that acceptance had been twice referred to in the recital, or twice in the operative part of the deed, there would have been considerable force in that argument; but we find that in the recital and in the operative part one and the same thing is referred to as the thing proposed to be done, and the thing witnessed to have been done. Both the recital and the operative part have the same object and effect, namely, the appointment to the trusteeship on the one hand, and the acceptance of it on the other. But there is no express covenant to do any special act or to perform any duty, and I think that no such covenant can be implied. The cases of *Courtney* v. *Taylor* (6 Man. & G. 851; 7 Sc. N.S. 749; 12 L. J. C.P. 330) and *Marryat* v. *Marryat* (28 Beav. 224; 29 L. J. Ch. 665) are the authorities which go in support of this conclusion, Assuming, then, that this is the true construction of the deed, the next and only remaining question is, whether in consequence of the acceptance of the trusteeship by an instrument under seal the present debt, and necessarily every other debt which could be proved against the estate in respect of this trusteeship, ought to be considered as a specialty debt. In my judgment it is concluded by authority. The case of *Adey* v. *Arnold* was decided by Lord St. Leonards in 1852, and it possesses, therefore, as I need not say, very great weight. In that case the deed was executed by the trustee, and therefore, in my judgment, that clearly amounted to an acceptance of the trust by him under seal; and that decision, so far as I know, has never been questioned. But in the present case the learned Vice Chancellor has not in any degree impugned the authority of *Adey* v. *Arnold*, for his Honour appears to have been misinformed upon a matter of fact, and to have supposed that in that case the deed was not executed by the trustee; and but for that misapprehension I think it probable that his Honour's decision would have been opposite to what it has been. On the other hand, the decision in *Adey* v. *Arnold* has been followed by Vice Chancellor Kindersley in the case of *Wynch* v. *Grant*, by the Lord Chancellor of Ireland in *Newport* v. *Bryan*, and by Lord Cairns in *Isaacson* v. *Harwood*. I think that the case of *Wood* v. *Hardisty* cannot be considered as opposed to that line of authorities, for in that case there was this express declaration, " subject to the trusts aforesaid, the said William Forbes, his executors, administrators and assigns, shall stand possessed of the said policies of assurance and of the moneys, bonuses and accumulations to be received in respect thereof, and of all other the premises hereby assigned or intended so to be, upon trust for the said Susan, her

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executors, administrators and assigns, for her and their own absolute use and benefit." The able counsel who argued the case for the defendant is stated simply to have argued that a breach of trust generally created a simple contract debt, but he was not prepared to say that it might not be otherwise where the trust was declared by an instrument under seal, and the learned Vice Chancellor said, unless any further authorities were cited for the defendants he should yield, though somewhat reluctantly, to those which had been cited for the plaintiff. That was before *Adey* v. *Arnold* was decided. I think under the circumstances it canot be considered as opposed to that case, and if it were, it must be considered of course as subordinate in point of authority to that decision; and since the decision in *Adey* v. *Arnold* there has been a stream of authorities flowing in the same direction, never in any way interrupted or questioned. I think, therefore, both upon principle and authority, it must be held that the mere fact of a trustee being a party to and executing a deed by which he is appointed trustee and accepts the office, is not of itself sufficient to justify the Court in holding that the breach of trust is of such a character as to constitute a specialty debt. I think, therefore, that the order of the learned Vice Chancellor should be discharged, and we must reverse it with the costs of the application in the Court below to vary the certificate of the chief clerk. The costs of the appellant will be costs in the cause, but the respondents must bear their own costs.

GIFFARD, L.J.—This case has been very ably argued, and I am quite satisfied that we have heard everything that could be said in support of the decision of the Court below, and the utmost that ingenuity could have imagined; but I must say that to me it appears to be a very plain case, both upon authority and upon principle. As regards the authorities, I do not think it necessary to refer to more than those two cases, one before Lord St. Leonards, and the other before Lord Cairns. I quite agree that the case before Lord Cairns is not a case which is similar to this, but he laid down the principles which are applicable to these cases, namely, that you are to inquire what it was that the parties meant. In *Adey* v. *Arnold* Lord St. Leonards said, that the Court would not raise a covenant without necessity, which I apprehend meant this, that if from the nature of the transaction you infer that a covenant was intended you will raise it, although there are not apt words such as are usually found when a covenant is intended. But on the other hand, if from the nature of the transaction you do not infer that a covenant was intended then you will not imply it. Now, what is it we have to deal with in this case? There is a power for the continuing trustees with the consent of the tenants for life to appoint new trustees. That power is executed in this way. There is a deed to which the tenants for life are parties, to which the continuing trustee is a party, and to which the intended new trustee is a party, and the object of that deed is two-fold: first, to appoint a new trustee, and secondly, to convey the trust property to him. It has no other object or purpose whatever, and if you look at the deed I must say that anything less likely or less to be inferred from the deed than that the one trustee should covenant with the other I never saw on the face of any deed. That was not the purpose of the deed at all; it was simply the appointment of a new trustee, and a simple conveyance of the trust property to that new trustee; and I cannot see that the witnessing part of the deed goes at all further than the recital. There is a recital that he has consented and agreed to become a trustee; the witnessing part of the deed is, that the trustee testifies his acceptance of the trust, which is neither more nor less than that by executing that deed he precludes himself from saying afterwards that he did not consent to become a trustee, and has not become a trustee. Then, what is the clear conclusion to be drawn from the case of *Adey* v. *Arnold*? It is simply this, and nothing else, that where there is an acceptance of a trusteeship under seal, that does not amount to a covenant. Here this deed, if you look at it fairly to see what the object and intent of it was, and what was really done, amounts to nothing more or less than the mere acceptance of the

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trusteeship under seal, and that being so, no covenant is implied, and I am satisfied that no covenant was intended. For these reasons I am of opinion that the decision of the Court below must be reversed. The costs, as my learned Brother has said, of the appeal, as regards the appellants, will be added to their costs in the cause; the respondents will have no costs of the appeal, and they must pay the costs of the application in the Court below.

I have only one word more to add. It has been suggested that there may be such a thing as a specialty debt in equity, which is not a specialty at law; but I do not hesitate to say, in the plainest possible language, that if there be not a specialty at law upon which an action at law can be maintained, in equity all debts rank *pari passu*, and there is no distinction between one description of debt and another, whether they be or be not specialty debts.

STUART, V.C., April 20, 1869.

CATT *v.* TOURLE.

38 L. J. Ch. 401; 20 L. T. 551: affirmed, [1869] E. R. A.; 38 L. J. Ch. 665; L. R. 4 Ch. 654; 21 L. T. 188 (L. JJ.).

Covenant—Conveyance of Land in Fee for Building Purposes—Covenant for the exclusive Right of supplying Ale, &c. to Premises to be built and opened as a Beer-house on the Land—Breach of Covenant—Injunction—Demurrer.

CONTRACT. INTOXICATING LIQUORS.—*On the occasion of a conveyance by the plaintiff (who was a brewer) of land to trustees in fee of a building society, of which the defendant (also a brewer) was a member, the trustees (the purchasers) covenanted with the plaintiff, that "he, his heirs and assigns, should have the exclusive right of supplying all ale, beer and porter which might be consumed in every house or other building which might be erected on the said piece of land, and which should be opened or used as an inn, public-house or beer-shop." The defendant, with notice of the covenant, opened a public-house on the land, and supplied it with ale, &c. of his own brewing. The plaintiff then filed a bill against the defendant alone for an injunction to restrain the breach of the covenant. The defendant demurred:*—Held, *that the covenant was not invalid, on the ground either of uncertainty, want of mutuality, or as being in restraint of trade; and the demurrer was overruled, with costs.*

Demurrer.

The bill in this suit stated as follows: The plaintiff, a brewer, of West Street, Brighton, was the owner of certain land in that town suitable for building purposes.

By the 6 & 7 Will. 4. c. 32. a society called the Conservative Land Society was constituted with the object of purchasing, with the moneys subscribed by the members on their shares in the society, and otherwise, land, according to the rules of the society, to be vested in trustees for the purpose of being divided into lots, and so distributed among the members, by ballot or otherwise, in proportion to the amount of their respective shares; the value of the lot representing the amount paid, and to be paid, on the shares of the member to whom it was allotted.

The society was desirous that their trustees should treat with the plaintiff for the purchase of a portion of his land. An agreement was accordingly entered into, whereby the plaintiff stipulated that no house, to be built on the land to be purchased by the society, within a specified distance from a certain inn then erected on the adjacent land, or within specified limits, should be used as an inn or public-house; and that no house, to be so used elsewhere on the said land so to be purchased, should be supplied with ale, beer or porter by any other person than the plaintiff; and the plaintiff, as the society and the defendant well

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knew, would not have sold that part or any of his land in Brighton, except on those or similar terms.

At the time of the purchase by the society of the plaintiff's land, or at the time of the distribution of the same under their rules, the defendant was a member of the society, holding shares in it; or at that distribution he acquired the lot hereinafter mentioned in the character of a member of the society.

By an indenture, dated the 22nd of September, 1853, and made between the plaintiff of the one part and the trustees of the society of the other part, and duly executed by the plaintiff, after reciting that the plaintiff had contracted with the trustees of the society for the sale to them of a certain piece of land for the sum therein mentioned; and that, upon the treaty for the purchase by the said trustees of the said piece of land, it had been stipulated and agreed that the said trustees, their heirs or assigns, should, at their expense, execute and deliver unto the plaintiff a deed of covenants to observe and perform certain covenants, conditions and stipulations in respect of the same piece of land, and the buildings to be erected thereon; and that it had been agreed that the said deed of covenants should be so noticed in the conveyance of the said piece of land as to cause the same to run with the land, so far as the law would allow; the plaintiff conveyed to the trustees of the said society in fee a piece of land, at Round Hill, Brighton; and further agreed that the conveyance thereby made was for the purpose of carrying the said recited contract and agreement into effect.

By an indenture of even date with that conveyance, and made between the trustees of the one part and the plaintiff of the other part, and duly executed by the trustees, they did for themselves, their heirs, executors and administrators covenant with the plaintiff, his heirs, appointees and assigns, that the trustees, their heirs or assigns, owner or owners for the time being of the said piece of land conveyed by the said indenture of even date, should not at any time or times thereafter open or use, or permit or suffer any house or other building, which might be erected on certain parts therein specified of the said piece of land, to be opened or used as an inn, public-house or beer-shop. And also, " that the said Charles Catt " (the plaintiff), " his heirs and assigns, should have the exclusive right of supplying all ale, beer and porter which might be consumed in every house or other building which might be erected on any other part of the said piece of land, and which should be opened or used as an inn, public-house or beer-shop." And it was thereby covenanted and declared that the indenture now in statement and the covenants therein contained, and which, on the part and behalf of the trustees, their heirs and assigns, were or ought to be done, observed or kept, should affect and run with the said piece of land comprised in the said indenture of even date therewith, and affect and bind as well the trustees, their heirs and assigns, as also all future purchaser or purchasers, owner or owners, of the same premises so far as the rules of law or equity would permit.

The trustees purchased the said piece of land as trustees of the society, and for the purpose of its distribution among the members. The society issued a plan of the piece of land, under the name of " the second portion of the Round Hill Park Estate," laid out in building lots, a portion of which was distinguished in the plan as to be then allotted on certain terms and conditions of sale printed on the plan, in one of which conditions it was stipulated that on no lot, " except lot 159," should any hotel, tavern, public-house or beer-house be built, or any house used as such; and the defendant, as or in the character of a member of the society as above mentioned, or in fact, had allotted to him, or purchased, the said lot No. 159. That lot was situated where the hereinbefore-stated covenant against permitting any house to be used as an inn, public-house or beer-shop, did not apply.

The defendant, in accordance with the rules of the society, became entitled to have the said lot conveyed to him (but under what circumstances, or whether any conveyance thereof had been in fact made to the defendant, the plaintiff

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did not know); but the defendant, shortly after his purchase, entered into and had since continued in possession by himself or his agents or servants of the said lot, as owner thereof.

The defendant purchased the lot, with notice, as a member of the society, or with notice in fact, or, but for his neglect to make proper inquiry into title on his said purchase, would have had express notice of the hereinbefore-stated indenture of covenants, or the defendant became otherwise bound by the same indenture.

The bill then further stated that the defendant was, at the time of his purchase, and had since been, and then was, carrying on at Brighton the business of a brewer, and that he had obtained from the society an indemnity against any proceedings by the plaintiff under the hereinbefore-stated covenant for the exclusive right of supplying ale, beer and porter; and that he had built on the said lot a house to be opened and used as a beer-house. The plaintiff's solicitors then gave notice to the defendant's solicitor not to infringe the covenant. He, however, treated it as not binding.

The beer-house had since been opened by the defendant, under the sign of the "Duke of Edinburgh," and had been and was then supplied by the defendant, as brewer, with ale, beer and porter for consumption therein; and the same so supplied had been since the 4th of February last, and were then, sold thereat by the defendant or his agents; and such supply and sale were intended to be continued.

The bill then alleged that, under the covenant in that behalf, the exclusive right of supplying ale, beer and porter, which had been or might be consumed in the said "Duke of Edinburgh" beer-house, had always, since the opening thereof, belonged, and then belonged, to the plaintiff; and the covenant had also, since the defendant's purchase, been and then was binding on the defendant, and the defendant had not nor ever had any right of supplying ale, beer or porter for consumption in the said beer-house from any other brewery than the plaintiff's; and the aforesaid supply and sale, and each of them, by the defendant, his agents or servants, had always been, and was, in breach of the same covenant, and contrary to the equity affecting the owner for the time being of the said lot. The plaintiff, in exercise of his said exclusive right, had always been and then was ready and willing, and previously to the institution of this suit had offered to the defendant, to supply to the orders from time to time of the defendant for consumption in the said "Duke of Edinburgh" beer-house, ale, beer and porter, all of good quality, in requisite quantities, and at market or fair and reasonable prices, as specified in the same offer; but the defendant refused such offer, and denied the plaintiff's said exclusive right, and insisted that the defendant had the right of supplying the said beer-house from breweries other than the plaintiff's.

The bill lastly alleged that, by reason of the large number of houses which had been erected and were in course of erection in the neighbourhood of the said "Duke of Edinburgh" beer-house, and of the custom arising therefrom and otherwise, the plaintiff's said exclusive right was of considerable and increasing value, and he had suffered great loss and damage by and on account of the defendant's aforesaid breaches of covenant.

The bill prayed that the defendant, his agents and servants, might be restrained from supplying or causing, or procuring to be supplied, from any other brewer than the plaintiff, any ale, beer or porter which might be consumed in the said "Duke of Edinburgh" beer-house; the plaintiff being ready and willing, and thereby offering to supply to the orders from time to time of the defendant for such consumption, ale, beer, and porter, all of good quality, in requisite quantities, and at market or fair and reasonable prices; and that the defendant, his servants and agents, might be further restrained from selling in, or from keeping in, the said beer-house any ale, beer or porter supplied by him or by any brewer other than the plaintiff for

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consumption therein, and remaining unconsumed; for an account; for damages; and that the defendant might be ordered to pay the costs of the suit.

The defendant demurred to the bill, for want of equity.

Mr. Greene and *Mr. Townsend* supported the demurrer.—They contended that the covenant, which purported to confer on the plaintiff the exclusive right of supplying the defendant's public-house with ale, beer and porter, to be consumed therein, was so vague that a bill for the specific performance of it could not have been sustained; and an injunction for the breach of it must therefore be refused. There were three principal objections to this covenant: First, it was uncertain in its terms. There was nothing said in it as to the quality of the beer and other articles to be supplied, or as to the price of them, or the quantity of them, whence they were to come, or when or how they were to be furnished. Under the covenant, as it stood, the plaintiff might insist upon supplying any ale, beer or porter that he chose—any that might not be to the taste of the defendant's customers, or that might be even bad—*Holcombe* v. *Hewson* (2 Campb. 391); *Cooper* v. *Twibill*, note to *Jones* v. *Edney* (3 Campb. 286). Secondly, there was no mutuality in the covenant; it was one-sided only. The plaintiff was not bound by it to supply any beer, &c. to the defendant. But this Court would never enforce a contract of which one party to it could alone compel the specific performance. To have rendered this covenant binding on the defendant, the offer made by the bill in this suit (*ubi supra*) to supply the beer, &c. to the orders of the defendant should have been part of the covenant. But it was not so; nor was there any thing in the conveyance of even date with the deed of covenants to remedy that defect in the plaintiff's case. It would not assist him to make the offer by his bill. Thirdly, the covenant was in restraint of trade, and as such, being contrary to public policy, was invalid. It was only where the special circumstances of the case required that some particular trade should, for the general good, be protected that this Court upheld such covenants. Where, as here, they were mere arbitrary attempts to prevent a person from exercising his legitimate business, this Court would never consider them binding. But, further, this was the case of a conveyance in fee to a purchaser for value, and that being so, this covenant, notwithstanding the apparent intention of the parties, would not run with the land, so as to bind the assignees of the purchaser, in which position the defendant really stood.—*Spencer's case* (5 Rep. 16; 1 Smith's Lead Cas. (3rd edit.) 22); *Keppell* v. *Bailey* (2 Myl. & K. 517, 545); *Hartley* v. *Pehall* (1 Peake, N.P. Cas. 178); *Doe* v. *Reid* (10 B. & C. 849; 8 L. J. K.B. 328); *Collins* v. *Plumb* (16 Ves. 454, 460, 461); *Sugd. Vend. & Pur.*, last edition, 589, note 1. And, lastly, the covenant, if valid at all, was good at law only, and not in equity; and the plaintiff must seek his remedy for the breach of it in a Court of law.

Mr. E. K. Karslake and *Mr. Ayrton*, were for the plaintiff.—This was not a case of specific performance at all. The plaintiff was originally the owner in fee of the property; a portion of which had been purchased by the defendant, or by the trustess of the society for him, as a member of it. It was plain upon the face of the deeds that the plaintiff might have restrained a purchaser from building a public-house, otherwise or elsewhere than in accordance with the covenants. But if the plaintiff could have prevented the purchaser from the greater infraction of a covenant—the building of a house,—he could *a fortiori* restrain a lesser one—the purchase of beer, &c., elsewhere, or from others, than himself.—*Collins* v. *Plumb*, ubi supra, was a very different case from the present one; but *Dietrichsen* v. *Cabburn* (2 Ph. 52); *The Great Northern Railway Company* v. *the Manchester, Sheffield and Lincoln Railway Company* (5 De Gex & Sm. 138); *Lumley v. Wagner* (1 De Gex, M. & G. 604; 5 De Gex & Sm. 485; 21 L. J. Ch. 898); *Rolfe* v. *Rolfe* (15 Sim. 88), were clear authorities for the case made by the plaintiff. Then, as to the "uncertainty" of the covenant. The words "exclusive right of supplying all ale, beer and porter which might be consumed" in the defendant's public-house, were perfectly plain. It was not necessary to state the quantity, because, as a matter of course, that must

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depend upon the amount of custom, and the demand for it, at the defendant's house. He alone would have the control of that, and must give the orders for what he wanted. As to the omission of the quality of the beer, &c., it was absurd to suppose the plaintiff would injure himself by supplying bad beer; and even if he were to do so foolish an act the defendant would, like any other customer of the plaintiff, have his remedy. So if the plaintiff were to discontinue the supply after it had been once begun. As to the objections of want of mutuality, and of illegality as regarded restraint of trade: they might be summed up under the general head of "unreasonableness." But there was, in fact, nothing unusual or unfair in this covenant—*Avery* v. *Langford* (Kay, 663, and the cases there collected at pp. 667-668; 23 L. J. Ch. 837); *Gale* v. *Reed* (8 East, 80). As to the covenant running with the land—*Spencer's case*, ubi supra; *Tulk* v. *Moxhay* (11 Beav. 571; 18 L. J. Ch. 83: on appeal, 1 H. & Tw. 105; 2 Ph. 774); *Pigott* v. *Stratton* (1 De Gex, F. & J. 33; 29 L. J. Ch. 1). Then, as to the equity of the plaintiff: This was a case of a *cestui que trust*, taking the legal estate through his own trustees, who had, in the first instance, purchased the property in fee, and were the covenantors in respect of it. The covenant was a negative one, intended by the parties to exclude competition, and binding on the conscience of the covenantors. Where that was the case this Court would uphold the covenant, if not in other respects illegal. The defendant had full notice of the covenant, and was therefore bound by it.—They were then stopped by the Court, after which

Mr. Karslake referred to *Holmes* v. *the Eastern Counties Railway Company* (3 Kay & J. 675).

Mr. Greene, in reply, contended that the plaintiff had no equity except on the covenant, and none upon that which would sustain his case. Even if an injunction were to be granted against the defendant it would be impossible to assess the damage done to the plaintiff. As to the question of damage, the bill did not shew any injury to the plaintiff's property, and upon the whole case the demurrer to the bill ought to be allowed.

STUART, V.C.—It is quite clear that, if this covenant be a good one in law, it binds the defendant. The defendant is a member of a building society which, through its two trustees, who entered into the covenant, bought from the plaintiff that land, which he sold upon the faith of this covenant being observed. The allegations in the bill that the defendant is a member of the society that bought the land, and that his trustees entered into this covenant, shew that he is bound by it if the covenant be a good one. The material question, therefore, is, whether that part of the argument in support of the demurrer which insisted that the covenant was bad, upon various grounds, can be sustained upon any one of those grounds?

The first ground alleged was, that this covenant is vague and uncertain in its terms; and so uncertain as to be bad in law. There is a great difference between the generality of a covenant and the uncertainty of a covenant. This covenant is very general in its terms, but perfectly certain as to those general terms. The language is, that the plaintiff shall have the exclusive right of supplying all ale, beer and porter which may be consumed in the house in question. There is no uncertainty whatever in those terms, though, no doubt, they are very general. It is quite true that there is no particular price, or quality or quantity stated; but where the words are, "all ale or beer consumed," there is perfect certainty. The case cited before Lord Eldon, of *Collins* v. *Plumb*, to shew that it was uncertain, has been wholly misunderstood. The case of *Collins* v. *Plumb* was one of this nature: the subject-matter of the contract being land with a well upon it, the purchaser entered into a covenant that he would not sell or dispose of the water from the well to any person or persons whomsoever. That is perfectly certain, so far as it goes; but the words that created uncertainty were these: "that he would not sell water to any persons whatever to the injury of the proprietors of the water-works." The uncertainty consisted in its being impossible to say whether the sale of water was or was not injurious to the

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purchaser with whom the contract was entered into. It is perfectly plain that, upon each occasion of a sale of water, the question would arise whether it was such a sale as would create an injury. Lord Eldon did not there say that the contract was bad; far from it, he allowed them to sue upon it at law; but he said that, upon each occasion of the breach of the covenant, a question would arise as to the extent of injury. Therefore it was a case in which, if this Court granted an injunction, it would not be able to enforce it from the want of certainty as to whether each alleged act in breach of the injunction was an injury or not. In the present case there is nothing that raises any difficulty about the amount of injury; nothing to create uncertainty as to it; because the words are as clear as can be that the plaintiff is to have the exclusive right of supplying all ale, beer and porter consumed upon the premises. Therefore, the argument upon the ground of uncertainty seems to me entirely displaced.

The next important objection to this covenant was, that there is no mutuality in it. In a covenant of this kind mutuality is not necessary at all. The books abound with cases in which covenants are entered into with brewers by the lessees of public-houses that they will consume no other beer upon the premises than the beer supplied by those brewers. In none of those cases is there ever a covenant on the part of the brewer to supply beer; nor has it, in any of those cases, been ever held that the want of a corresponding covenant on the part of the lessor or owner of the house to supply the beer vitiates the covenant by the occupier that he will exclusively use certain beer to be consumed upon the property. Therefore, upon the ground of mutuality, viz., that there is no covenant on the part of the plaintiff that he shall supply the beer, there seems to me to be no objection whatever to this covenant.

The last objection was, that the covenant is bad in law, because it is a covenant in restraint of trade. The cases in which Courts of law and equity have held that covenants in restraint of trade are bad, are cases in which those covenants have so extensive an operation as to cause public detriment. No such objection has ever been raised, in any of the cases in the books that I have referred to, to the covenants entered into with owners of public-houses, by lessees, to have their beer exclusively supplied by those persons. Nor could any such objection be raised in those cases; because the public are not affected to that degree which is requisite for the application of the principle making contracts clearly in restraint of trade to be bad. This covenant is a covenant between one individual and another with reference to the beer to be consumed in one particular house. Covenants of that kind are not confined to the consumption of beer; for instance, they may be covenants that all corn shall be ground at a particular mill. All those covenants are in restraint of trade; but are not such an extensive and general restraint of a public right as to be obnoxious to that principle of law which declares that covenants too general in restraint of trade are injurious to the public, and therefore to be considered bad.

On all those grounds, therefore, the attempt which has been made to support this demurrer has failed; and the demurrer must be overruled with costs. The defendant may have a month to answer the bill.

JAMES, V.C., April 21, May 6, 1869.

THE UNITED STATES OF AMERICA v. M'RAE.

38 L. J. Ch. 406; L. R. 8 Eq. 69; 20 L. T. 476; 17 W. R. 764.

Applied, *Republic of Peru* v. *Dreyfus Brothers*, [1888] E. R. A.; 57 L. J. Ch. 536; 38 Ch. D. 348; 58 L. T. 433; 36 W. R. 492 (Ch. D.). See, *West Rand Gold Mining Co.* v. *Rex*, [1905] E. R. A.; 74 L. J. K.B. 753; [1905] 2 K.B. 391; 93 L. T. 207 (K.B. D.).

International Law—Rights of Sovereign—Temporary Usurpation—Rights of restored Sovereign.

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INTERNATIONAL LAW.—*Where the sovereign power in a state is for a time de facto exercised by an usurping individual or body the original sovereign on restoration is entitled on the ground of jus in rem to all public property which existed before the usurpation and is found in specie after its termination, and he also becomes entitled jure successionis to all other public property of the usurper. But in an English Court of equity the latter right can only be enforced subject to the same correlative rights and obligations as if the usurper himself were seeking to enforce it. Therefore, the original sovereign cannot have a decree for an account against an agent of the usurper, unless he submits to be bound by all such obligations as would have been binding upon the usurper if plaintiff.*

The bill in this suit was short, and the material part is accordingly given *verbatim*.

" Complaining, shew unto his Lordship the United States of America, the above-named plaintiffs, as follows:

" 1. In the year 1861 divers persons who were inhabitants and subjects of and owed allegiance to the plaintiffs, the United States of America, rose in rebellion against the government of the plaintiffs, and formed themselves into an association for the purpose of carrying on the said rebellion. The said several persons usurped the plaintiffs' authority and established in part of the plaintiffs' dominions a pretended government, under the style of the Confederate States of America, which assumed the administration of public affairs there, and exercised such usurped authority during the rebellion and until the rebellion was put an end to as after mentioned.

" 2. The said pretended government, during the period of their exercising such usurped authority as aforesaid, possessed themselves of divers moneys, goods and treasure, which were part of the public property of the plaintiffs, and other moneys and goods were from time to time paid and contributed to them by divers persons being inhabitants of the United States, and who owed allegiance to the plaintiffs, or were seized and acquired by the said pretended government in the exercise of their usurped authority, and all the said moneys and goods became part of the public property of the pretended government, or were employed or intended to be employed by them for the purposes of the said pretended government and in aid of the said rebellion.

" 3. The said pretended government and their agents sent to divers agents and other persons in England large amounts of money to be laid out in purchasing goods or otherwise for the use of the said pretended government, and also sent to England large quantities of goods to be sold and the proceeds to be laid out in purchasing goods or otherwise for the use of the said pretended government.

" 4. The said pretended government and their agents at the time aforesaid sent large sums of money and large quantities of goods to Colin J. M'Rae, the above-named defendant, and the said Colin J. M'Rae sold a large part of the goods and received the moneys from such sale; and at the dissolution of the pretended government the defendant had in his possession or power large sums of money and large quantities of goods which had been so sent to him as aforesaid, or which had arisen from moneys and goods so sent to him as aforesaid.

" 5. The said rebellion was entirely suppressed and is now at an end, and the said association, or so-called Confederate government, has ceased to exist, and the several persons who had formed themselves into the pretended government and on whose account the moneys and goods were sent as aforesaid, have submitted to the authority of the government of the United States, and all the joint or public property of the persons who constituted the said pretended or so-called Confederate government, including the said moneys and goods, have vested in the plaintiffs."

Pars. 7. and 8. charged that the defendant was possessed of documents and privy to oral communications " shewing or purporting to shew or otherwise referring to the persons from whom, and the mode in which, and the objects for

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which, the said money and goods were sent to this country, and shewing the real title thereto, and by which the truth of the matters aforesaid would appear."

The bill prayed that an account might be taken of all moneys and goods which came to the hands of the defendant as agent for or otherwise on behalf of the said pretended government and of his dealings therewith, and that the defendant might be ordered to pay to the plaintiffs the moneys which on taking such account might be in his hands, and to deliver over to the plaintiffs the goods which were so in his hands, and for consequential directions.

There was no offer on the plaintiffs' part to pay what, if anything, in taking the account, might be due from them.

The evidence in support of the bill consisted of an affirmation by Mr. Dudley, a gentleman who had held various appointments under the United States government. He positively verified paragraphs 1. and 5. and also verified the 2nd paragraph on belief derived from his official information.

The rest of the evidence went to shew that the defendant was the agent of the Confederate States, and the dissolution of the Confederation.

Sir R. Palmer and *Mr. Wickens*, for the plaintiffs, submitted that the bill was an ordinary bill by a principal against an agent for an account.

Mr. Kay, *Mr. Marten* and *Mr. Benjamin*, for the defendant.—The case made by the bill is not proved. It is not proved that the defendant is or was an agent of the plaintiffs, or that he ever received any moneys or goods which originally were or any money or goods which on the dissolution of the Confederation became public property of the United States. But even taking the case made by the bill as proved, the plaintiffs do not sue in such a way as to enable the Court to do justice to the defendant; and the principle that he who will have equity must do equity applies to a foreign sovereign as much as to any ordinary suitor—*The King of the Two Sicilies* v. *Willcox* (1 Sim. N.S. 301; 20 L. J. Ch. 417); *The United States* v. *Prioleau* (2 Hem. & M. 559; 35 L. J. Ch. 7). In the present case, therefore, the plaintiffs can only have an account upon their submission to have it taken in the way in which it would be taken between the Confederate States and the defendant. If, therefore, the defendant has come under any obligations binding the moneys or goods claimed by the bill, the plaintiffs must indemnify him against them.

Sir R. Palmer, in reply.

At the close of the argument,

The VICE CHANCELLOR inquired of the plaintiffs' counsel whether they would be satisfied with a decree for an account in the ordinary form, that is, on the plaintiffs submitting to pay what, if anything, should be found due from them to the defendant.

Sir R. Palmer declined to make any submission.

JAMES, V.C. (*May* 6).—The bill in this suit states the case of the plaintiffs briefly and clearly.—[His Honour read the parts of the bill given above, and proceeded]—To this bill the defendant put in a plea, both to the relief and the discovery, on the ground that by American legislation the acts stated in the bill exposed him to penalties and forfeitures. The plea to the relief was overruled; but the plea to the discovery being allowed, the defendant has put in no answer, and has simply left the plaintiffs to make out by their own allegations and evidence their title to the interposition of a Court of equity.[1]

I have considered this case, and I propose to deal with it as if the plaintiffs, instead of being a foreign state, had been the government of India, and as if the defendant had been the agent of the persons who for several months had possession of the city of Lucknow and the surrounding territory of Oude, and assumed to exercise the rights of sovereignty there until their rebellion was finally suppressed by Lord Clyde.

Upon the suppression of such a rebellion and the determination of such an usurpation, very different rights in respect of the property seized and acquired

(1) 36 L. J. Ch. 722; L. R. 3 Eq. 724: on appeal 37 L. J. Ch. 129; L. R. 3 Ch. Ap. 79.

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during the rebellion and usurpation would accrue to the legitimate government recovering its power and possessions.

The moneys, goods and treasure which were at the outbreak the public property of the plaintiffs, and which were seized by the rebels, still continued their moneys, goods and treasure, their right of property and right of possession being in nowise divested or defeated by the wrongful seizure of them. And if at the end of the rebellion any of such moneys, goods or treasure, or the produce thereof, capable of being identified or ear-marked, could be traced into the possession of any person, the rightful owners would be entitled to apply to the proper tribunal having jurisdiction over such person to award restitution. If such person were an accomplice, or *particeps criminis*, or had received the property with full notice of the title of the rightful owner, the latter would be entitled to an order for restitution *simpliciter*. If he had received it as an innocent factor, banker or other agent, the right to restitution would be, or might be, of a more qualified or limited kind; it would be, or might be, subject to any claim or lien which, in his character of innocent bailee, without notice, he might have. The rights of the owner and the holder would in that case depend on the general law of bailments as applicable to the special circumstances of the bailments.

But, with respect to the other moneys and goods paid or contributed to, or seized and acquired by the pretended government in the exercise of their usurped authority, the right of the restored government is of a very different character.

It cannot be contended that such moneys or goods became by the mere fact of the voluntary contribution of accomplices or by the spoliation of innocent persons vested in right of possession or right of property in the lawful government. The moneys voluntarily contributed to the rebels could not, to use our legal phraseology, be considered as moneys "had and received" to the use of the lawful government; and the right of property and the right of possession in respect of the specific property taken by force from innocent persons would still remain in such persons.

But there is a right incident to the power of sovereignty which is applicable to the case.

I apprehend it to be the clear public law, universal law, that any government which *de facto* succeeds to any other government *de facto*, whether by revolution or restoration, conquest or re-conquest, succeeds to all the public property, everything in the nature of public property, and to all rights in respect of the public property of the displaced power, whatever be the nature or origin of the title of such displaced power. Any such public money in any treasury, any such public property found in any warehouses, forts or arsenals would, on the success of the new or restored power, vest *ipso facto* in such power; and it would have the right to call to account any fiscal or other agent, or any debtor or accountant to or of the persons who had exercised and had ceased to exercise the authority of a government,—the agent, debtor or accountant having been the agent, debtor or accountant of such persons in their character, or pretended character, of a government. But this right is the right of succession, is the right of representation, is a right not paramount to, but derived, I will not say under, but through, the suppressed and displaced authority, and can only be enforced in the same way and to the same extent, and subject to the same correlative obligations and rights as if that authority had not been suppressed and displaced and was itself seeking to enforce it.

Analogies, no doubt, are often misleading, but there is an analogy which I think in this case apt and not misleading. A person may happen to be the legal personal representative or assignee in bankruptcy of a wrongdoer who has tortiously acquired such person's property, and which property can be traced to the possession of the wrongdoer's general agent. In that state of things such person has the right to call the latter to account in respect of the property so traced, and he has another and a very distinct right to call him to account

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generally in respect of his agency. In the first case he deals with him simply as the holder of stolen goods. In the second, he must, if he proceeds at all, proceed on the privity of title, and must have his account taken on the footing of recognizing and adopting the agency, and, if he proceeds in this Court, according to the ordinary rules by which this Court takes accounts and administers equity between principal and agent.

It was therefore on this ground that I asked the counsel for the plaintiffs at the close of the case whether they were prepared to submit to such an ordinary account, that is to say, to have the account taken as it ought to be taken between the so-called Confederate government on the one hand and the defendant, as the agent of such government, on the other hand, and to pay what, on the footing of such account, should be found due from them if the result of the investigation should shew a balance due to the accounting party. For very obvious reasons the plaintiffs' counsel declined accepting such a decree as that. I can easily conceive the many public reasons which would preclude the plaintiffs from giving anything like the faintest recognition of the public character or public functions of such agents of the rebellion or secession as the defendant, the special agent of the Confederate loan. But they cannot in a Court of justice approbate and reprobate, and they cannot claim from an agent of the Confederate government an account of his agency and at the same time repudiate all privity of title with him and his former principals.

This to my mind obvious result was as obviously present to the mind of the careful and experienced pleader[2] by whom the bill was drawn, and reading that bill by the light now thrown on it by these considerations, and by the refusal of the plaintiffs to submit to such a mode of accounting as I have suggested, I am satisfied that the bill was intentionally drawn so as to omit any claim founded, or any title derived from or through the Confederate government, and that it was intended to be, and was, based entirely on the paramount title of the plaintiffs to those moneys and goods which were originally theirs, and in respect of which they could treat the possession of the defendant as the possession of the agent of public plunderers.

It is necessary to consider the bill as respects that part of the case, and here also it seems to me to fail absolutely. There is no allegation of any equity, there is no allegation of anything but the plainest and most ordinary legal right, the right to recover large sums of money and large quantities of goods of the plaintiffs in the hands of the defendant, without any suggestion of anything whatever to render necessary or proper or to justify the interposition of this Court as a Court of equity.

But of this allegation, insufficient as it appears to me to justify a bill for an account in equity, there is not in my judgment a particle of evidence. There is abundant evidence of the agency of the defendant as agent of the Confederate government; there is abundant evidence that large moneys belonging to that government as its public property were dealt with in such a way as possibly to make the defendant accountable to his principals for his receipts and payments; but of the essential fact—essential I mean in this the real subject of the suit—that any moneys or goods of the plaintiffs (moneys or goods of the plaintiffs in their own right, as distinguished from their right as the successors *de facto* of the suppressed government) ever reached the hands of the defendant, there is absolutely not a tittle of evidence.

The plaintiffs' case therefore has, in my judgment, wholly failed, and this bill must be dismissed, and, of course, dismissed with costs.

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(2) Mr. Archibald Smith.

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STUART, V.C., Feb. 25, 1869.

HOPE *v.* HOPE. HOPE *v.* CARNEGIE.

38 L. J. Ch. 410; L. R. 7 Eq. 254; 20 L. T. 9.

Practice—Suit—Husband and Wife Defendants—Contempt by Wife—Separate Appearance.

HUSBAND AND WIFE.—*A husband and wife were defendants in an administration suit; they appeared in the usual way; no answer was required from them, and a decree was made by which they were both bound. The wife subsequently committed a contempt of Court. Upon motion by the husband, supported by evidence that the wife was living apart from him out of the jurisdiction, and that he had no influence over her to prevent the contempt, the Court, without requiring service of the notice of motion on the wife, ordered, in terms of the notice, that the wife should appear separately in all further proceedings, and that the husband should not be responsible or liable to attachment for any neglect or refusal of the wife.*

Mr. Adrian Hope having died possessed of considerable real and personal estate both in this country and in Holland, a suit was instituted for the administration of his estate, to which his daughter, Mrs. Carnegie, and her husband, Admiral Swynfen Carnegie, were defendants. They appeared in the usual manner, but no answer was required from or put in by them, and a decree was made in the suit. After this decree, Mrs. Carnegie instituted proceedings in Holland with reference to the property there, making use of her husband's name for the purpose; and an injunction was, on the 25th of June last, granted, on the application of the plaintiff in these suits, to restrain both Admiral and Mrs. Carnegie from continuing those proceedings. A motion to commit both these defendants for disobedience of this injunction was made, on behalf of the plaintiff, on the 3rd of December last; but it appearing that Mrs. Carnegie was living apart from her husband, and out of the jurisdiction of the Court, and that Admiral Carnegie disavowed the Dutch suit, and had done all in his power to obey the order of this Court, the Vice Chancellor, as no order had been obtained for the separate appearance of the wife, who had alone been guilty of the contempt, refused the motion, and gave liberty to the plaintiff, or any or either of the defendants, to make such application as might be advised, to obtain the separate appearance of Mrs. Carnegie.

A motion was now made, on behalf of Admiral Carnegie, that the defendant Louisa Albertine Carnegie (his wife) might be ordered to appear separately from him in all further proceedings in this suit; and that he might not be in any manner responsible for any neglect or refusal by or on the part of the said Louisa Albertine Carnegie, in relation to such proceedings, or any of them, nor liable to any attachment or process in consequence of such neglect or refusal.

The evidence in support of the motion shewed that Mrs. Carnegie was living in Paris separate from her husband, and that he had not since the 7th of July, 1868, had any communication with her; that he had ceased to make her any pecuniary allowance since the 24th of October, 1868; that he had done all in his power to obey the orders of the Court, but had no influence whatever over his wife; and that there was no collusion between them.

Mr. E. K. Karslake and *Mr. F. Waller*, in support of the motion.—The present course is the proper one for the husband to pursue under the circumstances. The notice of motion is modelled upon that in *Barry* v. *Cane* (3 Mad. 472). It is not necessary to serve the wife with notice of this motion; we propose, however, to ask for liberty to serve her in Paris with the present order, so that she will be made fully aware of her danger. The authorities refer chiefly to cases where the husband has obtained leave to answer separately from his wife—*Garey* v. *Whittingham* (1 Sim. & S. 163); *Graham* v. *Fitch* (2 De Gex & Sm. 246); *Nichols* v. *Ward* (2 Mac. & G. 140); *Home* v. *Patrick* (30 Beav. 405;

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31 L. J. Ch. 424); *Bushell* v. *Bushell* (1 Sim. & S. 164); *Bunyan* v. *Mortimer* (6 Mad. 278). Here no answer has been required and none put in, and the husband is seeking to be relieved from the consequence of a contempt of his wife, which he is powerless to prevent, committed by her after a decree by which both were bound.

Mr. Dickinson and *Mr. Hemming*, for the plaintiff.—Notice of this motion should have been given to the wife, so that the order made thereon may be a proper foundation for future proceedings—*Nichols* v. *Ward* (ubi supra); *Garey* v. *Whittingham* (ubi supra); *Graham* v. *Fitch* (ubi supra); *Home* v. *Patrick* (ubi supra). If an order directing a married woman to appear separately is made behind her back, there may be difficulty in obtaining an attachment against her, whereas, if the order is made upon notice to her, the plaintiff will be able to proceed without delay. The order in *Bushell* v. *Bushell* (ubi supra), was a nominal order made on purpose to raise the question upon a motion to discharge it; whereas *Bunyan* v. *Mortimer* (ubi supra), is an express authority that a motion for an order that a married woman may answer separately must be made upon notice to her.

[STUART, V.C. remarked, that the order in *Bushell* v. *Bushell* was never entered.]

Mr. Karslake, in reply.—This order will be at the risk of the husband, and the plaintiff has no *locus standi* to object. He also referred to *Taylor* v. *Taylor* (12 Beav. 271; 19 L. J. Ch. 304).

STUART, V.C.—The cases cited are, no doubt, of some importance, but cannot be said to govern the present case. Here the husband and wife have appeared in the usual manner, and a decree has been regularly made in the cause against them both. In the cases cited the question generally arose, in the course of preliminary proceedings, as to the means by which the wife could be completely dissociated from her husband for the purpose of litigation; and in most of them the application was by the plaintiff in the cause, who sought to proceed to a decree or order, while the husband sought to avoid being bound to defend together with his wife.

In *Home* v. *Patrick* the Master of the Rolls held that, if the wife had concurred in an order to answer separately, no notice of the motion for an attachment need be served on her; because the order being one in which she had concurred, the attachment would issue as a matter of course, upon the footing that she must have been aware of the effect of the order so concurred in by her. But this is an application not by the plaintiff nor by the married woman, but by the husband who with his wife was bound by the decree, and it is impossible to say, that where the wife has not sought to dissociate herself from her husband, but has appeared together with him, and the Court has proceeded against them both together, that she is a stranger to the litigation. The application is not to proceed against the wife by attachment, nor is its object to enforce the decree against her, but it is the application of a husband who is bound together with his wife by a decree affecting property in which she is interested, but who, being separated from his wife, and having, as the evidence in the cause shews, no control over her, seeks only to be relieved from a contempt to which he is exposed by reason of her conduct. In that respect the case is more like *Garey* v. *Whittingham* than any of the other cases. And there the Court at once made an order directing the husband to be discharged and his wife to answer separately, and to indemnify him in respect of costs. It does not appear in that case that notice of motion was served upon the wife at all, and the Court observed, that the original order to sever their appearance and defence in the suit should be one of which the wife had notice; but notwithstanding the doubt which the Vice Chancellor entertained upon that subject he relieved the husband at once.

Now, looking at the terms of this notice of motion, it appears to me to throw no difficulty whatever in the way of the plaintiff, but, on the contrary, rather to assist him, because the order now asked for, so far as it seeks to

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dissociate the husband from the wife in the proceedings in the cause, is one which might or perhaps ought to have been obtained by the plaintiff, who is obstructed in his proceedings; while the husband is only forced to make this application because the plaintiff actually sought to commit him for a contempt by reason of his wife's disobedience. Such an order will not expose the wife to anything that she ought not to be legitimately exposed to; and it seems to me that the husband has made out his title to have the order he asks without any service of the notice of motion upon his wife. It is for the plaintiff, who wishes to reach the property of the wife and to sue the wife by process of contempt, to consider what further proceedings he will take upon it. I shall not make any order as to costs.

His Honour then made an order in the terms of the notice of motion, giving leave to the plaintiff to serve the order, and the order for the injunction, and any other proceedings which had taken place in the cause, and any notice of motion which he might be advised, on Mrs. Carnegie in France or elsewhere.

Lords Justices, April 16, 1869.

In re THE ESTATES INVESTMENT COMPANY; PAWLE'S CASE.

38 L. J. Ch. 412; L. R. 4 Ch. 497; 20 L. T. 589; 17 W. R. 599: affirming, [1869] E. R. A. 329; 38 L. J. Ch. 318; 20 L. T. 100; 17 W. R. 391 (M.R.).

See, *In re London and Mediterranean Bank*, [1871] E. R. A.; L. R. 12 Eq. 331; 24 L. T. 899; 19 W. R. 947 (V.C.): reversed, [1872] E. R. A.; 41 L. J. Ch. 1; L. R. 7 Ch. 55; 25 L. T. 471; 20 W. R. 45 (L. JJ.). Considered, *In re Scottish Petroleum Company*, [1883] E. R. A.; 23 Ch. D. 413; 49 L. T. 348; 31 W. R. 846 (C. A.). See, *Ex parte Storey*, 1890, 62 L. T. 791 (Ch. D.).

Company — Winding-up — Fraudulent Misrepresentation — Agreement to abide result of a Suit by one Shareholder.

Company.—*R. filed a bill against a company to be relieved of his shares, on the ground of misrepresentation. The company agreed with P, who also asked to be relieved of his shares on the same grounds, to be bound by the result of R.'s suit. The company was then wound up. Afterwards, a decree was made in R.'s suit in his favour*[1]:—Held, *that P. ought to be treated as if he had filed a bill before the winding-up, and that his name must be removed from the list of contributories.*

Decision of the Master of the Rolls *affirmed.*

This was an appeal by the official liquidator of the company from an order of the Master of the Rolls (reported 38 L. J. Ch. 318, where the facts are stated), removing Mr. Pawle's name from the list of contributories to the company.

Mr. Roxburgh and *Mr. Napier Higgins*, for the appellant, contended that this case was entirely within *Oakes* v. *Turquand* (36 L. J. Ch. 949; L. R. 2 E. & I. Ap. 325). The company could not enter into any agreement with Mr. Pawle to abide the result of Ross's suit, which could bind the creditors of the company. This was a private arrangement between the company and the allottees, of which the creditors had no notice, and by which, therefore, they were not bound.

Sir R. Palmer and *Mr. Cracknall* appeared for the creditors, in support of the appeal, but were not permitted to address the Court, as they had not themselves appealed from the order of the Master of the Rolls.

(1) *Ross* v. *the Estates Investment Company* (36 L. J. Ch. 54; 37 L. J. Ch. 873).

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Mr. Jessell, *Mr. Swanston* and *Mr. Everitt*, for the respondent, were not called upon.

SELWYN, L.J.—I entirely agree with the decision of the Master of the Rolls. The appellant relied on the case of *Oakes* v. *Turquand*, in the House of Lords. I have repeatedly stated that I fully concur in the decision in that case, nor am I disposed to extend in any way the exceptions to it. On the other hand, there can be no doubt that where there is fraud in a prospectus of a company, and a shareholder has, on discovery, at once repudiated his liability and taken proper proceedings to have his name removed from the share register before any steps have been taken to wind up the company, in that case, although his name has not actually been removed before the winding-up, he is still entitled, on proving his case, to have his name removed from the list of contributories. The question here is, whether, when several shareholders have agreed to repudiate their shares on the same grounds, and have communicated their intention to the company, it is necessary that each shareholder should take separate proceedings against the company. It would be contrary to the principles on which this Court has always acted if such multitudinous and expensive litigation were necessary. If Mr. Pawle had not taken part *bona fide* in the proceedings against the company, he could not now come here. But there is no pretence for any such allegation. Twelve separate actions were brought against the repudiating shareholders, among whom were Mr. Pawle and Mr. Ross. All of these actions, except the one against Mr. Ross, were stayed by an order of one of the learned Judges to await the result of the proceedings which were to be taken in equity by Mr. Ross to relieve him of his shares. The staying those actions was a public proceeding, and connected with the action against Ross. Then came a correspondence between the repudiating shareholders, of which body Mr. Pawle was chairman, and the solicitor for the company; and in one of the letters of that correspondence, written by the company's solicitor, are these words: "It is understood that the other allottees are not to be prejudiced by their not taking proceedings pending the decision in *Ross's case*." Then came the winding-up order, and the decision of the Court of Appeal in *Ross's case*. The question, therefore, is, whether, under these circumstances, Mr. Pawle ought to have taken separate proceedings against the company. I think that it would have been very wrong for him to have done so. In my opinion, the principle of *In re the Reese River Silver Mining Company; Smith's case* (36 L. J. Ch. 618; L. R. 2 Ch. Ap. 604) applies here, and Mr. Pawle was substantially a party to Ross's suit: it follows, therefore, that the decision of the Master of the Rolls is right; and this appeal must be refused, with costs.

GIFFARD, L.J.—This case is, in my opinion, entirely within *Smith's case* (36 L. J. Ch. 618; L. R. 2 Ch. Ap. 604). In that case, as in this there was fraud on the part of the company and repudiation on the part of the shareholder. The only difference is, that in this case no suit had been instituted before the winding-up by Mr. Pawle. But in my opinion, although Mr. Pawle was not actually a plaintiff in a suit against the company, he was substantially a party to the proceedings in Ross's suit, and can now properly avail himself of the decision therein. Were we to hold otherwise, you might have 500 suits in a case of this description, where one is quite sufficient to settle all matters in dispute. The appeal is dismissed with costs.

LORD ROMILLY, M.R., April 22, 1869.

ADNEY *v.* GREATREX.

38 L. J. Ch. 414; 20 L. T. 647; 17 W. R. 637.

Will—Construction—Gift of Residue to Nephews and Nieces—Nephews and Nieces by Affinity held to be included.

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WILL.—*A testator, after giving a legacy to each of several persons, whom he called respectively his nephews and nieces, gave the residue of his property to be divided between all his nephews and nieces equally, share and share alike. At the date of the will, the testator had one nephew and one niece, who were both mentioned in the will, and there was no possibility of his having future nephews or nieces. The other persons mentioned in the will, and therein respectively called the testator's nephews and nieces, were, in fact, the nephews and nieces of his wife*:—Held, *that the nephews and nieces by affinity were included in the gift of residue.* Smith *v.* Lidiard (3 Kay & J. 252), *distinguished.*

Thomas Simmons, by his will, dated the 28th of February, 1825, devised and bequeathed all his real, personal and leasehold estates to trustees, upon trust to sell the same, and to pay out of the purchase moneys to arise from such sale a legacy of 80*l.* to each of his nephews, the plaintiff, the defendant, Richard North, Thomas North and James North, and a legacy of the same amount to each of his, the testator's, nieces, the defendants Mary Cope, Mary Adney and Sarah Oswald. The testator then gave the residue of the moneys to arise as aforesaid to his trustees, upon trust to invest the same, and out of the income thereof to pay to his wife Mary Simmons and his friend Love Field respectively, during their respective lives, the weekly sums of 25*s.* and 15*s.* respectively, and from and after the decease of Mary Simmons and Love Field then upon trust, and the testator directed his trustees to divide and pay the residue unto and between all his nephews and nieces equally, share and share alike. The will contained a proviso, that if any of the nephews and nieces should happen to die before his or their parts or shares of his estate, or money intended for them, should become payable without leaving issue of his, her or their body or bodies, lawfully begotten, then that the share of him, her or them so dying should go and be paid unto and amongst all the survivors or survivor of his said nephews and nieces equally, share and share alike. But if any of his said nephews or nieces should happen to die before his, her or their shares should become payable, leaving issue lawfully issuing, then the part or share, parts or shares, of him, her or them so dying, leaving issue then living, should go and be paid to such issue, and if more than one child equally between them, share and share alike.

The testator died in the year 1825.

By the report made in the cause the Master found, among other things, that the plaintiff and the defendant Sarah Oswald were the only nephew and niece of the testator living at the date of his will and at the time of his decease, and that the plaintiff and Sarah Oswald were the only persons in the will specially named, and therein designated as the testator's nephews and nieces, who were his nephew and niece by blood. The Master also found that the testator was married to Mary Hayes, and that his wife had several nephews and nieces; namely, Thomas North, and the defendants Richard North, James North and Mary Cope, the children of Elizabeth North, who was a sister of the testator's wife, and Mary Catherine Hayes, the daughter of James Hayes, who was a brother of the testator's wife. The Master further found that Thomas North, Richard North, James North and Mary Cope were specially named in the will, and therein designated as the testator's nephews and niece.

The testator's widow and Love Field were both dead, and the plaintiff had presented a petition praying, among other things, for a declaration that the testator's nephews and nieces by affinity were not entitled to share in his residuary estate, and for a distribution accordingly of the residuary trust funds which had been brought into Court.

The testator's father and mother both died in his lifetime.

From the evidence filed on behalf of the respondents, it appeared that the testator had at the date of his will and at the time of his death no brother and only one sister, and that the latter had married upwards of forty-four years

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before the date of the testator's will, and that at the date of her marriage she was sixteen years of age.

Mr. Jessel and *Mr. Cozens-Hardy*, for the petitioner, referred to *Smith* v. *Lidiard* (3 Kay & J. 252); *Thompson* v. *Robinson* (27 Beav. 486; 29 L. J. Ch. 280); *Hogg* v. *Cook* (32 Beav. 641); *Crook* v. *Whitley* (7 De Gex, M. & G. 490; 25 L. J. Ch. 657; 26 L. J. Ch. 350); *Shelley* v. *Bryer* (Jac. 207); *Swaine* v. *Kennerley* (1 Ves. & B. 469); *Gill* v. *Shelley* (2 Russ. & Myl. 336).

Mr. Fry, for the representatives of Sarah Oswald, supported the prayer of the petition.

Mr. Southgate and *Mr. Chitty*, for some of the nephews and nieces by affinity, contended that the latter were included in the terms of the gift as well as the nephew and niece by blood. The testator has mentioned by name the nephews and nieces of his wife, and has treated them as his own. The construction we contend for is the only one which satisfies the words of the will. It is not possible, apart from the authorities, to doubt that the testator meant to include his nephews and nieces by affinity as well as those by blood.

They referred to *James* v. *Smith* (14 Sim. 214); *Tugwell* v. *Scott* (24 Beav. 141); *Owen* v. *Bryant* (2 De Gex, M. & G. 697; 21 L. J. Ch. 860); *Leigh* v. *Byron* (1 Sm. & Giff. 486; 22 L. J. Ch. 1064); *Frogley* v. *Phillips* (30 Beav. 168; 3 De Gex, F. & G. 466).

Mr. Woodroffe, for persons in the same interest.

The MASTER OF THE ROLLS said: This is a question upon the construction of a will. The question is very peculiar, because it is a case where embarrassment is occasioned to the Court by the cases which have been decided, for really I have no hesitation in saying what I am satisfied was the intention of the testator upon this will. The testator, after giving certain legacies and directing 25*s*. a week to be paid to his widow for her life, and 15*s*. a week to a person of the name of Field for her life, gives the whole of his property to all his nephews and nieces equally, share and share alike. Now, at that time he was in this position: he had one nephew and one niece, who were really his nephew and niece, and he had also nephews and nieces who were his wife's nephews and nieces. By his will he declares that if any of his nephews and nieces should die before their shares became payable, and without leaving issue, such shares should be paid to the survivors or survivor, share and share alike. He died in the year 1825, leaving his nephew and niece by blood and his nephews and nieces by affinity, and the age of the sister was such that it was impossible she should have any children who would be his nephews or nieces afterwards born. The only question is whether by using the words "nephews and nieces," in the plural, knowing the state of things as he did, it was clear that he intended to give the residue amongst the nephews and nieces by affinity as well as those by blood; and I am of opinion that that is the meaning of the will, unless I am bound by the cases which have been decided in this Court to come to an opposite conclusion. There are a good many cases in favour of this construction. In the first place, it is very difficult to distinguish this case from the case of *James* v. *Smith*. It is very difficult to distinguish it from *Gill* v. *Shelley*. It is exceedingly like *Owen* v. *Bryant* and *Leigh* v. *Byron*, where similar things took place. The cases which are contrary to it, such as *Thompson* v. *Robinson*, *Crook* v. *Whitley* and the like, are clearly distinguishable; but there is one case which it is certainly very difficult to distinguish from it, and that is the case of *Smith* v. *Lidiard*, which was very prominently brought forward on the subject. The testatrix in that case gave 1,000*l*. legacies to nine persons by name, whom the testatrix called her nieces, two of them being nieces of her husband, and then she gave the residue to her respective nephews and nieces. The Court held that the husband's nieces did not take, notwithstanding common parlance. But then, as far as I can understand it, in that case there was not, in the first place, the distinction between the singular and the plural; in the next place, it was very possible that more nephews and nieces might be born. But in this case the testator had only one

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nephew and one niece, and under ordinary reasonable circumstances no more could be born, and he uses the plural. I am entitled and bound to consider that he knew the state of the family, and I think the meaning of the will is, that both the nephew and niece by blood and the nephews and nieces by affinity take. I cannot say that it is a satisfactory conclusion to come to when regard is had to the other cases upon this subject, but I think that in cases of this description you are not bound by previous authorities which are not exactly in the same words, but you are bound to take this as your cardinal rule: look at the whole family, read the will all through, and say what a reasonable man would take to be the meaning of the words. I think the meaning was that they must all take. I cannot say I have come to this conclusion without hesitation, but in my opinion it is the safest course I can take, and I shall so decide. But I beg leave to have it considered that my judgment does not in the slightest degree affect any other case, and that if it is ever cited before any Judge I beg to say I disclaim its application to any case except one in which identically the same words are used as I have here before me.

I wish also to make this observation on *Gill* v. *Shelley*, which I have looked at carefully. The Master of the Rolls evidently took a good deal of interest in the matter before him, and I wanted to observe that Mr. Jarman in his book seems to have fallen into an error. I have not got the last edition of his book, and it may be different in that, but I do not understand on what authority the following remark rests. At page 187 of the 2nd vol. (2nd ed.) he makes this remark on *Gill* v. *Shelley:* "Sir John Leach, M.R., said that if *Swaine* v. *Kennerley* and *Hart* v. *Durand* had not been distinguishable from the case before him (that is *Gill* v. *Shelley*) he should have felt no hesitation in overruling them, and decreed that the illegitimate child was entitled to share in the residue." I do not know what the authority for that is. There is no such statement in the report, which I have gone through as carefully as possible. The observation throws a considerable amount of doubt upon the matter to persons who do not look at the cases The cases of *Swaine* v. *Kennerley* and *Hart* v. *Durand* both appear to me to be remarkably good law. The decision of *Swaine* v. *Kennerley* is by Lord Eldon, and that of *Hart* v. *Durand* is in 3 *Anst.* 684, and is, I think, the decision of Chief Baron Macdonald. I only wish to state that I do not know that there is anything to throw a doubt on these cases.

LORD ROMILLY, M.R., March 8, 1869; HATHERLEY, L.C., March 17, 1869.

THE DARE VALLEY RAILWAY COMPANY *v.* RHYS.

38 L. J. Ch. 417; 20 L. T. 291.

Lands Clauses Consolidation Act, 1845, *ss.* 23, 68.[1]—*The Common Law Procedure Act*, 1854, *ss.* 15, 17.—*Award.*

ARBITRATION, REFERENCE AND AWARD. COMPULSORY PURCHASE.—*When the Court refers a matter back to an umpire, who has made an award, for recon-*

(1) Section 23. provides that a party claiming compensation from a public company may have such compensation determined by a jury or arbitration, and further that "if when the matter shall have been referred to arbitration the arbitrators or their umpire shall for three months have failed to make their or his award, or if no final award shall be made, the question of such compensation shall be settled by the verdict of a jury as hereinafter provided."

Section 68. provides that if the party entitled to compensation desire to have that question settled by jury, "it shall be lawful for him to give notice in writing of such his desire to the promoters of the undertaking, stating such particulars as aforesaid, and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided, and in default thereof they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed, and the same may be recovered by him, with costs, in any of the superior Courts."

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sideration, that award is avoided altogether:—Held, *By the* Master of the Rolls, *that such reference back of an award of the value of land under the above act operates as an original reference to the umpire, so that, by virtue of section* 23. *of the Lands Clauses Consolidation Act, if no proceedings are taken on it for three months, the price is to be determined by a jury*:—Held, *by the* Lord Chancellor, *that when an award has been made a rule of Court it comes within section* 15. *of the Common Law Procedure Act*, 1854. *Therefore, if it be referred back by the Court for re-determination, and no new award be made within three months, it is still in the discretion of the Court under that act to allow or not an enlargement of the term for re-determination by the arbitrator.*

The defendants were owners of certain lands taken by the plaintiffs for the purpose of their undertaking. It was referred to two arbitrators, in pursuance of the Lands Clauses Consolidation Act, 1845, to determine the price to be paid for the land. The arbitrators differed as to the value of the land, and the matter was referred to an umpire, who made his award on the 29th of January, 1868, and awarded 50*l*. as the amount of purchase-money.

The award was made a rule of the Court of Chancery, and on motion of the defendants to set it aside (37 L. J. Ch. 719), Giffard, V.C. made an order, dated the 3rd of July, 1868, that upon the defendants undertaking not to make any claim beyond the sum of 5*s*. for surface damage, it should be remitted back to the same umpire to reconsider and redetermine the matters referred to him.

No proceedings were taken in the matter till the 5th of February, 1869, when the defendants gave notice to the plaintiffs to summon a jury to determine the price of the land, for which they claimed 3,500*l*.

On the 16th of February, 1869, the defendants gave the plaintiffs notice that if within twenty-one days of service of the first notice they failed to issue their warrant to summon a jury, an action would be brought to recover the full amount of the claim in accordance with section 68. of the Lands Clauses Consolidation Act.

This was a bill to restrain the defendants from proceeding in such action.

The bill was filed on the 19th of February, 1869. The defendants demurred, and on interlocutory motion, it was arranged that the motion should stand over till the hearing of the demurrer, the plaintiffs to be in the same position as if the motion had been made on that day.

The matter now came on to be heard on demurrer together with the motion.

Sir R. Baggallay and *Mr. Freeling*, for the demurrer, said: If the plaintiffs were right in contending that the award was valid and subsisting, there was a perfectly good defence at law, and it was proper to file this bill.[2]

Lind v. *the Isle of Wight Ferry Company* (1 N.R. 13); *The Sutton Harbour Company* v. *Hitchins* (21 L. J. Ch. 73; 1 De Gex, M. & G. 161); overruling *The London and North-Western Railway Company* v. *Smith* (1 Mac. & G. 216; 19 L. J. Ch. 193). If they were entitled to an injunction, they could have obtained it simply by moving in the matter, and ought not to have filed this bill. On the merits of the case: in the same way as the reference to an umpire was a distinct thing under section 23. from the reference to arbitration—*Skerratt* v. *the North Staffordshire Railway Company* (2 Phil. 475; 17 L. J. Ch. 161); *Bradshaw* v. *the East and West India Dock, &c. Company* (12 Q.B. Rep. 562), so here the reference to the umpire was a new and distinct matter under that section, and, failing proceedings being taken on it within the proper time, the course was to determine the value by a jury.

Mr. Southgate and *Mr. Field*, for the plaintiffs, said, the reference back did not destroy the original award, at any rate in this case, as it was upon an undertaking; it was in the nature of a contract. Further, the Court had no jurisdiction to refer the matter back under the Lands Clauses Consolidation Act, and section 23. would not apply. The Court clearly had jurisdiction to restrain proceedings at law, and a bill was more regular than a motion for that purpose.

(2) But see *Abrahams* v. *the City of London* (37 L. J. Ch. 732; L. R. 6 Eq. 625).

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The MASTER OF THE ROLLS said—I am clear this demurrer must be allowed. The state of the case is this. All proceedings were perfectly regular until they were referred to an umpire. The umpire made his award. Upon that, the defendants being dissatisfied with the award, took proceedings before the Vice Chancellor, the present Lord Justice, to set aside that award. The Lord Justice was of opinion that the matter must be referred back to the arbitrator (to use the expression in the bill) to be reconsidered and redetermined. It is therefore clear that the Vice Chancellor was of opinion that to some extent the umpire had miscarried, or he would not have considered it necessary that he should reconsider and redetermine the question. At the same time he imposed as the price of that reconsideration and redetermination that the defendants should only claim 5*s*. for surface damage. Then, what took place? Absolutely nothing whatever. No party seems to have been satisfied with it; no party took any steps for seven months. Then the defendants gave notice that they intended to take steps to have a jury called, or to claim the whole amount of damages. What was the railway company to do? Were they to stand by and do nothing, and to be entitled to say that this was an order which the defendants could prosecute if they liked, but if not, they were entitled to go back upon the original award? That is not the order as stated in the bill to have been made by Vice Chancellor Giffard. How can they be entitled to say that? If they had attempted to enforce the original award after this order, it is quite clear the Vice Chancellor would have restrained them by an injunction. It is obvious he would not have allowed the order to be treated as a mere mockery, and it is impossible for the plaintiff to say, We are entitled to enforce the award unless the others proceed to get it reconsidered. No words of that import are to be found in the order.

Then Mr. Southgate suggests that this was a contract; but I asked whether it was made by consent: the answer was, No, it was not made by consent. Then how can it be a contract? Besides which, in consequence of the abandonment of the order for seven months, it is quite clear they did not intend to proceed upon it, and if they did not intend to proceed upon it, why am I to put the defendants in a worse situation than the plaintiffs are in upon exactly the same proceedings? The railway company are in a very comfortable situation, because they have got possession of the land. They are perfectly indifferent when the price is paid, or whether any price is paid. In point of fact, they say the land is worth nothing, and they do not intend to pay for it at all. The award was that it was worth between 40*l*. and 50*l*.; the defendants claim upwards of 3,000*l*. I know nothing about the value of it, I do not go upon that. But the Court is just as much bound to assume that one is right as that the other is right, and I cannot go into that question.

I am also of opinion that the Lands Clauses Consolidation Act applies. This is a proceeding under that Act. By the Lands Clauses Consolidation Act the award was bound to be made by the umpire within three months from the time when the award was given to him, or when his functions were conferred upon him. He made his award within that time. The Court of Chancery, after a considerable time, directed that he should reconsider and redetermine it. Within what time? Is he to have five or six years? What time can possibly be attached to the order that is made, unless it be the time that is given by the Lands Clauses Consolidation Act, which is three months? In fact, the Court of Chancery said, Your award is a nullity, you must consider the matter over again and make an award over again within three months from the time that you made the award. That is the plain common-sense meaning of it. Mr. Field suggested that it was not for them to do it. It is just as much for them to do it as for the other party to do it. How can they be put in a different situation? It is a means of acquiring the land without paying for it. I am of opinion that this is a case in which the demurrer must be allowed.

March 17.—The plaintiff company appealed from the decision of the Master of the Rolls, and the appeal now came on for argument.

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Mr. L. Field (*Mr. Southgate* with him), for the appellants.—We contend that the award is complete, except so far as it was to be varied under the Vice Chancellor's order; and as it has not been varied within three months from the date of that order, the original award remains valid and complete. Section 23. of the Lands Clauses Consolidation Act has no application; for the defendants are still bound by their undertaking not to make any claim beyond 5*s.* for surface damage—*Newby* v. *Harrison* (3 De Gex, F. & J. 294; 30 L. J. Ch. 863), of which undertaking we cannot get the advantage except by coming here.

[The LORD CHANCELLOR.—Is it not the question whose fault it was that the reference back was not gone on with?]

It was not for us to take any further steps; we were satisfied with the original award. The Court has still power under the 15th section of the Common Law Procedure Act, which applies to this case, to enlarge the term for making the award.

[The LORD CHANCELLOR.—Do you contend, Mr. Freeling, that the Common Law Procedure Act does apply, or that it does not apply?]

Mr. Freeling.—I say that the order of the Vice Chancellor was made "In the matter of the Lands Clauses Consolidation Act," and that under section 36. of that act a submission may be made a rule of any of the superior Courts. It has also been held in *In re Elliot and the South Devon Railway Company* (2 De Gex & Sm. 17), that the Court of Chancery can make an order under that same section to set aside the award; it follows, therefore, that you may have a reference back.

[The LORD CHANCELLOR.—I think that the Common Law Procedure Act directs that certain sections shall apply to all the Courts; and that being so, as this submission has been made a rule of the Court, my opinion is, that the case falls within all those sections.]

I am perfectly willing to accept your Lordship's view of the matter.

The LORD CHANCELLOR.—Then I need not call on you further, Mr. Freeling; for on that ground I am of opinion that the demurrer ought to be allowed. The case stands thus: An award is made within the right time by the umpire, and then, one of the parties being dissatisfied with it, makes it a rule of Court. That seems to me to bring it within the operation of these clauses of the Common Law Procedure Act, which directs how an award shall be dealt with, and therefore the Court has power to do what it pleases in reference to the award, limited only by the rules and regulations prescribed by the act. Here the Vice Chancellor came to the conclusion that it was right to remit back the award to the umpire. Then, this being a favour granted to the party, the Court had the right to impose certain terms, and the Court thought right to impose the term that the claimants should not make any claim beyond 5*s.* in respect of damage to the surface of the land, and then the Court directed that it should be remitted back to the arbitrator for him not only to reconsider, but to redetermine the matter before him. It is clear from those words that at the present moment there is no award; for when a matter is remitted back to an arbitrator to redetermine, the first determination must be gone, and the arbitrator must deal with the whole thing *de novo*. That being the case, it follows that unless the Court see some reason to the contrary, the new award must be made within three months; that is under the Common Law Procedure Act; but still, even though no new award is made within three months, I can have no doubt that, on a proper application, the Court has power to take the course which may seem reasonable with reference to enlarging the time. At present, however, the matter stands thus: No such application has been made, and more than three months have run out. There has been, therefore, no award made at all, because the award, such as it is, has been determined by the Vice Chancellor not to be a proper award, and it has been remitted to the umpire for him to reconsider and redetermine; and no new award has been made by him. Then, the plaintiffs in the present suit having made no

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application to have the time enlarged, the defendants are entitled to consider, until that application shall be made and disposed of, that there is not any award made at all.

Then, as regards the defendants' being bound by the undertaking, it is only this: They are bound by the undertaking to make no claim beyond the 5*s.* specified, and that case cited of *Newby* v. *Harrison* was not a case to shew that where there has been an undertaking of this kind a separate bill may be filed upon the undertaking. I erred in that myself. The Court of appeal decided there that it has jurisdiction without a bill filed at all, the undertaking having been given. No doubt, if either of the parties had given an undertaking to get the award made in due time, the Court would, under that undertaking, have authority, and would insist upon the undertaking being carried into operation. At present the position of things is this: The time has elapsed; no one has evinced any intention of enlarging the time. *De facto* it has not been enlarged, the arbitrator cannot make an award without permission from the Court. That question may be discussed before the Court, whether or not it will give such a permission; but in the meantime, as things stand, on the face of this bill, the defendants are in the position of persons who are entitled and able to say that no award has been made within the time specified by the Lands Clauses Act, and, therefore, that they will pursue their other remedy, and will take advantage of the 23rd section of the Act, which is to the effect that, there being no award made within the time, the whole matter goes off. Of course, as to the 68th section, it is not for me to say anything about it. All I have to determine is, whether the defendants are entitled to proceed before a jury. If they desire to proceed before a jury, and they do not proceed within twenty-one days, then the 68th section, no doubt, would come into operation, unless it may happen that the company may be able to satisfy the Vice Chancellor that some blunder has been made, and that, therefore, the Court ought now to enlarge the time. That, however, would not be upon this bill; it would be merely proceeding upon the jurisdiction which the Vice Chancellor has of dealing with his own order as he thinks right to deal with it.

I think, on the face of the bill, there is no equity, and therefore the decision of the Master of the Rolls is right, and the appeal must be dismissed with costs.

IN THE HOUSE OF LORDS. March 2, 1869.

COLLINGWOOD *v.* STANHOPE.

38 L. J. Ch. 421; L. R. 4 H.L. 43; 17 W. R. 537; partly reversing, [1867] E. R. A.; 36 L. J. Ch. 894; L. R. 4 Eq. 286 (V.C.).

Definition adopted, *in re Bayley's Settlement*, 1871, L. R. 6 Ch. 590; 25 L. T. 249; 19 W. R. 789 (L. JJ.). Dictum referred to, *Carter* v. *Ducie*, [1872] E. R. A.; 41 L. J. Ch. 153; 25 L. T. 656; 20 W. R. 228 (V.C.). Discussed, *Reid* v. *Hoare*, [1884] E. R. A.; 53 L. J. Ch. 486; 26 Ch. D. 363; 50 L. T. 257; 32 W. R. 609 (Ch. D.). Referred to, *Domvile* v. *Winnington*, [1884] E. R. A.; 53 L. J. Ch. 782; 26 Ch. D. 382; 50 L. T. 519; 32 W. R. 699 (Ch. D.). See, *In re Prytherch*, [1890] E. R. A.; 59 L. J. Ch. 79; 42 Ch. D. 590; 61 L. T. 799; 38 W. R. 61 (Ch. D.). Referred to, *In re Smith's Estate*, 1892, 27 L. R. Ir. 121 (Ch. D.). Discussed, *in re Fitzgerald's Estate*, [1891] E. R. A.; 60 L. J. Ch. 624; [1891] 3 Ch. 394; 65 L. T. 242; 40 W. R. 29 (Ch. D.). See, *Law Union & Crown* v. *Hill*, [1902] E. R. A.; 71 L. J. Ch. 602; [1902] A.C. 263; 86 L. T. 773 (H.L.). Referred to, *In re Morton's Trust*, [1902] 1 Ir. R. 310 n (Ch. D.).

Settlement—Construction—Eldest Son—Clause of Exclusion—Period for ascertaining Class.

YOUNGER CHILDREN.—*By a settlement made in* 1820, *on the marriage of*

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Mr. and Mrs. C, certain funds were settled upon trust, after the death of the survivor of them, for their children or child, "other than and except an eldest son for the time being entitled" under a will, recited in the settlement, to a property at N. D, "for an estate in tail male in possession or remainder immediately expectant upon the death" of Mr. C: the fund to vest in such children or child at twenty-one. Mr. C. was tenant for life of the property at N. D. There were three children, a son, Edward C, and two daughters. The son, in the father's lifetime, concurred with him in barring the entail in the property at N. D, which was thereupon re-settled, the son taking only an estate for life after his father's death, but taking also out of the property an immediate provision of 500l. a year:—Held, *that although the time of distribution of the trust funds was the proper period for ascertaining who was the "eldest son" to be excepted out of the settlement as being entitled under the will as tenant in tail in possession to the estates at N. D, and although at that time Edward C. was only entitled to those estates as tenant for life, and so did not strictly answer the description of the child to be excluded, yet as he had already acquired the larger interest in the landed property, and had dealt with it as seemed good to him, he was by the terms of the settlement excluded from taking any portion of the trust funds.*

This was an appeal from a decree of Vice Chancellor Wood, and it arose out of the following facts.

On the marriage of Mr. Collingwood and Miss Calcraft a deed of settlement was made, and in it was recited, in effect, that by the will of Mr. Collingwood's father Mr. Collingwood was entitled to an estate at North Dissington for life, with remainder to his first and every other son severally and successively in tail male. The deed then mentioned an assignment and transfer to trustees of certain funds and moneys, amounting altogether to above 28,000*l.* (of which about 13,000*l.* was brought in on the part of the lady), and it then declared that the trustees therein named should hold these funds and moneys upon trusts for Mr. Collingwood and Mrs. Collingwood for life, and after the death of the survivor of them upon trust to transfer the same to and among such child (if any) or children, if more than one, of the then intended marriage, "other than and except an eldest, second or only son *for the time being*, entitled under the recited will" to the landed property at North Dissington, "for an estate in tail male in possession or remainder immediately expectant on the death" of Mr. Collingwood the father and the issue of such child, &c., in such shares and proportions, and at such ages, and in such manner as Mr. and Mrs. Collingwood might jointly appoint, or in default of joint appointment as the survivor should appoint, and in default of any appointment the trust funds were to go to and be divided among all and every the children or child of the said marriage other than such eldest or only son entitled as aforesaid, and if more than one such child equally, to vest at twenty-one. There were three children of the marriage, one son, Edward Collingwood, and two daughters, Arabella and Cecil. No joint appointment of the trust funds was ever made by Mr. and Mrs. Collingwood and Mrs. Collingwood died in the lifetime of her husband. In 1846, Edward Collingwood the son, having attained his age of twenty-one, joined with his father in a disentailing deed, reserving to themselves a power of appointment; and by another deed, made in the same year, they jointly appointed the estates at North Dissington to fresh uses, namely, to the use that the son should receive out of the estate a yearly rentcharge during the joint lives of himself and his father of 500*l.*, and subject thereto to the use of Mr. Collingwood the father, for his life, with remainder to the use of trustees therein named, for the term of 1,000 years, in trust to raise 6,500*l.*, being moneys paid by Mr. Collingwood for the benefit of Edward Collingwood the son, with remainder to the use of the said Edward Collingwood the son, for his life, with other remainders.

By a deed-poll made in 1856, Mr. Edward Collingwood the father appointed

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a moiety of the trust funds and moneys in favour of his daughter Arabella, then about to marry.

Mr. Collingwood the father died in 1856, without having made any further appointment of the funds and moneys subject to the trusts of his marriage settlement, and a question arose as to the manner in which the unappointed moiety of the trust funds should be divided among the children of the marriage. On behalf of Miss Cecil Collingwood, it was urged that Edward Collingwood the son was not entitled to any portion thereof, because he came within the scope and intention of the exception made in the settlement, as he had taken the estate in the lands at Dissington given by the will to the eldest son of Mr. Collingwood. And on the part of the son it was urged that, as, at the period of distribution, he was not entitled to the estates at Dissington as tenant in tail in possession, but was only entitled to them as tenant for life, he did not strictly answer the description contained in the deed of the child to be excluded from participation in the trust funds.

The trustees of the deed of settlement filed their bill praying that the rights of the parties interested in the trust funds might be ascertained. The cause was heard before Vice Chancellor Wood, who declared that upon the true construction of the deed of settlement, and in the events which had happened, Edward Collingwood the son was entitled jointly with his sister Miss Cecil Collingwood to the unappointed moiety of the trust funds.

From that decree Miss Collingwood appealed to this House.

Sir Roundell Palmer and *Mr. J. Pearson*, for the appellant.—The time of vesting was the period at which the person who was to be excluded as eldest son was to be ascertained; but even if he was to be ascertained at the period of distribution, Edward Collingwood was not entitled to participate in the trust funds, since the alteration in the nature of his estate in the landed property was the result of his own act. *Chadwick* v. *Doleman* (2 Vern. 528). It cannot be said that, because he has anticipated a portion of his estate, that estate has not come to him—*Harrison* v. *Round* (2 De Gex, M. & G. 190; 22 L. J. Ch. 322). When once the nature of the estate contemplated by any instrument is ascertained, the legal consequences which may follow from such an estate might be disregarded—*Doe* d. *the Earl of Scarborough* v. *Savile* (3 Ad. & E. 897, 963; 6 L. J. Ex. 270). In cases of succession duty it has been finally decided, that a tenant in tail cannot get rid of the liabilities attaching to such an estate by his choosing to change the nature of his estate—*Lord Lilford* v. *the Attorney General* (36 L. J. Ex. 116; L. R. 2 E. & I. App. 63). That principle applies here; otherwise, if Edward Collingwood had enlarged his estate tail into an estate in remainder in fee simple, upon his father's death he would yet be entitled to participate in the trust funds, because he would not at the time of distribution have answered strictly the description of the person to be excluded. But in the sense of the settlors he does answer that description. He has actually taken the full benefit of the estate, and therefore he must be excluded—*Ellison* v. *Thomas* (1 De Gex, J. & S. 18; 31 L. J. Ch. 867: reversed 32 L. J. Ch. 32). The cases relied upon in the Court below, *Fazakerly* v. *Ford* (4 Sim. 390; 1 Ad. & E 897; 2 L. J. K.B. 111), and *Smith* v. *Osborne* (6 H.L. C. 375), do not apply, because in those cases the alteration in the estate was not the act of the person to be excluded. The other cases of *Windham* v. *Graham* (1 Russ. 331), and *Tayleur* v. *Dickenson* (1 Russ. 521), depended on particular words.

Mr. Jessel and *Mr. Martineau* appeared for the respondent, and supported the judgment of the Court below, and argued, that the period of distribution was the period when the person who filled the character of eldest son was to be ascertained, and at that time Edward Collingwood did not strictly answer the description of the child who was to be excluded from participating in the trust funds; the words of exception did not apply to him, and they relied upon *Matthews* v. *Paul* (3 Swanst. 328); *Taylor* v. *the Earl of Harewood* (3 Hare, 372; 13 L. J. Ch. 345); *Fazakerly* v. *Ford* (ubi supra); *Tayleur* v. *Dickenson* (ubi supra); and *Harrison* v. *Round* (ubi supra).

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Mr. Nalder, for the trustees, was not called on.

The LORD CHANCELLOR.—Although I regret that I should occasion, by an error committed in my decision in the Court below, inconvenience and expense to the parties concerned in the present appeal, yet I am bound to say that I have come to the conclusion that upon the second branch of the case I undoubtedly was led into error by not sufficiently adverting to the distinction which manifestly exists between a case of this description and a case like that of *Fazakerly* v. *Ford*—possibly I may add like that of *Harrison* v. *Round*—and by applying to a case which falls within that class of cases where the question is whether or not, upon the whole provisions of a marriage settlement, the Court is to interpose that doctrine which, from a very early period, it has employed towards the wording of the settlement, for equality amongst the children, the principle which governs another set of cases of a different character, like that of *Fazakerly* v. *Ford*, where the question is whether or not, there being a limitation of two estates, the one of which is to shift in the event of the other being held by the same member, that limitation is a condition which must be performed strictly, and if it cannot be performed strictly, the shifting clause cannot at all take effect.

Now, as regards the class of cases relating to settlements they are of considerable antiquity, reaching from the time of *Duke* v. *Doidge* and *Chadwick* v. *Doleman* downwards; and principle of those cases is this, that the Court, with regard to all questions arising on provisions for children under a marriage settlement, holds that the principal intent to be imputed to the parties (however differently that intent may be expressed, so long as it is not contrary to what is actually found in the settlement) is a desire to provide equally for the children, that one child should not take a double portion, and that no child should be excluded. These seem to me to be the two beacons or landmarks by which the Court has directed itself in steering sometimes undoubtedly a very difficult and doubtful course.

That principle has led to this conclusion: that although it be in terms said in the settlement that the elder child is not to have a portion, yet if, under such a settlement, the one who is really the elder child, the first-born, does not take the family estate, the Court of Chancery does not regard him as the elder son, but regards the younger brother who is in possession of the family estate as the elder and the actually elder brother as the younger, in order to introduce him as a younger brother into the benefits of the portions provided for the younger children. That being so, it has been further held that the Court will not, notwithstanding very strong words in the settlement to the contrary, hold the portions to be indefeasibly vested in the children in such a manner as to allow on the one hand a double portion to be given to one child, or, on the other hand, to allow any child to be excluded. And, therefore, it has come to this conclusion, that the period for ascertaining what is the true construction of the settlement with reference to the distribution or the portions provided for the children, is that period when the distribution itself is to take place. Then, looking round and seeing all the events which have happened in the family, though you may find that one child has held the place of a younger child during the period that the settlement has been in existence, that is to say, subsequent to the marriage of the parents; and though you may find in such case that the younger child has been entitled to a portion, nay, even though that portion may have been assigned to him, yet if at the period of distribution that child has become the elder child, then he is no longer entitled to a portion, and the portion which has been assigned to him is no longer his. He takes the family estate, and the rest of the children are let in as younger children to the benefit of the fund out of which the portions are to be provided, including that portion of the fund which has been assigned to him who has now become the elder child.

Again, in the case of *Ellison* v. *Thomas*, the same proposition has been

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decided in the Court of Chancery, although, as the case has not come before this House, the question has not been decided by your Lordships hitherto. If the elder child who was entitled during the life of his parents to the estate predeceases his parents, so that that which was only a right in reversion never becomes an actual right in possession, and he never becomes the owner of the estate, but, in respect of his next brother acquiring the ownership, that second son becomes the elder son, in that case it has been held that the elder son who had acquired the interest is entitled—or rather his estate through the medium of his executors is entitled—to a share in the provision intended for those who did not take the family estate.

In this case, therefore, it appears to me that I was not in error as to the period at which the rights to portions were to be ascertained with reference to the elder and younger children. I think it was at the period when the fund became distributable that you should have ascertained whether or not the elder son had taken that which the elder son is by law considered to be entitled to, namely, the benefit of the estate. Now, at the period of distribution what were the facts? You found that the elder son had during his father's lifetime acquired this estate in remainder expectant on the demise of his father's life interest; that he had attained his age of twenty-one years; that his father and he had concurred in a re-settlement of this estate; that all the provisions for which portions are provided (portions being always considered to be provided for the purpose of enabling the children to provide for their own offspring and their own outset in life when they have arrived at the proper age) had been attained, and that the property had been re-settled so as to make him tenant for life after his father's death, and to give him an immediate provision of 500*l.* a year, and then to limit the estates after his own life estate to the benefit of his children. He, therefore, had had the whole benefit of the estate which was provided for the elder son, and then there remained this fund distributable among the younger children.

Now here it is, as it appears to me, in the second part of the case, that I fell into error. If this estate could by any means have been carried wholly off, or if the elder son had died in the lifetime of his father, so as never to have enjoyed it, we should have had in the one case to consider a state of circumstances, in which the case might well have been brought back to those in which the elder son does not obtain the benefit which was intended to be provided for him, or a case coming within the last class of cases in the same category as *Ellison* v. *Thomas*, where by death the provision having passed from him it was held that his executors were entitled to an equal share with the younger children of the family. But it appeared to me at the original hearing that I ought to be governed by the case of *Fazakerly* v. *Ford*, and the class of cases similar to that; and finding, as I did find, that at the time when the distribution took place that which had been the elder son's property conjointly with his father, and had been so dealt with as I have described, was no longer vested in him (the son) as the terms of the marriage settlement provide, namely, as an estate tail (those are the terms of the settlement), but that he had been cut down from that estate tail to an annuity of 500*l.* a year, and to an estate for life, and that it could neither be said that he had the estate given him in tail nor the greater part of it (which is the expression in the settlement), I then concluded that the case was one which fell within the doctrine of that class of cases of which *Fazakerley* v. *Ford* is an instance, or the case recognized in *Harrison* v. *Round*. And I held that, first having ascertained the period at which I was to look round for the persons who were to share in the property, I was then to look at the individuals and find whether, those persons being ascertained, they were in a condition to participate in the fund as elder or younger children. Finding this gentleman not in the position of the elder son according to the description, in which the elder son was in terms described as a person to be excluded under the will,—finding him not possessed of the greater part of the estate, and not possessed actually of an estate tail at all,—

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it appeared to me that he was entitled to fall among the class of younger children.

But in arriving at this conclusion I forgot the very foundation of this peculiar equity administered by the Court, and which has been carried to a very great extent, as it was in *Chadwick* v. *Doleman*. The foundation of that doctrine was, that the children should all partake equally; that the one should not be allowed to have an advantage over the others, except in this respect—that the elder son was looked upon by the law, where there was family property, as the person naturally to take the estate. When he took the estate it was held that he should not be admitted to participate in the portions provided for the younger children. Overlooking this when I had arrived at the facts to which the rule should be applied, I applied cases having a different foundation in law to this case, and accordingly I erred in giving this gentleman over again that which, in truth and substance, he already possessed, namely, his share of the family property, he having already been put in full possession of his share, though by concurrence with his father he had made certain provisions which ultimately, after providing for his own interest, and his own family, carried the estate on to his sisters.

It is not necessary for me to pronounce any opinion whatever, and I expressly reserve my opinion, upon what might have been the effect if that provision had been simply a provision for the younger sisters, and as to how far I should have acceded to the doctrine propounded by Sir Roundell Palmer, namely, that which was done by this gentleman amounted to making himself the master or possessor of the estate, so as to be equivalent to having property in it. I purposely decline expressing any opinion upon that argument. But I do find that he has had the full benefit of the family property, and that he has had it in the manner in which according to ordinary settlements and limitations in this country the benefit is provided for and enjoyed by the elder son, that is to say, when he came of age, being tenant in tail, his father being tenant for life, by the two concurring in making a re-settlement of the property.

Therefore, I propose to your Lordships that we should reverse that portion of the declaration which was founded on an error, and substitute for it a declaration that the appellant is now appointed to the whole of the unappointed fund, which I understand is a sum not exceeding one half, that is to say, not exceeding the settlement of her sister; the other, of course, would be brought into hotchpot, and that would exclude the sister altogether; that is the effect of the settlement I think.

[*Mr. Pearson.*—That is so, my Lord.]

Lord Westbury.—It appears to me that a great distinction must be made between the clause now before us and the clauses which are commonly denominated shifting clauses, which are applied in settlement for the purpose of determining the existing uses of an estate, and giving birth to new and different uses. These shifting clauses operate entirely under the Statute of Uses; and one of the cardinal principles of the law of uses is this, that a new use will not arise unless the conditions and terms on which it is to come into being are strictly followed.

The clause that we have to deal with is not a clause determining existing interests, or giving birth to new interests, but it is a clause used for the purpose of carrying into effect the great object of parties in making a provision for children, namely, that no one child should obtain a double portion at the expense of another.

These clauses ought to be so construed, and so dealt with, as to promote the object for which they are introduced, and which they were intended to serve; and if you construe them with reference to the rule applicable to shifting uses, and give to them an interpretation by which you defeat the object for which they were introduced, you make a cardinal error in the interpretation of instruments where the language is to be dealt with (certainly not departing from its meaning)

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with a view to obtain the object for which the provision, and the language in which it is worded, were inserted into the settlement.

Now, I quite agree that the character of eldest son is to be ascertained at the time appointed for distribution. That is quite settled by the cases which have been referred to; in fact, it arises from the necessity of the case. I see no reason to quarrel with the decision which was come to in *Ellison* v. *Thomas*, neither do I find that there is contained in it, either in the decision itself, or in the language of the Judge who pronounced it, anything which is an impediment to the course which my noble and learned friend proposes to take upon the present occasion. In *Ellison* v. *Thomas* an interpretation was required of the words "for the time being." The facts were simply these: there had been several sons; one had become the eldest son, but had derived no benefit, and then another was the eldest son at the time appointed for the distribution. Accordingly it was held, reversing the order of the Vice Chancellor, that the proviso for exclusion operated only to debar that person who answered the description of elder son at the time appointed for distribution. The result was, that the son who had predeceased the person found to fulfil that character, became according to the principles so well established in equity, in the eye of the Court of equity, a younger son, and not an elder son. Because "elder" is not merely senior in age, but "elder" is judged of with reference to this great and important condition, namely, that it must be that eldership which, in the language of Lord Hardwicke, carries the estate with it. He, by reason of his being elder at the particular time, carries the estate as elder for the purpose of the application of these rules, although in reality in point of age, and in point of natural birth, he may not be the elder son.

But now I beg your Lordships' attention to this: that in the description contained in this settlement of the person who is to be ascertained at the period of distribution there are two things to be observed. The one is, the age of the individual, and his relation to his parents and his brothers and sisters in point of birth; that is the relation which will stamp upon him naturally the character of being elder or younger. But there is superadded to that another thing, namely, his being "eldest," second or only son, for the time being, entitled under the said will; "the time being" belongs to "eldest, second or only son"; "entitled under the said will" is a thing superadded. It is quite right to say that you must refer to the time of distribution for the purpose of ascertaining who at that time, that is for the time being, is the "eldest, second or only son"; but neither the authorities nor the reason of the thing require you to refer to that time for the purpose of ascertaining, or rather for the purpose of requiring, that the individual upon whom you stamp the character of being "eldest, second or only son," shall also be at that particular time entitled to the estate in question. There is no necessity for doing any such thing. You must find that that individual who, at the particular period of time, answers the character, is also the person who is or has become entitled to the estate, and if it were otherwise, I think, the most absurd consequences would ensue. A man together with his family may have sold the estate only the day before the death of his father, and received the purchase-money, and put it in his pocket, and then, in defiance of all reason and common sense, we are to hold him to be a person that does not answer to the description of being entitled to the estate, because on the day subsequent to his full enjoyment and full possession of the entirety of that estate the father dies, and the period of distribution arrives.

My own opinion is, that the fact of the father and son joining in an act of disposition in order to prevent the devolution of the estate, was intended to be met in the clause by the words, "or in remainder immediately expectant on the decease of the said Edward Collingwood," because this would be the result as soon as a person is found to be for the time being the eldest or only son, and also to be entitled in remainder immediately expectant, a disqualification attaches to him prospectively and contingently, on his answering to the character of "eldest or only son" at the time of distribution. And it would be

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absurd enough to hold that if a disqualification is attached to him, the circumstance of his selling the estate, or making a different disposition of it, having thereby had the full enjoyment of it, shall restore him to the category and to the class of persons entitled to the benefit of other property from which we find that he has been already excluded.

These things are to be determined in conformity with the principles to which I have already referred. It is the good sense and reason of the thing that they must be construed and applied, provided always you do no violence to the rules of construction, in such a manner as will best promote and attain the object of the parties. That used to be expressed by Lord Thurlow in a phrase, which has become rather too trite a one, namely, that it should be interpreted according to the truth and honour of the settlement. There is a little too much laxity in that. It appears to me that it ought to be interpreted according to the plain object and obvious intention of the parties. That may be done in the present case, for the word "entitled" would comprehend being entitled, and having the full enjoyment of the property at any period, although that period happens to be anterior to the time appointed for distribution, which is the only *punctum temporis* to which you are to look for the purpose of ascertaining whether the individual at that time answers the character required, which character required is, the relation of eldest, second or only son, and no other character. The other part of the description is not made dependent upon its being in existence literally, according to the meaning of the words of the testator at the time appointed for distribution.

Lord Colonsay.—I entirely agree in the judgment which has been proposed by my noble and learned friends. The question arises out of a deed having for its object, in that part of it which we are dealing with, the provisions made for children. In making those provisions two subjects are dealt with; there is an estate, Dissington, I think, is the name of it, and a certain fund, and the substance of those provisions, as I read the deed, is this: that the children, other than the one who is to be entitled to that estate of Dissington, are to have the funds divided amongst them, subject to certain conditions. Then the question comes to be whether this party, coming at the moment for the first time into the benefit or enjoyment of the estate (for he had not enjoyed it previously), but having anticipated it, as I may say, and having obtained it already, would still be entitled to have a portion along with the other children. This case was put to us: suppose that he and his father had concurred in selling the estate, and that he had pocketed the whole price of the estate, he would still not have been within that clause which is called the clause of exclusion from this portion.

Now, giving the fair meaning and effect to the principle of always seeking to avoid double portions being given to children, a principle which is not peculiar to deeds constructed in this country, but which is a general common principle of fair dealing with such deeds, I have no doubt that the party having got such benefit from the estate as he chose to take, is not now entitled to encroach upon the provisions of the others by taking a double portion.

Lord Cairns.—I cannot help thinking that the fallacy which has pervaded the arguments of the respondents in this case is this. They have in the first place constituted by their argument a class of persons who filled the position of children at the period of distribution, and then they have treated the words of exclusion in the present case as if they were analogous to a shifting clause; and endeavouring to find out some words in that exclusion, which, as they think, cannot be satisfied by the events which have taken place, they appeal to the well-known principle, that when once you have got an estate vested you cannot divest it without the concurrence, to the letter, of the terms and conditions upon which the estate is to be divested.

Now, in my opinion, the true mode to approach a clause of this kind is not to conduct a process of reasoning of that kind, but to ascertain once for all what is the intention of the settlement with regard to the class of persons who are spoken of in this clause as those who are to take the portions provided.

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As regards the rule of law applicable to a case of this kind, I find it expressed so extremely well, if I may say so, in another case which came before my noble and learned friend on the woolsack while he was Vice Chancellor, that I will take the liberty of reading a few words from it to your Lordships. I mean the case of *Macoubrey* v. *Jones* (2 Kay & J. 684), in which my noble and learned friend said: "It is now well-established law that where the bulk of an estate is settled in strict settlement, and by the same settlement portions are provided for younger children, no child taking the bulk of the estate by virtue of the limitations in strict settlement shall take any benefit from the portions. And that is so, whether the settlement does or does not contain an express provision to exclude him from a share in such portions." And further on my noble and learned friend continued: "The intention of the parties being clearly to provide portions for all children except such as should so take the estate, the Court will carry that intention into effect. And in thus carrying out the intention of the parties, the Court has considered itself at liberty to go further; and in *Duke* v. *Doidge*, where there was in the settlement a power to select the son who was to take the estate, and the third son was selected for that purpose, the eldest son was held entitled to a portion, the Court saying that 'every child except the heir is considered in equity as a younger; and that eldership, not carrying the estate along with it, is considered not such an eldership as shall exclude by virtue of such clauses.' That, as far as words go, was a strong decision. In other respects it was a sensible one; the question being, what was the intention of the settlement?"

When we turn to the settlement in the present case, what we find is this: the provision is for the children "other than and except an eldest, second and only son for the time being." But it appears to have occurred to the framer of the settlement that that alone, if he stopped there, would be insufficient, and that you would have there words such as "eldest, second and only son," without any connexion with the estate which would indicate that the real object of the parties was to provide portions for those who did not take the estate. Therefore, in order to get rid of that difficulty, he continues "entitled under the said will of the testator, Edward Collingwood, to the said manor and other hereditaments at North Dissington, and other the estates therewith devised, or the principal part thereof, for an estate in tail male in possession, or in remainder immediately expectant on the decease of the said Edward Collingwood, party hereto."

Now, without, in the first place, scanning those words accurately, I should say that, in substance, what they are intended to express is simply this, that the child to be excluded is the child who takes and has the benefit of the bulk of the estates. But even scanning the words according to their literal meaning, I apprehend that those words have been, in this case, exactly fulfilled; because, when I inquire into the position of the son (the only son, as it happened), who joined with his father in resettling the estate, making himself tenant for life after his father's death, and entailing the estate afterwards upon his issue, I apprehend that of him it can be predicated to the letter that he had become entitled under the will to the manor and other hereditaments in question as tenant in tail. He had so become entitled before the period of distribution; but it appears to me that that makes not the slightest difference. It was for him to consider whether he would leave his title as it then stood, or use that title for the purpose of creating a new devolution of the estates. He had become entitled to, and obtained the benefit of, the estates within the terms of the settlement.

I quite agree that the proposed alteration should be made in the decree, and that the appellant should be declared, in the events which have happened, entitled to the whole remainder undistributed up to this time of the portions of the younger children.

Sir R. Palmer.—Perhaps your Lordships will allow me, on behalf of both parties, to mention that, in the Court below, the Court thought fit to give the costs of all parties out of the fund. If your Lordships think that right upon this occasion, neither my learned friends nor myself will offer any objection to it.

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LORD CAIRNS.—I own I think that would be an extremely satisfactory course to take where the parties do not oppose it, and where the matter concerns near relatives, as is the case here.

Sir R. Palmer.—It is a trustees' suit to administer the fund.

LORD WESTBURY.—It cannot be done except upon the application of both parties.

The LORD CHANCELLOR then put this question: "That the portion of the decree complained of by the appellants be reversed; that the rest of the decree be affirmed; and that the case be remitted to the Court below, with a declaration that the appellant is absolutely entitled to the moiety of the trust fund, subject to the payment of the costs of the appeal out of the unappointed moiety."

MALINS V.C., March 19, 20, 1869.

In re THE JOINT-STOCK COAL COMPANY; *In re* GREEN; *In re* COPELAND.

38 L. J. Ch. 429; L. R. 8 Eq. 146; 20 L. T. 966; 17 W. R. 585.

Followed, *In re London Suburban Bank*, [1871] E. R. A.; 19 W. R. 600 (V.C.): affirmed, [1871] E. R. A.; L. R. 6 Ch. 641; 19 W. R. 763 (L. JJ.).

Winding-up—Companies' Act, 1862, *ss.* 79, 91.—*Meeting of Shareholders by Order of Court—Costs of Second Petition.*

COMPANY.—*A limited company, established for trading purposes, had suffered continuous loss from its commencement, but was nevertheless solvent and "able to meet its engagements":*—Held, *on the authority of* In re the Suburban Hotel Company (36 L. J. Ch. 710), *that, under these circumstances, the Court could not order a compulsory winding-up.*

Where no case is made for a compulsory winding-up, the Court will not order a special meeting of shareholders to be called to consider the expediency of winding-up voluntarily.

These were two petitions for winding-up the above-named company: the first by a holder of fifty shares, the second on behalf of the shareholders residing at Norwich, in which town the company held a depot for the sale of coal, which had since been suppressed. The material facts sufficiently appear in his Honour's judgment.

The evidence in support of the petitions appearing to be insufficient to enable the Court to make a winding-up order, the main point of discussion was, whether the Court would order a meeting of shareholders to be convened, with a view to the winding-up of the company.

Mr. Cotton and *Mr. J. N. Higgins*, for the first petitioner, cited—*In re The Great Northern Copper Mining Company of Australia* (17 W. R. 462); *In re the Suburban Hotel Company* (36 L. J. Ch. 710; L. R. 2 Ch. Ap. 737).

Mr. Bradford and *Mr. Bardswell*, for shareholders, in support of the same petition.

Mr. E. K. Karslake and *Mr. Chitty*, for the second petition.

Mr. Glasse and *Mr. Roberts*, *for* the company, opposed both petitions.

MALINS, V.C.—This company was formed in October, 1864, for the purpose of selling coal to members of the company and others, cheaper than they could obtain it in the market. The prospectus held out two objects: first, the obtaining of cheaper coal; secondly, the making of profits. It was, in fact, a co-operative coal company. The shares were 60,000 in number, at 1*l.* each, on which 15*s.* have been paid, leaving 5*s.* per share, or 15,000*l.*, still liable to be called up. The business done was very large; depots were established in many

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large towns. In the year 1868 coal was sold to the value of 71,000*l.*, of which London alone took 39,000*l.* The proceedings of the company, however, were unfortunate. It is true that dividends had been declared, but the losses up to the 20th of December, 1868, had been continuous, and at that date amounted to 13,000*l.*, being an average loss of 3,500*l.* a year since the commencement.

From the affidavit of the chairman, Mr. Smith, it appears that a searching inquiry was then set on foot, the result of which was the discovery that improvident bargains had been entered into, that there was a staff of useless and expensive servants, and that depots existed beyond the strength of the company. Remedies were applied, the bad bargains were arranged, the servants dismissed, and some of the depots suppressed; among them the Norwich depot, which is the subject of the second petition.

A balance-sheet for December, 1868, and also a prospectus, were issued, with the view of attracting fresh capital, and it was understood, that if the half-yearly balance-sheet to be submitted to the company in June, 1869, shewed no profits, a special meeting of shareholders would then be summoned to consider further measures.

Now, it appears that the first petitioner, Green, presented his petition subsequently to the issue of the balance-sheet of December, 1869. Therein he states that he is a holder of eighty shares, though, in fact, he never had but sixty; and at the time the petition was concocted he only held fifty, and was a defaulter for a call on his shares amounting to 7*l.* 10*s.* Being unable to pay this small sum, he was ejected from the meeting of shareholders, and he is now spending his money in presenting this petition.

Now, the petition alleges the insolvency of the company. Insolvency means that the assets are insufficient to meet the engagements. [His Honour examined the balance-sheet of December, 1868, the accuracy of which was not contested, shewing the available assets to be 14,000*l.*, while the debts amounted only to 8,000*l.*, and continued:] Thus the allegation of insolvency wholly fails; and it cannot be said that the company is unable to pay its debts. But then, in the Companies' Act, 1862, s. 79, clause 5, is the expression, "when the Court is of opinion that it is just and equitable that the company be wound up." Now, in *In re the Suburban Hotel Company*, I thought that, where the company was suffering a continuous loss, the majority of the shareholders ought not to be allowed to go on dragging money out of the pockets of the minority. But the Court of Appeal thought otherwise, and held that the reasons which were to affect the mind of the Court in the application of this fifth clause must be *ejusdem generis* with the reasons for winding-up a company enumerated in the preceding clauses of the section. I have, therefore, all along felt that I could not make an order to wind up this company. The question then was, should I, under section 91. of the same act, order a meeting of the company to be called, to consider the expediency of winding-up? I think it may be advisable; but as the parties do not agree to it, I must decide according to their strict rights. I shall, therefore, lay down the rule that, whenever I am satisfied upon the evidence that there is no case for a compulsory winding-up, I will not hear counsel in support of an order to call a meeting, there being in such cases no ground for the intervention of the Court. *In re the Staverton Cloth Company*,[1] in which I made an order for a meeting, has no application in this case. There the company was actually unable to pay its debts, and agreed to call a meeting; and it was afterwards wound up voluntarily.—[His Honour, after commenting on the circumstances attending the presentation of the first petition, which, he said, gave a very unfavourable aspect to the case, went on to say]—Again, it is to be observed that the petitioner is a shareholder, not a creditor. That makes a great difference in the view that the Court will take of the petition.

As to Copeland's petition, it is based on the fact that the business of the Norwich depot had been discontinued. Now, the Norwich shareholders hold

(1) Not reported.

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two-thirds of the whole number of shares; they could, therefore, have called a meeting, and carried a resolution for the voluntary winding-up, had they been so minded. Why, then, should the Court of Chancery be called upon to put its machinery to work to do what the shareholders might have done for themselves? Moreover, at the time of Copeland's petition, the Norwich business, though closed, had not been discontinued a year, and in any case the petition must have been dismissed, though I admit that, in certain respects, it is distinguishable from the first petition upon the merits. But seeing that the first petition had already been presented and advertised, there was no excuse for a second petition, presented for the same object. Mr. Copeland should have contented himself with coming forward to support the first petition. On neither petition can I give the principal relief prayed, and therefore, according to the rule I have above laid down, I cannot give the subordinate relief. Both petitions must be dismissed with costs.

IN THE HOUSE OF LORDS. Feb. 26, March 1, 2, 4, 1869.

THOMPSON AND ANOTHER *v.* HUDSON.

38 L. J. Ch. 431; L. R. 4 H.L. 1: reversing, [1867] E. R. A. 435; 36 L. J. Ch. 388; L. R. 2 Ch. 255; 15 W. R. 697 (L.C. & L. J.).

Observations referred to, *In re Newman; Ex parte Capper*, [1877] E. R. A.; 46 L. J. Bk. 57; 4 Ch. D. 724; 35 L. T. 718; 25 W. R. 244 (C. A.). See, *Protector Endowment Loan Co.* v. *Grice*, [1880] E. R. A.; 49 L. J. Q.B. 812; 5 Q.B. D. 592; 43 L. T. 564; 28 W. R. 427 (C. A.). Dictum referred to, *Dendy* v. *Evans*, [1910] E. R. A.; 79 L. J. K.B. 121; [1910] 1 K.B. 263; 102 L. T. 4 (C. A.).

Penalty—Agreement to accept Part of Debt in Discharge of the Whole—Condition revising the Original Debt—Waiver.

JUDGMENT. MORTGAGE. PENALTY. WAIVER.—*H. was indebted to T. and S. on several accounts, to ascertain which, three several suits were pending against him. In one suit a final decree was made fixing the liability of H. on one account, and ordering him to pay by a day named. He wished for further time, and it was agreed between him and T. and S. that the terms of the order as to payment should be varied, H. agreeing not to appeal against the final decree already made in the one suit, to admit the amounts claimed in other two suits, and, on a certain day, to pay a fixed sum and to execute a mortgage, for securing the payments in a particular manner, of another sum; and T. and S. agreed thereupon to take a less sum than they claimed, but with the proviso that, if H. made any default, they should be at liberty to recover their whole debt. H. paid the sum fixed, and executed a mortgage for the other sum, but not on the day named, and by consent the terms of the mortgage were varied: but it contained a fresh proviso, that the arrangement then made was, if its terms were broken by H, not to prejudice the existing rights of T. and S. H. again made default, and, when T. and S. claimed their whole debt, he pleaded that the proviso was a condition in the nature of a penalty; that the condition had been waived, and that the penalty could not be enforced in equity:*—Held, *that, as there was money already due upon contract, the proviso in the agreement to take part of it, and that, in certain events, the whole debt should revive, was a stipulation which ought to be enforced, and was not a penalty against which relief should be granted in equity; and the variation in the subsequent consent was not a waiver of the rights existing under the original agreement, as no new claim or right was thereby created.*

This was an appeal from part of a decree of the Court of Chancery, made on appeal from an order of the Master of the Rolls. The first appeal was heard before the Lord Chancellor (Lord Chelmsford) and Lord Justice Turner, when

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their Lordships differed; and, the Lord Chancellor agreeing with the judgment of Lord Romilly, that judgment was confirmed (36 L. J. Ch. 388).

The facts are fully stated in the opinion of the Lord Chancellor, and the case arises out of instruments which are fully set out in the report in the Court below. The following statement will suffice:—

In 1853, Mr. Hudson was indebted to the York and North Midland Railway Company in various amounts upon several accounts, and that company, by Mr. Thompson and Mr. Seymour, the appellants, had instituted against him three several suits in Chancery. In one of these suits the company had obtained a final decree in December, 1853, under which Mr. Hudson was ordered to pay upwards of 54,000*l.*, of which upwards of 40,000*l.* was for principal moneys, the remainder being due for interest, and he was ordered to pay 20,000*l.*, part of the 54,000*l.*, on the first day of Hilary Term and the remainder on the first day of Easter Term then next. In the other two suits the company claimed respectively 4,000*l.* and 14,000*l.*

The property of Mr. Hudson at that time consisted of an estate at Whitby, an estate at Albert Gate, Knightsbridge, an estate known as the Newby Park estate, and sundry dock and other shares in public companies, all of which property was in mortgage to various creditors.

In August, 1853, Mr. Hudson executed a mortgage of all the above estates and shares, to operate as a further charge, subject to the existing incumbrances, to trustees, in trust to raise the aggregate amount of divers unsecured debts of Mr. Hudson, amounting to nearly 144,000*l.*, but not including the debts to the appellants.

In October, 1853, Mr. Hudson contracted to sell to Lord Downe the Newby Park estate for 190,000*l.* In January, 1854, Mr. Hudson being anxious for further time for payment of the 20,000*l.* directed to be paid by the said order, in consideration of the company forbearing to require immediate payment, and also consenting to accept 50,000*l.* upon certain conditions in discharge of the respective sums due to them in the said suits, such 50,000*l.* to be subject moreover to certain deductions, and also consenting to accept the sum of 1,000*l.* in discharge of their costs of suit, Mr. Hudson undertook, on behalf of himself and the trustees of the deed of August, 1853, to execute a mortgage of the Newby Park estate, then contracted to be sold to Lord Downe, and to pay out of the purchase-money 20,000*l.*, part of their claim, and 1,000*l.* for costs; also, when that was done, to execute to them a mortgage by way of first charge on his Whitby estate to secure the payment of the balance of the moneys agreed to be taken by them, namely, 30,000*l.*, less deductions, which left a sum of about 25,000*l.*, which was to be so secured and paid in three annual instalments, the first to be paid on the 6th of April next.

On the 16th of February, 1854, Hudson and his trustees executed a mortgage to the appellants, of the Newby Park estate for the 50,000*l.* and 1,000*l.*, with interest. It should be observed that the date of this mortgage was the day after that which had been stipulated for in the agreement of the 30th of January then last.

In August, 1854, at Mr. Hudson's request, the company consented to vary the terms of their agreement of January, 1854; and it was accordingly agreed between them ("but without prejudice to the right of the said company to recover the whole of the moneys ordered to be paid to them by the said final decree in the secondly thereinbefore-mentioned suit, and the whole of the moneys which the said company were entitled to recover in the firstly and thirdly thereinbefore-mentioned suits, and the consent to final decrees contained in the said agreement of January, 1854, in case the principal and interest to be secured by the indenture of October, 1854, hereinafter stated, or any part or parts thereof, were not duly paid on the respective days by such indenture appointed for payment thereof"): First, that the company should receive out of Lord Downe's purchase-money 33,000*l.*, instead of the 20,000*l.* and 1,000*l.*; secondly, that Mr. Hudson should mortgage to them to

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secure the balance of the 51,000*l.*, less the 33,000*l.* and the other deductions agreed upon, not only the Whitby Estate but also his estate at Albert Gate and his dock shares, such estates and shares to be subject to a prior charge of 75,000*l.*; thirdly, that the balance so secured should be paid by two equal yearly instalments; and lastly, the company agreed that, upon his fulfilling all the terms of that agreement, they would release him from all their claims upon him.

In October, 1854, the sale to Lord Downe was completed, and out of the purchase-money the 33,000*l.* was paid to the appellants; and at the same time the deed of mortgage upon the Whitby estate, the Albert Gate estate and the dock shares was executed. The two instalments by which the balance was to have been paid were not paid on the respective days appointed for payment thereof; but he subsequently paid one of the instalments, with interest thereon. Subsequently, the railway company bought up the several incumbrances, amounting to 75,000*l.*, affecting the properties mortgaged to them by the deed of October, 1864; and in 1863 they filed their bill in the nature of a bill of foreclosure, and, on the inquiry as to what was due to them, the question arose whether the company were bound to accept the remaining instalment with interest thereon in full satisfaction of all their claims under their three suits, or whether they were entitled to recover the whole of the several amounts claimed by them, and as to which it should have been mentioned that Mr. Hudson had assented to decrees for the full amounts.

The question being argued before the Master of the Rolls, his Lordship declared that they were not entitled to any charge beyond the instalment yet due, with interest thereon, and the subsequent incumbrances purchased by them, 75,000*l.* and interest.

On appeal, the cause was heard before the Lord Chancellor (Lord Chelmsford) and Lord Justice Turner, when the order of the Master of the Rolls was in effect affirmed; but Lord Justice Turner dissented. Hence this appeal.

Sir R. Palmer and *Mr. Mellish* (*Mr. G. Williamson* with them), for the appellants.—This is a case in which a creditor agrees to take a portion of his debt in lieu of the whole upon payment on a given day. The proviso that in default of payment on that day the whole debt shall revive is not in the nature of a penalty, for no new thing is thereby imposed on the debtor, but an advantage is promised him upon certain terms. This principle is recognized in *Ex parte Bennett* (2 Atk. 527); and in *Davis* v. *Thomas* (1 Russ. & M. 506); and in *Ford* v. *the Earl of Chesterfield* (19 Beav. 428). The case of *Rose* v. *Rose* (Amb. 331), on which the respondent much relied in the Court below, does not apply, for there the debt was not the original debt of the son, and was a liability of the father which the son undertook.

Mr. Jessel and *Mr. H. M. Jackson*, for the respondent.—The original agreement contained many stipulations, on breach of any one of which the reverter was to take place. This was a penalty, for whatever the agreement between the parties may have been, if the advantage is wholly disproportionate, that is a penalty—*Kemble* v. *Farren* (6 Bing. 141; 3 Mo. & P. 425; 7 L. J. C.P. 258). If the stipulation secures a very great advantage on the happening of a trumpery loss, that is a penalty—*Astley* v. *Weldon* (2 Bos. & P. 346); *Betts* v. *Burch* (Hurls. & N. 506, 509; 28 L. J. Ex. 267); which this case resembles, for here as there there were mixed stipulations, and the proviso was held by Baron Bramwell to be only *in terrorem*. The company waived their rights under the first agreement by taking the mortgage, after the date originally agreed upon. The first agreement was altogether cleared away by the second, which was altogether different and distinct, and by it the company acquired larger advantages, the payment of 33,000*l.* instead of 21,000*l.* out of the purchase-money, and the payment of the balance by two instalments instead of three, and the security on the three properties instead of on the one. The mortgage of those three properties was simply a mortgage for the two sums of

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1,400*l.*, being the two moieties of the balance, and it stipulated that if either of those sums were not paid, as therein provided, interest should commence to run upon those sums. This is wholly inconsistent with the contention of the appellants, namely, that in default of payment of either of those moieties the whole debt should be revived, and become a legal charge upon the estates. The final order made in the one suit, and the decrees consented to in the other two suits, were not merely direct charges upon the estate, but only upon Mr. Hudson personally. When the company accepted a mortgage of his estates for a particular amount, they abandoned their right to the larger claim.

The LORD CHANCELLOR.—In this case the attention of the House has been called to an order of the Master of the Rolls, made upon summons at chambers, with reference to an account which had been directed of what was due to the appellants upon certain securities obtained by them from Mr. Hudson, in respect of three several sums of money, one of which had been ascertained and recovered by the decree of the Court, and the other two were sums due upon accounts in respect of which two other suits were pending at the time the agreements to which I am about to refer were entered into; and the question is, whether, in consequence of those agreements, the appellants are bound to accept a lesser sum than was due to them. The Master of the Rolls has ordered that, in taking the accounts directed by the decree in the causes, the company should be held to have agreed and to have bound themselves to accept the lesser sum; and, on appeal, the noble lord the then Lord Chancellor and the Lord Justice Turner, having differed in their view of the case, the decree of the Master of the Rolls became affirmed, and, in consequence, the present appeal has been presented.

Now, the matter turns entirely, as it seems to me, upon the proper construction of the several agreements which have been entered into between the company and Mr. Hudson. Those agreements were principally, so far as they were committed to writing, an agreement which was entered into in January, 1854, an instrument executed in pursuance of that agreement in February, 1854, and other instruments which were executed consequent on, rather than in pursuance of, that agreement in the month of October, 1854. There was also an intermediate stage, in which it is said that there was an agreement entered into by parol in or about the month of August, 1854, to which I shall presently refer.

The position in which Mr. Hudson and the company found themselves at the date of the agreement in January, 1854, was this: The company had obtained in one of the three suits which had been pending between them and Mr. Hudson a final decree, by which a sum of 54,000*l.* had been found due to them. There were two other suits pending between them and Mr. Hudson, in which decrees had been made for an account, but that account had not been taken or ascertained; that is, the amount to be found due had not been reported by the chief clerk, and there had, therefore, been no final decree in those two causes. Moreover, the decree in which the 54,000*l.* had been found due also directed that 20,000*l.*, part of the 54,000*l.*, should be paid at a given time. When that time arrived Mr. Hudson was not prepared to pay it, and, accordingly, the time having elapsed, and further time which had been conceded having also elapsed, Mr. Hudson was obliged to ask for further indulgence, and this the company agreed to concede to him, but upon terms, and the terms insisted upon by the company were that, as regards the two decrees in the suits in which there had not yet been a final account, those accounts should be at once adjusted; that the amounts claimed to be due by the company should be agreed to by Mr. Hudson, and that he should also engage not to present any appeal in respect either of the decree under which the amount had been ascertained, or in respect of the other two suits in which he now consented that decrees should be made for the sums which were claimed by the company. Besides that, Mr. Hudson was to make certain arrangements with reference to the payment of the money which the company claimed to be due. And if those arrangements were made, the company then entered into an agreement that

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they would accept 51,000*l.* in full satisfaction of their whole demand; but that was to be only on condition of the engagements being fulfilled by which the 51,000*l.* was to be provided for.

Those engagements are contained in this agreement of January, 1854, and they are of this character, that, inasmuch as an arrangement had been made for the sale of a large amount of the property of Mr. Hudson to Lord Downe, which sale was intended then to be completed on the 6th of April, Mr. Hudson was, out of the purchase-money he was to receive from Lord Downe, to pay 20,000*l.*, part of the 51,000*l.*, and to pay also 1,000*l.*, further part of the 51,000*l.*, and which was to be paid in respect of costs, the 30,000*l.*, residue of the 51,000*l.*, being taken in respect of the debt; and besides that, Mr. Hudson was to execute a mortgage by a given day, by which the residue of the debt should be secured to the company, and the mortgage was to be a first mortgage upon the property, which was so to be pledged to them as security for the further payment.

These arrangements having been entered into by the first three conditions of the agreement, the fourth was in these terms: "The entering into this agreement and the acceptance by the plaintiffs of its provisions, in no way to prejudice their existing lien on the estates of the defendant, nor the different proceedings in the suits, nor their right to continue the same until the total amount herein agreed to be accepted shall be wholly discharged." With reference to that provision, it appears to me that the construction which has been put upon it by Lord Justice Turner is the correct one, namely, that this fourth clause keeps on foot the decrees that had been obtained, which decrees, I should have mentioned, had been registered by the company. It keeps on foot the lien which they had established by registering their decrees for the purpose, so far as that fourth clause is concerned, of securing the full and complete performance of this agreement now in question. It appears to be confined to that particular object. It is "in no other way to prejudice their existing lien on the estates of the defendant, nor the different proceedings in the said suits, nor their right to continue the same, until the total amount herein agreed to be accepted shall be wholly discharged."

And then, by the last provision of the agreement, it is thus provided: "In case Lord Downe or the defendants shall not pay and secure the said sums to the plaintiffs in manner aforesaid, or if a good and satisfactory mortgage shall not be executed to the plaintiffs for the said sum of 25,613*l.* 15*s.* and interest, or if the defendants shall fail in performing all or any of the stipulations on his part hereinbefore contained, then the plaintiffs shall be at liberty to recover the said principal sums, interest and costs decreed or claimed to be due to them in the said several suits, and to adopt all such proceedings in the said several suits or otherwise for aiding their recovery of their said several claims as they may be advised." That is a clear and distinct provision that, upon failure of compliance on the part of Mr. Hudson with the previous arrangement, in respect of which the indulgence was to be granted to him, all the rights of the company were to revive to the full amount of the several sums found due or claimed and admitted to be due by the defendant, Mr. Hudson.

This appears to me to be the proper place for observing in what manner the law would be applicable to an agreement of this character. Now, in this respect, I have the great satisfaction of saying that I in no respect differ from my noble and learned friend who, as Lord Chancellor, came to the conclusion that the decree of the Master of the Rolls should be upheld. I in no degree differ from his statement of the law as applicable to cases of this description. Indeed, as his Lordship in giving judgment in the Court below said, as far as regards this particular agreement, had the case rested there, upon the failure of compliance of Mr. Hudson with the stipulations contained in the agreement, the rights of the company would have revived, and they would have been entitled to the full amount of their claim with reference to the sums established to be due in the one suit and agreed and admitted to be due in the other suits. I take the law to be perfectly clear that where there is a debt actually due, and

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in respect of that debt a security is given, be it by way of mortgage or be it by way of stipulation, that in the event of its not being paid at the appointed time a larger sum shall become payable and be paid, in either of those cases equity regards the security that has been given as a mere pledge for the debt, and it will not allow either a forfeiture of the property which is pledged or any augmentation of the debt by way of penalty. For equity would regard the contemplated forfeiture, which might take place at law, of the estate as in the nature of a penal provision against which equity would relieve when the object in view, namely, the securing of the debt, is attained; and it would also regard the stipulation for the payment of a larger sum of money if the debt were not paid at the time stipulated for as a penalty and in the light of a forfeiture, against which equity would relieve.

Now, that being clear on the one hand, it is equally clear on the other that where there is a debt actually due, and at the time when the debt becomes due and is not paid, an agreement is entered into for granting to the debtor further indulgence, and the creditor is willing to allow him certain advantages and deductions from that debt as well as to extend the time for its payment, if adequate and proper security in the mind of the creditor be afforded him as his part of the bargain in respect of which he is to make these concessions, then it is perfectly competent for the creditor to say, "If the payment be not made *modo et forma* as I have stipulated, then forthwith the right to the whole original debt shall revert to me, and it shall be open to me to proceed and to exercise all those powers which I have for compelling payment of the original debt; in other words, I am entitled to be replaced in the position in which I was when this agreement which has been broken was entered into. Therefore, as far as the law of the case is concerned, there can be no difficulty in the matter. The sole difficulty is to ascertain the proper construction to be placed upon the various instruments which we have to consider.

Now, as I have already said, I do not find that any difference of opinion exists between my noble and learned friend and myself as to the construction to be placed upon the first of these instruments, the agreement of January, 1854, namely, that on a breach of any of the engagements entered into by Mr. Hudson in that agreement the creditor should be at liberty to pursue all those remedies which he had for the recovery of the original debt to the full amount. That being so, as regards this first agreement, what next takes place is this: the mortgage which was to have been given upon the property of Mr. Hudson is not given on the day which was originally contemplated, but two days afterwards. It was to have been given on the 14th of February, and it was not given until the 16th of that month; and, as it turned out afterwards, Mr. Hudson not being able to clear off the incumbrances which affected the property so mortgaged, it could not be a first mortgage. On the 16th of February the mortgage was executed, and one of the arguments which has been urged before us by the counsel for the respondents has been that by the waiver of the breach of one of the conditions of the agreement, namely, the waiver of the non-compliance with the condition that the security should be given on the 14th of February by the acceptance of the mortgage on the 16th, the whole of the engagements which Mr. Hudson entered into were waived (for that is really what the contention amounts to), and that it was impossible after that to revive the debt which originally existed, and in respect of which the benefit of all the securities is reserved on failure of compliance with the conditions.

I confess it seems to me to be an extremely strange contest on the part of the respondents when it is attempted by them to say that on the non-performance to the day by Mr. Hudson of one of the numerous engagements into which he had entered, and on an indulgence being given to him to the extent of a few days, or it might be a month (for it is not very material to consider the amount of time which was given), but further time being given to him in respect of the performance of one of these conditions, that thereupon there was a complete waiver of the whole of the other stipulations which he had entered into. For

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it is not like the case of a condition which, being whole, complete and entire, if once waived, is waived once and for all; but it is simply (as Lord Justice Turner put it) that, upon one of the conditions being broken, a concession is made in respect of that one condition, with regard to which the company could never again insist upon their complete right, but as regards all the other conditions of the agreement they remain in full force and validity, and all have to be performed; and the breach having taken place, not only in respect of the few days elapsing, beyond the time when the mortgage was to have been given, but in respect also of the security for the payment of the money, being a second mortgage and not a first mortgage, and in respect also, as it afterwards turned out, of the non-payment, on the 6th of April, of the sums which were to be paid out of the purchase-moneys to be received from Lord Downe, it appears to me plain and clear that, under the agreement of February at least, the rights of the appellants remained exactly in the position in which they would have been if the mortgage in question had been executed on the 14th instead of the 16th of February. I ought also to observe that in the deed of the 16th of February exactly the same provision is contained, namely, that in default, all the rights and remedies of the appellants, the company, should be reserved. I do not think it at all a material point in the case, but I observe, in passing, that it shews, among other evidence to the same effect, the anxious care of the appellants at all events (whether they have succeeded in doing so or not), in every step of the transaction, to preserve their original debt in the event of the terms upon which they granted the indulgence which has been mentioned not being fully complied with.

Then the next transaction is the one which is said to have taken place in August, of which the first trace is found in a statement contained in the bill of the present appellants, and which is as follows: "In the month of August, 1854, George Hudson requested the North-Eastern Railway Company to vary the terms of the agreement of the 30th of January, 1854, and the company consented to such variance; and it was accordingly agreed between them (but without prejudice to the right of the company to recover the whole of the moneys ordered to be paid to them by the final decree in the secondly thereinbefore-mentioned suit, and the whole of the moneys which the company were entitled to recover in the firstly and thirdly thereinbefore-mentioned suits, and the consent to final decrees contained in the agreement of the 30th of January, 1854, in case the principal and interest to be secured by the indenture of the 21st of October, 1854, hereinafter stated, or any part or parts thereof, were not duly paid on the respective days by such indenture appointed for payment thereof), first, that the company should receive the sum of 33,000*l.* instead of the sums of 20,000*l.* and 1,000*l.* out of the said Viscount Downe's purchase-money," and so on. Then the statement proceeds to give the various terms of the engagement which was contemplated in August, and which was afterwards perfected.

Now, assuming this to be the agreement which was to be perfected on the next day, the 31st of August or the beginning of September, or any time that may have been thought right before the month of October, the question is, what is the effect of this statement? And here it is that I cannot concur in the view taken by his Lordship in the Court below as to the effect of this statement.

I quite agree that the reservation contained in the expression that a new arrangement would be entered into without prejudice, cannot confer any new right on the parties who save to themselves an existing right by those words, but not to enter into any engagement or stipulation with regard to a new right. But it appears to me that, in reading this very long parenthesis, we must read it as if in truth the words which occur at the end of the parenthesis, and which tend to confuse the meaning, namely, the words "in case the principal and interest to be secured by the indenture of the 21st of October, 1854, hereinafter stated, or any part or parts thereof, were not duly paid on the respective days by such indenture appointed for payment thereof," had occurred at the beginning instead of at the end of the parenthesis. I will explain what I mean

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by making that transfer. I take it the true intention of the parties here was, not to create a new right, but to say, We will grant you an extended time, but that extended time which we intend to grant you shall not prejudice our still holding on to our right in respect of the original decrees in case of the new agreement being broken as the former one already has been. We will, therefore, do this, we will give you the further time which you require; but in doing so we say that it shall be without prejudice to our rights which now exist. We have those rights now; you have broken the first agreement; the time has passed; the money has not been paid by Lord Downe, and you have not given us a first mortgage. In all respects you are in default. We have the right, and that right we intend to insist upon, and this new arrangement which we are about to make shall be without prejudice to that right, and the new arrangement shall be this: the extended time which we mean to give you shall be provided for by the arrangements which we shall hereafter make; but you shall not, when that time has elapsed, be in a better position than that in which you are at this present moment. But that which has confused the arrangement is this: they commence by saying without prejudice to our right to recover upon non-payment at a date which has not yet arrived; therefore they cannot be speaking of an existing right. They seem towards the end of the sentence to be speaking of some new right which is to accrue to them on a new default. I apprehend that that is not really or in any way the meaning of the sentence. The meaning is to be construed exactly as if these words had come at the first part of it instead of at the last, which would make it run in this way: that in case the principal and interest to be secured by what we are about to do, and the instrument we are about to execute be not paid, still there shall be no prejudice to our rights which we have at the present moment. And the language used is perfectly consistent with that meaning being put upon it. Even if we take the sentence as it stands, and read the words as they are at present placed, it means the same thing, but expresses the meaning less clearly than it would have done if those latter words had been placed in the previous part of the sentence. If you read the words either in the one place or the other the meaning comes out satisfactorily, but at the same time I think it would have been more clearly brought out and made more intelligible if those words had been put at the beginning instead of at the close of the sentence, and they had said, We are about to enter into new engagements and stipulations; but in case those engagements and stipulations be broken, then again we reserve all our old rights which now exist; those rights still belong to us; we have never let go our hold and grasp upon those rights, and we never intend to do so until you have faithfully performed the contract which you are entering into with us. We previously entered into one engagement with you, but you have not been able to keep it, therefore our rights are now the same as if that engagement had never been entered into; we will now enter into a new engagement: we will allow a certain variation of the terms of the agreement which we have already entered into. We are willing to do that, and that variation shall take place in the manner we are about to arrange; but, remember, if that engagement also be broken, then again will revive all those rights which subsisted in us at the date of the agreement.

I think, in that point of view, it is quite immaterial whether that agreement was entered into in August or at a later period. If it was entered into in August it was, at all events, to be completed by an agreement which was afterwards to be reduced into writing. That was contemplated by everybody; and all that the pleader is stating here is that an agreement was entered into, which was to be reduced into writing afterwards, to express more clearly the intention of the parties, by which further arrangements were made and certain further indulgence was granted; but with an express proviso that that further indulgence should not prejudice any of the rights existing in the company at the time of their entering into the further agreement in August, supposing that the terms which were to be embodied in that further agreement were again departed from, as

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Mr. Hudson had already departed from his previous engagement. Now, when we get to the recital in the deed of October itself, we have not exactly the same sort of clumsiness of expression, and although there is there also a very long parenthesis, yet the matter is somewhat more precisely and clearly stated than it is by the pleader in the passage which I have read from the bill. In the deed of the 21st of October, 1854, the recitals are these: "And whereas the hereinbefore-recited sale to the said Lord Viscount Downe, of the said Newby Park Estate, and the chattels and effects thereon, has not yet been completed" (which ought to have been completed in April), "and whereas, shortly previous to the execution of these presents, George Hudson applied to and requested the North-Eastern Railway Company to vary the terms of the agreement of the 30th day of January last, in order to enable him, out of the purchase-money payable by the Lord Viscount Downe, to pay and discharge the claims of the several persons (other than the North-Eastern Railway Company) having charges, liens or claims upon the estate and premises contracted to be sold to the Lord Viscount Downe, and upon the hereditaments and premises at Whitby," whereof a first mortgage had been agreed to be granted by the articles of the 30th of January, 1854. Then it says, "And the North-Eastern Railway Company upon such application and request thereupon consented that the terms of arrangement and compromise which had been previously agreed upon, and which are contained in the hereinbefore-recited articles of agreement of the 30th day of January, 1854, should (but, nevertheless, without prejudice to the right of the company to recover the whole of the moneys ordered to be paid to them by the final decree in the secondly hereinbefore-mentioned suit, and the whole of the moneys which the company are entitled to recover in the firstly and thirdly hereinbefore-mentioned suits, and the consent to final decrees therein contained in the hereinbefore-recited agreement of the 30th of January last, in case the principal sum and interest hereinafter secured, or any part or parts thereof, are not duly paid on the respective days hereinafter appointed for payment thereof) be varied in the following particulars."

Now there the agreement is stated to have been shortly before the execution of this indenture. One would infer, certainly as the more natural inference from such a recital, contained in an instrument of that kind, that the agreement was that which was to be embodied in the indenture, and that the indenture was merely to be the expression of that which had been previously arranged between the parties immediately anterior to the execution of the instrument. You look at the indenture as that which expounds the agreement which was come to in August by giving full and complete expression to that which the pleader imperfectly expressed in the recital as the intention of the parties in August, and then we find that what is agreed to in that long parenthesis is this: We hold on to our claim; we are not creating any new claim, or any new right, which we had not before, but we hold on to our claim in case this agreement itself be broken. We do not reserve to ourselves a new right by means of which, upon the breach of this agreement, there shall arise to us a claim or demand which was gone and past at the time of entering into this arrangement of October, but we simply do that which we expressed in the mortgage of February, and that which we have frequently stated as our intention. That appears to me to be the substance of it, though I confess it is not very happily arranged as regards the language in which it is expressed. They say, We will do what we can to accommodate you; we will make arrangements with you with regard to the payment of this money; but what we do insist upon is that we always will retain our original hold upon our original debt, as the right which we must revert to in case all these attempted agreements prove abortive in consequence of your being unable to fulfil their conditions. I think there is nothing else of any materiality stated in that indenture beyond this: the new arrangements are stated there, but I really need not enter into them. It is unnecessary to enter into the details of those arrangements, which have been broken, beyond stating that Mr. Hudson was to pay a larger sum of money down than the 21,000*l.*,

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which was originally stipulated for out of Lord Downe's purchase-money. It was now to be 33,000*l.* instead of 21,000*l.*, and the mortgage to be given would be comparatively reduced in amount, and that mortgage was no longer to be a first mortgage, but the company had agreed to waive their right to its being a first mortgage and to allow certain other charges of a considerable amount to be created with the view of clearing off certain incumbrances and judgments. Then, in the mortgage-deed, there was contained a power of sale to be exercised in default of the performance of the covenants for payment of Mr. Hudson, which was in the usual form. The payment was to be made by instalments, at dates specified, one at a given date, and the other half a year afterwards, and in default of payment there is a power of sale which arises under the mortgage. I mention this because it was a good deal relied upon by the counsel for the respondents, that this power of sale was a power of sale arising upon default, and the trusts of the moneys arising from the sale being to pay, first, the lesser sum to the company which it was to be the privilege of Mr. Hudson to pay in the event of his complying with all the terms of the agreement, and then, after paying that lesser sum, to hand over the surplus to some persons who came next as incumbrancers, and then finally to hand over the ultimate surplus to Mr. Hudson himself, it was contended that, being so, there could not be any intention of recovering the whole of the debt in the event of default being made, because, said the counsel for the respondents, you find that default is made, you find that sale is made, and you find that provision is made, not for the larger sum, but you find provision is made for the smaller sum, and after making payment of the smaller sum, you find that the surplus of that which is produced from the sale is to be handed over to Mr. Hudson. A similar remark was made upon the recitals in the agreement, namely, that the obligation there was upon Lord Downe's payment being made and upon the mortgage being made. Upon those two conditions being complied with, the estate of Mr. Hudson was to be released, and it was only upon full and complete payment on the day of the sum covenanted to be paid by Mr. Hudson that Mr. Hudson personally was to be released upon compliance with the other two provisions.

But what must govern the rights of the parties is this: in the ultimate provision contained in the indenture, after reciting what had been recited as having been agreed upon as stated by the pleader in August in the agreement, a short time anterior to the deed, we find this provision: "Provided always, and it is hereby agreed and declared, that these presents shall not, nor shall anything herein, or in the said hereinbefore-recited agreement of the 30th day of January last, or the said recited mortgage security made and executed in pursuance thereof, or in the said hereinbefore-recited subsequent arrangements and agreements contained, prejudice or affect the rights and claims of the said North-Eastern Railway Company under the hereinbefore-recited decrees or orders respectively made in the three several hereinbefore-mentioned suits, or under any or either of such decrees or orders, or the rights and remedies of the said North-Eastern Railway Company against the said George Hudson, his heirs, executors, administrators or assigns, under or by virtue of such decrees or orders, or any or either of them, or the rights of the said North-Eastern Railway Company, under or by virtue of the said recited agreement of the 30th day of January last, or otherwise, to call upon the said George Hudson to consent to or otherwise obtain a final decree in each of the said suits hereinbefore firstly and thirdly mentioned, for the several sums of money in the said recited agreement of the 30th day of January last mentioned in that behalf, or any other sum or sums of money which may be recoverable in the said last-mentioned suits or either of them, or to recover the whole of such several sums of money, and the sums of money, interests and costs which, by the hereinbefore-recited final decree made in the said secondly hereinbefore-mentioned suit, were declared due or ordered to be paid to the said York and North Midland Railway Company, or prejudice or interfere with any lien or charge which the said North-Eastern Railway shall or may have upon or against the hereditaments and premises

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hereinbefore respectively expressed to be granted, appointed, demised and assigned; or upon any other real or personal estate which now, or at any time hereafter, may belong to the said George Hudson, his heirs, executors, administrators or assigns, or in which he or they may have any beneficial interest, it being the express understanding of all parties to these presents that the security intended to be hereby given shall be in addition to, and not in any manner in substitution for, the charge or lien which the said North-Eastern Railway Company may have upon the said hereditaments and premises comprised in these presents, under or by virtue of the said decrees or orders, or any or either of them, and that the said George Hudson, his heirs, executors, administrators or assigns, shall not be at liberty to dispute the right of the said North-Eastern Railway Company to recover the whole of the principal moneys, interest and costs, which by the said final decree in the said secondly hereinbefore-mentioned suit are awarded to the said York and North Midland Railway Company, and the whole of the several principal moneys, interest and costs mentioned in the said agreement of the 30th day of January last to be recoverable in the said firstly and thirdly hereinbefore-mentioned suits, except on or until full payment by the said George Hudson, his executors, administrators and assigns, on or before, but not after, the several days hereinbefore appointed for payment thereof, of the principal sum and interest hereby secured."

Then the whole arrangement runs thus: As far as the mortgage is concerned, it is prepared in the ordinary form in which a mortgage would be prepared. It is prepared for securing a certain sum of money, which is the lesser sum, and it has the usual provisions which are contained in every mortgage-deed, and among them a power of sale. It is provided that, upon default in the payment of the mortgage-debt and interest there mentioned, there shall be sale; and then, after sale, there shall be payment of the money to the mortgagee, and afterwards to the persons claiming under the mortgagor when the moneys secured under the mortgage are paid. That is not in any way inconsistent with the provision in the deed, which is this. If, after all, this mortgage being made and these moneys being secured, the whole debt be not satisfactorily paid and everything arranged under this agreement just as was provided before under the agreement of February, then we are to have full rights and powers of recovering the money in question, except (for that is the mode in which the proviso is expressed here) on the payment of the full moneys due on or before, but not after, the final days appointed for payment. Here they have done exactly what it seems to me was done by the pleader in August.

It does not appear to me, therefore, that, under those words, "without prejudice, it was intended that any new right whatever should be created; but it was simply intended to preserve the original right. The right originally existed; but the time for reserving that original right was protracted, and some further time was conceded to the debtor by the arrangement which was entered into.

This last instrument concludes the whole series. It appears to me that neither here nor in any of the previous arrangements was there for a single moment any abandonment of the right. What they did was this. They made the several arrangements which have been referred to for the purpose of meeting Mr. Hudson's necessities. Whether, as has been observed in the Court below, it was a hard bargain, might or might not be the case, but that is not a question which it is necessary for us at all to enter into, though I confess I am not myself able to see any special hardness in the bargain, regard being had to the magnitude of the stake and the difficulties in which Mr. Hudson's property was placed, and the embarrassments and incumbrances which surrounded his property; but whether it was a hard bargain or not, they made their bargain with him, which he on his part entered into, that under certain conditions he should be entitled to say that a less sum should be received by the company, the creditors, than would otherwise be due to them, but he still remained liable for the original debt, if he was not able to

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complete the arrangement by the payment of that less sum. There is no penalty, no forfeiture, nothing of the kind, but simply a provision that, upon the terms upon which the indulgence is granted having failed, the original rights shall be preserved, and that the creditors shall be entitled to avail themselves of those rights.

I do not enter into some of the other arguments which have been adduced before us, on the part of the respondent's counsel, by whom the case was exceedingly ably argued, and I may say that we are especially indebted to Mr. Jackson for his argument, which put the case very plainly before us from his point of view. But it appeared to me that the whole of his argument turned, in truth, upon this, that there was not contained in the original agreement any right to insist upon forfeiture in the event of non-payment by the day which was to be reserved by the mortgage to be executed in February; that, after the execution of the agreement in January and the execution of that mortgage two days later than the time specified in the agreement of January, there was not any longer a right existing in the company, but that that right must be considered to have ceased at the time of the engagement being entered into in August; and that expression, "without prejudice," would not revive any right if that right had determined. I should have been quite willing to follow his argument if I found that the conclusion to be derived from the instruments themselves warranted me in doing so; but I cannot find anything to warrant me in coming to the conclusion that at any period whatever the right claimed by and vested in the company of recovering their original debt had been waived or abandoned. And, under those circumstances, it appears to me that I am bound to suggest to your Lordships, that the original order of the Master of the Rolls made in this cause should be reversed.

Lord Westbury.—I am sure your Lordships will agree with me that the appellants have been very unfortunate in this litigation. In answer to the questions which they were required to answer in the chambers of the Master of the Rolls, they thought that it was very rational and very right to say, if a creditor tells his debtor, provided you pay me half the debt, or two-thirds of the debt, on an appointed day, I will release you from the rest, and will accept the money so paid in discharge of the whole debt, but if you do not make payment of it on that day then the whole debt shall remain due to me, and I shall be at liberty to recover it. There would be no doubt at all that the proposition was both reasonable and accordant with common sense. But the principle has not been accepted by the two tribunals before which the case has been heard.

The Master of the Rolls appears to have thought that the residue of the debt in the case I have put would be converted into a penalty, and that the penalty could not be enforced. It is impossible to hold that money due by contract can be converted into a penalty. A penalty is a punishment, an infliction, for not doing something. But if a man claims to be entitled to receive, at a future time, on the default of his debtor, that which he is now entitled to receive, it is impossible to understand how that can be regarded as a penalty. I have not, therefore, the least hesitation in stating that, if the Master of the Rolls is rightly reported, there was a strange confusion at the moment prevailing in his Lordship's mind, and that it could not have been present to him at the moment when he delivered his judgment that the rest of the debt still remained due by contract, and that what was due by contract could not be a penalty.

Now, the proposition of the Master of the Rolls was entirely negatived by my noble and learned friend near me, Lord Chelmsford, in his judgment, because he stated most distinctly (though it would hardly require authority) that, in the case put by the Master of the Rolls, the creditor would be remitted to his original claim. My noble and learned friend, however, appears to have been induced by what he heard in argument to suppose that there had been an antecedent agreement completed and concluded, and standing independently by itself prior to the deed of October, 1854, and that by that antecedent agree-

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ment the creditor had finally engaged to take a part in discharge of the whole. Then, it is plain enough that, if the rest of the debt has been remitted unconditionally, the rest of the debt so unconditionally remitted ceases. If it be revived it becomes a subject in respect of which there is no longer any contract in existence, and which, therefore, may properly be regarded as a penalty.

But when we come to examine the facts in this case it is abundantly clear, notwithstanding what was stated in the argument, that there never was any concluded agreement between these two parties on the subject of this debt, except the agreement of January, 1854, and the agreement which is contained in and carried into effect by the instrument of October, 1854. But it is quite immaterial to deal with the argument which has been addressed to your Lordships with regard to the agreement of January, 1854, because it is abundantly clear to all who will attend to the deed of October, 1854, that both the contracting parties at the date of that deed admitted that the original debt still remained due, and the whole deed is framed upon that basis and understanding. It is idle to suppose that there was any intermediate agreement in August, because the deed plainly treats the agreement or treaty of August as the thing that was to be carried into effect by the deed of October, 1854. And accordingly, in the recital contained in the deed of October, 1854, it is stated that Mr. Hudson had applied to the company to vary the terms of the agreement of the 30th of January. And then it goes on to state that they have agreed to vary those terms, and to make a new agreement between the parties, the company receiving the minor sum of money, but with these words, that in case the principal sum and interest hereinafter secured, or any part or parts thereof, are not duly paid on the respective days hereinafter appointed (that is, appointed in this deed) for the payment thereof, the entire debt is to be paid. The whole debt is by this recital plainly treated as an existing debt due to the company; and the agreement is to take the mortgage and part of the debt as a satisfaction of the entire debt; but, on the terms which I have read, provided that, if the principal sum and interest hereinafter secured are not duly paid on the day hereinafter appointed for the payment thereof, the entire debt is to be paid. Now, that being clearly the agreement between the parties, we are told distinctly that the debt is due, and the whole of the securities are living and available for that debt, the proposition is to alter the terms of the antecedent agreement, to substitute for them, or for that portion of them which was not carried into effect (for part had been done), the terms which are here stated, namely, the acceptance of the lesser sum and the security for that lesser sum, subject to the proviso that it shall be paid on the days hereinafter appointed, otherwise the entire sum is to be paid.

Now, upon this there was a very ingenious argument addressed by the counsel for the respondent. He put the law thus: "If," he said, "the larger debt is to arise on the breach of several stipulations,—and one of those stipulations may be the default of the debtor in a minor and immaterial point of performance,—then the entire debt arising upon such trifling default must assume in the eye of the law the character of a penalty, and not of a debt." And in support of that proposition the well-known case of *Kemble* v. *Farren* was cited. Now, the case of *Kemble* v. *Farren* was an attempt on the part of certain contracting parties to escape from the well-known law on the subject of penalty by giving to a penal sum by contract the character and shape of liquidated damages; and the whole question was, whether that agreement to make the damages a sum of money ascertained by the agreement of the parties could or could not be effected? The answer that was given by the Court of Common Pleas was, Why, if the liquidated damages be a large sum, and the title to that sum is to arise upon some very trifling consideration, then it follows plainly that the damages never could have been the proper sum. It was an oppressive agreement; the damages never could have been the proper sum, which could have been ascertained upon a default, and probably would have been measured by 2*s.* 6*d.*, in the shape of proper damages, and therefore the damages should still be regarded as in the

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nature of a penalty. But the penalty and the liquidated damages there were not an antecedent debt due upon the contract for valuable consideration, but were a conventional sum put in by the parties plainly for the purpose of securing the performance of the agreement contained in the engagement between them. There is, therefore, nothing at all corresponding to a case where a creditor says to his debtor: "If you pay me punctually on a given day a smaller sum of money I will take it in discharge of the whole, but if you fail in doing so my title to the original debt shall in no respect be prejudiced by this agreement."

Another very ingenious argument was urged on your Lordships' attention by the junior counsel for the respondents, who very properly admitted, what is the plain truth of the case, that the whole of the relation between the respondents and the appellants is to be collected in law from the final instrument, namely, this deed of October, 1854, and that all that previously existed, all that was treated of or agreed on, was merged in the stipulations contained in that final agreement. But he endeavoured to shew that time was not of the essence of the contract contained in that agreement. Now, if it be possible, as it plainly is possible, to make time of the essence of a contract touching the performance of a thing agreed upon on the payment of money, I think it is impossible to imagine anything more distinctly and lucidly stipulated for than that time should be of the essence of the performance of this contract touching the payment of the smaller sum of money. Indeed, as I stated in the course of the argument, the conveyancer seems to have ransacked the English language for clear expressions to denote that the parties placed themselves in this relation: "Give me the money on the day named, and I give you a release; but if you do not give me the money on the day named then our antecedent relations as creditor and debtor shall remain unaffected." And, therefore, when he says the money shall be paid on that day he is not content with that, but he says, "Pay it on, and not after, that date." It is quite plain, therefore, that if language could ever make time of the essence of a contract we have that language in this instrument we have to construe.

I think it is therefore abundantly clear what the answer is that ought to have been given to the question put at chambers, whether the accounts ought to be taken on the footing that the company were bound to accept this sum? The answer to it must be in the declaration of this House embodied in its order: Declare that the appellants, the North-Eastern Railway Company, are not bound to accept these sums in full satisfaction of all their claims under the decrees. And I submit to your Lordships that this should be the declaration in the order that is now to proceed from your Lordships; and I trust that the appellants, and both parties in fact, having found that their continued litigation is not merely suffering to one but also to the other party, will be more successful in conducting what they have still to do in respect of these matters to a final termination.

LORD COLONSAY.—I entirely concur in the opinions that have been delivered. I think that this case is clear, even if we should confine our attention to the deed of the 21st of October. It appears to me that the judgment of the Master of the Rolls has proceeded on the principle that, according to the established or generally recognized form of mortgage, where the arrangement of the words is such as appears in this deed, it is necessarily to be regarded as a matter of penalty, and not as a stipulation that can be enforced; and I think his Lordship, in that view, declined to look at any of the previous history of the case, even as collected in the deed of the 21st of October, 1854. But when we look to the narrative of that deed, which ought, according to the ordinary rules of construction, to be looked into as influencing the parties, I think it is very clear that this transaction originated out of a position of matters which involved a liability on the part of Mr. Hudson, and the right of creditors on the part of the company, established by the decree which gave them certain rights against his property; and the whole course of proceeding afterwards was not with a view merely of compelling the payment of the smaller debt, but with the view

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of releasing Mr. Hudson from the payment of the larger debt under certain conditions. Then, if that be so, I think we must read the whole of this deed, confirmed, as I think it is, by a reference to the antecedent deeds, as a matter of arrangement, with the view of giving Mr. Hudson relief if he does certain things, but not otherwise. I see no ground on which the judgment complained of could be sustained, unless it be on the ground which appears to have been taken by my noble and learned friend opposite (Lord Chelmsford) in the Court in which the order appealed from was made, namely, that in the course of these proceedings and arrangement between the parties something was done which put an end to the original agreement of January, and placed matters in this position, that Mr. Hudson being now wholly relieved from the previous debt, comes under a new class of obligations with reference to the payment of the smaller debt. And that, again, depends upon an arrangement said to have been entered into in the month of August. We have no date of that deed; but it is said that it is necessary to produce a deed because we have the admission of the parties on the pleadings that such an agreement was entered into. We have a brief statement of it in the pleadings, but we have it, also, where it is important to look for it, in the deed of October. And what is it? No doubt, it is an agreement said to have been entered into—a contract by which certain conditions were arranged between the parties, not now alleged to have been in any previous deed, but which are set forth in this deed of October, to the full effect of which the party founding on the alleged agreement of August is entitled to claim, for he is not entitled to claim on that agreement of August as containing anything which is not set forth in that deed of October. Now, I think when you read that recital it is plain, on the face of it, that there was a clause in that arrangement of August which was substantially a reservation or contrivance of that which was in the arrangement of January, and which was again repeated more fully at the conclusion of the deed of October. I, therefore, find no evidence to support the proposition that the original agreement of January was infringed upon or varied, except to the effect mentioned in the deed of October. That being so, I think we are brought back to the original proposition of the parties; and the question comes to be whether, when a stipulation is made by a creditor that he will accept a smaller sum, and certain securities for that smaller sum, provided the payment is made within a definite time, but that if the payment is not made within that definite time, the right which he possesses, and which is treated throughout the deed of October as a present existing right, shall be open to be enforced by him, that is to be regarded as a penalty. Now, I cannot understand that that is to be regarded as a penalty. It is a reservation of an existing right. It is not the emergence of a right that never had any existence at all except on the violation of the agreement which was made. It is merely the reservation of what is the just and honest right of the party, which he was willing to waive to a certain extent, provided his debtor would do certain things; but if the debtor fails in doing those things, then that right which belongs to the creditor shall continue to belong to him, and he may enforce it. That being the view I take of the case, I am under the necessity of coming to the conclusion that the judgment appealed against ought to be reversed.

I have had some difficulty in going through these voluminous deeds and pleadings, but I found in the last deed of October, voluminous as it is, the whole of the materials to which it is necessary to refer in order to arrive at a just conclusion as to what the decision ought to be in this case. I was a good deal moved at the last sitting, especially by the argument that was submitted to us by the concluding counsel for the respondents. He endeavoured to shew us that, upon the true construction of all the agreements between the parties, it never was intended that this right should be enforced, and particularly that, under the clause in the mortgage, it was plain that the matter was to be dealt with differently when the money was recovered under power of sale. But that is an ordinary mortgage clause, and, at all events, it is quite consistent with

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the reservation in the conclusion of the deed that the full rights of the parties shall be reserved. Upon the whole, I am of opinion that the judgment of the Court below ought to be reversed.

Orders appealed from discharged, with a declaration that, in taking the accounts, the North-Eastern Railway Company are not bound to accept the sums of 14,566*l.* 7*s.* 6*d.* and 570*l.*, with interest thereon, in full satisfaction of their claims under the decrees in the bill mentioned, and with directions that the costs of the appellants in this appeal, and in the Court of the Master of the Rolls, and in the Court of Appeal in Chancery, be added to their securities.

LORD ROMILLY, M.R., Dec. 12, 1869.

In re METTÉ'S ESTATE.

38 L. J. Ch. 445; L. R. 7 Eq. 72.

Approved, *In re Wilkes' Estate*, [1881] E. R. A.; 50 L. J. Ch. 199; 16 Ch. D. 597 (V.C.); *Cottrell* v. *Cottrell*, [1885] E. R. A.; 54 L. J. Ch. 417; 28 Ch. D. 628; 52 L. T. 486; 33 W. R. 361 (Ch. D.).

Lands Clauses Consolidation Act, 1845, *s.* 74.

COMPULSORY PURCHASE.—*Where land in trust is let on lease at rack-rent, and taken under the Lands Clauses Consolidation Act, the tenant for life is entitled during the remainder of the term to the amount of rent, and not the income derived from the purchase-money.*

In 1859, a house in Kensington, held in trust under the will of E. M. Metté, was demised for twenty-one years at the rent of 84*l.* a year. The trustees, the tenant for life and persons absolutely entitled in remainder joined in the lease. The house was, at the time, out of repair.

In 1868 the house was taken by the Metropolitan Board of Works under the Lands Clauses Consolidation Act, and the purchase-money paid into Court.

This was a petition by the tenant for life, asking that the whole of the income of the purchase-money, which amounted to considerably more than 84*l.* a year, might be paid to her.

Mr. A. Smith, for the petitioner, said that she was entitled to the whole income derived from the property. Section 74. was only intended to apply to cases where a fine had been taken, or where there was a beneficial holding at the time of the creation of the trust, as in *In re Wootton's Estate* (35 L. J. Ch. 305; L. R. 1 Eq. 589); as had really been held in the earlier case, *In re the Steward's Estate* (1 Drew. 636), the increased value of the house was in great part due to its being taken compulsorily, and the tenant for life was entitled to the benefit of such increase.

Mr. Baggallay and *Mr. Chitty*, for the remaindermen, were not called upon.

Mr. Casson, for the Board of Works.

The MASTER OF THE ROLLS said the matter was governed both by the words of the act and by authority. No distinction could be made between a lease granted in consideration of a premium and one which had, though originally granted as rack-rent, become a beneficial lease, as was the case here. The value of the house consisted of two parts, 84*l.* a year for the remainder of the term and the value of the reversion, and that was just what the 74th section of the Lands Clauses Consolidation Act dealt with. That an increased value was given to the land from the fact that it was taken compulsorily might be a reason morally that the remaindermen should allow something to the tenant for life; but, for legal purposes, the true value must be taken to have been assessed. The question was governed by *In re Wootton's Estate*.

An order was made for the petitioner to be paid 84*l.* a year until further order, the surplus income to be accumulated.

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LORD ROMILLY, M.R., Jan. 11, 12, 15, 1869.

SWENEY v. SMITH.

38 L. J. Ch. 446; L. R. 7 Eq. 324.

Tender under Protest—Pleading—Shares—Void Forfeiture.

COMPANY. TENDER.—*A tender accompanied by a protest is valid. Where the directors of a company have acted on a void forfeiture of shares, the holder is entitled to a declaration that the forfeiture is void, and to have the same cancelled. He may sue on behalf of himself and all other shareholders to obtain that relief.*

One of the objects of this suit was to procure the cancellation of an alleged forfeiture of shares for the non-payment of calls.

The plaintiff sued on behalf of himself and all other the shareholders of Spence's Patent Cement Company except the directors, who were made defendants.

The validity of the forfeiture depended on whether the plaintiff had made a proper tender of payment of calls. He had sent a cheque for the amount of calls due from him to the secretary of the company, with a letter which contained the following words: "I request that you will enter this my protest in the records of the company, and further, that this money be held in trust by the directors, each of whom I shall hold responsible for repayment of the same until the question of the vendor's patent has been settled." The cheque was returned by the secretary, and the company purported to forfeit the shares.

Mr. Southgate and *Mr. Mackeson*, for the plaintiff, on the question of the validity of the forfeiture, said, the tender was not affected by the accompanying protest, and therefore the forfeiture was void—*Scott* v. *the Uxbridge and Ricksmanworth Railway Company* (35 L. J. C.P. 293; L. R. 1 C.P. 596).

Mr. De Gex and *Mr. Bowring*, *Mr. Roxburgh* and *Mr. Rudall*, *Mr. Jessel* and *Mr. Springall Thompson*, *Mr. Freeling* and *Sir R. Baggallay* and *Mr. Horton Smith*, for the defendants, on this point contended that the tender was not a tender accompanied by a simple protest, but a tender on condition, and valueless —*Hough* v. *May* (4 Ad. & E. 954; 5 L. J. K.B. 186); *The Marquis of Hastings* v. *Thorley* (8 Car. & P. 573); *Bevans* v. *Rees* (5 Mee. & W. 306; 8 L. J. Ex. 263). The plaintiff could not sue on behalf of the other shareholders in respect of dealings between himself and the company, he being in the position of a stranger to the company in respect of dealings relating to his shares.

Mr. Mackeson replied.—The plaintiff, being entitled to the relief he asked in respect of the forfeiture, would not be deprived of his remedy by the insertion of the words "on behalf of all other shareholders"; but the other shareholders were really interested in having their affairs properly conducted.

The MASTER OF THE ROLLS (*Jan.* 15) said—I think the forfeiture is bad. The tender of payment was good. The letter was a mere protest. The cheque was sent expressly in payment of the call. The trust mentioned in the letter amounts to nothing; the directors are necessarily trustees for some one. The plaintiff does not say to the directors, You must separate this money to abide the result of this particular question, and you must not apply it for any other purpose; on the contrary, he sent it in payment of the call. The cases cited are totally different; for example, where a sum was tendered as rent, the person who took it must have admitted that the sum was the correct amount of rent. So, where a cheque was drawn for the balance of an account. And if the plaintiff had required the directors to set apart the money to indemnify him against the result of this suit, the tender would have been bad; it would not have been in payment of the call.

It is said that the plaintiff sues on behalf of himself and all other share-

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holders, and the forfeiture is a matter personal to himself. I think not. I think it is for the interest of all the shareholders that the shares should not be improperly forfeited.

It was declared that the forfeiture was void, and the same was ordered to be cancelled.

JAMES, V.C., Feb. 27, 1869.

HILL *v.* HIBBIT.

38 L. J. Ch. 447; L. R. 7 Eq. 421.

Practice—Evidence de bene esse—Administration Suit—Second Suit by a Claimant for the Purpose of taking Evidence de bene esse—Right to read such Evidence in the First Suit.

EVIDENCE.—*After decree had been made in an administration suit directing the usual inquiries as to the heirs and next-of-kin of the intestate, but before such decree had been drawn up, a claimant, as one of the intestate's co-heirs and next-of-kin, who was not a party to the suit, instituted a second suit for the administration of the same intestate's estate, with the object of having the evidence of an old and infirm witness taken de bene esse in the second suit, and used to support her claim under the decree in the first suit. After the witness had been examined and also cross-examined on behalf of the parties to the first suit before one of the examiners, an application by the claimant, that the evidence thus taken in the second suit might be read in the first suit, was refused.*

Adjourned summons taken out by Sarah Angus Hay, that the depositions of James Hay, taken before one of the examiners of the Court in the suit of *Hay* v. *Hill*, might be read as evidence on the part of the applicant, and treated as if taken in the above suit of *Hill* v. *Hibbit*.

The last-mentioned suit, which was for the administration of the real and personal estate of John Wight Wight, deceased intestate, had been instituted, March 13th, 1868, principally with the object of discovering who were the heirs and next-of-kin of the intestate.

On the 30th of July, 1868, an administration decree directing the usual accounts and inquiries was made, but some delay occurred in drawing up this decree, and before it had been drawn up, on the 12th of November, 1868, the claimant, S. A. Hay, who was not a party to the suit of *Hill* v. *Hibbit*, filed her bill against the plaintiff and the defendant to the first suit, claiming to be one of the co-heirs and next-of-kin of the intestate as the daughter of one of his deceased sisters, and praying administration of his estate in the same terms as the plaintiff in the first suit.

Miss Hay in her bill alleged that in order to prove her claim the evidence of her father James Hay was necessary; that James Hay was upwards of eighty years of age, and it was important to her that his evidence should be taken *de bene esse*, and it was not safe for her to wait till the inquiries in the first suit as to the persons entitled to the real and personal estate of the intestate were prosecuted. Towards the end of November the decree in *Hill* v. *Hibbit* was drawn up. An order was obtained in the suit of *Hay* v. *Hill* to examine Mr. James Hay *de bene esse* on behalf of the plaintiff, and the defendants in that suit had been served with notices of appointments for the examination of Mr. Hay before one of the examiners of the Court. They accordingly attended the examinations, which took place on the 28th of November, 1868, and the 16th of January, 1869, and cross-examined Mr. James Hay.

On the 22nd of January, 1869, advertisements were published in pursuance of the decree in *Hill* v. *Hibbit*, under which Miss Hay came in as a claimant. On the 13th of February she took out this summons.

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Mr. J. Waller, on behalf of the applicant, said that, although there was no authority to support such an application, the order asked for appeared upon principle to be one of course. Long depositions had been taken at great costs. The parties to the first suit of *Hill* v. *Hibbit* had attended before the examiner and cross-examined the witness. If the application were refused there would have to be another examination of the same witness by the same parties, and on precisely the same point.

Mr. Amphlett and *Mr. Bedwell* appeared for the plaintiff in *Hill* v. *Hibbit*, and

Mr. A. E. Miller and *Mr. W. W. Cooper*, for the defendants in that suit; but they were not called upon to argue the case.

JAMES, V.C. said he had no jurisdiction to make the order asked. Evidence taken *de bene esse* was not to be used until it became necessary. It would be altering the whole principle of such examinations if the application were granted. It must be refused, with costs.

JAMES, V.C., March 18, 1869.

TATTON *v.* THE LONDON AND LANCASHIRE FIRE INSURANCE COMPANY.

38 L. J. Ch. 448; L. R. 8 Eq. 450.

Practice—Cause set down by one of several Defendants—Form of Order.

PRACTICE. Semble—*where a cause set down by a defendant comes on for hearing, and the plaintiff does not appear, another defendant who has not set it down nor been served with a subpœna to hear judgment is not entitled, although he appears to have the bill dismissed against him.*

In this case issues had been directed which had been found adversely to the plaintiff; and the cause now came on for hearing, having been set down by the defendants, the London and Lancashire Fire Insurance Company. They had served the plaintiff with a *subpœna* to hear judgment, but neither they nor the plaintiff had served the other defendants.

The plaintiff did not appear.

Mr. Rodwell, for the Insurance Company.—We have done all that as defendants we are bound to do; and I ask that as against us the bill may be dismissed with costs.

Mr. Bardswell, for two other defendants, who had not set the cause down, asked that as against them also the bill might be dismissed with costs. He referred to *Clarke* v. *Dunn* (5 Madd. 474); *Smith* v. *Wells* (6 Madd. 193).

JAMES, V.C. having expressed a doubt as to the proper form of order, requested the registrar to draw up the usual order in such a case.

The order, as ultimately settled in accordance with the opinion of a majority of the registrars, was, that the bill stands dismissed with costs as against the defendants, the London and Lancashire Fire Insurance Company.

The cause was not again mentioned in Court.

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LORD ROMILLY, M.R., June 1, 3, 1869.

THE WATFORD AND RICKMANSWORTH RAILWAY COMPANY *v.* THE LONDON AND NORTH-WESTERN RAILWAY.

38 L. J. Ch. 449; L. R. 8 Eq. 231; 21 L. T. 81; 17 W. R. 814.

See, *Llanelly Railway* v. *London & North-Western Railway*, [1872] E. R. A., 20 W. R. 898 (V.C.). Considered, *London, Chatham & Dover Railway* v. *South-Eastern Railway*, [1889] E. R. A.; 58 L. J. Ch. 75; 40 Ch. D. 100; 60 L. T. 370; 37 W. R. 65 (C. A.).

Railway Companies' Arbitration Act, 1859—*Agreement to refer—Jurisdiction—Account.*

COMPANY. RAILWAY.—*An agreement, coming within section* 2. *of the Railway Companies' Arbitration Act*, 1859, *to refer matters to arbitration is (under section* 26. *of the same act) obligatory on and ousts the jurisdiction of the Court of Chancery.*

This was the hearing, upon motion for decree, of a suit to obtain a declaration of the rights of the two companies, and for the taking accounts and payment of what should be found due to the plaintiff company, under an agreement made between the two companies, and dated the 16th of June, 1862.

The chief terms of this agreement were shortly these, viz., that as soon as their railway should be completed to the satisfaction of the inspector to be appointed by the Board of Trade, so as to be opened for public traffic, and should have been passed by such inspector, together with all proper and sufficient sidings, stations, approaches, works and conveniences, the plaintiff company should hand the same over to the defendant company, who should thereafter work and use the same with their own engines and carriages, and at their own expense; that, on or after the expiration of one year after the completion and opening for traffic of the railway, the defendant company would, at their own expense, keep in repair and maintain the same in good working order or condition; that the tolls, rates and charges (to be fixed and levied as therein provided) should be received by the defendant company, that company keeping and submitting half-yearly to the plaintiff company accounts of the gross earnings; and that the defendant company should pay fifty per cent. of such gross earnings by half-yearly payments to the plaintiff company.

The agreement also contained (paragraph 18.) the following clause:

"In every case in which any difference shall arise between the London and North-Western Company and the Watford Company touching the true intent or construction of this agreement, or touching anything to be done, suffered or omitted in pursuance of this agreement, or touching any of the incidents or consequences of this agreement, or touching any breach or non-fulfilment of this agreement, or touching any liability, damages, losses, costs or expenses, by reason of any such breach or non-fulfilment, or touching any claim or demand relating to any such liability, damages, losses, costs or expenses, or otherwise relating to the premises, every such difference shall be referred to and determined by arbitration according to the provisions of the Railways Companies' Arbitration Act, 1859."

The consent of the Board of Trade to the opening of the line was obtained on the 30th of September, 1862, and the line was opened on the following day.

The bill claimed that there was due to the plaintiff company, under the above agreement, fifty per cent. (or one moiety) of 8,275*l.* 9*s.* 5*d.* gross traffic earnings alleged to be admitted to have been received by the defendant company; and also claimed that such admitted receipts were, in fact, less than the actual receipts; and prayed that the relative rights of the two companies under the above agreement might be declared; and that an account might be taken of the tolls, rates and charges levied or charged by the defendant

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company for the conveyance of traffic upon or over the railway of the plaintiff company; and that what should be found due to the plaintiff company in respect thereof might (with interest at 5*l.* per cent. on arrears, with half-yearly rests) be ordered to be paid to the plaintiff company.

The defendant company claimed, by their answer, to be entitled to set off against the plaintiff's claim items amounting to more than the plaintiff's claim in respect of expenses incurred by them in completing the line and certain sidings, stations and approaches, which they alleged ought to have been completed by the plaintiff company; and also for rent for the use of their Watford Station prior to the time fixed for the commencement of the operation of the agreement. They also submitted and insisted that the proper remedy of the plaintiff was by an action at law, or by a reference to arbitration under the said agreement, and not by a suit in equity.

Mr. Locock Webb (*Sir Richard Baggallay* with him), for the plaintiff company.

Mr. Speed, for the defendant company, contended, first, that the account asked was of a simple kind, and could be obtained in an action at law—*The North-Eastern Railway Company* v. *Martin* (2 Phill. 758); *The Taff Vale Railway Company* v. *Nixon* (1 H.L. C. 111); *Dabbs* v. *Nugent* (11 Jur. N.S. 943); *Dinwiddie* v. *Bailey* (6 Ves. 136); *Phillips* v. *Phillips* (9 Hare, 471; 22 L. J. Ch. 141); *Padwick* v. *Hurst* (18 Beav. 575; 23 L. J. Ch. 657); *Foley* v. *Hill* (2 H.L. C. 28); *Smith* v. *Leveaux* (2 De Gex, J. & S. 1; 33 L. J. Ch. 167); *Moxon* v. *Bright* (L. R. 4 Ch. 292). Secondly, that the Court would not direct an account in a case in which it could not specifically enforce the performance of the whole agreement, which could not be done in the present case on account of the clauses relating to the working of the line. Thirdly, the jurisdiction of the Court was taken away by the arbitration clause of the agreement (par. 18), having regard to the provisions contained in sections 2. and 26. of the Railway Companies' Arbitration Act, 1859, 22 & 23 Vict. c. 59.[1]

Sir R. Baggallay, in reply, was heard upon the third point only, in reference to which he cited *Cook* v. *Catchpole* (34 L. J. Ch. 60).

The Master of the Rolls (*June* 3).—On looking at the papers in this case I am quite satisfied that the account prayed by the bill is not one that would be taken in an action at law, but would be referred to arbitration immediately. Many cases have been cited to me, but in these questions of account one case does not govern another, but each case depends on its own particular merits. I am quite satisfied that the account prayed by the bill is not one that would be a proper case for an account in equity; but a greater difficulty arises out of the contract to refer disputes to arbitration. I am of opinion that it is impossible to evade the words of the agreement. The plaintiffs assert that the whole question between them is to be governed by the agreement, which they say has not been observed by the defendants; and they also say that the case made by the defendants for set-off rests upon an alleged understanding which was no part of the agreement. It is impossible, however, to escape from the words of the arbitration clause; the matters complained of by the plaintiff have been done by the defendants either in pursuance of a right which they have under the agreement, or in nonfulfilment of their obligation under the agreement; and, in either case, these matters come within the questions agreed to be referred to

(1) These sections, so far as is necessary for the present report, are as follows:

Section 2. "Any two or more railway companies, whether already or hereafter incorporated (in this Act called 'the companies'), from time to time, by writing under their respective common seals, may agree to refer and may refer to arbitration, in accordance with this act, any then existing or future differences, questions, or other matters whatsoever in which they then or thereafter shall be mutually interested, and which they might lawfully settle or dispose of by agreement between themselves."

Section 26. "Full effect shall be given by all the superior Courts of law and equity in the United Kingdom, according to their respective jurisdiction, and by the companies respectively, and otherwise, to all agreements, references, arbitrations, and awards in accordance with this act."

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arbitration.—[His Lordship then read clause 18. of the agreement and sections 2. and 26. of the act, and continued:]—The present questions being thus clearly within the matters agreed to be referred, it remains to be considered whether section 26. makes the reference to arbitration compulsory and ousts the jurisdiction of the Court, which is not ousted by an ordinary agreement to refer.

The question is quite new to me, and no decision in point has been cited. The agreement, however, being clearly within the description contained in the 2nd section of matters which may be referred, I think that the words of section 26. are conclusive, and render it compulsory on the Court to give full effect to the agreement. If the defendants will consent to waive the point, and if both sides can agree as to the amounts of the items in dispute, I shall have no objection to act as arbitrator, and to hear in chambers and decide on the rights of the parties under the agreement; but if the defendants insist upon their right to take the objection that the plaintiff's claim is covered by the arbitration clause, I must dismiss the plaintiff's bill, but without costs, since the defendants might have raised the point by plea.

MALINS, V.C., Feb. 23, 1869.

MARRIOTT v. ABELL.

38 L. J. Ch. 451; L. R. 7 Eq. 478; 20 L. T. 690; 17 W. R. 569.

Referred to, *Alty* v. *Moss*, 1876, 34 L. T. 312 (Ch. D.); *In re Maunder*, [1902] 2 Ch. 875; 51 W. R. 31 (Ch. D.): affirmed, [1903] E. R. A.; 72 L. J. Ch. 367; [1903] 1 Ch. 451; 88 L. T. 280; 51 W. R. 549 (C. A.).

Will, Construction of—Divesting Clause—Survivors or Survivor—Death of all Legatees before Period of Distribution.

WILL.—*Bequest of personalty to M. B. for life, and after her decease to eight persons by name in equal shares, with a direction that in case of the death of any of them before the death of M. B. the share or shares of him, her or them so dying should be paid to the survivors or survivor share and share alike. The eight legatees survived the testator, but all died in the lifetime of M. B.*:—Held, *that the divesting clause had no operation, there being no survivor at the death of the tenant for life, and therefore the original one-eighth share of each legatee passed to his representatives.*

Crowder *v.* Stone (3 Russ. 217; I. J. Ch. 93) *is a questionable authority.*

George Butterworth, by his will, dated the 29th of July, 1822, gave all his real and personal estate, upon trust, after conversion, to invest and pay the income to Martha Barton for life, if she should so long continue unmarried, and after her death or marriage to pay and transfer the whole fund to five persons therein named in equal shares, their interests to be vested at the time of his decease. Shortly afterwards the testator executed a codicil to his will in the following terms:

"Whereas I have by my said will directed Thomas Budgett and Thomas Butterworth, my trustees therein named, and the survivor of them, his executors and administrators, to pay, assign and transfer the whole of the moneys to arise from the sale of my real and personal estate after the death or marriage of Martha Barton therein named, and after payment of the annuities and sums of money therein mentioned, and the security or securities in or upon which the same or any part thereof should or might be then vested, and the interest, dividends and produce which should arise from or in respect of the same from the death or marriage of the said Martha Barton, to Samuel Bower and Catherine Bower, John Marriott and Hannah Marriott, and Charles

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Butterworth,[1] in equal parts, shares and proportions, to and for his, her and their own use; and I did thereby declare their interests therein to be vested interests at the time of my death: now, I do hereby direct the said Thomas Budgett and Thomas Butterworth, and the survivor of them, his executors or administrators, to pay, assign and transfer the said moneys, not only to the said Samuel Bower, Catherine Bower, John Marriott, Hannah Marriott and Charles Butterworth, but also to Elizabeth Ann Church, John Church and Elizabeth Church, in equal parts, shares and proportions, to and for his, her and their own use and benefit. And I do hereby direct that in case of the death of any of them before the death or marriage of the said Martha Barton, the share or shares of him, her or them so dying shall go and be paid to the survivors or survivor of them equally, share and share alike."

The eight legatees named in the codicil survived the testator, but all of them predeceased Martha Barton, the tenant for life, who died in 1864, without having married.

The question now was, who became entitled at her death under the gift in remainder?

Mr. Cadman Jones, for the plaintiffs, the representatives of Hannah Marriott, the last survivor of the eight legatees, relied on *Crowder* v. *Stone* (3 Russ. 217; 7 L. J. Ch. 93); and argued that the word "survivor" must be taken in its natural sense, with reference to the survivorship of the legatees *inter se*; therefore Hannah Marriott, as the last survivor, took all the accrued shares as well as her own original share.

[MALINS, V.C. expressed doubt as to the authority of *Crowder* v. *Stone*, and referred to *Harrison* v. *Foreman* (5 Ves. 207), and *Sturgess* v. *Pearson* (4 Madd. 411).]

Mr. Glasse, as *amicus Curiæ*, pointed out that *Crowder* v. *Stone* had been questioned by Sir J. Leach in *Ranelagh* v. *Ranelagh* (2 Myl. & K. 441, 443; 1 L. J. Ch. 183).

Mr. C. Jones.—But those authorities do not affect the question raised by the present case, viz., to what period the survivorship is to be referred. The principle of *Crowder* v. *Stone* is expressly recognized by Vice Chancellor Wood in *Wilmott* v. *Flewitt* (13 W. R. 856), and the same principle is supported by the decisions in *Bright* v. *Rowe* (3 Myl. & K. 316), and *Ive* v. *King* (16 Beav. 46; 21 L. J. Ch. 560). *Crowder* v. *Stone* was not cited in *Littlejohns* v. *Household* (21 Beav. 29), nor in *Cambridge* v. *Rous* (25 Beav. 409). The decision in *White* v. *Baker* (2 De Gex, F. & J. 55; 29 L. J. Ch. 577), "turned wholly on the particular language of the will," per Vice Chancellor Wood in *In re Hunter's Trusts* (L. R. 1 Eq. 298). He also cited—*Cripps* v. *Wolcott* (4 Madd. 11) and *In re Corbett's Trusts* (Johns 591).

Mr. W. Barber, for the executor of Thomas Butterworth, the father of Charles Butterworth, submitted that the survivorship clause in the codicil only referred to the three new legatees therein named, and did not apply to the original legatees named in the will; therefore the direction which was found in the original will, that the share of Charles Butterworth should be paid to his father in the event of his dying before the death or marriage of Martha Barton, took effect, and the gift over was not defeated by the codicil.

[MALINS, V.C., however, held that the eight legatees must be treated as forming one class only, and that the clause of survivorship referred to the whole class, so that if the clause operated at all, it operated upon the share of Charles Butterworth, and in effect revoked the gift over contained in the will to Thomas Butterworth.]

Mr. J. W. Chitty, for the representatives of Charles Butterworth, who died last but one of the residuary legatees, supported the argument of the plaintiffs, as to the period of survivorship; but contended that only the original share of

(1) The will contained a direction which was not recited in the codicil, that in case of the death of Charles Butterworth before the death or marriage of Martha Barton his share should go over to his father, Thomas Butterworth.

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each legatee went over at his or her death to the survivors, while the accrued shares passed to the legal personal representatives of the legatee to whom they had accrued. The result would be to carry out the benefit of the survivorship clause to the fullest extent, because all the legatees, except the one who died first, would take something.—He reviewed the authorities already mentioned.

Mr. Rodwell, for the representative of John Church, who died first of the eight legatees, referred to *Page* v. *May* (24 Beav. 323; 27 L. J. Ch. 242), and was proceeding to argue that in the event, which had happened, of all the legatees dying before the tenant for life, the share of each passed to his representatives, and the survivorship clause had no operation, when he was stopped by the Court.

Mr. Herbert Smith, for the heir-at-law.

MALINS, V.C., after reading the will and codicil, and disposing of the point raised by Mr. Barber, as mentioned above, proceeded:—The case resolves itself into this. There is a gift to Martha Barton for life, and after her death to eight persons by name absolutely, with a direction that in case of the death of any of them in the lifetime of Martha Barton, the share or shares of him, her or them so dying shall go over to the survivors or survivor. But inasmuch as all the eight legatees have died in the lifetime of Martha Barton, the tenant for life, the question now is, who has become entitled to the residuary estate under the gift in remainder? The construction relied on by Mr. Jones and Mr. Chitty is, that the words "survivors or survivor" apply to the death of each legatee, so that as each died his or her share went to the then survivors, that is, when the first died his share went to the seven who survived; when the next one died his share went to the six, and so on; the consequence of which would be, that of all those persons the only one who would not get anything or transmit any interest to his representative would be the one who died first, because on the death of the second, although his original eighth share would go over to the six survivors, his seventh of an eighth, which had accrued to him upon the death of the first, would pass to his representatives; and so on upon each successive death.

Now, this would be a very fantastic disposition of property, and, in my opinion, opposed to every probable intention of the testator. In all these cases of construction certain rules had been adopted by the Court with the view of carrying out the probable intention of a testator. One of these is, that if there be a gift to a person for life or a limited period, and then over to a class, and the "survivors or survivor" of that class, the word "survivor" is uniformly referred to the period of distribution. That was settled by *Cripps* v. *Wolcott* with respect to personal estate, and as to real estate by the more recent case of *Gregson's Trusts* (2 De Gex, J. & S. 428; 34 L. J. Ch. 41). In the present case it is not disputed that if there had been a gift to Martha Barton for life, and after her death to the eight legatees, or the survivors or survivor of them, then if only one survived, that one would have taken the whole; or that if all the eight had died in her lifetime, there being no person or persons to answer the description of "survivor or survivors," the original gift in favour of the whole class would remain unaffected by the survivorship clause, and the property would go to the representatives of the eight. But the gift is not made precisely in that form, and the Court must determine to what period the words of survivorship refer. What is the testator directing his attention to? There is a gift in the will to Martha Barton for life, and after her decease to the five persons named in the will, to whom three more are added by the codicil, and then there is a clause of survivorship in the event of any of the legatees dying before the death of Martha Barton. The testator was directing his attention to the death of Martha Barton, and the words "survivors or survivor" must, in my opinion, be taken as referring to that period. Then there being at that time no survivors or survivor, what effect can the divesting clause have upon the original gift? It can have no operation at all. I drew the attention of counsel to *Sturgess* v. *Pearson,* which, in my opinion, is the same in principle as the present case, and

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that case was founded upon the decision of Sir W. Grant, made as long ago as 1800, in the case of *Harrison* v. *Foreman*—[His Honour commented upon the cases referred to, and continued:]—But it is said that the construction which I am here putting on the words "survivors or survivor" is opposed to Lord Lyndhurst's decision in *Crowder* v. *Stone*, which decision is, no doubt, in favour of Mr. Jones's and Mr. Chitty's contention, because if I were to follow that case the decree here would be, that on the death of each legatee his share went over to the then survivors. It appears to me that great inconvenience would arise from such a construction, nor could it be consonant with the testator's intention; and although very great weight must necessarily attach to any decision made by that eminent Judge, my impression is, that his decision has never been followed in any case in which *Harrison* v. *Foreman* and *Sturgess* v. *Pearson* were cited. Certainly *Littlejohns* v. *Household* is directly opposed to it, as well as *Cambridge* v. *Rous*. I think, therefore, the law is now settled that where there is a tenancy for life, with remainder to a class, and the survivors or survivor of that class, and none of them survive the tenant for life, the divesting clause has no operation. Here the testator was directing his attention solely to the death of Martha Barton, and intended those who survived her to take, not those who survived each other. But in default of there being any such survivor, each of the legatees took his one-eighth under the original gift, and the share of each passed to his representatives. There must be a declaration to that effect.

As to the case of *White* v. *Baker*, I concur with the observation of the present Lord Chancellor, that it was decided wholly upon the particular language of the will.

JAMES, V.C., April 22, 23, May 6, 1869.

DAUN *v.* THE CITY OF LONDON BREWERY COMPANY (LIMITED).

38 L. J. Ch. 454; L. R. 8 Eq. 155; 20 L. T. 601.

Referred to, *Menzies* v. *Lightfoot*, [1871] E. R. A.; 40 L. J. Ch. 561; L. R. 11 Eq. 459; 24 L. T. 695; 19 W. R. 578 (M.R.). Applied, *Bradford Banking Corporation* v. *Briggs*, [1885] E. R. A.; 29 Ch. D. 149; 52 L. T. 643; 33 W. R. 730 (Ch. D.): reversed, [1885] E. R. A.; 31 Ch. D. 19; 53 L. T. 846; 33 W. R. 887 (C. A.): latter decision reversed, [1887] E. R. A.; 56 L. J. Ch. 364; 12 App. Cas. 29; 56 L. T. 62; 35 W. R. 521 (H.L.); *Reardon* v. *Provincial Bank of Ireland*, [1896] 1 I. R. 532 (M.R. and C. A.).

Mortgage—Priorities—Public-House—First Mortgage to Brewers—Second Mortgage to Distillers—Custom of Trade—Tacking.

INTOXICATING LIQUORS.—*A company of brewers took a mortgage of a public-house and other premises, as a security for a debt then due to them from the publican, and for future advances to be made and beer to be supplied by them to him. Subsequently, a firm of distillers took a second mortgage of the same premises as a security for a debt then due to them from the publican, and for future advances and goods to be supplied by them, and they gave to the brewers' company notice of their mortgage*:—Held, *after the notice to the brewers' company of the distiller's mortgage, that the priorities between them must be regulated by the respective dates of the advances being made and goods supplied by them respectively.*

Semble—*There is not, as between brewers and distillers, any custom of trade affecting their priorities as mortgagees in a manner different from the rule of law decided in* Hopkinson *v.* Rolt (9 H.L. C. 514; 34 L. J. Ch. 618).

This suit was instituted by the plaintiffs, as the second equitable mortgagees of the "Green Dragon" public-house, Fore Street, in the city of London, and

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other property, to determine their priorities as against the defendants, the City of London Brewery Company (Limited), the first equitable mortgagees of the same premises.

The plaintiffs carried on the business of distillers, in London, under the firm of "Holme, Sewell & Co." The defendants, the brewery company, in 1860, succeeded to the business and rights, credits and effects of Messrs. Felix Calvert & Co., brewers, and had since that time carried on the business of brewers in London. On the 26th of March, 1858, the defendant George Smith, the lessee of the "Green Dragon" public-house and certain messuages adjoining, deposited his lease and other title-deeds of the leasehold premises with Messrs. Felix Calvert & Co., and signed a memorandum of the same date, stating that the deposit with Messrs. Felix Calvert & Co. was made for the purpose of securing to them repayment of the sum of 202*l.*, lent by them to him, with interest at 5*l.* per cent. per annum; and Smith thereby undertook, whenever required so to do, to execute to the mortgagees an assignment, by way of mortgage, of the leasehold premises, and his interest therein, and of the fixtures and fittings upon the premises, and the goodwill of the trade of a publican, carried on in the said house, for securing the said sum of 202*l.* and interest thereon, as well as any other sum or sums of money, with interest at the rate aforesaid, in which he might become indebted to the said firm on any account not exceeding in the whole amount the principal sum of 500*l.*, with mortgagee's costs, charges and expenses; and he thereby declared that in the meantime, until the aforesaid mortgage should be executed, the said leasehold premises, fixtures, fittings and goodwill should stand charged with the payment of the moneys and interest aforesaid. On the 7th of July, 1865, the brewery company made to Smith a further advance of 100*l.* on the security of the documents then in their hands, and he executed in their favour a second memorandum of deposit, in the same form as the first. On the 11th of July, 1865, Smith executed, in favour of the plaintiffs, another memorandum of deposit, by which he declared that the several deeds and documents deposited with the brewery company, "and also the hereditaments and premises, and all other property and effects therein comprised, and to which such several deeds and writings, or any of them, related, and all his estate and interest therein or thereto, should thenceforth stand charged, and be and remain (subject to the security to the brewery company) as a security, as well for the payment of the sum of 120*l.* then due from him to them with interest" as therein mentioned, "as also of all other sum and sums of money that then were or might at any time, and from time to time thereafter, be due from him, either alone or jointly with any other person or persons, to the partners for the time being constituting the plaintiffs' firm, their successors, executors or administrators, for goods sold, money lent or paid to or for him, or upon any bill or bills of exchange, &c., or for any costs and expenses the plaintiffs might incur in relation to the non-payment of any such sums of money as aforesaid, or incidental to the security thereby given, or in realizing the same, or otherwise howsoever; and Smith thereby undertook, when called upon, to make a valid legal mortgage of the premises to the plaintiffs, subject to the security of the brewery company. On the same 11th of July, 1865, the plaintiffs gave to the brewery company a formal notice in writing of the memorandum executed by Smith in their favour. In November, 1867, Smith, with the concurrence of the manager of the brewery company, and of the plaintiffs, agreed to sell his interest in the public-house to the defendant Jackson. On the 30th of November, 1867, a meeting was held at the said public-house for the completion of the contract of sale to Jackson, and for carrying out the business proceedings usual on a change of possession of a public-house. According to the usual practice, this meeting was attended by representatives of the respective firms of the plaintiffs and the brewery company, as well as by Smith, Jackson and Leah, Smith's broker. As is customary at such meetings which are technically called "changes," the accounts between Smith and the brewery company and the plaintiffs were taken, in order that the

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amount due to each might be paid by Leah out of the purchase-money in his hands. On taking the accounts the brewery company claimed to have a first charge on the property, not only for the 300*l.* due to them under the memorandum of equitable charge in their favour, and 36*l.* 10*s.* for interest thereon, but also for a sum of 64*l.* 15*s.*, in which the defendant Smith was indebted to them for beer and ale, which they as brewers, in the regular course of trade, had supplied to him after the receipt of the notice of the equitable mortgage in favour of the plaintiffs, upon which mortgage there was then owing to the plaintiffs the sum of 250*l.* 19*s.* 6*d.* The amount realized by the sale of the property being insufficient to pay the claims of both the plaintiffs and the brewery company, the plaintiffs refused to recognize the company's claim to any further amount than had been owing to them at the date of the notice of the plaintiffs' equitable mortgage, whereupon the brewery company's agent refused to give up possession of the deeds which he claimed to hold to the full amount of the debt due from Smith to the brewery company. Accordingly Leah refused payment to the plaintiffs of their claim, and retained the purchase-moneys in his own hands. Before filing this bill the plaintiffs had paid to the brewery company 300*l.* for principal and 36*l.* 10*s.* for interest in respect of their first equitable mortgage, and they had also, under protest, tendered to the company a further sum of 35*l.*, for any costs which they might have incurred as mortgagees. The bill prayed for a declaration that the brewery company were not entitled to receive out of the purchase-money of, or to have a charge upon, the mortgaged premises, for any debt for beer or other goods supplied by them to Smith after the 11th of July, 1865, the date of the notice, in priority to the claim of the plaintiffs, for a transfer of the premises and documents to the plaintiffs, and, if necessary, for the usual redemption and foreclosure decree according to the interests of the parties.

By their answer, the brewery company alleged as follows: "We the said company, and the said firm of Calvert & Co., according to the usual custom of trade between brewers and publicans, from the year 1858 up to the month of November, 1867, supplied the said defendant George Smith with beer, and the said deposit and memorandum of equitable mortgage were made and executed by the said George Smith to secure, not only cash advances made to him, but also sums of money in which he might become indebted to the said firm of Felix Calvert & Co., or to us for beer so supplied. It is the custom of the trade between brewers and publicans that such a deposit and memorandum should be given by the publican to the brewer, and that such memorandum and deposit should be a security for all sums of money due from the publican to the brewer for beer supplied by the brewer to the publican, and such security is always considered as a first charge on the hereditaments to which the deposit and memorandum relate, and is always considered as subsisting, unaffected as to further advances or otherwise by the second charge on the same hereditaments which is usually given by the publican to the distiller. The plaintiffs, as distillers, supplying the said defendant George Smith with spirits, were at and before the said 11th day of July, 1865, aware of the customs of trade hereinbefore mentioned, and the said memorandum of the 11th day of July, 1865, was made upon the footing of such custom."

In support of this allegation, the brewery company adduced the evidence of the solicitors of brewers and others connected with brewers, who stated that the practice of brewers was to take first mortgages of the public-houses to which they supplied beer, and that the distillers who supplied the same houses with spirits usually took a second mortgage of the same premises, and they gave some instances in which the distillers, as second mortgagees, had allowed the brewers to be paid the amount of their book debts for goods supplied after notice of the second mortgage in priority to the claims of the distillers as second mortgagees; but the evidence did not establish such a practice as the invariable and universal custom of the trade. On the other hand, the plaintiffs' evidence went to shew

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that the practice of distillers taking second charges for their book debts did not extend back beyond a period of ten or twelve years.

Mr. Amphlett and *Mr. A. G. Marten*, for the plaintiffs relied upon the authority of *Rolt* v. *Hopkinson* (25 Beav. 461; 3 De Gex & J. 177; 28 L. J. Ch. 41: (House of Lords), *sub nomine Hopkinson* v. *Rolt* (9 H.L. C. 514; 34 L. J. Ch. 468), and asked that the defendants, the brewery company, might be paid in priority to the plaintiffs only so much as was due to them when they had notice of the plaintiffs' second mortgage. As regarded the alleged custom of trade, it was not sufficiently established by the evidence. The limits to which it extended were nowhere stated. Nor did the evidence prove it was a universal or general custom. In fact, until about ten years since, it had not been the practice for distillers to take a mortgage of public-houses as a security for goods supplied in the way of their trade.

Mr. Kay and *Mr. Decimus Sturges*, for the brewery company, argued that the evidence sufficiently shewed that the custom was established, and the plaintiffs took their second mortgage with a full knowledge of its existence, and with the intention that the brewery company should have a first charge on the mortgaged property in accordance with it.

Mr. Edmund James appeared for the defendant Jackson.

Mr. W. Pearson, for Leah's assignee in bankruptcy.

Mr. Amphlett replied.

JAMES, V.C. said the question in this suit was between the plaintiffs and the defendants, as the first and second mortgagees of a public-house, the mortgages being made in the usual manner, to secure moneys due to the plaintiffs and the defendants respectively at the date of their respective mortgages and future advances. The plaintiffs said that by the law of the land their second mortgage was not affected by advances made to the mortgagor by the brewery company, as first mortgagees, after they had given to the brewery company notice of their second mortgage, and they relied upon the principles of law laid down in *Hopkinson* v. *Rolt* (9 H.L. C. 514; 34 L. J. Ch. 468). These principles as a general rule were not contested by the defendants, but they said that in this case there were particular circumstances preventing the application of the rule. They did not rely upon any personal dealing affecting the rule, but they said to the plaintiffs, "You are distillers; we are porter brewers; and there is a custom of trade by which, as between these two classes of tradesmen the brewer, as first mortgagee, is entitled to a priority over the distiller as second mortgagee, in respect of moneys become due to him from the publican for goods supplied even after notice of the distillers' second mortgage, and the rule of *Hopkinson* v. *Rolt* is not to be applied in contravention of this custom."

Before considering the evidence with regard to the existence of such a custom as alleged, a question arose as to the legal validity of such a custom, supposing its existence should be satisfactorily established. In the first place, it was a custom which would affect the legal validity of written documents tending to alter interests in land, although there was a law that to affect the interest of persons in land there must be some writing. No doubt there were some instances in which the enactments of the legislature had been evaded by decisions of this Court, but the rule was to follow the intention of the legislature. His Honour would be slow to extend anything by which an interest in land could be altered by a parol arrangement or understanding between the parties not in writing. It was further to be observed, that in this case there was an absence of mutuality between the first and the second mortgagees. There was no direct agreement between them, and the only link between them was, that they both supplied with goods a common customer. It would be very difficult to apply a custom such as alleged to persons in these circumstances. In the cases relating to the custom of the Stock Exchange, which had been lately discussed a good deal, the custom of the Stock Exchange had been recognized, but then it had been shewn to be a part of every contract entered

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into upon the Stock Exchange. So there might be a custom introduced into contracts relating to land, as in the common case of a landowner letting his land to a tenant. But these cases differed from the custom attempted to be set up by the defendants, which was one of the same kind as if it were alleged that where a citizen of London and a farmer in Suffolk were creditors of the same party, the citizen of London should have priority. Then it had been pointed out by Mr. Amphlett that there was no evidence adduced to shew what were the limits of the custom. Within what district and to what classes did it apply? Within how many miles of St. Paul's did it extend? Was it to prevail between a brewer at Highgate and a distiller at Hounslow, or what were the limits of it? The absence of evidence on this head was a very serious objection in the way of giving operation to any such custom. But when you came to consider the evidence in support of such a custom apart from the question as to its extent, it seemed wholly insufficient to establish the existence of it. The security of the plaintiffs was given in 1865. It was proved that the practice of distillers taking charges from publicans only commenced in 1858, so that the alleged custom, if it existed, must have arisen in those seven years. From the manner in which the trade was conducted, it might be inferred that the instances in which the publican would be unable to pay both the brewer and the distiller would be rare, and accordingly there would be few instances in which the custom could arise. Moreover, the evidence shewed that the securities of the brewers and distillers were usually taken contemporaneously at one of the "changes" of the public-house, at which both parties were present; and under these circumstances different considerations might arise, and a distiller who had been present on such an occasion might possibly be unable afterwards to exercise his right. But that case was different from this, where the securities had been given independently. Then it was observable that no publican or distiller had been called by the defendants to prove the custom. Their evidence was confined to that of persons connected with the brewing trade, who stated that the brewers did habitually get paid in priority to the distillers. But in some of the instances spoken to by the defendants' witnesses this appeared to be done, not in pursuance of any custom, but in pursuance of an "understanding" or "agreement" come to between the brewers and the distillers. There certainly was no custom made out by the evidence of the defendants' witnesses to the extent alleged by them. That being the state of the evidence, his Honour was of opinion that the defendants' case failed, and that the plaintiffs were entitled to a decree, as in *Hopkinson* v. *Rolt*, regulating the priorities of the plaintiffs and the defendants, after the defendants had notice of the plaintiffs' charge, according to the respective dates of the goods being supplied by the plaintiffs and the defendants respectively.

LORD ROMILLY, M.R., April 26, 1869.

LLOYD *v.* LLOYD.

38 L. J. Ch. 458; L. R. 7 Eq. 458; 20 L. T. 898; 17 W. R. 702.

Referred to, *Kirby Smith* v. *Parnell*, [1903] E. R. A.; 72 L. J. Ch. 468; [1903] 1 Ch. 483; 88 L. T. 493; 51 W. R. 493 (Ch. D.).

Will — Devise and Bequest of Residue upon Trust — Words of Trust appropriate to Personalty only—Realty held to be included.

WILL.—*A testator, after making a specific devise of certain bequests, devised and bequeathed all his other property to trustees, upon trust to continue the same in the investments on which it should be standing at his death, or, at their discretion, to call in same and invest it on government or real securities, or debentures of railways or municipal corporations*:—Held, *that the gift of residue included the testator's residuary realty.*

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Edward Lloyd, by his will, dated the 1st of January, 1863, after specifically devising to his wife Rosabelle Susan Lloyd, for her life, his house and lands at Lingcroft, with remainder to his daughter Georgina Rosabelle Lloyd, her heirs and assigns; or, in the event of her dying in the lifetime of her mother without issue, to his, the testator's, daughter Edith Maria Graeme Lloyd, her heirs and assigns; and, after making certain bequests, continued as follows: "I devise and bequeath all my other property whatsoever and wheresoever to my brother the Reverend Yarburgh Gamaliel Lloyd and my nephew Yarburgh George Lloyd, upon trust to continue the same in investments on which it shall be standing at the time of my decease, or, at their discretion, to call in the same and invest it in their names on government or real securities, or debentures of railways or municipal corporations, and to apply the same in manner following: to set apart such a portion of the said residue as, with the sum of 300*l.* a year settled on my said wife, will amount to one-half of the total income arising from my residuary estate and the said settled property united, and to pay the interest of such sum to her during her natural life; and I bequeath the income of the remainder of my said residuary estate to my said two daughters, whom I commit to the care of their mother as their sole guardian. And I direct that my trustees shall pay to my said wife, and after her decease shall apply for their maintenance and education such part of their income as they shall think proper until they attain respectively the age of twenty-one years, or marry with their mother's consent; and that, on their respectively attaining that age or marrying as aforesaid, the said remaining trust-fund shall be equally divided between them; and the sum reserved as aforesaid for their mother's life shall be divided in the same manner at her decease. Should I leave any other children, they shall take equal shares with their sisters in the furniture and property bequeathed to them."

The testator died on the 4th of February, 1869, leaving the above-named Rosabelle Susan Lloyd, his widow, and leaving his daughters Georgina Rosabelle Lloyd, Edith Maria Graeme Lloyd and Cecil Mary Lloyd, his co-heiresses-at-law.

The testator, at the date of his will, was only possessed of the real property therein specifically mentioned; but between the date of his will and his death he became the owner of other real property. The question was whether such last-mentioned property was included in the gift of residue contained in the will, or descended to the testator's three daughters as his co-heiresses-at-law.

Sir R. Baggallay and *Mr. Brodrick*, for the co-heiresses-at-law.—The testator has not in the residuary disposition used words of limitation applicable to real estate, though he does use such words in the specific devise. It must, therefore, be assumed that he intended the disposition of residue to include the personalty only. The trusts as to the investment of the residue are only applicable to personalty; if, therefore, the residuary disposition passed the realty, no trusts have been declared concerning it, and the trustees hold it in trust for the testator's co-heiresses-at-law. They referred to *Coard* v. *Holderness* (20 Beav. 147; 24 L. J. Ch. 388); *Dunnage* v. *White* (1 Jac. & W. 583); *Doe* d. *Spearing* v. *Buckner* (6 Durnf. & E. 610).

Mr. Jessel and *Mr. Babington* appeared for the widow.—In *Coard* v. *Holderness* there was no devise of real estate preceding the gift of residue, and no use of the word "devise." Here we have a devise of real estate followed by a devise of residue, and this concludes that part of the question. As to the other part of the plaintiff's argument, it is immaterial that the trusts are applicable to personalty only—*Stokes* v. *Salomons* (9 Hare, 75; 20 L. J. Ch. 343); *Saumarez* v. *Saumarez* (4 Myl. & C. 331). They also referred to *In re the Greenwich Hospital Improvement Act* (20 Beav. 458).

Sir R. Baggallay, in reply.

The Master of the Rolls.—The testator first devises certain real property, and then bequeaths certain personal property. He then devises and bequeaths

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all his other property. He also further on speaks of the income of his residuary estate. I think this gift of residue includes the residuary real estate. The observation that he has not used words of limitation applies to the personalty as well as the realty. There must be a declaration that the whole of the testator's real estate passes by the will.

LORD ROMILLY, M.R., March 8, 15, 1869.

GRAVATT *v.* TANN.

38 L. J. Ch. 459; L. R. 7 Eq. 434.

Administration of Estate—Estate partially distributed—Suit by Infants not for their Benefit—Costs.

EXECUTOR AND ADMINISTRATOR. INFANT.—*Personal estate was given by will to a large number of legatees. The executors and trustees, after deducting* 10*l. from each share to form an indemnity fund against certain possible claims, paid off the adult legatees, and invested the share of each infant legatee in his name and theirs jointly. A general release, to which the accounts were scheduled, was then executed by all the adult legatees. Some years after this a bill for the administration of the estate was filed by six of the infant legatees, their next friend being the managing clerk of their solicitor, acting at the request of their father, who had executed the release. The result of the accounts was to shew that the suit was not for their benefit:*—Held, *that the next friend was entitled to his costs; that the fund for payment of costs consisted of the indemnity fund and the undistributed shares of all the infant legatees; but that any residuary legatees who had been paid, including the trustees, asking for costs, should bring in the shares which they had received; and (the trustees taking large shares, and being therefore unwilling to bring them in) that any surplus remaining should be paid to the trustees towards their costs.*

This was a bill for the administration of the personal estate of Edward Tann. The plaintiffs were six of the infant grandchildren of Edward Tann. The defendants were the two executors and trustees of his will, and took large shares of residue under it.

The testator's debts and liabilities, being of trifling amount and known to the executors, were paid very shortly after his death. By his will the testator gave 60*l.* to each of his grandchildren, and other pecuniary legacies to other persons named in his will, and directed his residue to be distributed among his legatees in proportion to the value of their legacies.

A question arose whether certain grandchildren in Australia were to be regarded as objects of a specific gift of certain leaseholds. The defendants, by deed executed by all the grandchildren who were then or who afterwards became of full age, agreed to distribute the estate among the grandchildren in England, retaining 10*l.* from each share, to be kept in hand for twenty years as an indemnity fund against the claims of the grandchildren in Australia. The shares of the adult legatees were then paid to them, and the share of each infant was invested in new 3*l.* per cents. in his own name jointly with those of the trustees; and the dividends, as they became due, were similarly invested in a post-office savings bank.

This arrangement was made at the wish of all persons *sui juris* who were interested, in order to avoid the necessity of a Chancery suit.

On the 2nd of March, 1864, a release, fully reciting all the dealings with the estate and referring to the executor's accounts, set out in a schedule, was executed by all the persons then *sui juris* interested under the will, including the father of the plaintiffs. Before the institution of the suit, this deed was executed by all those who since its date had attained twenty-one. The father

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of the infant plaintiffs had the accounts in his possession about two months before executing the release, and expressed himself satisfied therewith.

Under these circumstances, without any previous application to the executors for accounts, the present bill was filed, on the 2nd of June, 1866, by six of the infant grandchildren of the testator, against the executors, for the administration of the personal estate of the testator. The next friend of the plaintiffs was the managing clerk of their solicitor, who stated that he had been requested to act by their father. The defendants thereupon moved for an inquiry whether the suit was for the benefit of the plaintiffs; and if so, whether it ought to be conducted by the present next friend. This motion was supported by the affidavits of nearly all of the adult persons interested, who were very numerous, stating that they were satisfied that the estate had been properly administered; but it was refused with costs by the Master of the Rolls, and on appeal by the Lords Justices.

On taking the accounts, it appeared that the personal estate amounted to nearly 8,000*l*., and that this had been duly accounted for, except as to a sum of between 60*l*. and 70*l*. Of this sum about 40*l*. was disallowed as an unnecessary expenditure for safes in which to keep the testator's papers and deeds, which were very numerous; a small sum further was for interest paid to one of the legatees, the payment of whose legacy had been deferred; and the residue represented the costs of completing a partition of certain specifically devised freeholds, which had been agreed upon and partly carried out by the testator.

The suit having come on for further consideration,

Mr. Jessel and *Mr. F. H. Colt*, for the defendants, argued that, since the administration of the estate was practically completed (except as to the indemnity fund) before the institution of the suit, the next friend was not entitled to his costs. The father of the plaintiffs had himself approved the accounts, and the only result of the suit had been to incur heavy costs with no benefit to the plaintiffs, whose shares, on the contrary, would be largely diminished. They cited *Mackenzie* v. *Taylor* (7 Beav. 407); *Thompson* v. *Clive* (11 Beav. 475). Here everything had been done *bona fide;* the accounts were substantially correct, and the plaintiffs' father and their next friend had full notice of their correctness before instituting the suit.

Mr. Southgate and *Mr. Wickens*, for the plaintiffs, argued that the costs should be, as far as possible, charged on the estate generally, by refusing their costs to those who had already been paid their shares, unless they brought into account what they had received. They cited *Holgate* v. *Haworth* (17 Beav. 259).

Mr. J. N. Higgins, *Mr. Langley* and *Mr. Forster* appeared for other parties attending the proceedings.

The Master of the Rolls (*March* 15) directed payment into Court of the disallowed items, and decided that the plaintiffs' costs must come out of the residue (including the indemnity fund). He could not require the residuary legatees to repay anything they had received; but, if any residuary legatee came in and asked for costs, he must bring in the share of residue which he had received. As to the surplus of the indemnity fund, if there was not sufficient to pay all, the executors must have their costs first.

James, V.C., March 20, 1869.

PRICE v. THE DENBIGH, RUTHIN AND CORWEN RAILWAY COMPANY.

38 L. J. Ch. 461; 17 W. R. 572.

Specific Performance—Alternative Relief—Railway Company—Landowner

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—Agreement to take Shares—Contract for Sale of Land—Variation—Release of Liability on Shares.

COMPANY.—*A landowner who had agreed to take shares in a railway company contracted with the company for the sale to them of certain land for a sum in cash. Subsequently the landowner, at the request of a person professing to act as the company's agent, agreed to vary the contract by accepting an annual rentcharge in lieu of the sum in cash, upon condition of being released from all liability in respect of certain of his shares. The conveyance purported to be made in consideration of the rentcharge. The company took possession and paid the rentcharge for seven years. They afterwards made calls against their vendor on all the shares he had originally agreed to take, and brought an action against him for payment. The landowner thereupon filed his bill to restrain the action or for specific performance of the original contract. The company repudiated the authority of their agent to vary the contract:*—Held, *that under these circumstances the vendor was entitled to specific performance of the original contract, and to have the amount of calls set off as against the purchase-money due to him.*

This was a suit to restrain proceedings at law by the defendants against the plaintiff, or (in the alternative) to enforce the specific performance of a contract made between the plaintiff and the defendants.

The plaintiff, who was the owner of a considerable estate in the county of Denbigh, in 1860, before the passing of the company's act of incorporation, at the request of Thomas Savin, the principal promoter of the company, signed the subscription contract, and thereby agreed to take 100 shares of 10*l.* each in the company.

The company was duly incorporated by act of parliament the same year. The company's act named the plaintiff one of the first directors of the company. In October, 1860, the company gave notice to the plaintiff to treat for certain parts of his land. In November, 1860, a verbal agreement was made between the plaintiff, who was at that time chairman of the company's board of directors, and Savin, for the sale of a part of the plaintiff's land to the company at the price of 1,800*l.* cash. On the 27th of November, 1860, an interview took place between the plaintiff and William Lloyd, the company's solicitor Savin, Jenkins, the company's valuer, and Hill, the company's land agent, at the office of the plaintiff's solicitor, when, at the request of Savin and Lloyd, the plaintiff agreed to accept a rentcharge of 72*l.* per annum as the purchase-money for his land, in lieu of the 1,800*l.*, previously agreed upon, on the express condition that the plaintiff should be released from all liability in respect of the said 100 shares so agreed to be taken by him, except to the extent of twenty shares, which he retained as the necessary qualification of a director. On the 30th of November, 1860, the plaintiff's solicitor sent to Savin, on behalf of the company, a draft agreement expressed to be made between the plaintiff of the one part and Savin, on behalf of the company, of the other part, whereby the plaintiff agreed to sell and the company to purchase the land for 1,800*l.* With this draft the plaintiff's solicitor wrote and sent a letter to Savin, wherein was this passage, "The agreement you will perceive makes the purchase-money payable, but it is quite understood that the purchaser takes a rent-charge at 4*l.* per cent. on 1,800*l.* from this day, and 200*l.* in shares." The conveyance of the land to the company was made by indenture, dated the 21st of February, 1861, which purported to be in consideration of a yearly rentcharge of 72*l.* The company shortly afterwards took possession and paid the plaintiff his rent-charge down to and including the half-year ending the 30th of May, 1867. The company nevertheless retained on their share list the plaintiff's name as the holder of 100 shares, and in 1867 they applied to the plaintiff for five calls, of 2*l.* each, on his 100 shares. No certificates for any of the shares had ever been issued to the plaintiff. The plaintiff who had then ceased to be a director, repudiated his liability to pay the calls, upon the ground that he had been

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relieved by the above-mentioned agreement from all liability in respect of eighty of such shares, and that he had paid for twenty of the shares in timber supplied to the company. In May, 1868, the company commenced against the plaintiff an action at law for the recovery of the amount of the calls and interest, amounting altogether to 1,345*l.* 16*s.* 3*d.*

The plaintiff then filed this bill, praying that the company might be restrained from proceeding in their action at law, or in the alternative that they might be decreed to specifically perform the agreement of November, 1860, and pay the plaintiffs 1,800*l.*, being the purchase-money for his lands taken by the company, and that he might be declared to have a lien on the land for payment thereof, or for damages in lieu thereof. The company filed an answer repudiating the agency of Lloyd and Savin to enter into the parol arrangement of the 27th of November, 1860, and denying that they ever assented to or were aware of the existence of any condition releasing the plaintiff from any of his shares. They insisted that the only agreements ever entered into between them and the plaintiff were, first, the agreement to purchase the plaintiff's land for 1,800*l.*; secondly, the substitution of the rentcharge of 72*l.* per annum in lieu of the 1,800*l.*

Mr. Druce and *Mr. Method*, for the plaintiff, urged that the substitution of the rentcharge for the 1,800*l.* cash was by an agreement, part of which was a condition that the plaintiff should be released from his contract as to 80 of the 100 shares he had signed for. The company could not set up their agreement with the plaintiff in part and repudiate it in part. Either the plaintiff had a rentcharge of 72*l.* per annum, and was not liable in respect of those eighty shares, or else he was entitled to the full amount of 1,800*l.* cash. With regard to the agreement to cancel the unpaid shares, that was an act *intra vires* of the directors and their agents—*Marshall* v. *the Glamorgan Iron and Coal Company (Limited)*, 38 L. J. Ch. 69; L. R. 7 Eq. 129.

Mr. Kay and *Mr. Dryden*, for the company.—Savin had no authority to enter into an agreement on behalf of the company for the cancellation of the plaintiff's shares. Such an agreement would even have been *ultra vires* of the directors alone without confirmation by a general meeting of the company. They referred upon this point to the provisions in the Companies' Clauses Act (statute 8 Vict. c. 16. ss. 29, 31, 32). The plaintiff, as chairman of the board, must have known very well both what was the authority of Savin and what were the powers of the directors. The deed of contract said nothing about the cancellation of shares, and the plaintiff was trying to travel out of his written contract and set up an allegel parol contract behind it that his shares were to be forfeited, although the forfeiture of shares could not be the subject of a contract—*Harris* v. *the North Devon Railway Company* (20 Beav. 384), and although the bill contained no prayer for the rectification of the deed of conveyance.

JAMES, V.C., during the argument, said, he thought that the letter of the 30th of November, 1860, from the plaintiff's solicitor to Savin, contained evidence of the arrangement as to the forfeiture of eighty of the plaintiff's shares. He now (without calling for a reply from the plaintiff's counsel) said he thought the plaintiff was entitled to substantial relief. Part of the contract entered into between him and Savin on behalf of the company was that he was to hold shares to the amount of only 200*l.*, and that the other shares he had taken should be forfeited. As regarded the forfeiture, the contract had never been completed. The conveyance to the company was in consideration of a rentcharge of 72*l.* per annum, instead of for a sum of 1,800*l.* cash, which was the consideration mentioned in the agreement for the sale. The deed of conveyance contained no recital shewing how this rentcharge came to be substituted for the 1,800*l.*, but the plaintiff alleged that he came to an arrangement with the company's agent that he would accept the rentcharge of 72*l.*, instead of the sum of 1,800*l.* cash, upon condition that he was released from the eighty shares, because he stated that when he had agreed to take 100 shares

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he had looked to the purchase-money to be paid for his land taken by the company as the fund for the payment for the shares which he agreed to take. There could be no doubt that an arrangement of this sort had been talked of between the plaintiff and the agents of the company. It was possible that Mr. Savin had no authority from the company to enter into any such arrangement, but still the plaintiff having executed the conveyance as part of an arrangement which had fallen to the ground, and there being no obstacle to prevent the parties being put again in their original positions, the plaintiff was entitled to say to the company,—" If you refuse to perform the whole of the agreement you must release me from the part of it which I have executed."

The order would be—" The company repudiating the agreement entered into between the plaintiff and Savin, so far as it related to the discharge of the plaintiff from all liability in respect of the eighty shares, the plaintiff is entitled to be released from the conveyance which he had executed, and to have the original contract specifically performed."

The plaintiff would accordingly be entitled to 1,800*l.* and interest. Against this sum there must be a set-off of the amount of calls due from the plaintiff and the rent-charge received by him. The company to pay the difference within three months from the date of the certificate. The plaintiff to have a lien for the balance upon the land. The company to pay the plaintiff his costs of the suit.

JAMES, V.C., March 20, 1869.

ARMSTRONG *v.* ARMSTRONG.

38 L. J. Ch. 463; L. R. 7 Eq. 518; 20 L. T. 776; 17 W. R. 570.

Referred to, *Newill* v. *Newill*, [1871] E. R. A.; 40 L. J. Ch. 640; L. R. 12 Eq. 432; 25 L. T. 21; 19 W. R. 1001 (V.C.): reversed, [1872] E. R. A.; 41 L. J. Ch. 432; L. R. 7 Ch. 253; 26 L. T. 175; 20 W. R. 308 (L.C.); *Baillie* v. *Treherne*, [1881] E. R. A.; 50 L. J. Ch. 295; 17 Ch. D. 388; 44 L. T. 247; 29 W. R. 729 (V.C.); *In re Butler's Trusts*, [1888] E. R. A.; 57 L. J. Ch. 643; 38 Ch. D. 286; 59 L. T. 386; 36 W. R. 817 (C. A.).

Will—Construction—Bequest to A. " for the benefit of herself and her children "—Joint Tenancy or Tenancy in Common—Marriage—Severance.

WILL.—*A testator bequeathed personal estate to his widow absolutely " for the benefit of herself and her children ":*—Held, *that the children took as joint tenants, whether in remainder or otherwise.*

Semble—*The construction of the gift would be to the widow for life, with remainder to her children.*

One of the testator's daughters married:—Held, *that her marriage did not operate as to her share as a severance of the joint tenancy.*

The object of this suit was to determine the construction of the will of John Armstrong, deceased.

The testator, by his will, dated the 5th of August, 1850, devised and bequeathed " unto my wife Eliza, her heirs, executors, administrators and assigns absolutely," all his real and personal estate, " for the benefit of herself and her children," and he appointed his wife executrix of his will; and in the event of her death during his lifetime, he appointed T. O. Crane and G. Brane his executors, " requesting that they will kindly act in the winding up of my affairs for and on account of my children, to whom I bequeath all such property as I may die possessed of as above stated, say two-thirds of all such property to be divided amongst the girls, and the other third amongst the boys."

The testator died in October, 1852, leaving his widow and six children him

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surviving. His widow proved his will. The testator's property at his death consisted of personal property only, or property distributable as personalty. The testator's widow died in June, 1867, intestate, and letters of administration to her, as well as letters of administration *de bonis non* to the testator, were granted to the defendant Farleigh Armstrong, one of their surviving children. Mary Ann M'Taggart, another of the testator's children, had married William M'Taggart and died intestate in June, 1866, in the life of the testator's widow.

This bill was filed, by three of the surviving children of the testator and Eliza Armstrong, against Farleigh Armstrong and William M'Taggart. John William Armstrong, one of the surviving sons of the testator, was indebted to the testator's estate to an amount greater than the amount of his share in the estate, whatever construction might be put upon the will, and accordingly he was not made a party to this suit.

Mr. Wickens, for the plaintiffs, contended that the dominant gift was that to Eliza Armstrong and her children. That gift amounted to a gift to her in trust for herself and her children, which, according to the authorities, must be construed as a gift to Eliza Armstrong for life, with remainder to her children—*Jeffery* v. *Honywood* (4 Madd. 398); *Morse* v. *Morse* (2 Sim. 485); *Crockett* v. *Crockett* (2 Phil. 553; 17 L. J. Ch. 230); *Jarman on Wills* (vol. ii., pp. 369—374, 3rd edit). A gift to A. for life, with remainder to her children, was a gift to the children as joint tenants, and not as tenants in common. Here there were no words of severance, and a joint tenancy only could have been created. It might perhaps be said that although the interests of the children in this property were reversionary choses in action, the marriage of Mrs. M'Taggart operated as a severance of the joint tenancy. But in *May* v. *Hook* (Co. Lit. 246 a, note 184), Lord Chancellor Bathurst had decided that articles of agreement entered into by an infant, one of two joint tenants, in contemplation of marriage, by which leaseholds were agreed to be assigned, did not amount to a severance of the joint tenancy. That case was decided after the marriage of the infant, and could not have arisen if marriage by itself alone operated to sever a joint tenancy.

Mr. F. C. J. Millar, for the defendant Farleigh Armstrong, argued that the widow Eliza Armstrong, under her husband's will, took the whole property absolutely, subject to precatory words, which were insufficient to devest the property from her. As to the insufficiency of the words to create a trust, there being no specific purpose denoted, he referred to *Longmore* v. *Elcum* (2 You. & C. C.C. 363; 12 L. J. Ch. 470). The decisions in other cases were distinguishable from this, since in them a power had been given to the legatee " to dispose of " the property—*Raikes* v. *Ward* (1 Hare, 445; 11 L. J. Ch. 276); *Crockett* v. *Crockett* (2 Phil. 553). In other parts of this will where the testator wished to declare his intention he used expressions precise enough, and the Court would therefore hesitate to strain his meaning in this clause, and to insert words into the will which the testator had not used—*Jones* v. *Greatwood* (16 Beav. 527); *Hart* v. *Tribe* (18 Beav. 215; 23 L. J. Ch. 462); *Byne* v. *Blackburn* (26 Beav. 41; 27 L. J. Ch. 788); *Jarman on Wills* (vol. 1, p. 371); *Woods* v. *Woods* (1 Myl. & Cr. 401).

Mr. Winterbotham, for William M'Taggart, argued that either a tenancy in common among the children was created by the words of the gift, or if a joint tenancy was created, a severance of it was effected by Mrs. M'Taggart's marriage. 1. A gift to A. and her children would be construed as a gift to A. for life, with remainder to her children as tenants in common—*Crawford* v. *Trotter* (4 Madd. 361); *Audsley* v. *Horn* (26 Beav. 195; 28 L. J. Ch. 293; on appeal, 1 De Gex, F. & J. 226; 29 L. J. Ch. 201); *Ward* v. *Grey* (26 Beav. 485; 29 L. J. Ch. 74); *Morse* v. *Morse* (2 Sim. 485). 2. Where the gift was to A. for the benefit of her children. There, if there were any words implying a settlement or a separation of interests, such as directions that the share of the widow should be for her separate use, the Court would construe it as a gift to A. for life with remainder to her children—*Froggatt* v. *Wardell* (3 De Gex & Sm. 685); *Jeffery*

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v. *De Vitre* (24 Beav. 296); *Bibby* v. *Thompson* (32 Beav. 646); *In re Phene's Trusts* (L. R. 5 Eq. 346). But if the will be construed as creating a joint tenancy, Mrs. M'Taggart's marriage operated as a severance of her share. The case of leaseholds was different from the case of reversionary choses in action—*May* v. *Hook* (Co. Lit. 246 a, note 184); *Bracebridge* v. *Cooke* (Plowd. 418).

JAMES, V.C. (without hearing a reply) said, there was no ground for holding that the children took as tenants in common. It was clear that there were no words of severance, and no words, as in *In re Phene's Trusts*, directing the testator's executors to do that which they might think most to the advantage of the children. The Court in that case stood in the place of the executors, and in the performance of their office gave the property among the objects of the testator's bounty as tenants in common; but that was the only case cited as an authority that the children took as tenants in common. He must hold that in this case the children took as joint tenants. And if they took as joint tenants it was, under the circumstances which had happened, immaterial to decide the question whether the gift was to the testator's widow for life, with remainder to their children as joint tenants, or whether the gift was to the widow and children immediately as joint tenants. He should have been inclined to follow *Crockett* v. *Crockett*, and hold that the gift was to the widow for life, with remainder to her children; but it was immaterial to determine that point. It was sufficient to hold that the children took as joint tenants in remainder or otherwise. Then, as to the question whether the joint tenancy was severed as to Mrs. M'Taggart's share by her marriage. Looking to the decisions as to the cases of chattels real and chattels personal, he was inclined to think that the balance of authority was against holding that by marriage a severance was effected of that which the husband could not have reduced into possession during the coverture.

LORD ROMILLY, M.R., April 28, 29, May 3, 27, 1869.

SMITH *v.* WEGUELIN.

38 L. J. Ch. 465; L. R. 8 Eq. 198; 20 L. T. 724; 17 W. R. 904.

Referred to, *Goodwin* v. *Robarts*, [1875] E. R. A.; 44 L. J. Ex. 57; L. R. 10 Ex. 76; 32 L. T. 199; 23 W. R. 342 (Ex.): affirmed, [1875] E. R. A.; 44 L. J. Ex. 157; L. R. 10 Ex. 337; 33 L. T. 272; 23 W. R. 915 (Ex. Ch.); and affirmed also, [1876] E. R. A.; 45 L. J. Ex. 748; 1 App. Cas. 476; 35 L. T. 179; 24 W. R. 987 (H.L.).

Jurisdiction—Foreign Government—Loan negotiated in England—Foreign Contract—Hypothecation.

INTERNATIONAL LAW.—*If a foreign government violates a contract entered into with British subjects resident in England, the Court cannot in the absence of that government apply its property in this country to the relief of the injured parties.*

A loan contracted by a foreign state by its agent in this country is a foreign contract.

A foreign company, under a contract with a foreign government, held the surplus proceeds of guano shipped to this country remaining after the satisfaction of certain prior charges at the disposal of that government. The foreign government contracted a loan by its agent at this court, to be secured by hypothecation of the guano shipped to this country. The foreign government did not appear:—Held, *that the Court of Chancery could not direct the guano shipped to this country to be applied according to the terms of the hypothecation.*

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The republic of Peru, which had at various times contracted loans in this country, secured by hypothecation of the guano consigned to British territories, in 1862 contracted a new loan.

At the time when this loan was negotiated, the Peruvian government was under a contract with a company at Lima, called La Campañia de Consignacion de Huano en la Gran Bretaña, relating to guano shipped for the consumption of this country. By that contract the government engaged to consign to the company all the guano permitted to be extracted from the guano-beds and shipped to Great Britain and Ireland, for eight years from a specified day, and to permit no guano to be sold or exported for this market unless by the company; the net proceds of the guano, after the payment of certain expenses, were to be held in London at the disposal of the Peruvian government; the company were to set apart preferentially the amounts necessary to provide for the service of the Anglo-Peruvian debt; and of the remainder one-third was to be devoted to the reimbursement of the company.

Under this contract the whole of the guano shipped to Great Britain and Ireland since January, 1862, was the property of the company until it was sold, subject to their liability to account to the Peruvian government for the proceeds.

It was during the subsistence of this contract that the new loan was negotiated. The government of Peru, by its Minister at this Court, authorized Messrs. Heywood, Kennards & Co. to receive subscriptions on behalf of the republic for a loan of 5,500,000*l*. (to be secured by bonds), on terms expressed in articles of which the following are material:

"Art. 8. In addition to the formal guarantee of the government of Peru, with all its revenues in general, it is expressly stipulated that the said government specially and exclusively hypothecates the whole of the guano that shall be imported into the United Kingdom of Great Britain and Ireland and her colonies, and into the kingdom of Belgium, and the whole of the proceeds resulting from the sale of such guano, after the deduction therefrom of the amount of expenses of shipment, of discharge, of freight, of commissions, and of all customary expenses whatsoever; but no other deductions whatsoever shall be made. If the net proceeds of the guano hypothecated for the loan shall, at any time, from any event soever, prove insufficient for the payment of the interest and of the redemption fund provided for by Art. 12, in such case the government of Peru shall mainly provide whatever sum may be necessary for those payments from other sources, and in particular shall appropriate and use for that purpose the proceeds of any other guano which may, at any future time, be at the disposal of the government.

"Art. 9. The house in Great Britain, and, in the event hereinafter mentioned, the house in Belgium, to which the guano may from time to time be consigned shall (fifteen days before the respective periods specified in articles 2. and 12.) pay to Messrs. Antony Gibbs & Sons, in London, the sums that may be necessary for the payment of the interest and of the redemption fund respectively; any surplus of the proceeds of the hypothecated guano after the completion of the yearly payments for interest, and for the redemption hereinafter provided for, shall always remain at the disposal of the Peruvian government. In the event of the proceeds in the hands of the house in Great Britain, to whom the guano may be consigned, being insufficient in any half-year for the purpose of such payments respectively, the surplus proceeds in the hands of the Belgian house shall then be applied to make up any deficiency.

"Art. 11. If, from any unexpected event, twelve months should elapse without the arrival of vessels with guano, or the house to whom the guano is consigned should not prove to the satisfaction of Messrs. Heywood, Kennards & Co., when called upon by them to do so, that guano is expected in sufficient quantity for the payment of the interest and redemption fund herein provided for, Messrs. Heywood, Kennards & Co., or their agents in Lima, shall have authority and power to take possession of, put on board ship and transmit to the order of Messrs. Heywood, Kennards & Co., in England, for account of the

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republic of Peru, an amount of guano sufficient, in the opinion of such agents, to meet the current year's payments for interest and redemption fund as aforesaid; and shall render at the proper time the account sales of the cargoes in the usual manner, and place at the disposal of the Peruvian government, and hand over the surplus that may remain after payment of the amount payable for interest and redemption fund for the then current year."

Messrs. Antony Gibbs & Sons were at that time the agents of the Peruvian government in London for the business of the loans. Before the commencement of the suit they had been succeeded by Messrs. J. Thomson, T. Bonar & Co., the first four defendants on the record.

The 12th article provided that a certain sum should be applied every half-year by the Peruvian government to the redemption of the bonds. If the price of the bonds was above par, the government was to be at liberty to redeem at par, the bonds to be redeemed being selected by lot. If the price was below par, the redemption was to be effected by purchases in the market.

The stipulated sum was applied in accordance with these provisions on the 1st of January and the 1st of July, in every year up to and including the 1st of July, 1865.

On the subsequent half-yearly days the proper sum had been applied, but the plaintiff alleged that it had been applied, in disregard of the 12th article, to the redemption of bonds already virtually cancelled, and at prices unnecessarily high. The result was to injure the remaining bondholders, by preventing the rise in the price of the bonds which would otherwise have taken place.

The plaintiff, therefore, a holder of bonds issued under this loan, instituted the present suit on behalf of himself and the other bondholders.

The defendants were Messrs. J. Thomson, T. Bonar & Co., the Republic of Peru (which did not appear), the Compañia de Consignacion de Huano en la Gran Bretaña, and Mr. Ayers, one of the bondholders of a subsequent loan, who was made a defendant to represent them.

The bill prayed that all guano in the United Kingdom and the British colonies, or consigned thereto, and in the possession of Messrs. J. Thomson, T. Bonar & Co., or their agents, or of the Compañia de Consignacion de Huano en la Gran Bretaña, or their agents, or to come into their possession, might be applied under the direction of the Court in accordance with the terms of the hypothecation thereof.

Mr. Jessel and *Mr. Westlake*, for the plaintiff.—The company was bound to hold the surplus proceeds of the guano after satisfying certain charges upon it as a trustee for the Peruvian government, and that government has hypothecated this surplus to the bondholders. The company therefore is now the trustee of the surplus for the bondholders. The company is in the position of a first mortgagee. We are entitled to a subsequent charge. It cannot injure us that the Peruvian government, the mortgagor, against whom we seek no relief, is out of the jurisdiction. We proceed against the company as first mortgagee. It cannot be denied that the proceeds of the guano sent to this country and in the hands of a trustee here are subject to the jurisdiction of this Court. The existence of property in this country gives jurisdiction to enforce a charge against it—*The Carron Iron Company* v. *Maclaren* (5 H.L. C. 416; 24 L. J. Ch. 620); *Story's Conflict of Laws*, ss. 549, 550; *Cammell* v. *Sewell* (3 Hurls. & N. 617; 5 Hurls. & N. 728; 27 L. J. Ex. 447; 29 L. J. Ex. 350). The same principle was affirmed by the *Cour de Cassation* in France on the 13th of December, 1865. This principle is applied even to personal property according to its actual locality, where the object of the proceeding is to affect the specific property itself; although we admit that where the universality of a man's property is concerned, as in bankruptcy, rights are governed by the law of the owner's domicil. We are not deprived of our remedy because the republic of Peru does not appear. When a foreign government has created a charge on property in this country in favour of persons in this country, it cannot bar the jurisdiction which it thus confers on our Courts by declining to appear. In *The Duke of Brunswick* v.

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the King of Hanover (2 H.L. C. 1), the Lords carefully guarded themselves from giving sanction to a contrary proposition. This consequence follows from the general rule, that a party entitled to a charge may enforce it in this court whether the defendant appears or not. Therefore it makes no difference whether the defendant failing to appear is a foreign potentate or not. The jurisdiction is not personal—*Gladstone* v. *Musurus Bey* (1 Hem. & M. 495; 32 L. J. Ch. 155); *The United States* v. *Prioleau* (2 Hem. & M. 559; 35 L. J. Ch. 7). This loan, moreover, is an English contract, and our Courts will enforce it.—See *Story's Conflict of Laws*, s. 285. Although it was the contract of a foreign government, it was made by an agent residing in this country, and it was to be executed here.

Mr. Southgate and *Mr. Charles Hall* appeared for the first four defendants, who, being mere agents, were not affected by the question in dispute, and they took no part in the argument.

Sir Roundell Palmer and *Mr. Kekewich*, for the Compañia de Consignacion. —We appear for a foreign company, subject to the laws of a foreign country. The company is under no contract with the bondholders whom the plaintiff assumes to represent. It is under a contract with the government of Peru relating to guano sent to this country, and both parties to the contract are subject to the laws of Peru. The contract on which the plaintiff proceeds is not an English contract. It is a state loan, to be interpreted according to the laws of Peru. The word "hypothecate" is not a term of English law, and the provisions relating to the disposal of the guano are subordinate provisions. The governing terms of the contract are those which create the relation of debtor and creditor between the republic of Peru and the subscribers to the loan. The Peruvian law is the foundation of the authority to negotiate the loan, and it is immaterial that the government acts by its agents in London. It is incorrect to call the company a trustee. That is to import the terms of English law into the construction of a foreign contract. The scope of the bill is to interfere in the arrangements between the Peruvian government and parties contracting with it. In order to ascertain the surplus which the plaintiff seeks to charge, the Court must take the accounts between the parties; and the Court is asked to take an account on the footing of a foreign contract between a foreign government and a foreign company simply on the ground that one of the foreign parties has agents in this country. Such an account could not bind the Peruvian government, which is absent. Moreover, the question whether that government has injured the bondholders cannot be tried in its absence—*Gladstone* v. *the Ottoman Bank* (1 Hem. & M. 505; 32 L. J. Ch. 229).

Mr. Fry, for Mr. Ayers, took no part in the argument.

Mr. Jessel, in reply.—We cannot be prejudiced because the Peruvian government refuses to come in, but the government may be bound by the decision against its agent—*The Duke of Brunswick* v. *the King of Hanover* (6 Beav. 39; 13 L. J. Ch. 107). We do not desire to take accounts between the Peruvian government and the Consignment Company. We only seek to enforce our rights against the guano in this country. I contend that a direction given for value to an agent to apply the proceeds of certain property in his hands for my benefit constitutes him a trustee for me. But it makes no difference whether the persons holding this guano are regarded as trustees or agents. They are equally bound in both cases. The fact that the loan contract was to be performed in London makes it an English contract. But if it be not, I can still enforce it. If a merchant in Peru hypothecates a cargo to me, I can enforce the charge here. I admit that the Peruvian law would govern the construction of a Peruvian contract, but the construction is not in question.

The MASTER OF THE ROLLS (*May* 27) after stating the facts said: On this state of facts the question is whether the plaintiff is entitled to any, and, if any, what, relief. I am of opinion that he is entitled to none. It is obvious that if any party is to blame in this transaction it is the Peruvian government, and that alone. The contract which governs this question is in my opinion

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clearly and unmistakably a foreign contract. It is a contract between the Peruvian government on the one hand and the Consignment Company on the other, entered into in Peru, between Peruvians and according to the law of Peru, by which the government on the one hand give leave to the company to consign to their agents in London guano, to be applied in the first instance to the payment of the loans contracted by the Peruvian government as that government shall direct, a certain proportion of the surplus being devoted to the payment of disbursements with which the plaintiff has no concern.

The company are bound to follow the directions of the government, and to account to the government. If they misapply the proceeds they are accountable to the republic of Peru, and to no one else. The Peruvian government is not here, and is not amenable to this jurisdiction; and the Court is asked, on the ground that the Peruvian government has entered into another and distinct contract with the plaintiff in common with the other bondholders (many of whom I assume are not British subjects or resident in Great Britain) to take an account arising upon a foreign contract between a foreign government and a foreign company which can bind no one and can have no possible result.

The most singular part of the argument is this: that though this matter must be dealt with according to the Peruvian law, in which, for aught that I am informed in this suit, the doctrine of trusts is wholly unknown, it is contended that the agents of the Consignment Company in London are trustees of the proceeds of the guano for the bondholders, and that the matter must be disposed of according to the English law of trustee and *cestui que trust*. If this be correct, then the bondholders who have taken a part of the loan in Belgium are entitled to deal with the guano in Belgium and in the hands of the Belgian house as consignees, according to the law of Belgium.

It is in my opinion a complete misapprehension to suppose that a government negotiating a loan in a foreign country thereby introduces into the transaction all the peculiarities of the law of the country in which the negotiation is made. The place where the loan is negotiated does not in my opinion in the least degree affect the question of law.

The contract is the same and the obligations are the same whoever may be the bondholders. Suppose a company in Paris or in Brussels instruct their agents in London to subscribe for some of these bonds, is the contract between the Peruvian government and the French company or between the Peruvian government and the Belgium company to be regulated by the English law, because the contract is made by their agents in London, or are the contracts to vary according to the domicil of the subscribers of the loan? If the French government should negotiate a loan on certain specified terms, whether it be negotiated in Brussels, in London or in Paris, the same law must regulate the whole, and that law is the law of France as much as if it had been expressly notified in the articles that the French law would be that by which the contract must be construed and governed. So, if the English government were to negotiate a loan in Paris or in New York, the English law must be applied to construe and regulate the contract.

But assuming that it was otherwise, how can this Court interfere? Suppose a palpable breach of the contract between the Peruvian government and the bondholders. If the Peruvian republic declared that it would not pay a penny to any of the bondholders, but would totally disclaim and repudiate the debt, could this Court interfere?

Some of the States of North America negotiated loans, partly here and partly at home, and afterwards repudiated them. No one ever attempted to seize any property belonging to those States in this country and thus enforce a contract between those governments and the holders of their bonds. If this Court attempted to further such a demand it would fall into this dilemma, either it would simply make itself ridiculous in attempting what is impossible, or, if it could assume that the foreign government was answerable and then found property belonging to that foreign government in this country, it might

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alter the relation between the two countries and enable a bondholder practically to declare war against a foreign state. If the Court of Chancery could seize all the guano belonging to the Peruvian government it might as well seize Peruvian vessels under the article which declares that all the other property and sources of revenue of the republic should be applicable to payment of the loan.

But the case of the plaintiff fails even according to the English law. I am of opinion that neither articles 8. and 11, nor any other article on which the plaintiff relies, according to the true construction in an English Court gives him a right to regulate the management of the loan on the guano contract, and that it is not in his power under this contract to restrain the action of the Peruvian government with relation to the price at which the bonds are taken.

The counsel for the plaintiff rely on three cases in particular,—*The Duke of Brunswick* v. *the King of Hanover*, *Gladstone* v. *Musurus Bey* and *The United States* v. *Prioleau*. The first case has little to do with the matter. All that I understand to have been decided by it is, that a foreign sovereign is not amenable to the jurisdiction of the Court of Chancery for any act done by him as a sovereign, and that he does not by appearing to a suit waive his right to take that defence, but that if he also has an English character distinct from that of a foreign sovereign he may in respect of acts done in that character be made a defendant.

The second case is that which is principally relied upon. In that case a company in London entered into a contract with a foreign government for the establishment of a bank. The foreign government, in order to secure the execution of the contract by the English company, required 20,000*l*. in bonds of the foreign government, to be deposited in the Bank of England, to be forfeited if the contract was not executed. The foreign government thought fit to declare that the contract had been violated, and directed its ambassador to withdraw the deposit, which, but for the intervention of the Court, he would have been able to do. The Court refused to make any order on the ambassador, and allowed his objection to the jurisdiction; but on an interlocutory application restrained the bank from parting with the amount so deposited until the hearing of the cause, on the ground that it held this fund as a trustee for the foreign government or the English company according as the case should be proved at the hearing. It does not appear to me to have any bearing on the present case favourable to the plaintiff. The Court did not enforce the specific performance of any contract between the foreign government and the English company, nor did it assume any power to do so; but as an English company had deposited a sum in the hands of a third party to wait a certain result the Court interposed indirectly to prevent the foreign government from taking possession of the sum until it had established that according to the contract entered into with the company it was entitled to do so. The Court expressed no opinion as to the nature of the contract entered into with the English company, whether it was an English or a foreign contract; all that it did was to prevent the foreign government from dealing with the fund as its own before it was shewn that it was forfeited. This is clear from the whole case, and particularly from this passage, at page 503: "The case may well be supposed of a foreign ambassador here accepting the trusts of a marriage settlement, it may be as sole trustee. If the funds were invested in his name in the Bank of England it is quite true I could not deal with him on account of the impossibility of any process being had against an ambassador. But the funds being in the Bank of England it appears to me clear that I could in such a state of circumstances (this being a fund vested in the ambassador absolutely and accepted by him upon certain trusts) prevent the Bank of England from handing it over to the ambassador, upon a distinct intimation on his part that he intended to apply it to his own use." But does it therefore follow that at the instance of the English company the Court would have enforced the contract against the foreign government or touched the property of that government in this country (which is what is sought to be obtained here)? Indeed, the next case in the same volume,

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Gladstone v. *the Ottoman Bank*, establishes a proposition precisely in point. A bill filed against the Ottoman Bank, its directors and the Sultan, alleged that the Sultan's government had granted to the plaintiffs the exclusive right of issuing bank notes in Turkey, and had subsequently, in derogation of that grant, made a similar concession to the defendants (the Ottoman Bank), and prayed a declaration of the plaintiffs' exclusive right, and an injunction against the Ottoman Bank and its directors. It was held on the demurrer of the bank and its directors that, inasmuch as the Court had no jurisdiction on the contract against the Sultan, it had none against the bank and its directors, and the demurrer was allowed accordingly. That is exactly this case. There is no jurisdiction against the Peruvian government, and therefore there is none against the Consignment Company, and no decree can be made.

The third case has in my opinion no bearing on the question before me. It merely establishes that a foreign government which puts down an insurrection within its own territories acquires all the rights of contract which the temporary and insurgent government it replaces possessed or exercised.

But, assuming that the Court had jurisdiction, then I am of opinion that, on the merits, the Peruvian government was perfectly justified in what it did.—[His Lordship then discussed the mode in which the stipulated sum had been applied to the redemption of bonds, and proceeded]—I think the Peruvian government has acted within the strict spirit and according to the due construction of the articles on which the loan was taken. If it had not done so, I think that it is a matter in which this Court has no power to interfere, and that if it did interfere it would be necessary to take the accounts between two foreign parties to a foreign contract, both residing abroad; and to do this is contrary to the principles of this Court. In the present case, it is made more difficult by the fact that one of these parties is a foreign government not before the Court, and who cannot be made amenable to it. In all respects I think the plaintiff is in the wrong, and his bill must be dismissed with costs.

MALINS, V.C., March 24, 1869.

LYNE'S TRUST.

38 L. J. Ch. 471; L. R. 8 Eq. 65; 20 L. T. 735; 17 W. R. 840.

See, *In re Drew*, [1899] E. R. A.; 68 L. J. Ch. 157; [1899] 1 Ch. 336; 79 L. T. 656; 47 W. R. 265 (Ch. D.). Disapproved, *In re Coley* [1903] 2 Ch. 102; 88 L. T. 521 (Ch. D.); [1903] E. R. A.; 72 L. J. Ch. 502; [1903] 2 Ch. 102; 88 L. T. 517 (C. A.).

Will, Construction—Legatee, Description of—Present and after-taken Wife.

WILL.—*Bequest of a fund to testator's son (then married) for life, and after his decease the fund to be divided equally between the wife of the said son, if she should survive him, and all and every the child or children of the said son:*—Held, *that no particular wife was designated, and that an after-taken wife who survived the son was entitled to share in the gift over.*

Edward Lyne, by his will, made in 1854, bequeathed a sum of 800*l.* to trustees, upon trust to pay the income to his son George for life, and after his decease "to pay and transfer the said sum unto and equally between the wife of the said son, in case she should survive him, and all and every the child or children of his said son."

At the date of the will the testator's son, George Lyne, had a wife and one child living, but the wife died in the following year.

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The testator died in 1858. George Lyne the son married a second wife in 1859, and died in 1868, having had no child by his second wife.

The trustees having paid the fund into Court, his widow, the second wife, now petitioned for a declaration that she was entitled to one moiety.

Mr. G. Hastings, in support of the petition, cited *Peppin* v. *Bickford* (3 Ves. 570), and contended that the widow, though an after-taken wife, of the testator's son, was entitled just as much as his children by her, if any, would have taken, there being no words to limit the gift to any particular wife.

Mr. Cotton and *Mr. A. E. Miller*, for the only child, claiming the whole fund, referred to 1 *Jarman on Wills*, 304, and cited *Garratt* v. *Niblock* (1 Russ. & M. 629); *Bryan's Trust* (2 Sim. N.S. 103; 21 L. J. Ch. 7); *Boreham* v. *Bignall* (8 Hare, 131; 19 L. J. Ch. 461). The gift was not to any after-taken wife, but to the particular woman who was at the date of the will the wife of the testator's son, and known to the testator as such. The analogy is the same as in the case of a gift to testator's servants; the gift is limited to persons answering the description at the date of the will—*Parker* v. *Marchant* (1 You. & C. C.C. 290; 11 L. J. Ch. 223: affirmed on appeal, 12 L. J. Ch. 385).

Mr. M. Cookson, for the trustees.

MALINS, V.C.—The question here is, whether the gift over is limited to the children of the testator's son and the particular lady who was known to the testator as his son's wife at the date of the will, or whether, in the events that have happened, it extends to an after-taken wife who has survived the testator's son? It is clear that all the children of George Lyne, whether by his then wife or by his widow, the present petitioner, would have been equally entitled. It is also clear that the class to take could not be ascertained till the death of George Lyne; then the gift is to his wife, if she survive, and his children as a class. The contingency which has actually arisen was, probably, not present to the mind of the testator, and his intention is therefore uncertain. But seeing that the petitioner answers the description of the wife, and might certainly have been the mother of children who would have taken under this gift, I cannot presume that the testator intended to exclude her from the class, and, in my opinion, the words which he has used are not such as render it necessary for me to do so. The authorities do not appear to me to proceed upon any very sound principle, but I think the present case may fairly be distinguished from *Garratt* v. *Niblock* and *Bryan's Trust*, in both of which there were expressions which are not found here, indicating that the testator meant a particular person. One moiety of this fund, therefore, will go to the petitioner as the widow of George Lyne, and the other moiety to his only child.

MALINS, V.C., June 10, 1869.

SUTCLIFFE *v.* HOWARD.

38 L. J. Ch. 472; 17 W. R. 819.

Will—Construction—"Respective"—Tenancy in Common—Distribution per Stirpes.

WILL.—*Gift to three persons by name for their respective lives, and subject thereto for their respective children as tenants in common.*

The life tenants are tenants in common, and the children take per stirpes.

John Howard devised certain hereditaments upon trust, to apply the rents and profits to and for the benefit of his two brothers James and Samuel and his married sister Lucy, "during their respective lives, in such manner as the

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trustees should think fit, and subject thereto in trust for the respective children of his said brothers and sister as tenants in common."

The testator died in July, 1848; his brother James died in the following October, leaving children; his sister Lucy died in 1867, leaving children; his brother Samuel was still living and had children.

The questions were, whether the gift to the testator's brothers and sister created a joint tenancy or a tenancy in common, and whether their children took *per capita* or *per stirpes*.

Mr. Dunning, for the trustees, the plaintiffs, submitted the case to the Court.

Mr. Glasse and *Mr. J. T. Humphry*, for Samuel Howard, the surviving brother claimed a life interest in the whole, and submitted that, upon his death the property would be divisible between all the children *per capita*, and not *per stirpes*. They cited upon the question of joint tenancy—*Woodstock* v. *Shillito* (6 Sim. 416); *Armstrong* v. *Eldridge* (3 Bro. C.C. 215); *Cranswick* v. *Pearson* (31 Beav. 624); *Wood* v. *Draycott* (2 New Rep. 55); *Pearce* v. *Edmeades* (3 You. & C. Ex. 246; 8 L. J. Ch. 61); *Bryan* v. *Twigg* (37 L. J. Ch. 249; L. R. 3 Ch. Ap. 183); and upon the question of distribution—*Congreve* v. *Palmer* (16 Beav. 435; 23 L. J. Ch. 54); *Abrey* v. *Newman* (16 Beav. 431; 22 L. J. Ch. 627); *Alt* v. *Gregory* (8 De Gex, M. & G. 221).

Mr. Nalder, for the children of James and Lucy, the deceased brother and sister, was not called upon.

MALINS, V.C.—The contention upon the first question here raised is, that the brothers and sister took as joint tenants, so that the surviving brother is now entitled for his life to the whole of the rents and profits as against the children of the deceased brother and sister; and if that is so, then there is the second point, whether, upon the death of the surviving tenant for life, the children take *per capita* or *per stirpes?* Now, I think there can be no doubt that the testator intended to give an equal share in this property to each of the three devisees and their children. Has he used words sufficient to effectuate that intention? I think it turns upon the word "respective," which has a most important significance here. The gift is to the three persons named "for their respective lives," which, as I understand it, means that each is to be tenant for life of one-third; and "subject thereto," that is, subject to the life interest already given to each parent in one-third of the property, the children of each are to take the deceased parent's share. The words are, I think, sufficient to shew that the share of each parent was to go over upon his or her death to his or her children; and it follows from this construction that the children take *per stirpes*.

MALINS, V.C., Feb. 12, March 5, 1869.

STUART *v.* COCKERELL.

38 L. J. Ch. 473; L. R. 7 Eq. 363; 20 L. T. 513: affirmed, [1870] E. R. A.; 39 L. J. Ch. 729; L. R. 5 Ch. 713; 23 L. T. 442; 18 W. R. 1057 (L.J.).

Will—Construction—Remoteness—Class to be ascertained after Death of Unborn Tenant for Life.

PERPETUITY.—*Testatrix gave property to three persons successively for life, one of whom was unborn at her decease, and after the decease of the survivor, to all the children of S. (who was at the date of the will unmarried) in equal shares, and the child or children of such of the said children as should be then dead, with an absolute gift over in case there should be no child or grandchild of the said S. then living*:—Held, *that the limitation over to the children and grandchildren of S, being a gift to a class to be ascertained after the expiration of a life not in being at the death of the testatrix, was void for remoteness.*

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Observations upon Ashley v. Ashley (6 Sim. 358; 3 L. J. Ch. 61), *and* *Avern* v. *Lloyd* (37 L. J. Ch. 489).

This was a petition to determine a question of remoteness arising in the administration of the estate of Elizabeth Edgley Hewer, who, by will, dated the 21st of March, 1782, devised and bequeathed all her real and personal estate to trustees upon trust to sell and convert, and to invest the proceeds on government securities, and to pay the interest, dividends and proceeds to her nephew Sir Simeon Stuart (who was then unmarried), for his life for his own use; and after his decease, upon trust to pay the said interest, dividends and proceeds to the eldest son of Sir Simeon Stuart for life for his own use and benefit, and after the decease of the eldest son of Sir Simeon Stuart, then upon trust to pay the said interest, dividends and proceeds to her niece Elizabeth Stuart for life for her own use and benefit; and after the decease of the survivor of them, the said Sir Simeon Stuart, his eldest son, and Elizabeth Stuart, then upon trust " to pay and transfer the said government securities unto all and every the children of my said nephew Sir Simeon Stuart, share and share alike, if more than one, and if but one, then to such one child, and the child or children of such of the children of the said Sir Simeon Stuart as shall be then dead, according to the Statute of Distribution of Intestates' Estates; but in case there shall be no child or grandchild of the said Sir Simeon then living, then upon trust to pay and transfer the said government securities unto all and every the children of my said niece Elizabeth, equally to be divided between them if more than one, and if but one, then to such one child; but in case there shall be no child of my said niece then living, then upon trust to pay and transfer the said government securities unto Charles Cockerell, to whom I give the same accordingly."

The testatrix died in 1785. Sir Simeon Stuart died intestate in January, 1816, having had four children, two of whom died in his lifetime. His eldest son, Simeon Henry Stuart, was born in 1790, and died in October, 1868, leaving issue. Elizabeth Stuart, the niece of the testatrix, died in 1846.

Upon the death of Simeon Henry Stuart, the successive life estates having all expired, his brother William Henry Frederick Hewer Stuart, the second and only surviving son of Sir Simeon, claimed to be entitled under the gift over to the whole corpus of the testatrix's estate, and presented this petition for payment thereof out of Court.

It was admitted, however, at the bar that the petitioner's claim under the will, if any, could only extend to a moiety of the fund, the children of Simeon Henry Stuart being equally entitled to the other moiety in right of their deceased father.

The claim was resisted on behalf of the next-of-kin of the testatrix, on the ground that all the gifts over after the three life estates were void for remoteness.

Mr. Cotton and *Mr. Riddell*, for the petitioner, contended that there was a distinct and valid gift to the children of Sir Simeon Stuart, which vested in interest, though not in possession, as they came into *esse;* and though the gift to the children of deceased children, which was nothing but a substitutionary gift, might be too remote, still that did not affect the validity of the original gift to the children of Sir Simeon Stuart. There was nothing in the original gift to contravene the law upon which the rule against perpetuities was based, namely, the rendering of an estate inalienable beyond the legal period of a life or lives in being and twenty-one years afterwards. If a remainder over after the death of an unborn tenant for life necessarily vested, as this did, within the legal time, the gift was clearly good. *Lewis on Perpetuities*, 164; *Cadell* v. *Palmer* (1 Cl. & F. 372; 7 Bligh, N.S. 202).

[MALINS, V.C. referred to *Barlow* v. *Salter* (17 Ves. 479, 483).]

That case depended on a contingency. Here there was none. The gift to the children vested at their birth, subject to a postponement of the enjoyment only—*In re Bennett's Trusts* (3 Kay & J. 280).

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[MALINS, V.C.—You seek to bring the case within *Roe* v. *Jeffery* (7 Term Rep. 589).]

Admitting that authority, we contend that here it is immaterial that the gift over is preceded by a good gift to an unborn person for life—*Routledge* v. *Dorril* (2 Ves. 357); *Beard* v. *Westcott* (5 B. & Ald. 801); *Walker* v. *Shore* (15 Ves. 122).

Mr. Shapter and *Mr. Woodroffe*, for mortgagees claiming under Sir Simeon Stuart's eldest son, adopted the same line of argument, insisting that the original gift to the children was quite distinct from the substitutionary bequest to the grandchildren, and wholly unaffected by invalidity in the latter. They relied on *In re Bennett's Trusts*, *ubi supra*, and cited in addition, upon the question of remoteness, *Lewis on Perpetuities*, 423, 513; 1 *Hayes on Conveyancing*, 495; 1 *Jarman on Wills*, 2nd ed., 239; 11 *Jarman's Bythewood*, 188; *Sugden's Gilb. Uses*, 270-274, 277; *Ashley* v. *Ashley* (6 Sim. 358); *In re Merrick's Trusts* (35 L. J. Ch. 418; L. R. 1 Eq. 551); *Avern* v. *Lloyd* (37 L. J. Ch. 489; L. R. 5 Eq. 383). And upon the true meaning of a "substitutionary gift" they referred to *In re Turner* (2 Dr. & Sm. 501; 34 L. J. Ch. 660); *Loring* v. *Thomas* (1 Dr. & Sm. 497; 30 L. J. Ch. 789).

Mr. Fleming and *Mr. Wickens*, for the personal representatives of Elizabeth Stuart, argued for an intestacy after the expiration of the life estates. The gift of the corpus is too remote. It is a fallacy to read the latter part of the bequest as a substitutionary gift. It is all one original gift to the children and the grandchildren alike, including children of unborn children, and therefore necessarily void. It is impossible to get over the word "then"; and the class could only be ascertained upon the death of the last survivor of the tenants for life, one of them being an unborn person at the testator's death. They referred to *Leake* v. *Robinson* (2 Mer. 363); *Cattlin* v. *Brown* (11 Hare, 372); *Knapping* v. *Tomlinson* (34 L. J. Ch. 3).

The VICE CHANCELLOR declined to hear *Mr. Cottrell*, who appeared for beneficiaries claiming under Elizabeth Stuart.

Mr. Cotton was heard in reply.

MALINS, V.C. (*March* 5), after stating the facts, said: It is contended on the part of the respondents that all the gifts after the life estate to the eldest son of Sir Simeon Stuart are void for remoteness. Property may be given by will or secured by settlement to an unborn person for life, or to several unborn persons successively for life, with remainders over, providing the vesting of the remainders or the ascertainment of those who are to take in remainder be not postponed till after the death of such unborn person or persons.—[His Honour referred to *Ashley* v. *Ashley*; *Lewis on Perpetuities*, 423; 1 *Jarman on Wills*, 3rd ed. 264; *Gilbert on Uses, by Sugden*, 269, n.]—I refer to those passages because they were cited in argument, but of course there are many others which illustrate and support this proposition.

In the present case, therefore, the life interest of the unborn son of Sir Simeon Stuart would have caused no difficulty if those who were to take in remainder, subject to that life interest, could have been ascertained with certainty within the allowed period of a life or lives in being at the death of the testatrix, and twenty-one years after. But the gift is to a class of persons consisting of the children and grandchildren of Sir Simeon Stuart who should be living at the death of the survivor of Sir Simeon Stuart, his unborn son and the testatrix's niece, Elizabeth Stuart. That necessarily postponed the ascertainment of the class to take, and consequently the vesting of the property till after the expiration of a life not in being at the death of the testatrix; and the gift is necessarily void for remoteness.

The case is in principle like *Jee* v. *Audley* (1 Cox, 324), where the gift was if a person should die without issue then to the children of two living persons. A gift over on failure of issue would be void for remoteness as to mere personal property, but a gift over to children living would have been good if it

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had been to children living at the death of the testatrix, but as those persons might have had other children it was impossible to say that it meant children then living. The gift was held void for remoteness, and Lord Kenyon would not assume that the two aged persons might not have had other issue. I followed that case in *Sayer's Trusts* (36 L. J. Ch. 350; L. R. 6 Eq. 319). The decision in *In re Bennett's Trusts* was much relied on by Mr. Shapter and Mr. Cotton, who argued in support of the validity of the bequest, but there all the gifts in remainder were to take effect at the expiration of lives in being, and the question of remoteness could not therefore arise. I do not stay to refer to the cases. It was a mere question who was to take at the death of the two children of the testator who were living at the time of making his will. That case, therefore, has no application to the doctrine of remoteness upon which this question must be determined.

If the gift over at the death of the unborn son of Sir Simeon Stuart had been confined to the life interest of the niece it would have been good upon the principle of *Roe* v. *Jeffery*. That was a devise to Thomas Frisswell and his heirs for ever, and with a gift over if he died without issue to four persons, without words of limitation.

If the limitation over was to take effect upon his death, without issue generally, that was an estate tail, but if it meant dying without issue within a limited period it was a fee with an executory devise over. The Court of Queen's Bench held that it was a fee with an executory devise over. The devisees over could only take for life. The failure of issue must necessarily be within lives in being. So here, if the gift over had been confined to the niece for life it would have been good, because it must have taken effect in her lifetime or not at all.

But as her life interest was followed by remainders to the children and grandchildren, the case is like *Barlow* v. *Salter*, which is an authority of the highest importance. The bequest there was in these words: "All my estate, real and personal, of every sort and kind, to my daughter and her heirs, and half the navigation money for her natural life; and in case she dies without issue all to be divided between my four nephews and nieces, Nathaniel Barlow, William, Catharine and Elizabeth, Catharine's part"—this is the point—"only for life, and her part to be divided between the survivors." Now, if the bequest had stopped with the gift over to Catharine for life of course it would have been good, upon the principle of *Roe* v. *Jeffery*, which I have just cited, but as it was followed by an absolute gift over to the survivors, Sir William Grant lays down the rule thus, at page 482: "Where nothing but a life interest is given over the failure of issue must necessarily be intended a failure within the compass of that life, but where the entire interest is given over the mere circumstance that one taker is confined to a life interest furnishes no indication of an intention to make the whole bequest depend upon the existence of that person at the time when the event happens on which the limitation over is to take effect. When a remainder for life has been limited after an estate tail it never was argued that an estate tail could not really be meant to be given because of the improbability of intending a personal provision for one person after the indefinite failure of issue of another. The failure may happen during the life, and that chance is what is given to the remainderman for life. So here, if Catharine shall be living when the issue fails she will take a life interest, but the bequest over is still to take place when the failure of issue shall happen whether Catharine be then living or not." So in this case, the niece was to take for life if she was living, but if she was not living those in remainder were equally to take whether her death took place before the period or after the period.

I have referred to the two cases mentioned by Mr. Shapter after the argument. The first is *In re Merrick's Trusts*. I am not able to see that that has any particular application, because the events there did not call for any application of the doctrine of remoteness. But the second case, of *Avern* v. *Lloyd*, is apparently applicable. That was a decision of Vice Chancellor Stuart,

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in the year 1868. The marginal note is this: "Bequest of personal estate to unborn issue as tenants for life"—that is, to all the children of A, who, as yet, had no children, "as tenants for life," to that there could be no objection—"and to the executors, administrators and assigns of the survivor of the unborn issue." The Vice Chancellor held that that gave an absolute interest to the survivor. Now, that may be reconciled by regarding the words "executors, administrators and assigns" following a gift of life estate as words of limitation. If the Vice Chancellor construed it thus, that it was a gift to all the children for life with a limitation to one of them absolutely, it may possibly be reconciled. But if the Vice Chancellor intended to decide that the vesting of any gift whatever can be postponed till after the expiration of lives not yet in being, then I must respectfully differ from his opinion, because nothing can be more clearly settled (it was finally settled by *Cadell* v. *Palmer*,) that you may postpone the vesting of the estate either to a person in existence upon an event which may never happen or to a class of persons not yet in existence but who may come into existence at any time within the life or lives in being and the period of twenty-one years in gross afterwards. But every gift which must not necessarily be ascertained within that period is void.

Therefore, a gift to take effect at the expiration of lives not yet in being must necessarily be void. The Vice Chancellor, I see, uses this expression: "Considering that this limitation to the executors, administrators and assigns must take effect in the lifetime of one of the unborn issue, to whom a good estate for life is given, so as to give him an absolute estate in possession when he becomes survivor, it is not easy to see on what ground it can be considered as too remote." It is clearly too remote if the persons who were to take were not to be ascertained until all the unborn persons were dead; but he goes on to say, "The gift to the executors, administrators and assigns of the surviving tenant for life attaches to the life estate so as to give a contingent absolute interest to each tenant for life." That, I think, was the ground upon which the Vice Chancellor decided it, and upon that ground it may be right; but if it is attempted to say that you may postpone the gift until after the expiration of the lives of all those unborn persons, that is plainly in opposition to all the settled rules on the subject, and I cannot think that Vice Chancellor Stuart intended to decide anything of the kind. I may make an observation also on the case of *Ashley* v. *Ashley*, which was cited by Mr. Shapter, where Sir Lancelot Shadwell held that you might give an estate to unborn persons for life as tenants in common, with cross-remainders between them for life. Now, if you were to give an estate to A. for life, remainder to his children, as tenants in common in fee, with a proviso that if any one of the unborn children should die without issue living at the time of his death, his share should go over, nobody would for a moment contend that such a gift would be good, because it is a cross-limitation to take effect at the death of an unborn person. Therefore it is that on such limitations, with cross-limitations in fee, every person acquainted with the subject takes care to limit the cross-remainders over upon the death of the children under twenty-one, it being perfectly clear that if you give to A. for life, remainder to his children as tenants in common in fee, and provide that if any one of the children shall die under the age of twenty-two years, the original gift to them as tenants in fee is good, but the cross-limitation to them is void, as being too remote. But if twenty-two years is too remote, how can it be good when it is at the expiration of a life not yet in existence? Therefore, with great respect to the memory of Sir Lancelot Shadwell, I cannot help thinking that he went too far in holding that life estates may be given to unborn issue as tenants for life, with cross-remainders between them, because every such remainder must either be a remainder upon an estate tail, or a cross executory bequest or limitation limited so as to take effect necessarily within a life in being and twenty-one years afterwards.

The only point, therefore, here is—Is it a gift to a class of persons, to be ascertained at the expiration of an unborn person? The words are, "after

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the decease of the survivor of them, the said Sir Simeon Stuart, his eldest son, and my said niece Elizabeth" (that is, after the expiration of the lives of two persons who were then *in esse*, and one who was not then *in esse*), "then upon trust to pay and transfer the said government securities unto all and every the children of my said nephew Sir Simeon Stuart, share and share alike, if more than one, and if but one, then to such one child and the child or children of such of the children of the said Sir Simeon Stuart as shall be then dead." It is perfectly clear to my mind that the whole class is a class consisting of children and grandchildren, and that the class could not under the terms of this will be ascertained until all the three tenants for life were dead. That is too remote a period, and it is made still more clear by the terms of the ultimate gift over.—[His Honour read the clause and continued]—It is perfectly clear, therefore, to my mind that the object of the testatrix was to give to the children of Sir Simeon Stuart, if there were any at that period; if not, then to the children of her niece, and if there were no children of the niece, then to Sir Charles Cockerell.

Upon every ground it appears to me to be a limitation void for remoteness, not simply, as I have already said, because there is interposed a life interest to an unborn person, but because the vesting is postponed until after the expiration of that life. There must be, therefore, a declaration that the limitations are void for remoteness: the consequence of which, I apprehend, will be, that the next-of-kin of the testatrix will take.

LORD ROMILLY, M.R., April 24, 1869.

In re PEYTON'S SETTLEMENT TRUSTS.

38 L. J. Ch. 477; L. R. 7 Eq. 463; 20 L. T. 728.

Trustee—Power to invest in Fee Simple Lands in Possession—Freehold Ground-Rents—22 & 23 *Vict. c.* 35. *s.* 30.

TRUST AND TRUSTEE. *Power to invest funds in the purchase of hereditaments of a clear and indefeasible estate of inheritance in fee simple in possession*:—Held, *to authorize an investment in freehold ground-rents.*

By an indenture of settlement, dated the 4th of April, 1843, certain hereditaments were conveyed to trustees and their heirs to the use of John East Hunter Peyton for life; with remainder to the use of the trustees to preserve contingent remainders; with remainder to the use of the first and other sons of J. E. H. Peyton in tail male; with remainders over.

The settlement contained a power for the trustees, with the consent of the person for the time being entitled thereunder for his life to the rents and profits of the settled property, to sell any part thereof, with a declaration that when any part of the settled property should be sold, the trustees should, with all convenient speed, and with such consent as aforesaid, invest the money to arise by the sale in the purchase of other "hereditaments to be situate in England or Wales of a clear and indefeasible estate of inheritance in fee simple in possession, or of lands or hereditaments of a leasehold or copyhold tenure convenient to be held therewith, or with the hereditaments thereinbefore settled."

The trustees had, in exercise of the power, and with the consent of J. E. H. Peyton, the person entitled for life to the rents of the settled property, sold part of such property for upwards of 18,000*l.*, and they and also J. E. H. Peyton were desirous that 8,866*l.*, part of this sum, should be invested in the purchase of several plots of land situate in the parish of Kensington, and on which fifty-five dwelling-houses had been recently erected. Of these houses leases had been granted for terms of ninety-nine years; as to some from the 24th of June, 1866,

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and as to others from the 25th of December, 1867, at rents amounting together to 403*l*.

Doubts being entertained by the trustees as to whether the contemplated investment was within the meaning of the power contained in the settlement, they, conjointly with J. E. H. Peyton, had presented a petition, under the 22 & 23 Vict. c. 35, asking for the opinion of the Court as to whether the contemplated investment was an investment within the terms of and authorized by the settlement, and praying that the costs of the application might be provided for.

Mr. Jessel and *Mr. E. S. Ford*, for the petitioners.

Lord Romilly, M.R.—I am of opinion that the proposed investment is authorized by the settlement. The costs of the petitioner must be paid out of the trust funds.

Lords Justices, March 23, 1869.

THE MIDLAND BANKING COMPANY (LIMITED) *v.* CHAMBERS.

38 L. J. Ch. 478; L. R. 4 Ch. 398; 20 L. T. 346; 17 W. R. 598; affirming, L. R. 7 Eq. 179; 19 L. T. 548; 17 W. R. 156 (V.C.).

Referred to, *Gray* v. *Seckham*, [1873] E. R. A.; 42 L. J. Ch. 127; L. R. 7 Ch. 680; 27 L. T. 290; 20 W. R. 920 (L. JJ.).

Principal and Surety—Debtor and Creditor—Proof of Debt.

Banker. Bankruptcy.—*A customer of a bank wishing to overdraw his account, procures a surety to the extent of* 300*l*. *The guarantee provided that all dividends, compositions and payments received by the bank should be taken and applied as payments in gross, and that the guarantee was to apply to and secure any ultimate balance which should remain due. The intending debtor gave to the surety an equitable mortgage to secure him from loss. Afterwards he executed a creditors' deed. The account was then overdrawn to the extent of* 410*l*. *By arrangement between the assignees and the surety the mortgaged property was sold, and the latter received out of the proceeds of the mortgaged property* 300*l*., *and paid it to the bank*:—Held, *that the bank was entitled to prove for the whole* 410*l*.

This was an appeal from a decree of Vice Chancellor Malins, declaring the plaintiffs entitled to prove, under a creditors' deed, against the estate of one F. J. Mercer for the sum of 410*l*. 4*s*. 11*d*., under the following circumstances.

The plaintiffs carried on the business of bankers at Sheffield, and in 1865, Mercer was a customer. Mercer wishing to overdraw his account, obtained from one Thorpe a guarantie to the plaintiffs, which was addressed to the plaintiffs in the following terms:

"In consideration of your opening an account with F. J. Mercer, and advancing to him at any time the sum of 300*l*. at my request, I hereby guarantee to you the repayment of all moneys which shall at any time be due from him to you on the general balance of his account with you, and I hereby declare that this guarantie shall be a continuing guarantie to the extent at any one time of 300*l*., and shall not be considered as wholly or partially satisfied by the payment or liquidation at any time or times hereafter of any sum or sums of money for the time being due upon such general balance, but shall extend to cover and be security for every and all future sums of money at any time due to you, notwithstanding any such payment. And I further declare that you may grant to the said F. J. Mercer, or to any drawer, acceptor or indorsers of bills of exchange or promissory notes received by you from him, any time or other indulgence, and compound with him or them respectively, without discharging or satisfying any liability, and that all dividends, compositions and

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payments received from them or him respectively shall be taken and applied as payments in gross, and that this guarantie shall apply to and secure any ultimate balance that shall remain due to the company; and I further declare that this guarantie shall continue to be binding, notwithstanding any changes that may from time to time take place in the shareholders of the said Midland Banking Company (Limited)."

At the same time this guarantie was given by Thorpe, Mercer gave to Thorpe an equitable mortgage on some property to secure him from any loss by reason of the guarantie. This fact did not appear to be known to the bank.

The bank accordingly made advances to Mercer, the amount of which varied from time to time. At the date of Mercer's executing the deed, presently mentioned, the amount owing to the bank was 410*l.* 4*s.* 11*d.*

On the 6th of January, 1866, Mercer executed a deed of assignment of his estate to the defendants Chambers and Thorpe for the benefit of creditors, which deed was afterwards duly registered under the Bankruptcy Act, 1861.

The trustees of the deed sold the property mortgaged to Thorpe, and Thorpe, acting in his character of mortgagee, took 300*l.* out of the purchase-money and paid it to the Midland Banking Company in discharge of all liability on his guarantie. The exact arrangement which he and his co-trustee made in reference to this transaction did not appear.

The Midland Banking Company having tendered a proof of the whole of the 410*l.* 4*s.* 11*d.*, of course, however, not claiming to receive more than with the 300*l.* would pay them in full, the trustees refused to admit the proof for more than 110*l.* 4*s.* 11*d.*, the balance after deducting the 300*l.*

This suit was therefore instituted for the purpose of administering the trusts of the deed so as to enforce the proof. The bill prayed that the plaintiff might be declared entitled to prove for the whole, the amount receivable under the proof being limited as above mentioned.

Vice Chancellor Malins having decided in favour of the plaintiffs, the defendants now appealed.

Mr. Cotton and *Mr. Kekewich*, for the appellants.—The plaintiffs here are creditors who have been partly paid out of the debtor's estate: how can they have any claim to prove for the whole debt? It is true that a surety, if he pays the amount for which he is liable as surety, is ordinarily entitled to stand in the creditors' shoes—*Thornton* v. *M'Kewan* (1 Hem. & M. 525; 32 L. J. Ch. 69), and we admit that he may by contract divest himself of that right in favour of the creditor—*Ex parte Hope; In re Fernandez* (3 Mont. D. & D. 720); yet this admission does not apply here, because Thorpe received from the bankrupt's estate the whole amount he paid to the plaintiffs; he, therefore, had no right or desire to prove. How can the plaintiffs then prove for the 100*l.*? If the Vice Chancellor's judgment be supported there will be this result: that though the bankrupt only gave security for 300*l.*, yet the whole debt may possibly be paid in full, and that without any other person suffering or even incurring any risk. This cannot be the effect of the transaction, as it would practically disregard the rule in bankruptcy that a secured creditor can only prove for the balance after realizing his security. We are not concerned to argue whether if the plaintiffs had proved for the whole amount and received a dividend, and then required payment of the balance from Thorpe, they could have recovered in full. We submit, however, that according to the true construction of the agreement it would not be so; they would then only be entitled to such an amount as was the difference between the dividend on 300*l.* and that sum. The fact, however, is, that they have received out of the bankrupt's estate 300*l.*, and they cannot now prove for it.

Mr. De Gex and *Mr. Bristowe*, for the plaintiffs, were not called upon.

[Counsel for the defendants also endeavoured to raise a second point, namely, that the true remedy was in bankruptcy, and not by bill. This point was, as counsel stated, not argued in the Court below, because they felt sure, from previous decisions of his Honour, that he would have decided against

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them, but they wished to raise the point in the Court of Appeal. Their Lordships, however, refused to hear any argument as to the jurisdiction, as it had not been taken below.]

SELWYN, L.J.—There are two questions in this case: one as to the construction of this contract, and the other a question of principle, as to the effect of the counter security being given to Thorpe, and his being paid in full. It is settled by *Ex parte Holmes* (Mont. & C. 301: reversing 8 L. J. Bk. 44); *Thornton* v. *M'Kewan;* and *Ex parte Hope*, that where a surety who is liable for part of a debt has paid that part, he is entitled to stand in the place of the creditor for so much as he has paid, against the estate of the bankrupt debtor. The surety may, however, in his contract of suretyship resign this right in favour of the creditor; and the question is, whether he has done so here. I am of opinion that the last clause in this guarantie is to give the creditor the right to the full amount of the dividend, and exclude the surety from the right to have any share in the benefit of the proof. This being so, is the case affected by the existence of the counter security, and the fact of full payment to the surety out of that security? This question seems answered by *Ex parte Hope*, which differs from the present case in the fact that there the security was upon the separate estate of one of two partners; Lord Justice Knight Bruce, however, who was the Chief Judge in Bankruptcy, and was of great experience, in his judgment seems to treat that as immaterial. He says, "The agreement would, I conceive, have been clearly effectual and binding between the creditor and surety if the surety had not, by means of his mortgage or otherwise, received payment from the assignees or from the bankrupt's estate; and if so, I do not see why their redemption of the mortgage, or the payment of the surety in any other way out of the bankrupt's estate, should vary the rights of the creditor. I think they must take the surety's rights, if they take them at all, as he had them himself; that they cannot make any claim against the creditors' dividends which the surety could not have made; that he could not have made this claim, and that their petition must be dismissed. I may observe that I have not stated the facts specifically as they appear, nor, indeed, do all the facts clearly appear; but I have meant to state, and I believe I have stated, the case in a manner as favourable as possible to the petitioners. The debtor was, in truth, a firm of several persons in partnership together, and the mortgaged estate seems to have been the separate property of one of the firm, a circumstance which appears to me to make no difference, at least in favour of the petitioners. I suppose that if it had been originally made to the respondents, it would not have affected their right of proof against the firm." Of course, if there were any fraud in this transaction, different considerations might arise; but nothing of the kind is suggested. The case is simple, and comes within that decided by Vice Chancellor Knight Bruce, and I think the appeal must be dismissed, with costs.

GIFFARD, L.J.—I quite agree with the opinion of the Vice Chancellor. When we look at this guarantie, I think we cannot doubt what is its meaning: it refers to dividends, which must mean dividends from the debtor's estate. It was therefore a relinquishment of all claim to any such dividends. If the surety had paid the 300*l.* out of his own money, he would in ordinary cases have had a right to prove for that amount. This right, however, he gave to the plaintiffs. The argument depending upon the fact that the 300*l.* came out of the estate is ill founded, because the 300*l.* did not come out of the estate; it came out of property which, having been devoted to this very purpose, did not at the date of the execution of the creditors' deed, form part of the estate. That being so, there is no ground for reducing the proof, and the appeal must be dismissed, with costs. It must be distinctly understood that we give no opinion on the question of jurisdiction.[1]

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(1) See *Ex parte Sherrington, In re Bond* (1 Mont. D. & D. 195).

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STUART, V.C., Feb. 11, 12, 19, March 24, 1869.

WOODHOUSE v. WOODHOUSE.

38 L. J. Ch. 481; L. R. 8 Eq. 514; 20 L. T. 209; 17 W. R. 583.

Referred to, *British Mutual Investment Company* v. *Smart*, [1875] E. R. A.; 44 L. J. Ch. 697 (n.); L. R. 10 Ch. 569 (n.); 32 L. T. 849; 23 W. R. 724 (V.C.): reversed, [1875] E. R. A.; 44 L. J. Ch. 695; L. R. 10 Ch. 567; 32 L. T. 849; 23 W. R. 800 (L. JJ.)

Trustee and Cestui que Trust—Non-enforcement of Covenant—Breach of Trust—Privity—Administrator ad Litem—Lapse of Time.

TRUST AND TRUSTEE.—*A marriage settlement executed in May, 1817, contained a covenant by the husband with a trustee to pay to the trustee within three years a sum of 3,000l., to be held upon the usual trusts in favour of the husband and wife and issue of the marriage, or else to secure that sum by mortgage. The money was neither paid nor secured, and the trustee never attempted to enforce the covenant, but acted as solicitor to the purchaser, on a sale in 1846 by the covenantor for his own benefit of the property he had covenanted to mortgage. The trustee died in 1848; his sons had notice of the settlement in 1851. The covenantor became bankrupt in 1852, and applied to the widow and executrix of the trustee to prove for the 3,000l., which she declined to do. Dividends of 11s. in the pound were declared in the bankruptcy, and new trustees of the settlement were appointed by the Court, whose proof was rejected as too late. The widow and executrix of the trustee died in 1865, and his sons entered into possession of his property as devisees and legatees under his will, but when cited to take out letters of administration to their father, they declined to do so.*

Upon a bill filed on the 2nd of October, 1867, by the widow and children of the covenantor and the new trustees, against the sons and an administrator ad litem of the deceased trustee, in answer to which the sons admitted assets:—Held, *first, that the sons having admitted assets, the administrator ad litem represented the deceased trustee sufficiently for the purposes of the suit.*

Secondly, that the rights of the plaintiff were not barred by lapse of time, and that the sons were liable to make good the loss occasioned by the breach of trust to the extent of the assets of their father in their hands.

By the settlement, dated the 28th of December, 1816, and made in consideration of the marriage of J. T. Woodhouse and Clara Oppenheim, J. T. Woodhouse and his father jointly and severally covenanted with two trustees, of whom Joseph Woodhouse, a solicitor, was one, that they, or one of them, would within three years from the solemnization of the marriage pay to the trustees the sum of 3,000*l.*, with interest thereon at 5*l.* per cent., payable half-yearly. And it was thereby declared and agreed that the trustees should invest the said sum of 3,000*l.* when received, and stand possessed thereof, and of the securities for the same, upon trust, to pay the income thereof, and also the interest payable under the covenant to J. T. Woodhouse for life, and after his death to Clara Woodhouse for her separate use for life, and after the death of the survivor should stand possessed of the said trust fund, upon the ordinary trusts, in favour of the children of the marriage, with the usual powers of appointment by the parents. The settlement also contained a covenant by J. T. Woodhouse with the trustees that, in case the said sum of 3,000*l.* should not be paid to the trustees within the three years, he would secure the payment thereof, with interest, by a mortgage on certain hereditaments therein specified.

The marriage took place in May, 1817, and the settlement was duly executed by all parties.

The 3,000*l.* was not paid to the trustees nor secured by the mortgage either

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within the three years of the marriage nor after the expiration thereof; and the trustees never made any attempt to enforce either of the covenants.

In 1846, many years after his father's death, J. T. Woodhouse sold for 3,500*l.* the property which he had covenanted to mortgage as a security for the 3,000*l.* Joseph Woodhouse, one of the trustees, acted as solicitor to the purchaser upon the occasion of the sale, and the purchase-money was appropriated by J. T. Woodhouse to his own use.

Joseph Woodhouse survived his co-trustee, and died in 1848, having, by his will, devised his realty and bequeathed a portion of his personalty to his sons, Richard Woodhouse and Joseph Woodhouse, and having appointed his widow executrix.

In the month of December, 1851, the settlement came into the possession of Richard Woodhouse, to whom it was sent for safe custody.

In 1852, J. T. Woodhouse (the husband) became bankrupt, and he applied to the executrix of Joseph Woodhouse, the deceased trustee, to prove under the bankruptcy for 3,000*l.*, but she refused to do so, except upon receiving a release in full, and she also declined to concur in appointing new trustees of the settlements. Dividends amounting to 11*s.* in the pound having been declared under the bankruptcy, a petition was presented for the appointment of new trustees of the settlement. Before the hearing of the petition the executrix of Joseph Woodhouse died, and the sons entered into possession of the remainder of his property.

In February, 1865, an order was made on this petition, whereby William Daggs and Frederick James Hand were appointed trustees of the settlement with power to sue on the covenants, and they then tendered a proof under the bankruptcy for the 3,000*l.* and interest, which was rejected as not having been made within the proper time.

J. T. Woodhouse (the husband) died in April, 1866, and his widow and two children then applied to Richard and Joseph Woodhouse, the sons of the deceased trustee, to take out letters of administration with the will annexed of the estate of their father, of which they were in possession, left unadministered by his executrix. This they refused to do, and having been cited before the Court of Probate, and having failed to appear, by an order, dated the 16th of July, 1867, letters of administration of the unadministered estate of Joseph Woodhouse, limited to the purposes of this suit, were granted to Joseph Carpenter Woodhouse.

On the 2nd of October, 1867, the present bill was filed by the widow and children of J. T. Woodhouse against the two sons of the administrator of Joseph Woodhouse, for the purpose of having the loss sustained by the breach of trust committed by Joseph Woodhouse made good out of his assets. The bill prayed a declaration that the neglect or omission of Joseph Woodhouse to enforce the covenants as to the payment and securing of the 3,000*l.* was a breach of trust on his part, which his estate was liable to make good; for an account of what was due to the present trustees in respect of the trust funds and breaches of trust; that what should be found due might be declared a charge upon the real and personal estate come to the hands of the defendants; that the defendants (the sons) might be ordered to pay what should be so found due, and, if they should not admit assets for the purpose, for an account and administration of the real and personal estate of Joseph Woodhouse, and, if necessary, for an injunction and receiver.

The plaintiffs had previously effected a compromise with the representatives of Secretan, the trustee who predeceased Joseph Woodhouse; and the defendants (the sons) admitted assets of their father in their possession.

Mr. Greene and *Mr. Babington*, for the plaintiffs.—It was the duty of the trustees to have enforced both the covenants contained in the settlement; and so far from enforcing either of them, Joseph Woodhouse actually concurred in the sale of the lands, subject to the second covenant. It is clear that he committed a breach of trust; that breach of trust was repeated by his widow

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and executrix; and the rights of the *cestuis que trust* cannot be barred by the lapse of time. There is nothing approaching to acquiescence, and the defendants, the sons, are liable to make good the loss to the extent of the assets of their father in their hands. They cited *Obee* v. *Bishop* (1 De Gex, F. & J. 137 29 L. J. Ch. 148), and *Brittlebank* v. *Goodwin* (37 L. J. Ch. 377; L. R. 5 Eq. 545).

Mr. Dickinson and *Mr. J. W. Chitty*, for the defendants, the sons of Joseph Woodhouse.—First, there is not before the Court any sufficient legal personal representative of Joseph Woodhouse, the deceased trustee, and the plaintiffs shew no such privity between themselves and the defendants, for whom we appear, as to create an obligation on our part to make good the loss which the trust estate has sustained. Secondly, the claim of the plaintiffs is barred by lapse of time and laches. This is not the case of a demand against a defaulting trustee in his lifetime, but of administration of his estate and payment of his debts after his death, and in the latter case his debts, if specialty, are barred after twenty years,—if simple contract, after six years. Although Lord Justice Turner, in *Obee* v. *Bishop*, ubi supra, was of opinion that it would be dangerous to hold that a demand against the assets of a deceased trustee, in respect of a breach of trust committed by him, is barred at the expiration of six years from his death, an opposite view has been taken by the Court of Chancery in Ireland—*Dunee* v. *Doran* (13 Ir. Eq. Rep. 545), which was the unanimous judgment of the Court of Equity Exchequer in Ireland, and was followed by the Master of the Rolls in *Brereton* v. *Hutchinson* (2 Ir. Ch. Rep. 648), whose decision again was affirmed by the Lord Chancellor (3 Ir. Ch. Rep. 361), and the same view was taken in *Newport* v. *Bryan* (5 Ir. Ch. Rep. 119). In *Brittlebank* v. *Goodwin*, ubi supra, the Vice Chancellor Giffard merely said that he does not agree with the Irish authorities on this point. We claim, however, the benefit of laches, founded not merely on acquiescence, but also on the alteration in the state of the parties. The debt sought to be thrown on the defendants, who are innocent parties, is a debt of 20*s*. in the pound, whereas the sum which the plaintiffs would have recovered from the estate of the deceased trustee in his lifetime, had they used due diligence, would have been only 9*s*. in the pound. So that, even if lapse of time is not a bar to the plaintiffs, their laches is—*Browne* v. *Cross* (14 Beav. 105); *Bright* v. *Legerton* (29 Beav. 60; 29 L. J. Ch. 852: on appeal, 2 De Gex, F. & J. 606; 30 L. J. Ch. 338). Moreover, the breach of trust committed by Joseph Woodhouse was only in neglecting to sue, and was not a case of misappropriation, by which his assets have been swelled, so that, considering the great lapse of time and the conduct of the parties, to hold the defendants now liable would be a case of extreme hardship.

Thy also referred to *The Life Association of Scotland* v. *Siddal* (3 De Gex, F. & J. 58); *Fowler* v. *Bayldon* (9 Hare, Ap. 78).

Mr. Greene, in reply.

His Honour reserved judgment.

Stuart, V.C. (*March* 24).—It was the duty of the trustees of the settlement of 1816 to enforce both the covenants entered into with them. If the 3,000*l*. covenanted to be paid to them by James Thomas Woodhouse and Edward Woodhouse within three years was not paid, they were bound to enforce the covenant by James Thomas Woodhouse to secure that sum by mortgage on the estates mentioned in the deed. The duty of the trustees was neglected as to both covenants, and the concurrence of Joseph Woodhouse, the trustee, in 1846, in the sale of the lands subject to the covenant was as gross a breach of trust as could be committed. Even after that breach of trust the covenants were continuing obligations, with a continuing duty in Joseph Woodhouse, the surviving trustee, to enforce them. Joseph died in 1848, and his widow and executrix soon after his death, and also the devisees of his real estate, were all cognizant of the trust and of its breach. After the covenantor became bankrupt, in 1852, the executrix refused to prove under his bankruptcy for the debt on the covenants. The relief sought in this suit is not against her, for she died in 1865,

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but against her sons, who upon her death became entitled in possession to the real assets of their father, Joseph, the trustee, and also to part of his personal estate. They, being the defendants in this suit, are in the possession of the assets of the defaulting trustee. They had full notice of the breach of trust, if not in the life time of the trustee, certainly in 1851, when the settlement of 1816 came into the possession of one of them (Richard), and that was before the refusal of the executrix, his mother, to prove the debt on the covenant under the bankruptcy. Upon the death of the executrix, in 1865, they declined to constitute themselves legal personal representatives of their father, the trustee.

There are two grounds on which they resist the right to relief in this suit. First, they say that there is no sufficient legal personal represenative of the defaulting trustee, of whose assets they admit they have obtained possession. But there is before the Court the person to whom letters of administration have been granted limited to the purposes of this suit. This defendant, who is thus appointed administrator *ad litem* on their refusal, is clearly a sufficient representative for the purposes of this suit, as they themselves are in possession of the assets which are claimed by the plaintiffs as liable to make good the breach of trust.

The other ground of defence is length of time. It was in 1866 that the tenant for life died and that the plaintiffs became entitled in possession. The tenant for life was himself the covenantor, who, with the concurrence of the trustee, in 1846, sold the estate which was subject to the covenant. It can make nothing against the rights of the plaintiffs, who are *cestuis que trust* in the covenant, that they might have called upon the trustee in 1846 to enforce it, or might have filed a bill against him then, for there is no suggestion of acquiescence. On the contrary, in 1852, the widow and executrix of the defaulting trustee was called upon to prove under the bankruptcy of the covenantor and refused. She held the assets of her husband with full knowledge of the breach of trust, and the statement in the answer of the defendants her sons shews that they too, at that time and since 1851, had notice of the breach of trust by their father. Her duty as executrix of the surviving trustee was to enforce the covenant, and her refusal was a double breach of trust by her. It appears that if she had proved, a considerable dividend would have been obtained, and the liability which clearly attached to her husband's assets in her hands would have been *pro tanto* relieved. At her death, in 1865, the assets liable to make good the breach of trust (which she had possessed since 1848) passed into the hands of the defendants her sons, who had, not only then but from 1851, full notice of the trust. It seems, therefore, impossible for the defendants, who now possess the assets, to fix upon any date when the right of the plaintiffs was barred by length of time.

It has been argued that the defendants, although in possession of the assets with notice of the breach of trust, are not liable because there is no privity between them and the plaintiffs, and no duty or obligation by them to the plaintiffs. But having notice of the trusts so long ago, and of the breach of trust, they cannot be allowed to say that the assets in their hands are not liable to the plaintiffs' claims. Their defence is rather prejudiced than assisted by their refusal upon citation to take out the letters of administration. The decree will therefore be, that Joseph Woodhouse, the trustee, by not enforcing payment, committed a breach of trust; and that the defendants, having admitted that they have assets of his in their possession, are, to the extent of those assets, liable to make good the 3,000*l*., with interest at 5*l*. per cent. from the 14th of April, 1866, the day of the death of the tenant for life.

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JAMES, V.C., April 20, 1869.

In re THE TRENT & HUMBER SHIP-BUILDING COMPANY (LIMITED); *Ex parte* BAILEY AND LEETHAM.

38 L. J. Ch. 485; L. R. 8 Eq. 94; 20 L. T. 301; 17 W. R. 1079.

Followed, *In re Home Investment Society*, [1880] E. R. A.; 14 Ch. D. 167; 28 W. R. 576 (Ch. D.); *In re Dominion of Canada Plumbago Co.*, [1884] E. R. A.; 53 L. J. Ch. 394; 27 Ch. D. 33; 50 L. T. 82 (Ch. D.): affirmed, [1884] E. R. A.; 53 L. J. Ch. 702; 27 Ch. D. 33; 50 L. T. 518 (C. A.); *In re Wenborn*, [1905] E. R. A.; 74 L. J. Ch. 283; [1905] 1 Ch. 413; 92 L. T. 228; 53 W. R. 332 (Ch. D.).

Company—Winding-up—Successful Action against Company in Liquidation —Recovery of Costs in full by Plaintiffs from the Company.

COMPANY.—*As regards the question of costs there is no difference in principle between the prosecution by a company in liquidation of an action which proves fruitless and the unsuccessful defence by the company of an action brought against them. Accordingly, where the plaintiffs in an action for breach of contract, brought against a company in liquidation by leave of the Court, were successful in obtaining damages against the company, they were allowed their costs of the action in full upon the authority of* Mackrill Smith's case (37 L. J. Ch. 185; L. R. 3 Ch. 125).

This was an application to the Court upon an adjourned summons, taken out on behalf of Messrs. Bailey & Leetham, of Kingston-upon-Hull, shipowners, that the official liquidators of the above company might be ordered to pay to the applicants a dividend in respect of an amount awarded to them in an action brought against the company in liquidation in pursuance of an order of the Court, and also to pay to them in full the amount of the taxed costs of the said action, and their costs of proving their claim in the above matter.

By an order of Vice Chancellor Wood, made in the above matter, and dated the 7th of December, 1867, upon a summons taken out by the official liquidators, it was ordered that William Bailey and William Leetham be at liberty to bring an action at law against the company in respect of the non-delivery of two vessels, called the "Lincolnshire" and "Yorkshire." In pursuance of this order Messrs. Bailey & Leetham brought an action in the Court of Exchequer against the company, which the official liquidator obtained leave to defend. In this action the jury, by consent of the parties, found a verdict for the plaintiffs for 11,000*l.*, the amount of their claim, subject to this sum being reduced by the award of an arbitrator, to whom the amount was referred. The arbitrator, by his award, dated the 7th of December, 1868, awarded that the verdict for the plaintiffs do stand, but that the damages be reduced to 6,083*l.* The plaintiffs' costs of the action and reference were taxed at the sum of 516*l.* 10*s.* 10*d.*, and judgment was signed by them for these two sums. The claimants, Messrs. Bailey & Leetham, now asked to have a dividend paid to them upon the 6,083*l.*, the amount of their damages, and to be paid in full the 516*l.* 10*s.* 10*d.*, the amount of their costs at law, and also their costs of the proceedings in Chancery.

Mr. Little and *Mr. Macnaghten* supported the application.—If the company had been plaintiffs in an action which had failed, the applicants, as defendants in such action, would have been entitled to be paid their costs in full—*In re the Bank of Hindustan, China and Japan; Mackrill Smith's case* (37 L. J. Ch. 185; L. R. 3 Ch. 125). In this case the applicants were the plaintiffs in the action at law, but they had been driven to their action by the company. The result of the action in the defendants' favour, shewed that the resistance of the applicants' claim by the company was improper.

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JAMES, V.C., said, it seemed to him that the same principle would apply to both cases, and he called upon

Mr. Kay and *Mr. J. N. Higgins*, for the official liquidator.—They argued that the case was analogous to that of a claim in an administration suit for a debt and costs, where the practice was to add the costs to the debt, and to pay a dividend on the aggregate sum if the estate were not enough to pay the whole amount. In suits of that kind the rule was that the claimant could not recover his costs in full where he could only recover a part of his debt, and in a case of this sort the same rule must prevail.—They referred to *Morshead* v. *Reynolds* (21 Beav. 638); *Ship's case* (13 W. R. 1016); 1 *Griffiths on Bankruptcy*, 589; *The Companies' Act*, 1862, *ss.* 95, 158, 163; 12 & 13 Vict. *c.* 106. (*The Bankruptcy Act*, 1849), *s.* 181; *Rule* 27. *of General Order, November*, 1862, *under the Companies' Act*, 1862 (32 L. J. Ch. p. iv.); *Rule* 24. *of Consolidated General Orders XL.*

[JAMES, V.C., referred to *Clinch* v. *the Financial Corporation* (38 L. J. Ch. 1; L. R. 4 Ch. 117.]

The action had been brought by leave of the Court under the 87th section of the Companies' Act, and no terms had been imposed upon the plaintiffs—*In re the Exhall Mining Company* (33 L. J. Ch. 595).

Mr. Little said, they asked costs of this and the other adjournment into Court, as well as of the action.

JAMES, V.C., said, that in this case the authority of Lord Cairns, L.J., in *Mackrill Smith's case* led him to the same decision as he would have come to if he had been deciding the case merely upon the unvarying rule of right, viz., that these costs ought to be paid to the claimant. Upon general principles, unless the Court was bound by some express enactment or order to the contrary, a company in winding up ought to be dealt with as a matter of course like any other litigant, and if an action were brought or resisted for the benefit of the estate, and that action were brought fruitlessly, or defended fruitlessly, then the estate, that is to say, the other creditors of the company, ought, like everybody else, to be fixed with the costs to which they had improperly and unnecessarily put their opponent.

The result of the action in this case, to his Honour's mind, shewed that it had been improperly resisted on behalf of the assets; and if so, he thought the assets ought to pay the costs of that improper resistance. There might have been, perhaps, some doubt upon the words of the order; but he rested upon the authority of the Lord Justice in *Smith's case*, who did exactly the same thing when he allowed the costs of a fruitless action brought by the liquidator to be paid in full out of the assets of the company. As he understood that decision, Lord Cairns made the company pay in full the costs of the application to the Court below and to the Court of Appeal. That being so, he conceived that this plaintiff was entitled to receive this 516*l.* 10*s.* 10*d.*, being the costs of the action for which the plaintiff had recovered judgment against the company, exactly in the same way as Smith received the 123*l.* in the case before Lord Cairns. There could be no distinction in principle between the costs of an action which failed and the costs of an action which had been unsuccessfully defended.

That disposed of the 516*l.* 10*s.* 10*d.* Then the other costs, as he understood, were not the ordinary costs of proving a claim, which were governed by the general orders, but the costs of an application *extra* the claim, that was to say, the costs of the application for leave to bring the action. The order would be, that the costs of the action, of the former application to the Court for leave to bring the action, and of the present application be allowed in full. The other costs to be taxed and added to the debt. The official liquidator to have his costs out of the estate.

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LORDS JUSTICES, April 29, 1869.

DEAR v. VERITY.

38 L. J. Ch. 486; 21 L. T. 185; 17 W. R. 716: affirming, [1869] E. R. A. 310; 38 L. J. Ch. 297; 20 L. T. 268; 17 W. R. 567 (V.C.).

Written Agreement to grant a Lease—Parol Variation of the Contract—Uncertainty—Specific Performance.

LANDLORD AND TENANT.—*An agreement to grant a lease of a house was contained in three letters, which specified the term and the amount of rent, and stipulated that the intended lessee (the plaintiff) was to do all repairs, painting, decorating, &c. The intended lessor (the defendant) refused to grant a lease on the footing of the agreement, on the ground that the plaintiff had at the time of entering into the agreement also verbally undertaken to expend* 1,000*l. on the premises in a particular manner, and to allow covenants to compel him to do so to be inserted in the lease; that the plaintiff had not performed that part of his agreement, and had objected to such covenants; and further that the agreement as contained in the letters was too uncertain for the Court to enforce:*— Held, *on a bill filed for specific performance of the agreement as contained in the letters, that the alleged parol collateral agreement was not substantiated by the evidence, and that there was no ground for saying that the terms of the letters were uncertain, and therefore that the plaintiff was entitled to a decree with costs.*

This was an appeal by the defendant from a decree of Stuart, V.C., for specific performance of an agreement to grant a lease of a certain house called Vale Lodge.

The case is reported 38 L. J. Ch. p. 297, where the facts, evidence and documents in the case, and the judgment of the Vice Chancellor, are set out at length.

Mr. E. K. Karslake and *Mr. Rowcliffe*, for the appellant, contended, (1) that the evidence proved that the expenditure by the plaintiff of the 1,000*l.* on the premises was either a condition precedent to granting the lease or an essential part of the agreement; and, (2) that the terms of the so-called agreement, with reference especially to the words "I agree to do all repairs, painting, papering, decorating, &c.," were too uncertain for the Court to enforce.—They relied on *Taylor* v. *Portington* (7 De Gex, M. & G. 328).

Mr. Greene and *Mr. Cottrell*, for the respondent, were not called upon.

SELWYN, L.J. said that, without being at all prepared to extend that which the late Lord Justice Knight Bruce called the boundary line which divided negotiation from contract in such a manner as to convert letters written for the purposes of negotiation into a concluded contract, he could in this case have no doubt whatever that on the 27th of September, 1865, both the plaintiff and defendant intended to enter into, and did in fact enter into, a concluded agreement. That being so, the real and substantial question for decision was, whether the collateral parol agreement as alleged by the defendant was established in evidence or not; because if it were established it was perfectly clear upon all the authorities that the plaintiff had no ground for coming to this Court and asking for specific performance. On the other hand, if it were not established, then, in his Lordship's opinion, there was no uncertainty at all in the contract as contained in the letters, and the plaintiff was entitled to a decree. His Lordship, on a careful examination of the evidence, could come to no other conclusion than that this question of fact must be decided in favour of the plaintiff. The appeal, therefore, failed, and must be dismissed with costs.

GIFFARD, L.J. said that the defence in this case had been put upon two grounds: the one, that the letters, if they contained an agreement, were too uncertain for this Court to decree performance of it; the other, that the collateral

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parol agreement as alleged by the defendant had in substance been proved. With regard to the uncertainty, the case of *Taylor* v. *Portington* had been relied on; but in his Lordship's judgment *Taylor* v. *Portington* was different in principle from this case. That was a case where a lessor agreed as a condition precedent to granting a lease to do repairs and decorations. Here there was no condition precedent at all, but the condition was that the lease should contain covenants, and that in his Lordship's judgment at once made a distinction which put *Taylor* v. *Portington* entirely out of the case; and this was no more than the ordinary case of a man agreeing to grant a lease, the lessee undertaking to farm in a particular manner. The Court probably could not see that the farm was carried on in a particular manner, but it would not on that account say that a lease should not be granted. His Lordship was, therefore, clearly of opinion that he need not consider *Taylor* v. *Portington*, and that there was no ground for saying that the terms of the letters were uncertain. Then, with regard to the facts of the case, his Lordship was of opinion that the defendant's statement of his case could not be looked upon as accurate, and that the defendant had entirely failed in proving that the transaction was such as it was represented to be by him in his answer. That being so, his Lordship was satisfied that, if in any case specific performance ought to be enforced in equity, unquestionably this was that case. The appeal, therefore, must be dismissed, with costs.

LORD ROMILLY, M.R., June 11, 1869.

ROEBUCK *v.* CHADEBET.

38 L. J. Ch. 488; L. R. 8 Eq. 127; 20 L. T. 940.

Practice—Partition Suit—Sale of Part and Partition of Remainder.

PARTITION.—*In a partition suit the Court may, under the* 31 *&* 32 *Vict. c.* 40, *direct a sale of part of the property and a partition of the remainder.*

In a partition suit there was evidence that it would be for the benefit of the parties that part of the property should be sold and the remainder retained.

Mr. Wickens, for the plaintiff, submitted the question whether, under the 31 & 32 Vict. c. 40, the Court had power to direct a sale of part of the property and a partition of the remainder.

Mr. Davey appeared for the defendants.

The MASTER OF THE ROLLS held that the Court had jurisdiction, and made the order accordingly.

LORDS JUSTICES, May 22, 1869.

In re ROBERTS'S TRUSTS.

38 L. J. Ch. 488; L. R. 4 Ch. 561; 17 W. R. 718: on appeal from, [1869] E. R. A.; 17 W. R. 639 (V.C.).

Practice—Petition of Appeal—Certificate of a Single Counsel.

The rule which requires the signatures of two counsel to a petition of appeal will not be dispensed with, except on proof of the existence of exceptional circumstances in the case; and the fact that only one counsel appeared for the intending appellant in the court of first instance is not such an exceptional circumstance.

This was an application for leave to present a petition of appeal from a decision of Malins, V.C., signed by only one counsel. The application was

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founded on the circumstance that the applicant had been represented by only one counsel on the hearing before the Vice Chancellor.

In proof that a certificate signed by a single counsel was sometimes allowed by the Court,—

Mr. E. C. Willis, who appeared in support of the application, cited *Knowles* v. *Greenhill* (30 L. J. Ch. 670); *In re the Midland Counties Benefit Building Society* (12 W. R. 993).

LORD JUSTICE SELWYN was of opinion that the application must be refused. Where such an application had been complied with, it had been on account of the smallness of the fund which was the subject of the litigation, or of the poverty of the parties. But no such exceptional circumstances had been shewn to exist in the present case.

LORD JUSTICE GIFFARD concurred (see *Re Skeggs*, 11 Jur. N.S. 274; 13 W. R. 512).

STUART, V.C., April 21, 23, 24, May 28, 1869.

COOPER *v.* GORDON.

38 L. J. Ch. 489; L. R. 8 Eq. 249; 20 L. T. 732; 17 W. R. 908.

Protestant Dissenters — Endowment — Trustee and Cestui que Trust — Minister, Appointment of—Power of the Majority of the Trustees and of the Congregation to Remove—Injunction.

CHARITY.—*A congregation of Protestant dissenters was endowed, by deeds vesting in the trustees of the society freehold and leasehold hereditaments and premises upon certain trusts for its benefit. The deeds contained (inter alia) a trust "to permit and suffer the minister or pastor for the time being of the congregation to have the use or occupation of a house," or "to pay the rents and profits thereof to such minister or pastor, as the same should become due and payable, for so long a time as such minister or pastor should from time to time be and continue minister or pastor of the society or congregation, and officiate as such, and no longer, to and for his and their own use and benefit." Neither the deeds nor the rules and regulations of the society contained any provision as to the mode of ascertaining the will of the congregation upon the dismissal of a minister or pastor; and the only specific grounds stated for his removal were either immorality or heterodoxy. The defendant, the Rev. S. C. G., was unanimously elected by the congregation one of their co-pastors. Some time after his election the congregation became dissatisfied with the mode in which he discharged his duties, and dissensions ensued. Ultimately a meeting of the congregation was held, and a resolution passed by a majority of the members present at it, that the Rev. S. C. G. should be dismissed. No special ground was assigned for his dismissal. He questioned the legality of the meeting, and denied the power of the majority of the congregation or of those present at the meeting to remove him, except for immorality or heterodoxy, neither of which was imputed to him. He further claimed the right to hold his office of co-pastor and to officiate as such and take the emoluments of the office for his life. The majority of the trustees then filed a bill to have it declared that he was properly dismissed from his office, and for an injunction to restrain him from interfering with the property and the services in the chapel of the congregation:*—Held, *that the defendant, the Rev. S. C. G., was not entitled to preach or officiate in the chapel of the society against the will of the majority of the trustees and of the congregation; that he must be restrained from so doing and in other respects, as prayed by the bill; and that he must pay the plaintiffs their costs of the suit.*

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The plaintiffs in this suit were all the trustees (but one) of a congregation [1] of Protestant dissenters from the Church of England, called Independents or Congregationalists, assembling for religious worship at the Presbyterian meeting-house or chapel, Broad Street, Reading.

The defendants were the Rev. Samuel Clarke Gordon, one of the co-pastors of the congregation; Mr. George Christie, the remaining trustee of it; and a Mr. James Pike.

The bill in the suit prayed that it might be declared that the defendant the Rev. S. C. Gordon had been duly dismissed from and ceased, as from the 8th of September, 1868, to hold the office of co-pastor with the Rev. William Legg, or any office of pastor of the said congregation of Independents at Broad Street Chapel aforesaid; and that all (if any) necessary inquiries might be made, and directions given for the purpose of such directions and for effectuating the same; that the defendant the Rev. S. C. Gordon might be restrained by the order and injunction of this Court from preaching or officiating in the chapel and from in any manner disturbing or interfering with the performance of divine worship therein, and from acting or attempting to act as such co-pastor or pastor as aforesaid, or otherwise in any manner intermeddling or interfering with the trust premises of the congregation; that the defendants, the Rev. S. C. Gordon and Mr. James Pike, their attorneys and agents, might be respectively restrained in manner aforesaid from receiving or collecting, or continuing or attempting to receive or collect any of the rents payable for pews or sittings in the chapel; and that the said last-named defendants might respectively account for the moneys received or collected by or on behalf of them, or either of them, in respect of such rents; and that they or the defendant the Rev. S. C. Gordon might pay the costs of the suit.

By indentures of lease and release, dated respectively the 1st and 2nd of December, 1707, and the 29th and 30th of December, 1707, the meeting-house of the congregation was vested absolutely in twenty members of it.

By a deed-poll, dated the 11th of March, 1708, it was declared that the "said edifice, building and premises" (the meeting-house) were purchased in the names of those members in trust, and that their names were used in trust, for a certain private church or congregation of Christians, whereof Samuel Doolittle was then bishop or pastor, usually meeting and congregating for religious worship in the said meeting-house, and that the said premises and the property thereof should be to and for the use and behoof of and in trust for the said private church or congregation, from time to time and at all times thereafter, during such time as the assembling of Protestant dissenters for religious worship should be permitted by law at the said meeting-house; and provision was thereby made for the assurance of the premises to new together with the old trustees, as and in the events therein mentioned.

By an indenture of bargain and sale, enrolled and dated the 30th of November, 1808, certain freehold and leasehold premises therein particularly described, and comprising a new chapel or meeting-house in Broad Street, and the burying-ground, yard, passage and vestry-room thereunto belonging, and the ground and soil of the same, or so much thereof as was comprised in the indentures of the 1st and 2nd of December, 1707, and the 29th and 30th of December, 1707, were vested in the then trustees of the congregation, upon trust for the use and benefit of the society or congregation of Protestant dissenters from the Church of England then belonging thereto, commonly called Independents, and which should from time to time resort to and frequent the said meeting-house and premises, and become members of the society, for the exercise of divine worship therein, and peaceably and quietly to permit and suffer them, and every of them, freely to exercise their religion therein, and freely to enter and bury their dead therein, or in some part or parts thereof, under and subject to such orders,

(1) The term "congregation" was used by the plaintiffs in their bill as denoting only the assembly of persons for the time being in church membership, exclusive of mere seat-holders or attendants.

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rules, regulations and restrictions as had been and were or should be made and observed in the said society or other religious institutions of the like nature. And as to a certain messuage or tenement and workhouse (part of the said premises) in the occupation of Robert Dear, and the rooms over the same, "upon trust to permit and suffer the minister or pastor for the time being of the said society or congregation of Protestant dissenters called Independents, who did or should from time to time meet in the said meeting-house for the exercise of divine worship as aforesaid, to have the use and occupation of the same, or otherwise to receive and pay the rents and profits thereof unto such minister or pastor as the same should become due and payable for so long a time as such minister or pastor should from time to time be and continue minister or pastor of the said society or congregation and officiate as such, and no longer, to and for his and their own use and benefit." That deed then provided as to and concerning all the freehold and leasehold hereditaments thereby assured, that the same and every part thereof should be conveyed unto so many other fit persons who had been subscribers and contributed to the support of public worship at the meeting-house for twelve months then next preceding as they, the trustees, or any new or other trustees, to be chosen as thereinafter mentioned, or the survivors or survivor of them, his heirs or assigns, should choose, nominate and appoint, upon the same trusts as therein declared. And it was further provided, that in case the society or congregation should be totally dissolved, separated or dispersed, and the public worship at the meeting-house should be discontinued for twelve months together, then the trustees should release and convey the aforesaid freehold and leasehold hereditaments and premises unto and to the use of such person or persons, and in such manner, and to and for such intents and purposes, either religious or civil, as the trustees or the survivors or survivor of them, or the major part of them for the time being, by any deed duly executed, should direct or appoint.

The deed then provided for the appointment of new trustees whenever they should be only eleven or less in number; for continuing the full number, if possible, at twenty; and for renewing the leasehold premises thereby assigned.

Under or by virtue of the 13 & 14 Vict. c. 28, an act to render more simple and effectual the titles by which congregations or societies for purposes of religious worship or education in England or Ireland hold property for such purposes, and by an indenture, dated the 14th of March, 1855, the plaintiffs and the defendant George Christie became the sole trustees of the chapel and premises, and the entire legal estate therein was vested in them.

In the year 1865, it was considered desirable, by the members of the congregation assembling at the chapel, that the Rev. William Legg, who had for more than twenty years then last past officiated as their sole pastor, should have some assistance in his duties; and that another minister should be appointed to assist and act with him; and during that and the ensuing year candidates for the co-pastorate were invited to preach in the chapel. The Rev. S. C. Gordon was one of such candidates, and preached in the chapel in the spring of 1866. He subsequently received a letter from Mr. Legg, inviting him to preach again in the chapel, on Sunday the 1st and Sunday the 8th of April, 1866. On the 11th of April he received from Thomas Barcham, then the acting deacon of the chapel, a letter, which was as follows:

"From all I hear from all parties, it is the earnest desire of the Church to invite you to the co-pastorship; therefore, I trust, if you in any way reciprocate this feeling, you will kindly hold yourself open."

In reply to that letter the Rev. S. C. Gordon wrote thus:

"My dear Mr. Barcham,—I had your note this morning, for which I beg to thank you. In it you mention that it is the desire of the Church in Broad Street to invite me as a co-pastor and successor to Mr. Legg. Of course it would be premature to say what answer I should give were a unanimous invitation given me; but at the same time I would say that I was greatly pleased with my visit to Reading; and that the sphere of labour there is one which

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commends itself to me, on many grounds. A charge,—where the sole duties would not immediately devolve on me, and I should enjoy the counsel and mature experience of an aged colleague, in becoming acquainted with the practical working of a Church, while at the same time scope would be afforded for efforts of Christian usefulness,—presents, I think, peculiar attractions. At present I have no engagement to fulfil with any Church; and until I hear from you I shall enter upon none.—Yours sincerely,

"Samuel Gordon."

On the 18th of April, 1866, a meeting of the congregation assembling at the chapel was held, at which a resolution was passed, as follows:

"Broad Street Chapel, Reading,
"Church Meeting, April 18th, 1866.

"Moved by Mr. John Cooper,
"Seconded by Mr. Barcham,
"And carried unanimously,—

"The Church of Christ at Broad Street Chapel, Reading, having on several occasions heard with considerable satisfaction Mr. Samuel Clarke Gordon, of the Lancashire Independent College, Manchester, and believing him to be in every way qualified and suitable, Does now most cordially invite him to become co-pastor with their present esteemed minister, the Rev. William Legg."

A copy of that resolution was forwarded by Mr. Barcham to Mr. Gordon.

On the 23rd of April, 1866, Mr. Gordon wrote to Mr. Legg to ascertain what duties he would be expected to perform, and what would be his position as co-pastor. On the 25th of April Mr. Legg wrote to Mr. Gordon as follows:

"Reading, April 25th, 1866.

"My dear Sir,—The case of our co-operation is very simple. We would equally divide the pulpit labours and the week-night services. The junior to take the Bible Classes—of which at present there are two: a young men's and a servants'. I think the former was held by Mr. Mossop once a week, and I know that the latter is once a fortnight. Of course you would arrange these according to your own views and convenience, or add to them, if you should see fit. We at present would equally divide the income—which is about 300*l.*, and it has at times been 20*l.* more. It is capable of some increase, if your ministry should prove eminently successful, as I hope it would—not that there are any number of pews, or rather sittings, to let—but some would have their value enhanced. There would be no friction in our working. There is no idea that your connexion with the Church would be affected by the continuance of my life; that is, you are not asked to be an assistant minister, but as much a pastor as myself.—I am, yours very truly,

"W. Legg.

"Rev. Mr. Gordon."

On the 30th of April, Mr. Gordon sent to Mr. Thomas Barcham a letter, addressed to the Church worshipping in Broad Street Chapel, Reading, accepting the invitation. That letter was, partly, as follows:

"Being unwilling to keep you any longer in suspense upon the important subject of my settlement at Reading as one of your pastors, I have decided to reply, without further delay."

On the 2nd of May, 1866, Mr. Thomas Barcham wrote to Mr. Gordon as follows:

"I write a hasty line to say that the reception of your welcome letter gives us all pleasure. I have now sent it to Mr. Legg, who will on Friday night read it at our Church meeting."

That was accordingly done; and Mr. Gordon entered on his duties as co-pastor on the last Sunday in July, 1866; and was ordained as minister of the chapel on the 5th of September following.

Some time after the appointment of Mr. Gordon, as such co-pastor as aforesaid, a feeling of dissatisfaction at the mode in which he discharged his

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ministerial duties arose in the congregation assembling at the chapel. Mr. Barcham, the acting deacon, remonstrated with him for reading his sermons; and he and Mr. Quelch, another of the deacons of the congregation, afterwards requested Mr. Gordon to resign his office. Mr. Gordon was then told that that request was made to him for the eight following reasons, which had been shortly before read to him by Mr. Barcham:

"1st. That Mr. Gordon's sermons were too argumentative, containing trains of reasoning which the people could not carry away with them.

"2nd. That the sermons were above the level of the great mass of the people, not being sufficiently simple.

"3rd. That they were too Armenian in doctrine.

"4th. That they set up too high a standard of Christian life, not taking sufficient account of the influence of trials, &c.

"5th. That there was a deficiency of unction, gospel power, and Christian experience.

"6th. That the motives from which Christians were exhorted to act were not those of Christian love, but of dry, rigid duty.

"7th. That the work of the Spirit was not sufficiently dwelt upon.

"8th. That in some of the sermons there was nothing said to unconverted sinners."

It did not appear that those reasons, although so communicated to Mr. Gordon, were ever formally embodied in any resolution of the society, or otherwise conveyed on behalf of the congregation to him. He however declined to accede to the request made to him. Mr. Barcham and Mr. Quelch then relinquished the office of deacon respectively held by them; and the other acting deacons also and the treasurer of the society soon after resigned.

As the want of harmony between Mr. Gordon and the congregation and between him and Mr. Legg continued, the feelings of dissatisfaction and unpleasantness on all sides increased. Some of the congregation left the Broad Street Chapel and assembled for worship in the Town Hall of Reading. The society was in fact divided. However, at the regular monthly church meeting of the congregation, held at the chapel, on the 3rd of July, 1868, Mr. Gordon appointed Mr. James Pike and three other persons to act as his committee to look after his interests. They were so appointed because the offices of deacons and treasurer to the congregation were then vacant.

Mr. Gordon had never been in the occupation of the house mentioned in the deed of the 30th of November, 1808; and the intention was that Mr. Pike should receive subscriptions for Mr. Gordon; the deacons, as it was alleged, having refused to pay him his moiety of the moneys which they had received.

On the 4th of September, 1868, at the ordinary church meeting of the congregation for that month, a resolution was passed, appointing another meeting for the following Tuesday, the 8th of September.

On the 7th of September Mr. Gordon received notice that a Mr. Charles Smith would, at the meeting on that day, propose a resolution that Mr. Gordon should be dismissed from his office.

Mr. Gordon then instructed his solicitor to write, and he forthwith wrote, to Mr. Legg, protesting against the proposed meeting, and insisting that it had no power or authority to take into consideration Mr. Gordon's dismissal, nor to alter, control or otherwise deal with that gentleman's appointment as co-pastor, and alleging that any such meeting or proceeding would be illegal, irregular, unjust and improper.

The meeting was however held, on the 8th of September. It was convened, as the plaintiffs alleged, in accordance with the constant usage and practice of the society adopted in summoning and holding such meetings. A resolution of the church members present at the meeting, [such members constituting a majority of the church and congregation,] was duly proposed and carried by 115 votes. Only one person present remained neutral, and there was no opposition to the resolution.

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By that resolution Mr. Gordon was dismissed from his office of minister or co-pastor of the congregation.

A further resolution was then forthwith passed confirming that for the dismissal of Mr. Gordon, and authorizing and requiring the plaintiffs, as such trustees as aforesaid, to take the necessary steps to carry into effect the church vote of dismissal.

On the same 8th of September Mr. Gordon convened a meeting of his friends, but at a different place from that at which the church meeting had been held, and obtained from them resolutions in his favour. He, moreover, on the same day, received a memorial, signed by 174 persons,—many of whom were members of the congregation, and all of whom were regular attendants at the services held in the chapel—expressing their sympathy with him; that they considered the motion for his dismissal to be illegal, unjust and in direct contravention of the principles of congregationalism, and pledging themselves to continue their support to him.

On the 9th of September Mr. Gordon received from Mr. Legg the following notice:—

"To the Church assembling at Broad Street Chapel, Reading.

"In consequence of the vote at which the Church has arrived, I hereby revoke my consent to the co-pastorate hitherto held with me by the Rev. Samuel Clarke Gordon.

(Signed) "William Legg, Pastor."

"Reading, dated this 8th day of September, 1868."

On the 11th of September the plaintiffs, as such trustees as aforesaid, duly served upon Mr. Gordon a notice not again to officiate or attempt to officiate as co-pastor of the church or congregation.

Mr. Gordon had, since his receipt of the last-mentioned notice from the plaintiffs, and in contravention thereof, preached in the chapel and otherwise officiated as co-pastor in conjunction with Mr. Legg. He also threatened and intended to continue so to do, and to insist upon his right to the moiety of the pew rents.

The bill in the suit set forth several matters constituting the principal ones in dispute between the parties, to which, however, it is not now necessary more particularly to refer, and stated, that Mr. Gordon continued to promote dissension in the church and congregation; that his conduct had been very injurious to and brought scandal upon the church and congregation for whom the plaintiffs were such trustees as aforesaid, and had already diminished, and would if permitted to continue, very greatly diminish the revenues arising from the pew-rents of the chapel. It was further stated that the members of the congregation were unwilling to subscribe a sum of 400*l*.,—which was required to purchase the reversion, which had fallen in, of a portion of the leasehold premises of the society, and without which purchase being effected the services of the chapel were liable at any moment to be discontinued,—until Mr. Gordon was effectually prevented from acting as pastor of the congregation.

Neither the deeds, nor the orders, rules and regulations of the society contained any provisions as to the mode of ascertaining the will of the congregation on the subject of dismissing a minister or pastor of it.

The plaintiffs therefore adduced evidence to prove that dissenters of the denomination in question universally recognized and held as fundamental principles that each congregation of persons in church fellowship assembling at a particular chapel or place of worship, with their pastor, constituted a church complete in itself, and in its government, independently of all other congregations, although composed of persons professing the same religious belief; and that (in the absence of any special usage, rules or agreement to the contrary) the power of electing and dismissing their pastor or minister, or pastors or ministers, resided entirely with such body of church members for the time being assembling at the chapel or place of worship; so that it was well known amongst, and was the established usage of such dissenters as aforesaid (save in such

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exceptional cases as aforesaid) that each such congregation as aforesaid might at any time, at their discretion, dismiss their pastor or pastors from his or their office; and in the absence of any special usage or rules, the will of every such congregation was in all cases ascertained, and their aforesaid powers exercised by the vote of a majority of the members; and the minority were bound by the decision of the majority, unless the same should be inconsistent with the fundamental doctrines and principles held by the whole body. The mere seat-holders, or attendants at public worship who were not in communion with the church, were not considered to be in church fellowship, and were not entitled to vote in respect of church matters, although occasionally their wishes were consulted. The congregations assembling in the meeting-house aforesaid, and the chapel subsequently erected as hereinafter appears, had always consisted of dissenters of the above-mentioned denomination, and had held and acted upon such principles as aforesaid. No special rules or usage had at any time been recognized or adopted by the congregation assembling at the chapel or at the meeting-house aforesaid, either as to the election or dismissal of the pastors, or as to the mode of ascertaining the decision of the congregation, and the constant practice had been, that whenever such decision was required, it was obtained at a meeting convened for the purpose, by a vote of the majority of the members of the congregation, as the case might be, present at such meeting.

The defendant Mr. Gordon by his answer, admitted the accuracy of those allegations, except as to the following matters. He denied that (in the absence of any special usage, rules or agreements to the contrary) a power of *dismissing* their pastor or minister, pastors or ministers, resided in any way with such body of church members for the time being assembling at the chapel or place of worship (save as thereinafter mentioned), and he denied that it was well known amongst or the established usage of such dissenters as aforesaid, or the usage of any such dissenters as aforesaid (save in such exceptional cases as aforesaid) that each such congregation[2] as aforesaid might at any time, at their discretion or otherwise (save as thereinafter mentioned), dismiss their pastor or pastors from his or their office. He stated that it was, on the contrary, a fundamental principle among dissenters of the above denomination that (in the absence of special usage, rule or agreement on the subject) all appointments as pastor or minister or co-pastor to a congregation or meeting-house, were for life, so long as the person so appointed should abstain from preaching doctrines at variance with the tenets of such denomination, and should not be guilty of immorality or other similar gross misconduct; and that in except in such cases as last aforesaid there did not exist in any person or persons or body a power to dismiss such pastor or minister or co-pastor from such post.

Mr. Gordon, by his answer, further stated that so long as he had been acquainted with the congregation assembling at the chapel in Broad Street, and as he believed always, it had been customary to hold monthly meetings, whereof notice was given during public worship on the Sunday next preceding each such meeting; and that it had been customary to allow all persons worshipping at the chapel, who had been present at and partaken of the ordinance of the Lord's Supper at the chapel within three months of such meetings respectively to be present thereat, and to vote upon any question properly submitted thereto; but no other person or persons were, or as he believed ever had been, entitled to be present or to vote at such meetings. So long as he had been acquainted with such congregation, and as he believed always, it had been the custom to give a month's notice of motion previously to the same being brought under the consideration of any such meeting; and the powers of such congregation had been exercised by the vote of such meetings conducted in manner aforesaid, and in no other manner whatsoever. He denied that the congregation had held and acted on the alleged principles of church government, except in so far as they were admitted by his answer to have done

(2) The term "congregation" was used by Mr. Gordon, in his answer, to denote the persons for the time being in church fellowship, worshipping at a particular chapel.

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so. He said that it appeared from the records in the chapel, and he believed that since the foundation of the congregation, more than two centuries ago, no case had ever occurred of a pastor or minister thereof having been dismissed or removed by the congregation or any other authority, although instances had occurred of the congregation being desirous of doing so. In particular, in the year 1845, they wished to remove his co-pastor, Mr. Legg; but the congregation found there was no precedent or authority for such dismissal, except for the reasons aforesaid. He admitted that, save as therein otherwise stated, no special rules or usage had at any time been recognized or adopted by the congregation assembling at the chapel or at the meeting-house aforesaid as to the mode of ascertaining the decision of the congregation; but he said the constant practice, whenever such decision had been required, had been to obtain it at a meeting convened and conducted in the manner stated in his answer. He also stated, with reference to the meetings of the 4th of September and the 8th of September, 1868, that—although he did not attend them—he had been informed and believed that many persons attended and voted thereat who were not entitled to be present or to vote. He further said, that from a printed history of the chapel written by or by the authority of Mr. Legg, and from the records of the chapel, and as he had been informed and believed, on several occasions during the last two centuries co-pastors had been appointed to officiate in the chapel, and that in every instance the survivor of such co-pastor had, upon the death of his colleague, succeeded to him, and become the sole pastor, without further election or invitation. He also contended that his tenure of the office in no way depended on the consent or approval of Mr. Legg. He lastly submitted that the congregation was not adequately represented in the suit, and that Mr. Legg ought to have been made a party to it.

The bill in the suit was filed on the 15th of October, and the answers on the 26th and the 28th of November, 1868. On the 30th of November a church meeting of the congregation was held at the chapel, at which the previous resolutions and proceedings were discussed, but nothing was said or done to affect them. A notice of motion was given for an injunction according to the prayer of the bill; but it was afterwards arranged that it should stand over, to be treated as coming on with the hearing of the cause.

Mr. Hardy and *Mr. J. Napier Higgins*, for the plaintiffs.—The question in the cause was, whether the majority of the congregation, who had a clear right to elect a minister, had also a right to dismiss him. As the deeds and rules of this society were silent on the point, and there was no express agreement between the parties as to the time for which Mr. Gordon was to hold his office, the usage and practice of such bodies as these, and of this one in particular, must be considered. The congregation made no imputation of any kind upon Mr. Gordon, either as to his doctrines or moral conduct. It was plain, however, that if a minister or pastor and his congregation could not agree, it was for the benefit of all parties that they should separate. But if the minister would not depart peaceably, it was as evidently necessary that the congregation should have the power of dismissing him. By whom then, if not by the majority of those who had elected him, was he to be removed? The evidence proved that in all the transactions of the congregation, a majority of it, in meeting assembled at the chapel, had always governed its affairs.

[STUART, V.C.—But the congregation are not now before me.]

They were represented by the plaintiffs.

Perry v. *Shipway* (1 Giff. 1; 4 De Gex & J. 353; 28 L. J. Ch. 660), shewed that the pastor of such a congregation as the present was at law merely a tenant at will to the trustees.

[STUART, V.C.—The plaintiffs here are trustees with an admitted legal title; and as they seek the aid of the Court to protect their property from intrusion by the defendant Mr. Gordon, I think it is for him to shew why they should not have the relief they ask.]

Mr. Greene and *Mr. Yate Lee*, for Mr. Gordon, then opened his case.—The

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question was not merely whether the majority of the congregation had the power of dismissing their pastor, but whether they could do so without assigning any just or sufficient cause? There was nothing, in fact, alleged against Mr. Gordon, and nothing existed to disqualify him from discharging the duties of his office. It was suggested only that he did not cordially agree with Mr. Legg and some other members of the congregation. But was that a just cause for depriving him of his subsistence? *Perry* v. *Shipway* was a very different case from the present one. And what then were the facts of this case? The deeds and rules of this society were, no doubt, silent as to the mode of ascertaining the will of the congregation when dismissing a pastor. Immorality and heterodoxy were out of the question; and the eight reasons privately stated to Mr. Gordon were manifestly insufficient, and would not have been of avail even if made the substantial grounds for dismissing him. But there was in evidence a model deed, adopted by most of these bodies. That deed contained special directions, enabling a majority of the congregation or society to remove a minister or pastor for the reasons there alleged and subject to those reasons; or, in the absence of them, the pastor or minister duly elected was considered to hold his office for life. What then was the inference as to Mr. Gordon's position from the non-existence of any such directions in the deeds or rules of this society? Clearly this, that the majority here had no power to remove him at their mere will and pleasure, and that he was entitled to hold his office for life. Then, again, that was further illustrated by the position of his co-pastor, Mr. Legg. He was tenant for life of his office; for it had been treated as a freehold, and he had been allowed a vote for the county in respect of it. Why then should not Mr. Gordon be also a freeholder and life tenant of his office? A clergyman of the Established Church, a rector of a parish, a parish clerk and a public officer, were all entitled to hold their offices for life, and the position of a minister of one of these bodies was quite analogous to those.

[STUART, V.C.—The whole matter here is one arising out of the voluntary association of certain private individuals for special and religious purposes, and cannot be likened to the case of a person appointed to a public recognized office and for a public purpose.]

Then, the peculiar circumstances under which Mr Gordon was invited to the office must be looked at.—(He referred to the letters above stated.) There was no express reference in those letters to the exact time during which Mr. Gordon was to remain a pastor of the society; but it must be inferred from them, that he was to continue so for his life. He was certainly told that he was not to be a mere assistant to Mr. Legg, but in every sense his co-pastor. He was expressly assured that the death of Mr. Legg would not affect his tenure of office. The representations then made to him were authorized or, at all events, confirmed by his unanimous appointment by the congregation. Although Mr. Gordon's position was in no way dependent on Mr. Legg's consent or approval, the fact of that gentleman formally withdrawing his presumed assent shewed that he believed the representations made by him, as pastor of the congregation to be binding on them. How then could the trustees—even assuming for a moment that they duly represented the congregation, though that was not admitted by Mr. Gordon—be allowed now to break their contract so deliberately entered into with him? In truth, the onus of proof in this case was really cast upon the plaintiffs.

[STUART, V.C.—If your argument is correct, although the congregation might to a man object to their minister, they could not remove him; and yet he might get rid of them.]

Otherwise, the minister would be at the mercy of the congregation.

[STUART, V.C.—But you would place the congregation at the mercy of the minister.]

In *The Attorney General* v. *Pearson* (3 Mer. 353-357 and 402), the "usage" of appointing a minister to these congregations "for life" was recognized as the common practice. Of course, if the trust which the Court was called upon

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to establish were otherwise, the case would be different. Then there was a further ground on which Mr. Gordon relied. This society was an endowed body. Mr. Gordon was, under the deeds of the society, a *cestui que trust* of its property, and, as minister, specially interested in the rents of a portion of it. The plaintiffs were his trustees, and could not, as such, deprive him of any interest to which he was lawfully entitled in the trust premises. His office was part of that interest to which he was so entitled—*Lewin on Trusts*, 402, s.17. They then insisted, with respect to the constitution of the meetings of the 4th of September and the 8th of September, 1868, that Mr. Gordon had not had (for the reasons above stated) proper notice of them; that they were not duly constituted; that the majority was not that of the whole congregation, but only of those present at the meeting; and that the resolution for his dismissal, even if the majority of the congregation had been present and could have legally passed it, would have been irregular, informal and inoperative as against him—*Foley* v. *Wontner* (2 Jac. & W. 245); *Daugars* v. *Rivaz* (28 Beav. 233; 29 L. J. Ch. 685); *The Attorney General* v. *Drummond* (1 Dru. & W. 353). They lastly urged that nothing was shewn to have been done at the meeting of the 30th of November, 1868, to cure the defects of the former proceedings.

Mr. Gordon Whitbread was for the defendant Mr. Christie.—He had declined to concur with the plaintiffs in instituting this suit, because he considered it was quite uncalled for; and he had been and still was unwilling to enter into any litigation with respect to the matters in question in the suit. He did not claim to be made a party to it, and asked for his costs of it.

Mr. Greene and *Mr. Yate Lee* were also for the defendant Mr. James Pike. —He was only the agent of Mr. Gordon. He stated in his answer that he had never applied for or received any of the pew rents; and the bill ought therefore to be dismissed as against him with costs—*Dove* v. *Everard* (1 Russ. & M. 231).

Mr. Hardy replied.—He objected to the appearance of Mr. Christie by counsel. Notwithstanding the allegation in Mr. Pike's answer, there was the evidence of three witnesses, Charles Smith, Mary Swain and Thomas Barcham, to shew that he had, in fact, interfered with the receipt of some of the pew rents, and was therefore properly made a party to the suit. With respect to the alleged irregularities in the constitution of and the proceedings at the meetings, what had to be decided at them must, *ex necessitate*, be done by the majority of the church members actually present; and, to bind the congregation, it was not absolutely requisite that the majority should be that of the whole congregation. In truth, however, the evidence shewed that in this case it was the majority of the whole congregation who voted for the dismissal of Mr. Gordon.

[STUART, V.C.—The real question is as to the fact of a majority of the congregation voting for his dismissal. I think the evidence does establish that there was such a majority. What, therefore, was otherwise done or omitted at the meetings appears to me to be immaterial.]

Mr. Gordon contended that he was entitled, as *cestui que trust* under the deeds, to the office for life. But, taking all the deeds together, the congregation were the true *cestuis que trust* of them. At the utmost, he was only, so far as the deeds were concerned, an individual member of the congregation. If he was correct in his view of his position, what would be the result? The deeds provided that, in case the congregation was totally dissolved and public worship at the chapel discontinued for twelve months, the trustees were to release and convey the property to such persons as they might then think proper. But if Mr. Gordon was right, they could not execute those trusts; because he would be entitled to interpose his life interest in the property. Then there would be this further consequence: Mr. Gordon must claim a right to continue for life the pastor or minister of the congregation after it had been dissolved. But so absurd a result of his contention shewed that, unless he had been expressly appointed for life so as specifically to bind the congregation to such a contract, he could not be correct in his argument. He then cited *The Attorney General* v. *Aked* (7 Sim. 322); *The Protestant Dissenters' Catechism*, 25th edit., by Dr. John

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Pye Smith. The plaintiffs admitted that the contract which originally existed between them and Mr. Gordon was valid at law; but they insisted that under it Mr. Gordon was, at law, only tenant at will to them—*Perry* v. *Shipway*, ubi supra. But he was also tenant at will to the congregation. He could have no higher position in equity than at law. It was a strange thing that Mr. Gordon should have conceded that the majority of the congregation had power to elect him, and to do every other act that was requisite for managing the affairs of the society, but should have denied that the majority had a right to dismiss him. He had compared his office to that of a clergyman of the Church of England. But what an "office" was was stated in 6 *Bac. Abridg.* tit. 'Office' (A), and in *Doe* v. *Jones* (10 B. & C. 718; 8 L. J. K.B. 310); *Doe* v. *M'Kaeg* (10 B. & S. 721-723, cited in *Perry* v. *Shipway*). The principle on which *Doe* v. *Gartham* (1 Bing. 357; L. J. 2 C.P. 17), and *The King* v. *Gaskin* (8 Term Rep. 209), were decided was in favour of the plaintiffs in this suit. Although no immorality or heterodoxy was imputed to Mr. Gordon, his conduct had led to divisions in the congregation and tended still to uproot it; and what could be worse for the society than that?—*Porter* v. *Clarke* (2 Sim. 520). In some cases an inquiry had been directed in whom lay the right to appoint a minister—*Davis* v. *Jenkins* (3 Ves. & B. 151); but he submitted that a cognate inquiry as to the right to dismiss was unnecessary here. He then cited—2 *Hayes on Conveyancing*, edit. 1840, 38; note, 40, as to the registration of dissenting ministers as county voters in respect of lands attached to their offices. In conclusion, he insisted that, if the Court should not decide in favour of the plaintiffs, they would be deprived of the legitimate use of their own property; divisions and dissensions would increase in the congregation; the trusts which had been created for its especial benefit, and which this Court was bound to enforce, would be defeated; and the continuance and very existence of the society imperilled, if not destroyed.

Mr. Yate Lee then commented upon some of the cases cited by Mr. Hardy. —He said the question involved in this case was of immense importance to the various bodies of Protestant dissenters in this country. Indeed, its importance could not be exaggerated, and might in time come to be extended beyond those bodies. He then distinguished *The Attorney General* v. *Aked* from the present case. There the minister had been guilty of a neglect of duty. So also in *Doe* v. *Gartham* and *The King* v. *Gaskin*. In the last-mentioned case the offence of the minister was intoxication. Then, again, the cases of *Porter* v. *Clarke*, ubi supra, and *Davis* v. *Jenkins*, ubi supra, were not cases of "endowed" bodies. None of those cases therefore applied to this one.

STUART, V.C. (*April* 26) reserved his judgment; but exhorted the parties, in the interest of religion and of peace, to come, in the meantime, to some arrangement, and not to leave the question between them to be settled by a hostile decision of the Court.

STUART, V.C. (*May* 28.)—After a careful reconsideration of the evidence and of the arguments in this case, I can find no just grounds for the claim of the defendant the Rev. Mr. Gordon to continue to perform the duties and enjoy the emoluments of minister against the will of the trustees and of the majority of the congregation.

There is nothing in any of the written instruments to countenance the notion that the choice of a minister by the trustees and the congregation is an irrevocable choice, or that he is to continue the officiating minister for life, or during his good behaviour. Indeed, considering the nature of the duties, the purpose of the choice and the constitution of the congregation, they are inconsistent with any such irrevocable appointment. If the minister has a right to continue in that situation against the will of the majority of the congregation and of the trustees, and to enjoy the emoluments for his life, the numbers and the proportion of the majority could make no difference. Instead of being the minister of the congregation he might be the minister of a minority of ten or of one. Such a position would certainly not be that of the minister or pastor of the congregation described in the Declaration of Trust of 1808.

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As to the argument that this congregation is not a society existing by voluntary subscriptions, but is endowed with property held upon certain trusts, and that the minister is a *cestui que trust* under the deeds, it in no degree supports Mr. Gordon's claim to continue minister during his life or good behaviour. By the deeds he is a *cestui que trust* only so long as he shall continue minister or pastor of the society or congregation, and officiate as such, and no longer. The endowment is for the benefit of the congregation, and that they may be benefited by the services of the proper minister. The declaration of trust as to the rents and profits which the minister is to receive creates a trust for the benefit of the congregation, and a remuneration for those services by which they are to be benefited. There is no trust or purpose for the personal benefit, except to reward the services which he performs for the congregation.

Mr. Gordon has, by his answer, admitted "that in the absence of any special usage or rules, the will of every such congregation is in all cases ascertained and their powers exercised by the vote of the majority of the persons in church fellowship worshipping at the particular chapel." He adds this qualification, "and that the minority are bound by the majority in all points, so long as such majority act consistently with the fundamental doctrines and principles held by the whole body." Such a qualification is futile, because as soon as the fundamental doctrines are contravened by the majority they cease to be the fundamental doctrines of the whole body, and unless the minority submit there is no longer a united body held together by fundamental doctrines and principles.

No doubt the trustees and the congregation, by the unanimous vote which appointed Mr. Gordon to be minister, might at the same time have contracted that he should enjoy all the emoluments for his lifetime. It may, however, well be doubted whether such a contract would be valid as binding the property, or justified by the terms of the trust deeds, for the purposes for which the trust was created. That reasonable degree of harmony which is secured by the submission or complete secession of the minority, seems essential to the endurance of an association formed for the sacred purposes which united this congregation.

In the case of *Perry* v. *Shipway* I noticed the authority which established these two main points: first, that the minister of a dissenting congregation is, at law, merely the tenant at will of the trustees; secondly, that in such bodies the decision of the majority of the trustees binds the minority. Indeed, unless the law were so settled, nothing could follow but confusion and defeat of the very purposes for which these congregations are formed. The submission of the minority is the principle on which civil society is founded. It is a principle essential to that reasonable harmony which is necessary for the coherence of all societies, great or small, civil or religious.

In the case of *The Attorney General* v. *Aked*, it was decided that the minister of a body of dissenters has no equity to hold the office against the legal right of the majority to dismiss him. The judgment leaves open the question whether, in case of a capricious or improper dismissal, the Court might interfere. That is not very important, because of the improbability that anything done by the majority of the congregation, concurring with the majority of the trustees, could be capricious or improper. This Court would be very slow to interfere—and more probably would not interfere at all—with the discretion of the majority. In the present case there is nothing to prove that there is anything capricious in the decision of the majority of the trustees and of the congregation.

It is in vain to try to confound Mr. Gordon's position, as to the permanence of the tenure, with that of a public officer or the rector of a parish, or a parish clerk. The permanence of their tenure is established by the law of the land, for a public purpose and for a public benefit.

The minister of a dissenting congregation has a position which the law respects, and will protect, as that of one chosen by a voluntary association of private persons, united for sacred purposes, and entitled to choose a minister

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suitable to their own particular opinions, whose services are to be rewarded out of their own private funds. He is engaged upon a contract, which is merely a private one, and which is to be construed with the same regard to the rights of each of the contracting parties as any other private contract. His position as to tenure under the trustees is clearly defined by the law. There is nothing to shew that, in equity, he can have any position higher than he has at law; nor is there any equity to control that power of the majority of the trustees which is established at law. The power of the majority of the congregation seems to me to rest upon the same principle. Indeed, the statement as to the secession from this congregation—(which is admitted by Mr. Gordon himself in his answer)—and which occurred in the year 1845, shews the practical wisdom of maintaining the power of the majority. When the minority refuse to submit, peace is maintained by their seceding and forming themselves, if they can, into another harmonious congregation. This seems more suitable to the purposes for which such religious bodies are formed. It is better that it should be so, than that a contentious and recusant minority should continue members of the congregation, which would thereby be disturbed by feelings and passions that should not prevail among persons meeting together for public worship.

It is scarcely necessary to notice the argument, that the tenure of his ministry for life must be implied from the terms of the invitation and acceptance mentioning no shorter period. Nothing that involves an absurdity can, by mere implication, be made part of a contract. If it is to be implied that he was made minister for his lifetime, then the unanimous vote of the congregation could not displace him; and if he could not be displaced, there would be the absurdity of his being the officiating minister of a congregation unanimously recusant of his services.

There must be a decree declaring that the defendant Mr. Samuel Clarke Gordon is not entitled to preach or officiate in the chapel of the society against the will of the majority of the trustees and of the congregation; and an order for an injunction against him and the defendant Mr. Pike, according to the prayer of the plaintiff's bill.

It is unnecessary to direct any account; indeed, it has not been pressed for. The plaintiffs are entitled to the costs of the suit against the defendant Mr. Gordon, and also against the defendant Mr. Pike. Notwithstanding the allegation in the answer of that defendant, and the argument that he was merely the agent of the defendant Mr. Gordon, the evidence of Charles Smith, Mary Swain and Thomas Barcham proves his interference as to the pew rents, and he was properly made a defendant. The defendant Mr. Christie, having refused to join as a plaintiff, must bear his own costs.

HATHERLEY, L.C., May 25, 1869.

In re BATES'S AND REDGATE'S *Application by Petition for Patent.*

38 Ch. D. 501; L. R. 4 Ch. 577; 21 L. T. 410; 17 W. R. 900.

Referred to, *Ex parte Manceaux*, [1870] E. R. A.; L. R. 6 Ch. 272; 18 W. R. 1184 (L.C.). Followed without approval, *Lee* v. *Walker*, [1872] E. R. A.; 41 L. J. C.P. 91; L. R. 7 C.P. 121; 26 L. T. 70 (C.P.). Followed and approved, *Ex parte Bailey*, [1873] E. R. A.; 42 L. J. Ch. 264; L. R. 8 Ch. 60; 27 L. T. 430; 21 W. R. 31 (L.C.). Held inapplicable, *Ex parte Henry*, [1873] E. R. A.; 42 L. J. Ch. 363; L. R. 8 Ch. 167; 21 W. R. 233 (L.C.). Followed and criticised, *In re Dering's Patent*, [1880] E. R. A.; 13 Ch. D. 393; 42 L. T. 634; 28 W. R. 710 (L.C.).

Patent — Prior Provisional Specification, Rights under — Concurrent Inventions.

PATENT.—*The existence of a prior provisional specification is not a ground*

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on which the Attorney General ought to refuse to allow a second provisional specification by another inventor to be filed; and in the event of the later applicant for provisional protection being the first to obtain a grant of letters patent, his patent is a bar to the grant of letters patent for the same invention to the earlier applicant for such provisional protection.

The petitioners William Redgate and Stephen Bates claimed to have discovered, in May, 1868, an improvement in the manufacture of lace, and to have brought their invention into a state fit to be patented on the 5th of June, 1868. They did not, however, file their provisional specification till the 2nd of October, 1868. In the provisional specification they styled their invention an invention for "improvements in the manufacture of lace made on bobbin-net or twist-lace machines." On the 2nd of November, Joseph Hume Bertie filed a provisional specification for an invention for "improvements in the manufacture of lace and twist-lace machines." This invention was stated by him to have been made about the middle of June, 1868. Bertie was the first to obtain a warrant for affixing the great seal to his patent. His letters patent were, in fact, sealed on the 12th of January, 1869, Bates & Redgate having omitted to enter any caveat against their sealing; and on the 26th of February he lodged a notice of objection to the grant of letters patent to Bates & Redgate for their invention, on the ground that he had reason to believe their invention to be similar to that for which he had obtained a patent. Bates & Redgate applied for a warrant for affixing the great seal to their patent on the 19th of March, and notwithstanding the resistance of Bertie, the Attorney General issued his fiat authorizing their application to proceed on the 24th of March. They then gave notice at the Patent Office of their intention to proceed with their application for letters patent, and Bertie, on his part, gave notice of his intention to oppose the application. The question accordingly now came before the Lord Chancellor, Bates and Redgate petitioning him to order the great seal to be affixed to their letters patent, and to have the letters patent dated the 2nd of October, being the day of the filing of their provisional specification, or some other day prior to the 2nd of November, when Bertie's provisional specification was filed. There was no question which of the two inventions was in reality the earlier; nor was either charged with being a plagiarism on the other. The petitioners relied chiefly on the fact that, whereas formerly letters patent were always dated the day when the great seal was affixed to them, the practice, since the passing of the Patent Law Amendment Act (15 & 16 Vict. c. 83), has been to date the patent, when eventually granted, the day of the application for provisional protection.

Mr. T. Webster (of the common law bar) and *Mr. Everitt* appeared in support of the petition.—They contended that the prior registration gave the petitioners a *prima facie* prior right to a patent. The Attorney General moreover had consented to the grant of the patent, and his discretion could not be properly interfered with in the absence of any fraud or surprise on the part of the applicants. They had not been guilty of delay in giving notice to seal. Having been the first to obtain provisional protection they could not be expected to anticipate that a second provisional protection for the same invention would be granted. At all events, if Bertie had any valid objection to make to their patent that could be no ground why the Lord Chancellor should refuse to seal their patent, for this would not prevent the objection being hereafter raised at law. The only case which touched the point was—*Forsyth* v. *Rivière* (1 Webster Rep. Pat. 97 n.) They referred also to *In re Vincent's Patent* (L. R. 2 Ch. Ap. 341); 15 & 16 Vict. c. 83. ss. 10, 19, 20.

Mr. Grove and *Mr. T. Aston* (both of the common law bar), for Mr. Bertie, argued that his patent was *prima facie* a good patent, and that the Lord Chancellor had no jurisdiction to override a valid patent. The petitioners could not make out a case of hardship. The 15 & 16 Vict. c. 83. s. 12. provided means by which a patentee might protect his rights if he would. That section enacted that an application for letters patent must be advertised, and that notice might

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be lodged of objections to the grant; but the petitioners had neglected to make any such objection for the purpose of protecting the inchoate right which they had acquired by being the first to obtain provisional protection. It was against public policy that the provisional protection should be accepted as tantamount to the sealing of the patent, for the provisional protection did not secure the publication of the invention for the eventual benefit of the public. So far from section 10. of the act barring Bertie's claim, he was himself entitled to rely on that. They cited *Oxley* v. *Holden* (8 Com. B. Rep. N.S. 666; 30 L. J. C.P. 68); *In re Russell's Patent* (2 De Gex & J. 130).

Mr. T. Webster, in reply.

The LORD CHANCELLOR said the point was a very short one, on the construction of the statute. He was of opinion that an inventor who had filed a provisional specification after another inventor had filed one in reference to the same subject-matter, but who succeeded in procuring his patent to be sealed the first, was in the same position as he would have been before the passing of the statute which provided this machinery of provisional specifications. The benefit which the statute contemplated that inventors were to derive from provisional specification was a considerable one. It was, however, not absolute protection against all the world, but only security from the consequences of accidental imprudence on their own part giving opportunities to workmen and others in a position of confidence for betraying their trust. If they desired to obtain fuller protection, section 9. of the statute afforded the means of procuring it by filing a complete specification, which would, for a limited time, confer the same rights as letters patent, and would operate as a bar to any other persons who might be seeking a patent for the same invention. The general effect of these two several modes of procedure was made plainer still by section 10, which provided against the case of a fraudulent filing of a second specification. The petitioners had not filed such a complete specification, but they now contended that the effect of a provisional specification was to give the person first filing it protection in the meantime against all rival inventors, and that the original wrong was in the Attorney General suffering a second provisional specification to be filed. His Lordship was, however, of opinion that the Attorney General could not reasonably have refused Mr. Bertie's application in the absence of a *prima facie* case of fraud on the part of Mr. Bertie. There was no power to compel a person who had filed a provisional specification to proceed with his invention; and if the Attorney General were to reject a second applicant on the ground of one such specification having been already lodged, the consequence might be the loss to the public for a year or more of the fruits of the ingenuity of many minds which often were working simultaneously on the same track. The right which a provisional specification conferred on him filing it to have his letters patent when granted dated back to the time of the filing of the provisional specification was conditional on no rival inventor intervening and obtaining a patent first. It had been complained indeed, on behalf of the petitioner, that on Mr. Bertie's contention an inventor might be left helpless against rivals for six months. But this was not so. A person filing a second specification must advertise, and one who had filed the first provisional specification ought—as he would have had to do independently of the statute—to keep a watch over the advertisements, and to observe if any invention were advertised of an apparently similar character to his own. In the present case Mr. Bertie's advertisement was just like that of the petitioner's. They might, therefore, have applied to the Attorney General, entering a *caveat*, which would have made it incumbent on him to decide which was the first inventor. The petitioners had been negligent, and had only themselves to thank for having lost the opportunity of entering a *caveat* at the right time. The Lord Chancellor could not protect against the effects of such an omission by now antedating the patent. If there were anything in the petitioners' patent not covered by Mr. Bertie's patent, it was quite right that they should have a patent for that; but it would be improper to seal a patent which would interfere with the patent rights of Mr. Bertie, who

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had now possession in his favour. As, however, the matter was one of first impression it was not a case for making the petitioners pay costs. They might have their option either to have their petition simply dismissed without costs, or[1] the order might be that there should be no costs of the present hearing, and the petitioners might have leave to apply to the Attorney General for a patent for any part of their invention not covered by Mr. Bertie's patent. Such patent would be dated the 19th of March, 1869, being the day when the petitioners bespoke their patent.

LORD ROMILLY, M.R., April 17, 19, 1869.

JODRELL *v.* JODRELL.

38 L. J. Ch. 507; L. R. 7 Eq. 461; 20 L. T. 349; 17 W. R. 602.

Apportionment Act, 4 & 5 *Will.* 4. *c.* 22.—*Dividends payable under Decree of the Court to a Person for Life—No Apportionment.*

APPORTIONMENT.—*Under a will, dated in* 1858, *A. was tenant for life of an estate subject to impeachment for waste. B. was tenant for life of the same estate in remainder without impeachment for waste. In A.'s lifetime the Court had authorized the sale of some of the timber on the estate, and had ordered the dividends of the money arising from such sale to be paid to A. during his life. After A.'s death B. claimed the whole of the dividend which was accruing at the death*:—Held, *that such dividend was not apportionable between B. and the personal representatives of A.*

John William Jodrell, by his will, dated the 22nd of May, 1858, devised certain real estates to the use of his brother Francis Charles Jodrell, and his assigns for his life, subject to impeachment for waste, with remainder to the use of Edmund Henry Jodrell and his assigns, for his life, without impeachment of waste, with remainder to the use of Thomas Jodrell Phillips Jodrell, the petitioner, for his life, without impeachment of waste, with remainders over.

The testator died on the 25th of May, 1858. Francis Charles Jodrell died on the 4th of June, 1868, having survived Edmund Henry Jodrell, the second tenant for life.

There were upon the devised estates woods and plantations of great value, and the object of the suit which was instituted by Francis Charles Jodrell, was to get the direction of the Court respecting the timber.

By the decree which was made on the 15th of January, 1859, Francis Charles Jodrell was directed to fell and sell certain parts of the timber, and it was ordered that the proceeds of the sale thereof should be brought into Court and invested in 3*l.* per cent. consolidated Bank annuities, and that the dividends to accrue due on such annuities during the life of Francis Charles Jodrell should from time to time, as and when the same should accrue due, be paid to him or until further order.

In pursuance of the decree the sum of 1,022*l.* 18*s.* 9*d.* consols had been purchased with moneys arising from the sale of the timber, and this sum together with the dividends which had become due thereon in July, 1868, and January, 1869, was in Court. Thomas Jodrell Phillips Jodrell had presented a petition praying for a transfer and payment to him of the above-mentioned annuities and dividends. It was admitted that the petitioner was entitled to the 1,022*l.* 18*s.* 9*d.* consols, as representing the corpus of the timber moneys; but a question arose as to whether the dividend, which became due in July, 1868, was to be apportioned between the petitioner and the personal representatives of Francis Charles Jodrell, or the petitioner was to take the whole thereof.

Mr. Rigby, for the petitioner.—The dividends were payable to Francis

(1) Mr. Webster intimated that this alternative would be accepted by the petitioners.

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Charles Jodrell under a decree of the Court, and a decree of the Court is not an instrument within the meaning of the Apportionment Act of 4 & 5 Will. 4. c. 22.

He referred to *Cattley* v. *Arnold* (28 L. J. Ch. 352; 1 Jo. & H. 651); *In re Longworth's Estate* (1 Kay & J. 1; 23 L. J. Ch. 104); *In re Lawton's Estate* (L. R. 3 Eq. 469).

Mr. Dryden, for the personal representatives of Francis Charles Jodrell.—*Cattley* v. *Arnold* was a case of rent, and does not apply. In the other cases cited, the instrument which created the life interest was executed before the Apportionment Act. If the petitioner's view be correct, moduses, &c., are out of the act altogether.—*Knight* v. *Boughton* (19 L. J. Ch. 66; 12 Beav. 312).

Mr. Rigby, in reply.—The will did not contemplate the payment of these dividends. It was by virtue of the decree alone that they were made payable. It is impossible to distinguish the case from *Cattley* v. *Arnold*.—He also referred to *In re Markby* (4 Myl. & Cr. 484).

Lord Romilly, M.R. (*April* 19).—I think that there is no apportionment in this case. I must follow the authorities, and according to the authorities I cannot make out that there is in this case any instrument within the meaning of the Apportionment Act. The act is ill drawn.

Malins, V.C., May 25, 26, 1869.

LEWIS *v.* MATTHEWS.

38 L. J. Ch. 510; L. R. 8 Eq. 277; 20 L. T. 905; 17 W. R. 841.

Legacy to Executor Virtute officii—Power of Attorney—Proof of acting by Executor—Costs of Legatees not Parties to Record in Administration Suit.

Executor and Administrator.—*To entitle an executor to a legacy bequeathed to him as such, he must prove the will, or at least act in the execution thereof; probate of the will is the best, but not the only possible evidence of his intention to act.*

Residuary legatees, not parties to the record, but having by leave of this Court attended in chambers, held entitled to one set of costs amongst them.

James Lewis, by will, dated the 28th of September, 1850, gave and bequeathed " unto his executors thereinafter named the sum of 200 guineas for their trouble in the execution of the trusts of that his will, in addition to any other legacy he might have given them "; he then gave all his real and personal estate to Benjamin Lewis and William Lewis upon the trusts therein mentioned, and he nominated and appointed the said Benjamin Lewis and William Lewis his executors.

Benjamin Lewis pre-deceased the testator; William Lewis went to Australia in 1851, and resided there till his death, having, in 1854, executed a general power of attorney to the plaintiff, Alfred Lewis, to act as his attorney in all matters.

The testator died in 1859. In 1860 administration of his estate with the will annexed was granted to the plaintiff, the brother and one of the residuary legatees of the testator, limited until William Lewis should, by himself or by his attorney, apply for or renounce probate. Shortly after this grant of administration the plaintiff received a power of attorney from William Lewis, dated the 12th of July, 1860, authorizing him to procure letters of administration with the will annexed to the testator's estate, but " nevertheless for the use and benefit of the said William Lewis until he should apply for or obtain probate of the said will." Administration having been already granted to the plaintiff as above stated, no action was taken under this power of attorney.

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William Lewis died in 1862, having, by will, devised and bequeathed all his real and personal estate to the defendant Hannah Walker, who afterwards married the defendant Richard Matthews.

This bill was filed for the administration of the testator's estate; various questions were raised, amongst others a doubt was suggested whether William Lewis was entitled as executor to the above-mentioned legacy of 200 guineas, which was now claimed by the defendant Hannah Matthews, as his legal personal representative. The 20th and 21st paragraphs of the bill were as follows:—

"20. The plaintiff [Alfred Lewis] has, as such administrator as herein mentioned, received a large portion of the personal estate of the said testator James Lewis, and in consequence of the absence of the said William Lewis, and under such general power of attorney as aforesaid, the plaintiff has also, as the attorney of the said W. Lewis, received rents of the said testator's freehold and coyphold estates, and the plaintiff is willing to account for the same, as this honourable Court shall direct.

"21. The said W. Lewis accepted and acted in the execution of the trusts of the will of the said J. Lewis by the plaintiff as his attorney as aforesaid."

The chief clerk, in his certificate, disallowed the payment of the "executorial fee" of 210*l.* to the defendant Hannah Matthews, and submitted to the Court whether, under the circumstances stated, that legacy was or was not payable.

Mr. J. Pearson and *Mr. Ellis*, for the plaintiff.—William Lewis never proved the will, and is not therefore entitled to a legacy given to him as executor.—They cited *Griffiths* v. *Pruen* (11 Sim. 202); *Hanbury* v. *Spooner* (5 Beav. 630; 12 L. J. Ch. 434); *Angermann* v. *Ford* (29 Beav. 349); *In re Hawkins's Trusts* (33 Beav. 570; 34 L. J. Ch. 80); as shewing a concurrence of opinion among three Judges on this point.

Mr. G. Hastings, for residuary legatees in the same interest.

Mr. Glasse, for the defendants Richard and Hannah Matthews.—It is a mistake to suppose that to enable a man to take such a legacy it is necessary for him to take out probate; it is sufficient that he manifest an intention to act; here there is sufficient evidence of that in the execution of the special power of attorney and the assumption of all responsibility. In all the cases cited on the other side there was no sufficient expression of intention.—He cited *Roper on Legacies*, p. 778.

Mr. W. Pearson (with *Mr. Glasse*).—The executorial acts and duties performed by William Lewis and Hannah Matthews, in her representative character, are sufficient to entitle his estate to this legacy—*Harrison* v. *Rowley* (4 Ves. 212); *Brydges* v. *Wotton* (1 Ves. & B. 134).

Mr. J. Pearson, in reply.—In *Harrison* v. *Rowley* (ubi supra), the executor had acted as such. The acts on which the defendants rely were done by the deceased not as executor but as trustee; their duties are distinct; and a legacy for trouble in doing the duties of executor is not answered by trouble in doing the duties of trustee—*Lord Brougham* v. *Lord Poulett* (19 Beav. 119; 24 L. J. Ch. 233). Moreover, the plaintiff administered the testator's estate in his own person, not as attorney of William Lewis, who could not therefore claim the benefit of that act. Nor was the plaintiff bound to take out a second administration under William Lewis's power of attorney, and thereby increase the expenses of administration unnecessarily. In the cases cited the executor had been prevented from acting by some cause from without; here William Lewis might have acted at any time between the testator's death, in 1859, and his own death, in 1862. Having wilfully abstained from acting, he cannot take the legacy.

MALINS, V.C. said, that the rules of the Court as to legacies to executors were not open to doubt; such a legacy is given in respect of the office, and there must therefore be evidence of the intention to act, in order to entitle the legatee to the legacy. The best evidence of such intention that could be produced was, of course, the act of proving the will; but this was not the only possible evidence. *Harrison* v. *Rowley* was still law, and it was clear that an executor might do

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before taking probate all acts that he might do after taking probate, subject only to the risk of the will being invalidated. Such acts done anterior to probate were of themselves sufficient evidence of the intention, and would entitle the executor named to the legacy, even though he died before he had actually proved the will. But where, through age, infirmity or illness, the executor named had not proved, nor taken any step in the execution of the will, he could not have the legacy—*Hanbury* v. *Spooner; In re Hawkins's Trusts.* The case of *Angermann* v. *Ford,* following *Read* v. *Devaynes* (2 Cox, 285; 3 Bro. C.C. 95), shewed that where the executor named has the opportunity of proving the will, and of thus clothing himself with the character of executor, he must do so in order to entitle himself to a legacy as executor; and further, that probate is sufficient evidence of the consent to act, although delayed, as in that case, for six years. But, nevertheless, probate, though sufficient evidence, was not the only evidence of consent; and in the present case it was shewn that William Lewis had executed a power of attorney to the plaintiff authorizing him to take out administration with the will annexed of the testator's estate on his behalf. It was true this power was never used, the plaintiff having already taken out administration, but it was none the less evidence of William Lewis's consent to act. But, further, the plaintiff stated in his bill that he took the rent and profits of the testator's real estate as attorney for William Lewis, and that William Lewis had acted in the execution of the will by the plaintiff as his attorney; in fact he admitted himself to have been the agent for William Lewis, and he could not now be heard to say to the contrary. The legacy of 210*l.* to William Lewis must be allowed, and the chief clerk's certificate varied to that effect.

Some discussion took place with reference to the costs of legatees not parties on the record who attended proceedings in chambers.

Mr. W. Pearson objected to the costs of parties not on the record being allowed out of the estate. There were four residuary legatees, one of whom was represented by the defendant Hannah Matthews; the other three all attended separately in chambers; their interest in the estate was the same as the defendant's; they ought not, therefore, to have their costs of attending the taking of the accounts—*Daubney* v. *Leake* (35 L. J. Ch. 347; L. R. 1 Eq. 495); *Hubbard* v. *Latham* (35 L. J. Ch. 402); *Stevenson* v. *Abington* (11 W. R. 936); *Wragg* v. *Morley* (14 W. R. 949).

Mr. G. Hastings, for the residuary legatees.—Formerly the residuary legatees would all have been parties to the record, and would then have had their costs as a matter of course; we had liberty to attend, and were compelled to avail ourselves of it. In *Bellew* v. *Bellew* (3 Weekly Notes (1868), 253) one set of costs was given to parties other than those on the record.

MALINS, V.C. said, the rule in this matter must be cautiously exercised; he would follow the principle on which the point was decided in the last case cited, and give one set of costs to the parties attending the proceedings beyond those payable to the parties to the record.

LORD ROMILLY, M.R., June 3, 4, 1869.

In re THE CHINA STEAMSHIP AND LABUAN COAL COMPANY (LIMITED); DAWES'S CASE.

38 L. J. Ch. 512; L. R. 6 Eq. 232.

Referred to, *Faure Electric, &c., Co.* v. *Phillipart,* 1888, 58 L. T. 525 (Q.B. D.).

Company—Call—When owing.

COMPANY.—*A call is owing from the day on which it is made, although it is "payable" on a subsequent day.*

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The directors of this company on the 27th of November, 1866, made a call payable on the 20th of December. On the 17th of December the shares of Mr. Dawes were declared forfeited for non-payment of previous calls. The question was, whether the call made on the 27th of November was recoverable from him. The articles of association contained the following clause:—

"Any member, whose shares shall have been forfeited, shall notwithstanding be liable to pay to the company all sums or calls owing upon such shares at the time of the forfeiture."

Mr. Roxburgh and *Mr. Wickens*, for the liquidators, argued, that the call was "owing" from the time when it was made, although payable at a future date.

They cited *Mackenzie's case* (17 W. R. 343; 38 L. J. Ch. 199; L. R. 7 Eq. 240); *The North American Colonial Association of Ireland* v. *Bentley* (15 Jur. 187; 19 L. J. Q.B. 427).

Mr. Jessel and *Mr. Eddis*, on behalf of Mr. Dawes, urged, that "owing at the time of the forfeiture" meant payable at that time.

The MASTER OF THE ROLLS said—There is no question that the call made on the 27th of November, 1866, is payable on that day, and it is due on that day; but it cannot be compulsorily enforced until the 20th of December, 1866. The moment the call is made it is a debt due in every respect.

On the 17th of December, three days before the call can be compulsorily enforced, Mr. Dawes's shares are forfeited; and thereupon he asks whether he was bound to pay it. I should have thought it clear that he was, without any words in the articles. The case of *The North American Colonial Association of Ireland* v. *Bentley* seems to me to establish that; but the thing is made still more clear by the 34th clause of the articles, which says, "Any member, whose shares shall have been forfeited, shall notwithstanding be liable to pay to the company all sums or calls owing upon such shares at the time of the forfeiture." That expressly means that the call is owing the moment it is made, and all the cases are to the same effect. I am of opinion, therefore, that Mr. Dawes was bound to pay the call.

JAMES, V.C., May 28, 31, June 1, 7, 1869.

TOPHAM *v.* THE DUKE OF PORTLAND.

38 L. J. Ch. 513; L. R. 5 Ch. 49 (n.); 17 W. R. 911: affirmed, [1870] E. R. A.; 39 L. J. Ch. 259; L. R. 5 Ch. 40; 22 L. T. 847; 18 W. R. 235 (L.C. and L.J.).

Power of Appointment—Fraud on Power—Improper Influence—Second Appointment—Continuance of old Influence.

POWERS.—*Where an appointment has been set aside on the ground that, though not based on any actual agreement between the appointor and the appointee, it was made in reliance on a sense of moral obligation known to be operating on the mind of the appointee, which would lead her to carry out the appointor's wishes, nothing short of a distinct declaration by the appointor, that he considers the appointee relieved from such obligation, can make a fresh appointment to the same person valid.*

This was a suit to test the validity of two appointments by the Duke of Portland, whose former exercise of the same power was one of the subjects of dispute in a suit which came before the Master of the Rolls in 1862, and was finally determined by the House of Lords in 1864. That case is reported (31 Beav. 525: on appeal, 1 De Gex, J. & S. 517; 11 H.L. C. 32; 32 L. J. Ch. 81, 257).

The facts, so far as material to the present case, were as follows: By indenture, dated the 24th of June, 1843, the late Duke of Portland covenanted

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with his sons, the present duke (then Marquis of Titchfield), Lord George Bentinck, and Lord Henry Bentinck to transfer a sum of 52,000*l.* 3*l.* per cent. consols into their names; and it was declared that they should stand possessed thereof upon trust to invest the dividends during the life of the late duke, and that after his decease the said trust fund and all accumulations should be held by them, on trust for Lady Harriet Bentinck and Lady Mary Bentinck (the two surviving unmarried daughters), or for one of them exclusively of the other who should be living at the time of the appointment, and the issue then living of both or either of them, or all or any one or more of the objects of the power, in such priorities, &c. as the late duke, or after his decease the Duke of Portland for the time being should by deed appoint, and in default of and until such appointment, and as to such part or parts of the trust funds, and the dividends, interest and annual income to arise therefrom to which such appointment, if made, should not extend, upon trust during the joint lives of Lady Harriet and Lady Mary, to pay the interest and annual income to Lady Harriet and Lady Mary in equal shares, for their absolute use and benefit, and after the decease of either of them upon trust to pay the whole of the interest and annual income to the survivor for life; and, after the decease of the survivor, the trust fund and dividends were to go to such person as should then be Duke of Portland for his own absolute use and benefit.

By another indenture, dated the 24th of November, 1848, the late duke limited all his Marylebone estates to Charles Heaton Ellis, upon trust after his death (amongst other things) to raise a clear annuity of 2,720*l.* during the joint lives of Lady Harriet and Lady Mary, and pay the same to the present duke and Lord Henry Bentinck, to the intent that they should pay the same annuity, when payable to Lady Harriet and Lady Mary, or to either of them in exclusion of the other, in such parts and subject to such conditions or restrictions as the present duke during his life, or after his decease Lord Henry, or after his decease the personal representative of the survivor of them should from time to time by deed direct or appoint, and in default of such appointment to pay the annuity between Lady Harriet and Lady Mary in equal proportions.

The late duke died on the 27th of March, 1854, and Lady Mary married Colonel Topham on the 5th of October in the same year.

On the 21st of September, 1854, the present duke made two temporary appointments in favour of Lady Harriet alone under the above-mentioned settlements; and on the 19th of December, 1854, he executed two other deeds-poll, by the first of which, after reciting the marriage of his sister, he declared that, in pursuance of the power in that behalf contained in the deed of the 24th of June, 1843, he appointed that, until further or other appointment, and subject thereto, all the dividends to accrue during the life of Lady Harriet on the said sum of 52,000*l.* and the accumulations, should be paid and belong to Lady Harriet; and a power of revocation was reserved to the Duke of Portland for the time being. The other deed dealt in like manner with the annuity of 2,720*l.*

It will be seen, in the report above referred to, that the appointment was set aside, on the ground that it was an attempt to make the power subservient to a purpose foreign to the intention appearing on the face of the instrument creating the power, though entirely in accordance with what were known, or supposed to be known, to have been the real wishes of the settlor, viz., if possible, to deter Lady Mary from contracting a marriage of which he disapproved, or, if that failed, to tie up a moiety so that it should be available for her benefit in the event of her becoming by any means a *feme sole;* and that the chief circumstances which led their Lordships to this conclusion were: 1, the tenor of the correspondence between the present duke and his man of business, Mr. Ellis, and especially an A. B. case submitted by them to counsel, shewing that as to one moiety of the funds there was no intention to give Lady Harriet any beneficial interest, and that her agency would have been dispensed with altogether, if it had been thought possible to keep it out of

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the plaintiff's hands by any other means; 2, the fact that, after the temporary but before the permanent appointments to Lady Harriet, she had been induced to sign an order to Messrs. Drummond, the family bankers, applying in terms to future dividends as well as to those actually appointed to her, directing them to invest a moiety of the payments to be made to her from the account marked "S," in the joint names of the duke, Lord Henry and herself; 3, the fact that even the permanent appointments were made subject to revocation, so that the appointor still retained a hold over the appointee; and, 4, that the appointments were made on a well-grounded expectation that Lady Harriet would be disposed from her own feelings to co-operate in carrying out her father's wishes.

The decree of the House of Lords having been made without prejudice to any question as to any future exercise of the powers of appointment, the Duke of Portland proceeded to execute the two new appointments hereinafter described:

1. By a deed-poll, dated the 6th of July, 1864, after reciting the indenture of the 24th of June, 1843, the appointment thereunder by the said deed-poll of the 19th of December, 1854, the decrees of the Lords Justices of appeal, and that the capital fund then subject to the trusts of the said indenture of settlement consisted of a sum of 39,200*l.* invested on mortgage, and a sum of 33,467*l.* 5*s.* 9*d.* stock in the new 3*l.* per cent. annuities; it was witnessed that, pursuant to and in exercise of the power to him by the said indenture of the 24th of June, 1843, for that purpose given, and of every or any other power in anywise enabling him in that behalf, he, the Duke of Portland, did thereby irrevocably direct, limit and appoint that the dividends, interest and annual income of the said sums of 39,200*l.* and 33,467*l.* 5*s.* 9*d.* new 3*l.* per cent. stock, and of the stocks, funds and securities upon which the same might be invested, and of all other the capital, trust moneys, stocks, funds and securities (if any) for the time being, subject to the trusts of the same indenture of settlement thenceforth to accrue during the life of the said Lady Harriet Cavendish Bentinck, should be paid to the said Lady Harriet Cavendish Bentinck, her executors, administrators and assigns, for her and their own absolute use and benefit during the life of the said Lady Mary Elizabeth Topham, her executors, administrators and assigns; and it was further witnessed, that "so far as it might be necessary to give effect to his intention to appoint the income of the said trust funds in manner thereinbefore mentioned, but not further or otherwise, and by way of confirmation of the appointment thereinbefore made, he, the Duke of Portland, in exercise of the powers for that purpose given by the said indenture of the 19th of December, 1854, did thereby revoke and determine the trusts of such indenture declared of the said premises thereby appointed, and did irrevocably direct and appoint" as above stated.

2. By another deed-poll of the same date, after reciting the indenture of the 24th of November, 1848, the appointment thereunder of the annuity of 2,720*l.* thereby created, by the said deed-poll of the 19th of December, 1854, and the decrees of the Lords Justices and of the House of Lords, the Duke of Portland made an irrevocable appointment of the said 2,720*l.* annuity in substantially the same terms as the last-mentioned appointment. In the mean time, after the decree of the Lords Justices and pending the appeal to the House of Lords, Lady Harriet had signed the following order:

"Nice, 16th Nov., 1863.

"Messrs. Drummond,—Be pleased to transfer to an account to be headed and kept, 'Lady Harriet Bentinck's separate account,' the sum of 1,831*l.* 7*s.* 3*d.*, being a moiety of the following sums which have been paid to my account by the Duke of Portland and Lord Henry Bentinck Account S. (explained to mean 'Sisters' Account'), namely, 1863, March 27, 654*l.* 10*s.*, April 11, 406*l.* 14*s.* 7*d.*, June 27, 660*l.* 13*s.* 4*d.*, July 4, 850*l.* 13*s.* 4*d.*, September 28, 660*l.* 3*s.* 4*d.*, October 19, 430*l.* 19*s.* 11*d.* Also pay or transfer to the same separate account one moiety of all sums, which hereafter may be

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paid or transferred to my account by the Duke of Portland and Lord Henry Bentinck Account S.

"Harriet Margaret Bentinck."

And by a subsequent letter, dated the 28th of May, 1864, she had requested them to deal with all moneys standing to the separate account so opened by her according to the signature of her solicitor, Mr. E. S. Bailey, who was also the solicitor of the Duke of Portland.

No direct communication appeared to have taken place between the Duke and Lady Harriet respecting the new appointments made in her favour, but she was informed of them by the following letter from the said Mr. E. S. Bailey (the receipt whereof she duly acknowledged):

"Berners St., London, 1864, July 29th.

"Madam,—I have the honour of informing your ladyship that the Duke of Portland has executed two deeds of appointment, dated the 6th day of July last, by one of which his Grace has irrevocably appointed to you, for your own sole absolute use and benefit, during the joint lives of yourself and Lady Mary Topham, the whole of the annuity of 2,720*l.* charged by the late Duke of Portland on his Grace's Marylebone estate; and by the other, the Duke of Portland has also irrevocably appointed to you, for your like sole absolute use and benefit, during the joint lives of yourself and Lady Mary Topham, the whole of the yearly dividends and interest payable on the sum of 32,000*l.* 3½*l.* per cent. annuities settled by the late of Duke of Portland in the year 1843, and the accumulations; and which fund is now represented by a sum of 39,200*l.* sterling lent on mortgage and 33,467*l.* 5*s.* 9*d.* new 3*l.* per cent. stock. I inclose copies of these two appointments, the originals of which are held by my firm on your ladyship's account and subject to your order. I also inclose a copy of an order given by the Duke of Portland and Lord Henry Bentinck to Messrs. Drummond, to pay these funds as received by them to your account with them. I shall feel obliged by your ladyship's acknowledging the receipt of this letter and the inclosures. I have the honour to be, Madam, your ladyship's very obedient servant,

"E. S. Bailey."

The order referred to was in the following terms:

"Langwell, 6th day of July, 1864.

"Gentlemen,—We desire to cancel all existing orders, which relate to certain sums paid to our joint account with you marked S. As to the future disposal of such sums as will be paid to that account, we request that it may be as follows: As to the quarterly payments of an annuity of 2,720*l.* sterling and the half-yearly payments made by Mr. Watkins, and the half-yearly dividends on a sum of 33,467*l.* 5*s.* 9*d.* new 3*l.* per cent., from the last payment thereof to the date of this notice, we request that one moiety may be paid to the account of Lady Margaret Harriet Cavendish Bentinck, and the other moiety to the account of Lady Mary Elizabeth Topham. And as to all future sums paid to the said joint account of the said annuity, interest and dividends, and of any accumulation of the same stock, we request of you to pay the whole amount to the account of Lady M. H. C. Bentinck. We are, gentlemen, your obedient servants,

"Scott Portland,"
"Henry Bentinck."

Under these circumstances a bill was filed by Lady Mary Topham, in June, 1865, against the duke, Lord Henry and Lady Harriet, praying a declaration either that she was entitled to a moiety of the income of the trust fund and of the annuity respectively appointed to Lady Harriet by the deed-poll of the 6th of July, 1864, or that such appointments were void as against her, and that she was entitled to such moieties as in default of appointment from that date; and for consequential directions.

Sir William Topham, having by an indenture, dated the 5th of October,

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1854, covenanted to settle all after-acquired property of the plaintiff upon trust for her separate use, he and the sole acting trustee of such indenture were also made defendants.

The following passages occurred in the Duke of Portland's answers in the former and the present suit respectively:

In the former suit he said: "When the said deeds poll of the 19th of December were executed by me I fully intended that from and after the execution thereof the defendant Lady Harriet Cavendish Bentinck should receive the whole of the dividends or income and annuity thereby appointed to her; and I was aware when and before such appointments were made that the said Lady Harriet Cavendish Bentinck would have, and I intended that she should have, the power, if she thought fit to exercise it, of dealing with and disposing of the whole of the dividends, yearly income and annuity as her own moneys. But the said appointments were made in consequence of the marriage of the plaintiff, and as the only mode by which, as I was informed, the immediate and absolute vesting in the plaintiff of a share of the dividends or income and annuity so appointed could be prevented; and I did hope when the said appointments were executed that the defendant Lady Harriet Cavendish Bentinck would not on receiving the same proceed at once to apply the whole thereof to her own personal use and purposes, but as to a moiety thereof would set apart the same as a fund to be dealt with in accordance with the wish of the late duke in the event, which has occurred, of the plaintiff marrying the defendant Sir William Topham."

In the present suit he said: "I have in my said answers filed in the suit hereinbefore referred to said that when the said appointments of the 19th day of December, 1854, were executed I did hope that Lady Harriet Bentinck would not on receiving the said income and annuity so appointed to her proceed at once to apply the whole thereof to her own personal use and purposes; but when I made the said last-mentioned appointments of the 6th of July, 1864, I had not, nor have I now, any opinion, hope or expectation as to the manner in which Lady Harriet Bentinck would, or will, think proper to dispose of or apply or deal with the said income and annuity so appointed to her and of which she is the absolute beneficial owner so far as the appointments so executed by me and my full purpose to make her so can make her. I do not know, and cannot answer, as to my knowledge, information or belief, whether it is or is not the fact that Lady Harriet Bentinck does not apply or does not intend to apply more than one moiety of such income and annuity for her own benefit."

Lady Harriet, by her own answer in the present suit, stated that her order of the 16th of November, 1863, was not intended to apply to any moneys other than such as were paid under the appointments of 1854 (in fact pending the appeal), but that as it applied in terms to all moneys transferred to her account from the account marked "S," her bankers had acted accordingly, and that she had not thought it necessary to interfere at present, more especially as the plaintiff had instituted the present suit, and Sir William Topham had long since, as she (Lady H.) was informed and believed, intimated his intention to dispute any appointment of the whole of the income annuity which the Duke of Portland might make in her favour. Under the circumstances aforesaid she had not actually applied more than a moiety of the aforesaid income and annuity for her own personal use and purposes, but she entirely denied that she held them as a fund to be disposed of in accordance with any agreement or in trust for any person, and she intended to dispose of the same in any way she might from time to time think fit, either for her personal use or otherwise, at her sole will and pleasure.

In her cross-examination (taken abroad) she said, among other things, as follows [as to the order to Messrs. Drummond of the 18th of October, 1854, with respect to the moneys to be received under the former appointments]: "In signing that order I trusted to my brother. I never spent the money that accumulated; it would have been a dishonest act to spend the money which I

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had agreed to allow to accumulate. When I opposed Lady Mary's claim in the former suit, I did so to carry out my father's intentions. He told me so solemnly that she was not to have the money that I could not conceive her trying to get it. I mean if she married Mr. Topham. On that occasion the present duke's lawyers acted for me, and they do so in this suit. The duke paid all the expenses in the last suit, and I believe he does so in this suit.—[It was not clear whether the next passage referred to the former or the present suit.]—I have adopted what Messrs. Bailey did in this matter; my brother paid for it and I adopted it; I adopted whatever the duke's solicitors did. I knew that they were carrying out the late duke's wishes and the present duke's wishes. I left the whole matter to the lawyers, and I think that is the usual thing to do.—[Then as to matters subsequent to the former suit.]—In signing that order [of the 16th of November, 1863] I did not think whether I was carrying out the late duke's wishes. I left it entirely to Mr. Bailey. I trusted Mr. Bailey to carry out the late duke's wishes. . . . . I signed that [the letter of the 28th of May, 1864] and sent it. I think it probable it was drawn up by Messrs. Bailey for me. The bankers may under that order have dealt with the money according to the order of Messrs. Bailey. The bankers have had directions from Messrs. Bailey as to the money referred to in that order. The money is now entirely my own. . . . . The money which my brother made over to me after the late suit I have now invested in my own name. I did not do it directly, but I have done so since. I do not recollect the exact time at which it was invested. Mr. Bailey advised me not to invest it till the whole thing was settled. I invested it some little time before I heard from Mr. Bailey that the plaintiff was really going to appeal again. I mean by that to bring this suit. . . . . I reckon that dividend part of my income. I intend to spend it, as distinguished from accumulating it. I cannot tell whether I have spent it. I have a pass-book, but I keep no other account. When Messrs. Drummond draw this dividend they carry it to my general account. I cannot give any idea of what those dividends amount to in the whole. I have not looked particularly to see whether I have touched the dividends you speak of or not. The money is invested in my name only. My brother has made the money over to me unconditionally; and I have not thought whether I am carrying out the late duke's wishes. I left the matter to my brother. I left it all to my brother. I left it all to Mr. Bailey because he was my brother's solicitor. The investment had no reference at all to the late duke's wishes.

Sir R. Palmer, Mr. Hall and *Mr. Rowcliffe*, for the plaintiff.—(*Mr. Hall* was also for Sir William Topham and the trustee of Lady Mary's settlement.)—It is true that the question as to any fresh appointment was left open by the House of Lords, but it was left open to be examined upon such evidence as arises legitimately from antecedent circumstances, and those circumstances shew that an influence was known to be operating upon Lady Harriet's mind which would lead her to apply the funds appointed to her to a purpose foreign to the object of the power.

[JAMES, V.C.—Would this case be governed by the decision of the House of Lords: A father has two sons, and says, "one of my sons is so excessively extravagant that I cannot make any appointment to him. The other is a very prudent and good fellow, and I am quite sure he would never allow his brother to starve"? If the appointment were made in that way, would it be good?]

Yes, if, as the question seems to imply, it is the intention of the appointment that he shall unite that property with his own, and reliance is placed upon him with regard to the use he will make of that which is his own money; but the question is here, as to a series of transactions, whether the later transactions are substantially disengaged from the first. To such a case the general principle applies, which is laid down (with reference, it is true, to quite a different class of contracts) in the first volume of *White and Tudor's Leading Cases in Equity*, in a note to *The Earl of Chesterfield* v. *Janssen*, p. 549, ed. 1866, viz., that confirmation or acquiescence will be of no avail whilst the

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contracting party continues in the same situation as when he entered into the contract; and still more the observations of Lord Langdale, M.R. in *Askham* v. *Barker* (12 Beav. 499, 503), where, with reference to the case put by counsel of an appointment discovered to be invalid and a fresh appointment made with the concurrence of all parties, including and excluding the same objects as before, he said he should feel a great difficulty, because it would be almost impossible for the parties to get into the same situation in which they were before. In the former case, as here, it was denied that there was any actual agreement, but it was considered, on the authority of *In re Marsden's Trusts* (4 Drew. 594; 28 L. J. Ch. 906), that where there was reliance on a previously acquired influence over the mind of the appointor, the absence of agreement would not make the appointment a good one. Then, compare the Duke's language on the two occasions—[the learned counsel read the passages from his answer above set out].—His Grace's meaning apparently is this: "I had the opinion of lawyers, and was told that without the right being given to Lady Harriet to do what she pleased with the money, it would be good for nothing; at the same time I hoped she would not exercise it." Then, when we come to the answer in the present suit, he drops out the hope, and the rest is exactly the same. There was experience in that case, and knowledge of the character of Lady Harriet as well as the other facts. Lady Harriet, in her cross-examination, connects the giving of the order (still unrevoked) of the 16th of November, 1863, with the original purpose as distinctly as it is possible to do so. Lord Cranworth suggested in the former suit that if Lady Harriet had only been told that as between her and the duke there was to be no moral obligation whatever, it might have been all very well (even though he had gone on to state what, in his opinion, were her father's wishes); but that suggestion has not been acted on in any way. In fact, having learned something by the former proceedings, he thought it was better to leave the chain and net in which former circumstances had placed Lady Harriet to operate in the manner in which it was quite certain they would operate if nothing more was done.

Mr. Amphlett, *Mr. T. Stevens* and *Mr. Michael B. Smith*, for Lady Harriet Bentinck.—The question of law really comes to this, whether a person who has attempted to make an illegal appointment can afterwards make a new appointment. On this point the authorities are decisive—*Farmer* v. *Martin* (2 Sim. 502); *Birley* v. *Birley* (25 Beav. 290; 27 L. J. Ch. 569); *Carver* v. *Richards* (27 Beav. 488; 1 De Gex, F. & J. 548; 29 L. J. Ch. 169, 357); *Ward* v. *Tyrrell* (25 Beav. 563; 27 L. J. Ch. 749). In *Jackson* v. *Jackson* (Dru. 91), Lord St. Leonards said, "It is clear upon the authorities that if a man exercise a power improperly, so that his execution of it is void and he subsequently discovers his error, he may then exercise the power in the manner warranted by law," though in that case the will which it was sought to establish as an appointment was made on the assumption that the power had been well exercised already, and therefore could not take effect as such. There is a dictum of Lord Hardwicke in *Hervey* v. *Hervey* (1 Atk. 567), to the same effect. In *Askham* v. *Barker* (ubi supra), the second appointment was one which could not on any principle be supported. It was in fact a question of intention whether the appointor could have meant to include by general words in the second appointment property which he imagined himself to have disposed of by the first appointment. Lord Langdale, however, said "If it had been authoritatively and properly declared that the first execution of the power was entirely gone, for anything he knew to the contrary, the second execution of the power might not have been bad."

[JAMES, V.C.—Suppose a father receives a bribe from his son to appoint to him, and the appointment is set aside on a bill filed by another son, could the father appoint again to that other son?]

Undoubtedly.

[JAMES, V.C.—Could he appoint again to the son who received the bribe?]

The Court would, no doubt, look jealously into the whole transaction, but

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would not presume, in the absence of evidence, that the illegal consideration still pervaded the second appointment. Now, it is clear that, apart from the previous transactions and the former suits, there is no proof here by any external circumstances of any motives which would invalidate the appointments; but it is contended that these appointments are a continuation of the scheme which was held to be illegal and set aside in the former suits. It will be seen, on comparison, that there are most material and decisive differences. First, the letter by which Mr. Bailey informed Lady Harriet of the appointments must, with the legal knowledge the former suit must have given her, have made it clear to her that she had the absolute disposal of the money; whereas the former appointments were communicated in such terms that she could hardly suppose, and, in fact, did not suppose that she had any interest in the matter, but considered, as she said in her answer, that she was acting a formal and ministerial part only. It is true that the duke seems to have intended, even on the former occasion, that she should be informed of the real effect of the appointment; but she was not so informed, and the duke was responsible—at least, so Lord Westbury appears to have thought,—for the omission of his agents. As to its being a bare formal communication, the letter might, no doubt, have gone on to say, "You are entirely absolved from any obligation to carry out what were supposed to be the wishes of the late duke;" but the present duke had no business to say anything of the kind. She was perfectly independent of him, knew as well as he did what had been her father's wishes, and was as well able to judge of her obligations in respect of them. Therefore, *In re Marsden's Trusts*, which went on the express communication of the appointor's wishes to the appointee, has no application; indeed, it was not referred to even in the former suit by their Lordships, though it was relied on in argument. Then, as to her dealings with the appointed funds. The reasons given in her answer for still keeping a separate account are true and sufficient, and you have the positive oath of both her and the duke that there was no arrangement between them as to how the money should be disposed of; whereas, in the former case, an order by which she put both present and future dividends beyond her own control was sent to and signed by her as a matter of course. In the terms of the appointments themselves there is the very important difference that the former were revocable, whereas these are not. As to the intention of the appointor to make a *bona fide* appointment, the only possible evidence is that of the duke himself, which is distinctly in the affirmative. In fact, it was the only thing he could do. It is probable that even the late duke, if he were alive, would no longer desire the fund to be kept in suspense; for the result of the former suit was to give Lady Mary a considerable addition to her fortune, and she is now as well off as the other married daughters. The attention of the Court was also called to the concluding words of the A. B. case which was sent to counsel previously to the former appointments: "The fear, however, is, that if such an absolute interest be apportioned to J. K. in the dividends, &c., she will promise and give over to her sister one-half, ... and thus defeat the intentions of the settlor," as shewing that the moral influence which the duke was supposed to be relying on now, and which was likely to be much weaker after the lapse of ten years, was even then by no means so strong as it had been represented,—at all events, far less strong than that exercised in *In re Marsden's Trusts*.

Sir R. Baggallay and *Mr. A. Bailey*, for the Duke of Portland.—The duke's answer is complete and explicit on every point as to which he has been interrogated, and the Court has no alternative but either to hold that his statement is wilfully false, or that he had a *bona fide* intention to give the absolute control of the whole property to Lady Harriet. As to the motive which might have led him to exclude Lady Mary, it is well settled that an appointment cannot be questioned on the ground of anger and resentment—*Vane* v. *Lord Dungannon* (2 Sch. & Lef. 118, 130); at all events, not unless the motive appears on the face of the appointment itself. From the very fact that her brother appoints to her absolutely, Lady Harriet will naturally conclude that there is

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no moral reason connected with her father's wishes why she should not accept it and apply it to her own purposes. She has so accepted it; it has been invested in her own name, and neither Mr. Bailey nor anyone else has any means of finding out what she does with it. The duke did not even know of her previous dealings with it by the order of the 16th of November, 1863, and the letter of the 28th of May, 1864, as appears by his affidavit sworn in June, 1868, whereas, he was by no means equally ignorant of her proceedings under the former appointments. Even if she feels a delicacy after what has passed about applying it to her own purposes, she may intend to give it to charity. But, even if the duke knew that she intended to give it all to Lady Mary, it was still the best thing he could do to give it to her unconditionally; for he thus, at least, shifted the responsibility from himself on to her; and he must otherwise have given it to Lady Mary himself, or allowed it to go to her in default of appointment. As to the mode of communication, the duke might well be unwilling, with the prospect of a fresh suit, to write a private letter which would be exposed to hostile criticism and every possible misconstruction at the bar.

Sir R. Palmer, in reply.—The machinery employed in the former case still subsists, except that the account marked " S " has now become Lady Harriet's separate account, and that what Mr. Ellis was then, Mr. Bailey is now. His letter communicating the appointment to her was a mere formal intimation of a formal deed, and the legal knowledge which she may be supposed to have acquired from the former suit, so far from operating in the way suggested on the other side, would lead her to attribute no more meaning to the words " for her own use and benefit " than they had in the former case.

JAMES, V.C. (*June* 7).—The late Duke of Portland was minded to place a very large sum of money in trust for his two daughters, Lady Mary and Lady Harriet, subject to a power of appointment in his son, the present Duke of Portland.

In making that settlement and giving that power the duke had certain motives, objects, purposes, and wishes, of which he made the present duke and, to a certain extent, Lady Harriet the depositaries. He did not, however, embody these in the written document which, and which only, it is competent for a Court of law or Court of equity to regard; and, construing that document as it must be construed, by the ordinary rules applicable to such instruments, a Court is compelled to hold that the duke had no such motive, object, purpose, or wish in making such settlement and giving such power. The defendants, however, persistently regarding those wishes, which, in spite of all the lawyers have said or can say, they with filial reverence hold binding upon them *in foro conscientiæ*, have involved themselves in the past and present litigation to which that settlement has given rise.

In the year 1854 the present duke, in the exercise of his power, appointed the whole of the property to Lady Harriet, to the exclusion of Lady Mary. This deed was executed without the knowledge of Lady Harriet, without any bargain with her, without any promise by her. The House of Lords, however, affirming the decision of the Lords Justices, having regard to the whole history of the transaction, the motive, purposes, and object of the appointor and the position of the appointee, and the relation and understanding existing between the duke and Lady Harriet, determined that the deed of 1854 was what in our technical language is called a fraud upon the power, and was therefore void.

After that decision the duke, in 1864, executed another deed of appointment, again appointing the whole to Lady Harriet. The only difference between the deeds of 1854 and 1864 is, that the one was expressed to be revocable, the other is expressed to be irrevocable. I cannot, however, find in the judgment either of the Lords Justices or of the House of Lords any trace of their decision being based on the fact that the deed of 1854 was revocable.

The deed of 1854 was not communicated to Lady Harriet, but that was a slip, an unintentional omission of a formality; and the omission was only important as affording corroborative evidence of how unsubstantial the whole

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transaction was. It is to my mind clear that if the deed of 1864 had been made in 1854, whether in substitution for or in addition to the deed they actually executed, and if there had been the formal communication of it to Lady Harriet, the result of the litigation would have been precisely the same.

The only other circumstances which I can see differing the deed of 1864 from the deed of 1854 are: 1, that all the parties are ten years older, and that Lady Mary and her husband, whose enjoyment of the property *jure mariti* was the thing sought to be prevented, have lived ten years more of wedded life; 2, that there was the former litigation between the donee of the power and one of the objects of it, in which the donee of the power was defeated.

Besides those two circumstances, and the fact that another piece of parchment or paper has been engrossed, signed, sealed and delivered by the duke, I can find nothing to distinguish the position of the parties on the day after the second deed was executed from what it was on the day after the execution of the first deed.

The lapse of ten years, and the uninterrupted continuance of Lady Mary's wedded life during those ten years cannot be prejudicial to her; and assuredly the fact that the donee of the power has been defeated in litigation with an object of the power is not one to give additional validity to the exercise of a fiduciary discretion intended to be to the prejudice and operating in punishment of that object.

It has been pressed upon me, more especially by the counsel for the duke, with a vehement, almost passionate, eloquence that I cannot decide in favour of the plaintiff without holding either, first, that the appointments thereby made in favour of Lady Harriet being tainted with illegality by reason of the circumstances under which and the purposes for which they were made, it was impossible for the duke to make a fresh appointment in her favour free from the same taint of illegality; or, secondly, that I must discredit the statement made by the duke's answer and affidavit. I do not find myself under any obligation to accept either alternative. As to the first, without saying that it is impossible to set what was wrong right, and to make any subsequent appointment free from the taint, I hold that it was necessary, in order to set it right, that something should have been done and said clearly, unambiguously and sufficiently to disconnect the new appointment from the old understanding, from the old purpose, from the old influences, which rendered the old appointment illegal and void; and that merely executing a new deed and sending a dry, formal, lawyer's letter to the appointee, informing her of the new appointment and of the legal effect of the instrument, were not sufficient for the purpose. And on the second point, I hold that every man must be presumed to intend and mean that which is the natural and necessary effect of his acts.

Now, when the new deeds of appointment were made things stood thus: The duke had said in his answer in the former suit this.—[His Honour read the passage above set out.]—Lady Harriet knew that he had so said, and the duke knew that she knew it. In Lord Henry Bentinck's evidence in the former suit this appears: "When I say that I have heard and believe that Lady Harriet also gave her consent to a similar proposal, I mean that I heard it direct from Lady Harriet, last July. She told me that she had agreed to carry out the late duke's wishes." The duke knew, or must be taken to have known, that she had so agreed. Nothing was said or done before or at the time of the new appointment to get rid of the effect of what had been so said by the duke and agreed to by her. The new deeds, therefore, must be read with reference to what had been so said and agreed to. They were made by an appointee who had stated what his hope was, and what the wishes of the late duke were, to an appointee who had agreed with the late duke to carry out those wishes. It is impossible to regard any cesser of hope or wish, or any change of motive or wish, if any such cesser or change there was in the recesses of the duke's own mind not communicated to the appointee, and the new appointments must in all Courts of law and for all legal purposes be considered to have been made to

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Lady Harriet for the purpose of carrying out the late duke's wishes and because she had agreed to carry out such wishes; and the duke must be held to have known that Lady Harriet would of course receive such new appointment as bound morally and in honour by such agreement. And what to my mind is absolutely conclusive as to this case is, that Mr. Bailey has not been called as a witness. In the former suit there was the most unreserved communication of all that had taken place with and been done by the legal advisers of the duke. In the present case Mr. Bailey was for all practical purposes the duke; Mr. Bailey was for all practical purposes Lady Harriet. The deed could not have come into existence without some suggestion or communication from or to Mr. Bailey. But there is absolute reticence on the part of Mr. Bailey. Mr. Bailey knew as certainly as anything depending on mere moral certainty can be known that Lady Harriet would be governed entirely by him, the duke's solicitor, as to what she would do with the money; and there was the order still in force to the bankers to deal with the appointed money as Mr. Bailey should direct. It was essential therefore to know what Mr. Bailey's intention, purposes, objects and views with respect to the fund were, for Mr. Bailey's intention, purposes, objects and views were the duke's; and Mr. Bailey, it is clear, has no evidence to give which would be favourable to the validity of the appointment. Mr. Bailey knows everything and says nothing.

All the material and relevant circumstances on the day of the execution of the new appointment were in my judgment essentially the same as they were at the time of the execution of those former appointments which were pronounced by the House of Lords to be illegal and void.

My duty is simply therefore to abide by the decision of the House of Lords. That decision is binding on every Court in the kingdom, including the House itself in its judicial character. Some old writers have said that even the great Zeus himself submitted to the decrees of Fate. Perhaps the Duke of Portland, illustrious member as he is of the House of Lords, may be persuaded to submit to the decision of that House, and to feel that he ought not to struggle any more against the irreversible fiat of the law, even in his pious and honourable desire and resolve to do what he believes and knows (as, if it were permitted to me to speak otherwise than in my judicial capacity, I should say I believe and know) to have been the real wish of his deceased father, the creator of the power reposed in him.

My decree will be simply a repetition of the decree of the House of Lords, with the requisite verbal alterations and consequential directions; including, of course, a direction giving the plaintiff the costs of the suit as of the former litigation.

JAMES, V.C., May 7, 1869.

In re THE EAST AND WEST JUNCTION RAILWAY COMPANY'S SCHEME.

38 L. J. Ch. 522; L. R. 8 Eq. 87; 21 L. T. 86.

Referred to; *In re East and West India Dock Co.*, [1890] E. R. A.; 44 Ch. D. 38; 62 L. T. 239; 38 W. R. 516 (C. A.).

Railway Company—Scheme of Arrangement—Debenture Holder—Assent of Creditors—Majority Holders of Invalid Debentures—30 & 31 *Vict. c.* 127. *s.* 10.

RAILWAY.—*When a scheme of arrangement filed under the provisions of the Railway Companies' Act*, 1867, *has received the assent of the majority of debenture-holders, required under section* 10. *of that act, a non-assenting debenture-holder cannot object to its confirmation upon the ground that the debentures held by the assenting debenture-holders were invalid and fraudulently*

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issued; but he will be bound unless he can shew that the assent of the majority was obtained by fraud.

This was a petition for obtaining the confirmation of a scheme between the company and their creditors, filed under the provisions of the Companies' Act, 1867.

The company, under the powers of their original act, passed in 1864, had issued and called up the whole of their original share capital of 300,000*l.*, divided into 15,000 shares of 20*l.* each, and, with the exception of 420*l.*, they had borrowed on debentures the whole sum of 100,000*l.*, which by their act they were authorized so to borrow. The company's debts and liabilities were about 8,700*l.* for arrears of interest on debentures down to the 31st of July, 1868; 6,800*l.* for principal due on certain debentures then due; and 92,700*l.* for principal on their other debentures, to fall due before January, 1871; debts to outside creditors exclusive of landowners, nearly 46,380*l.*; due in respect of purchases of lands not completed, about 35,000*l.*; and for costs in relation to such purchases, about 5,000*l.* The company had partially completed twenty out of thirty-three miles of their railway, but no part had been opened for traffic, and they had made or paid deposits for purchase-money, and held for the purposes of their undertaking land to the value of 43,000*l.* Beyond this the company had no other property of any sort, and they stated that they were quite unable to meet their engagements and liabilities to the outside creditors, or to pay the interest or principal due on their debentures, and for want of funds the works upon the said line of railway had been stopped since August, 1866.

By the East and West Junction Railway (Capital) Act, 1866, the company was empowered to raise additional capital to the amount of 300,000*l.*, and 100,000*l.* upon debentures, and special resolutions of the company had been passed authorizing the directors to raise such additional share capital, but no part of it had in fact been raised.

The company proposed by their scheme, 1. That the directors be at liberty to enter into a contract for the completion of the railway within twenty-four months at a sum not exceeding 230,000*l.* 2. That in lieu of the additional 300,000*l.* share capital and 100,000*l.* debenture capital authorized to be raised as before stated, there should be created and issued at a discount not exceeding 20*l.* per cent. on the nominal amount thereof, debenture stock, to be called first debenture stock, to the amount of 400,000*l.*, bearing a fixed and perpetual preferential interest at 5*l.* per cent. 3. That the first debenture stock and the interest thereof should be a first charge upon the company's undertaking, and have priority over the existing debentures of the company and interest already or thereafter to become due thereon. 4. That the existing debentures be converted into a sum of 100,000*l.* second debenture stock, bearing interest as from six months after the date of the opening of the line at 6*l.* per cent., payable only out of the net profits of the year during which such interest accrued, and having priority over all other charges except the first debenture stock. 5. That there should also be created and issued a third debenture stock, not exceeding 100,000*l.*, bearing interest at 6*l.* per cent., payable out of the net profits of the half-year during which it should accrue as from six months after the opening of the line, to rank next in priority after the second debenture stock, and to be allotted to and taken at par by outside creditors of the company (including the 8,700*l.* arrears of interest due upon debentures, and the future interest to accrue due upon the debentures and debts of the outside creditors from the 31st of July, 1868, to the expiration of six months after the opening of the line) as fully paid-up stock, according to the amount of their respective debts and in satisfaction thereof. The first debenture stock, or the moneys to be raised thereby, to be applied, first, in payment of the purchase-moneys and costs in respect of the land acquired for the undertaking; secondly, in payment to a contractor for the completion of the railway; thirdly, in payment of the interest on the first debenture stock to the expiration of twelve months after the completion of the line.

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The scheme was assented to unanimously at a special meeting of shareholders convened specially for that purpose, at which shareholders representing 161,440*l.* of the company's shares had been present. Debenture-holders of the company representing 75,280*l.* out of 99,580*l.*, being more than three-fourths in value, had also assented to it; and the directors stated they had the concurrence of nearly the whole of the company's outside creditors.

The confirmation of the scheme was opposed by Mr. Toogood, a holder of nine debentures of 500*l.* each, and by Mr. Pell, an outside creditor. Mr. Toogood had obtained judgment against the company for arrears of interest due upon his debentures, and had also filed his bill in this Court to enforce his securities. Mr. Pell, who was a solicitor, claimed to be a creditor to the amount of 15,000*l.* for costs and professional charges. But he had delivered to the company no detailed account or bill of costs, and the company disputed his claim.

Mr. Willcock and *Mr. Fry*, for the railway company, supported the application.

They referred to *In re The Teign Valley Railway Company* (17 L. T. 201).

Mr. Dale, for outside creditors to the amount of 25,000*l.*, supported the application.

Mr. Westlake, for Mr. Pell, an outside creditor, opposed the scheme, upon the authority of *In re The Cambrian Railway Company's Scheme* (37 L. J. Ch. 409; L. R. 3 Ch. 278); *In re The Bristol and North Somerset Railway Company* (37 L. J. Ch. 851; L. R. 6 Eq. 448).

[JAMES, V.C. intimated his opinion that the scheme did not attempt to bind outside creditors.]

Mr. Kay and *Mr. Higgins*, for Mr. Toogood, opposed the application.

[JAMES, V.C. said, that debenture-holders bound by the statutory majority of assenting debenture-holders could not come to oppose the scheme, except under circumstances which would justify a *cestui que trust* in coming to oppose the conduct of his trustee.]

In this case there were special grounds for the interference of the Court. The debentures had been fraudulently issued by the company, before they had the requisite amount of share capital required by their special act subscribed for. The majority of debenture-holders were the holders of invalid debentures, and were not entitled to vote or bind the others. Then, again, the act of 1867 applied only to *bona fide* shareholders who had paid for their shares; that was not so here, and Mr. Toogood, as a debenture-holder, was entitled to come and realize his security—*Furness* v. *the Caterham Railway Company* (27 Beav. 358).

[JAMES, V.C.—It is the company who come; the individual shareholders have nothing to do with it.]

Then there was another point: many of the debenture-holders who formed the statutory majority were also shareholders having opposing interests. They could not be reckoned in the majority so as to bind dissenting debenture-holders.

JAMES, V.C. (without calling for a reply) said that, notwithstanding the objections which had been taken to the scheme, he was of opinion that it must be confirmed. As to the objection with regard to outside creditors, the Court had already stated its opinion that, according to the true construction of the scheme, it did not bind, and did not purport to bind, the creditors mentioned in paragraph 5. to accept debentures in payment of their debts. The scheme only pointed to an arrangement by which they were willing to do so. That disposed of the objection of Mr. Pell. If his Honour had thought that the effect of the scheme would be to deprive any creditor of a reasonable prospect of being paid, he should have had more hesitation in confirming it, but it was evident that, unless some scheme were resorted to, there would be nothing whatever for outside creditors.

With regard to debenture-holders the case might be different, for there might be some value in the land taken by the railway. As he understood the act of 1867, a majority of three-fourths in value of the debenture-holders could, by

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their assent in writing to the scheme, bind all the other debenture-holders, and upon such assent having been given the scheme should be deemed to have been assented to by all the debenture-holders. So that in this case the debenture-holder, who now came to dispute the scheme, must be taken, in fact, to have assented to it by the vote of the majority. It would be open to a debenture-holder to shew that the assent of this majority had been obtained by fraud, as, for instance, by means of bribes, and that would be a very substantial objection. But in this case there was nothing to shew that the majority was obtained in any way by fraud, or to shew that the debenture-holders who had assented were not *bona fide* debenture-holders, or that the act had in any way not been complied with. The question was not whether there had been fraud in originally issuing the debentures, but whether there had been any fraud in obtaining the consent of the debenture-holders. There was no evidence of any such fraud, and therefore all the debenture-holders were bound by the assent of the majority. The proposed arrangement seemed the best thing to be done under the circumstances, and he must confirm the scheme.

LORD ROMILLY, M.R., May 21, 31, 1869.

In re THE COMMERCIAL BANK CORPORATION OF INDIA AND THE EAST.

38 L. J. Ch. 525; L. R. 8 Eq. 241; 20 L. T. 839; 17 W. R. 840.

Referred to, *Nicholl* v. *Eberhardt*, [1889] E. R. A.; 58 L. J. Ch. 399; 59 L. T. 860 (Ch. D.): affirmed, [1890] E. R. A.; 59 L. J. Ch. 103; 61 L. T. 489 (C. A.).

Companies' Act, 1862, *ss.* 159, 160—*Winding-up—Compromise—Sanction of Court.*

COMPANY.—*The Court has jurisdiction, under sections* 159. *and* 160. *of the Companies' Act*, 1862 (25 *&* 26 *Vict. c.* 89), *to sanction a compromise between a company and its creditors and contributories, and to declare such compromise binding upon dissentient creditors and contributories.*

This was a petition by the official liquidator of the above-named company to obtain the sanction of the Court to a compromise proposed to be made under section 160. of the Companies' Act, 1862, between the creditors and contributories, which should be binding on all parties.

The company had, in 1864, been incorporated by charter obtained by certain members of an older corporation called the Commercial Bank of India, to whose business the present corporation had succeeded.

The present corporation having, by order, dated the 28th of May, 1866, been ordered to be wound up, many intricate and expensive litigated questions arose between various classes of creditors and contributories; and in particular a suit was instituted by the older against the present bank, involving claims to a large amount.

In order to put a stop to the enormous litigation which was otherwise inevitable a compromise was arranged between the creditors and contributories, the particulars of which it is unnecessary to state further than that the creditors were to receive 17*s.* in the pound, and all proceedings were to be stayed.

The proposed scheme was approved by 821 out of about 1,100 creditors. only eight dissenting, the remainder being silent; the assenting creditors representing 2,250,000*l.* and the dissenting 25,000*l.* in value. Of the contributories 332, holding nearly two-thirds of the shares, assented, one dissented, and 102 were silent.

Sir R. Baggallay and *Mr. Kekewich*, for the petitioners, submitted that

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the Court had jurisdiction to sanction the compromise and make it binding on all parties under sections 159, 160, of the Companies' Act, 1862. They referred to the judgments of the Privy Council in the case of *The Bank of Hindustan, China and Japan* v. *the Eastern Financial Corporation* (17 W. R. 554), on the 15th of March, 1869, in which it was held that under the similar sections of the Indian Companies' Act (Indian Act of 1866, sections 173, 174, which are substantially the same as sections 159. and 160. of the Companies' Act, 1862), the High Court of Judicature in Bombay had such jurisdiction.

Mr. Southgate and *Mr. H. F. Bristowe*, for the old bank.

Mr. Jessell, Mr. Swanston, Mr. W. F. Robinson, Mr. Fischer, Mr. Lindley and *Mr. Ferrers*, for other parties.

Mr. Devigne, a creditor for 3,600*l*., one of the eight dissentient creditors, opposed the application in person.

The MASTER OF THE ROLLS.—Having had much experience of the winding up of companies, and having on many occasions had this company before me, I feel the strongest opinion that this compromise ought to be carried into effect. It seemed to me probable that the present litigations would, if allowed to go on, grow into the largest and most expensive ever known. The result would, in my opinion, be that many persons would be ruined, that enormous time would be consumed, and the litigation would in all probability outlast the lives of many of the persons concerned in it. I have therefore decided to assist this compromise by expressing my very strongest opinion in favour of it.—[His Lordship then shewed from the statistics stated above that the scheme was approved by a large majority of creditors and contributories both in number and value.]—I am satisfied that by this arrangement the creditors will not only obtain speedier payment, but will also lose less by accepting 17*s*. in the pound than they would waste in costs.

My only doubt is as to my jurisdiction to enforce the compromise and make it binding on all parties. As to this I wish to read the papers in the case before the Privy Council, *The Bank of Hindustan, China and Japan* v. *the Eastern Financial Association*.

The MASTER OF THE ROLLS (*May* 31).—I have read the judgment of the Privy Council to which I referred, and it leaves no doubt on my mind that I have jurisdiction to approve this compromise, and I now give my sanction to it. I repeat that if those who have objected knew as much of this matter as I do they themselves instead of opposing would accept it.

LORD ROMILLY, M.R., May 29, 1869.

In re THE COMMERCIAL BANK CORPORATION OF INDIA AND THE EAST; WILSON'S CASE.

38 L. J. Ch. 526; L. R. 8 Eq. 240; 21 L. T. 164; 17 W. R. 979.

Company—Winding-up—Contributory—Infant Transferee—Acquiescence.

COMPANY.—*A transferee of shares in a company, who at the date of the winding-up order was still an infant, is entitled to treat the transfer to him as a nullity, unless and until he has since attaining twenty-one done acts amounting to complete acquiescence. Such acquiescence was held not to have arisen, from the fact that the solicitors consulted by him appeared for him and many other clients at the same time to resist a summons for a call.*

This was an application by Mr. Wilson to have his name removed from the list of contributories of the above company, on which he had been placed in respect of certain shares which had been transferred into his name during his minority.

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The list of contributories under the winding-up was settled on the 8th of December, 1866.

The applicant attained twenty-one in January, 1867.

A summons to shew cause why a call should not be made was taken out by the official liquidator on the 9th of August, 1867, and served upon the applicant in Bombay, being made returnable in November, 1867.

On the 13th of October, 1867, the applicant's then solicitors entered an appearance for him, and on behalf of him as well as of several other contributories, opposed the call. The call was, however, ordered to be made on the 19th of December, 1867.

The present summons was taken out on the 7th of April, 1869.

Mr. *Roxburgh* and *Mr. Ince*, for the applicant. They referred to *Lumsden's case* (L. R. 4 Ch. 31) and *Capper's case* (L. R. 3 Ch. 458).

Sir R. Baggallay and *Mr. Kekewich*, for the official liquidator, contended that the applicant by appearing to oppose the call and by his delay had acquiesced in and accepted his position as a shareholder.

The MASTER OF THE ROLLS.—I do not think that the fact that the solicitors, whom the applicant consulted, included him among a great number of other clients, for whom they put in appearances and attended to resist the call, amounts to such a distinct and complete acquiescence as is necessary to bind the applicant, who, at the date of the winding-up order, was an infant. Mr. Wilson's name must be taken off the list.

JAMES, V.C., June 5, 1869.

Ex parte THE LONDON AND SOUTH-WESTERN RAILWAY COMPANY.

38 L. J. Ch. 527.

Lands Clauses Act—Doubtful Title—Valuation by Surveyor—Practice—Costs of Respondents appearing when not interested.

COMPULSORY PURCHASE.—*Where there is a doubt as to the true ownership of land taken by a railway company, but neither claimant is absent or prevented from treating, the value of the land should not be determined by a surveyor appointed under sections* 58, 59. *of the Lands Clauses Act, but by the verdict of a jury, or by an award under section* 23; *and when the wrong course has been adopted the compensation money so deposited will not be paid out till the value has been ascertained in the proper manner and paid into Court.*

On a petition (not in a cause) for payment of a fund out of Court, where parties who were necessarily served because of the title to the account, but had ceased to have any interest in the fund, appeared by counsel,—Held, *that the proper course would have been to tender such sum as would cover the cost of consulting a solicitor as to whether they were interested or not, with an intimation that if they appeared their costs would be objected to, and that not having been done the respondents were entitled to their costs.*

The company having given notice of their intention to take part of a certain piece of land, called Poor's Wood, which the Rev. John Frederic Fixsen, Julian Robins and James Spofford, as trustees of the poor of the parish of Merton, claimed to be interested in, and entitled to sell and convey, and being desirous of entering on the same before purchase, caused the interest of the said trustees therein to be valued by a surveyor, in the manner provided by section 85. of the Lands Clauses Act, paid into Court the sum of 64*l*., being the amount at which such interest was valued, and gave the usual bond to secure payment of such purchase money or compensation as might ultimately be payable, with interest. Subsequently a certain James Mathias gave notice

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that he, as lord of the manor of Merton, claimed to be interested in the said land called Poor's Wood, and therefore the company, on the occasion of serving the trustees with notice to treat for another part of the said land, also served the said James Mathias with notice to treat for the whole land required, had the interest of both claimants therein valued afresh, paid the sum so ascertained, viz., 750*l.*, into Court (to the credit of *Ex parte* the company, the account of the said trustees and James Mathias), and gave another bond for the amount which should ultimately be payable.

Subsequently the company, owing to doubts as to the true ownership of the land, applied to two Justices of the Peace to appoint a surveyor, under section 59. of the act, to determine the amount of compensation; the amount so determined was 476*l.* 5*s.*, which was deposited in the bank (section 64), and a deed-poll was executed vesting the lands in the company (sections 75. and 76).

The company now presented a petition for payment out of Court of the two sums of 64*l.* and 750*l.* previously deposited, but the petition was dismissed by Vice Chancellor James on the ground that the provisions of the act had not been complied with, inasmuch as the compensation to be paid had not been ascertained by the verdict of a jury or the award of an arbitrator. Thereupon the company issued their warrant to the sheriff to summon a jury under section 39, and on the 12th of May, 1869, a verdict was returned for the sum of 600*l.*, both of the claimants attending the proceedings. Such sum was accordingly paid into Court, to the same account as the former sum of 750*l.*, and the company now presented another petition for payment out of Court of the three sums of 64*l.*, 750*l.* and 476*l.* 5*s.* above mentioned. The petition was served on the trustees of Poor's Wood and James Mathias, both of whom appeared by *Mr. Cookson*.

Mr. Jenkinson, for the company, objected to pay the respondents' costs on the ground that they could not now be interested in anything except the 600*l.*, and therefore, although served, ought not to have appeared—*Day* v. *Croft* (19 Beav. 518). [See *Morgan & Chute's Chancery Acts*, pp. 73, 542.]

JAMES, V.C. thought the proper course in such cases was, for the petitioners to tender to the respondents such a sum as would cover the costs of taking advice from a solicitor as to whether they were interested or not, with an intimation that if, after that, they chose to appear, their costs would be objected to. This not having been done, the costs must be according to the act.

LORD ROMILLY, M.R., June 29, 1869.

WAGSTAFFE *v.* WAGSTAFFE.

38 L. J. Ch. 528; L. R. 8 Eq. 229.

Referred to, *Portal* to *Lamb*, [1884] E. R. A.; 53 L. J. Ch. 1163; 27 Ch. D. 600; 51 L. T. 392; 33 W. R. 71 (Ch. D.): reversed, [1885] E. R. A.; 54 L. J. Ch. 1012; 30 Ch. D. 50; 53 L. T. 650; 33 W. R. 859 (C. A.).

Will, Construction—Wills Act, s. 24.—*Word "now"—Will speaking from Death.*

WILL.—*A will contained a bequest of "all my ready money, bank and other shares, freehold property, plate (family), books, and any other property that I may* now *possess":*—Held, *that the bequest comprised what the testator had at his death, and was not confined to what he had at the date of the will.* Cole *v.* Scott (1 Mac. & G. 518) *distinguished. Dictum of the* Master of the Rolls *in* In re the Midland Railway Company (34 Beav. 525) *disapproved.*

This was the hearing on further consideration of a suit for the administration of the estate of James Wagstaffe, who died on the 13th of August, 1867, having

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made his will, dated the 22nd of July, 1865, which contained the following bequest: "I desire that all my ready money, bank and other shares, freehold property, plate (family), books, *and any other property that I may* now *possess*, except the house situated at Plumstead, in the county of Kent (this belongs to my daughter Elizabeth), shall be valued, and if necessary sold, the proceeds to be divided into eight parts, in the following manner: First, to my only daughter, Elizabeth Wagstaffe, two eighth shares, the remaining six parts to be equally divided among my six sons (whom the testator then named). All debts that are now due, or that may fall due, on any liability that may arise out of this my estate to be equally divided amongst and settled by my said six sons above mentioned."

Mr. Jolliffe, for the plaintiff, who was one of the six sons, contended that the word "now" referred to the date of the will. There was a sufficient indication of a "contrary intention," within the meaning of those words in section 24. of the Wills Act (1 Vict. c. 26), to prevent the will speaking from the death of the testator. The bequest, therefore, only passed what testator possessed at the date of his will—*Cole* v. *Scott* (1 Mac. & G. 518; 19 L. J. Ch. 63).

[The MASTER OF THE ROLLS.—I do not know of any case before the Wills Act in which the word "now," applied to personalty, confined the bequest to what the testator had at the date of the will. A will of personal estate was, before the Wills Act, construed as speaking from the death. The statute only extended to real estate what was already the law with regard to personal estate. There was real estate in the case of *Cole* v. *Scott*.]

In the present case there is a devise of real estate, though there turns out in fact to be none. In the case of *In re the Midland Railway Company* (34 Beav. 525; 34 L. J. Ch. 596), your Lordship said as follows: "If a testator had by his will said, 'I leave all the money I now possess in the 3*l*. per cent. consols to A. B,' it would, I apprehend, be properly confined to the stock he held at the date of the will."

[The MASTER OF THE ROLLS.—That dictum was not necessary to the decision in that case, and now that I hear it read I am not sure that I approve of it.]

Mr. W. W. Cooper, for the defendant (who was one of the six sons and heir-at-law, and who on this point had the same interest as the plaintiff), supported the plaintiff's contention, and argued that as the word "now" had in the case of *Coles* v. *Scott* been held to make the will speak from its date and not from the death as to real estate, it would be very inconvenient to hold the contrary in the case of personalty, and thus impose two different laws of construction.

Mr. Southgate and *Mr. A. G. Marten*, for the defendant Elizabeth (whose contention was that the will spoke from the death), were not called on.

The MASTER OF THE ROLLS.—I certainly do not intend so to construe this will as to introduce one rule of construction for real and another for personal estate. I do not think that *Cole* v. *Scott* applies to this case. In *Cole* v. *Scott* the testator devised and bequeathed "all such lands and hereditaments, as well freehold, copyhold and leasehold, as are now vested in me, or as to the said leasehold premises as shall be vested in me at the time of my death," thus shewing that the testator had drawn a distinction between the date of his will and the date of his death, a distinction which had to be acted upon.

Now, a testator may make a bequest in three different forms: he may say simply, "I give all my real and personal estate,"—this would mean what he has at his death; or he might say, secondly, "I give all I possess,"—this also would mean at death; or, thirdly, he may say, "I give all I *now* possess." How does this differ from the first and second? "All my estate" and "all I possess" mean "all I now possess." Even before the Wills Act the will

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spoke from the death as to personal estate; but devises of residuary real estate being formerly treated as specific devises, a different construction was applied to wills of real estate. The statute removed this distinction, and to avoid uncertainty declared that "every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear from the will"—1 Vict. c. 26. s. 24. To raise a case of such "contrary intention," and to except a will from the rule of law, some clear and distinct words must be found in the will to indicate the intention. Such words were found in the case of *Cole* v. *Scott*. They are not to be found in the present will. I therefore hold that this will speaks from the death.

JAMES, V.C., April 27, 28, 29, 30, May 1, 24, 1869.

PIKE *v.* NICHOLAS.

38 L. J. Ch. 529; 20 L. T. 906; 17 W. R. 842: reversed, [1870] E. R. A.; 39 L. J. Ch. 435; L. R. 5 Ch. 251; 18 W. R. 321 (L.C. and L.J.).

Copyright — Injunction — Literary Piracy — Plagiarism of Substance — Evidence—Damages.

COPYRIGHT.—*Plagiarism does not necessarily amount to an invasion of copyright, and the author of a published book has no monopoly in the theories and speculations, or even in the results of observations therein stated; but no one, whether with or without acknowledgment, is to be permitted to take a material and substantial portion of the published work of another author for the purpose of making or improving a rival publication.*

Accordingly, a defendant who had systematically, although in different language, appropriated in his book the arguments, rhetoric, results of observations and quotations from authorities from a previous book of the plaintiff on the same subject was held to have infringed the plaintiff's copyright, although the defendant had employed considerable labour and skill in altering, transposing and adding to the plaintiff's language.

Order of procedure where evidence is taken viva voce at the hearing.

Observations upon the question how far the Court is bound to give weight to the positive oath of an interested party.

The mode of estimating damages in cases of literary piracy.

This was a suit seeking relief against the defendant for an infringement of the plaintiff's copyright.

In 1865, the plaintiff competed at the National Eisteddfod, held at Aberystwith, for a prize offered for the best essay, in English, Welsh, French or German, on 'The Origin of the English Nation, with reference to the Question how far that Nation is descended from the Ancient Britons.' The essay sent in by the plaintiff was distinguished by his initials, L. O. P. No award of a prize was then made; but it was remitted to the Eisteddfod of the following year. The arbitrators, however, expressed a hope that the essay distinguished by the letters L. O. P. would be published. Accordingly the plaintiff, after having carefully revised his essay, published it in May, 1866, under the title 'The English and their Origin, a Prologue to authentic English History.' The defendant, who had competed for the prize in 1865, again competed for it at the Eisteddfod of 1866, and sent in a second essay distinguished by the letters

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A. B. C. Z. The defendant, as appeared by his answer in this suit, finished this essay on the 13th of June, 1866, and sent it in to the Secretary of the Eisteddfod on the 2nd of July, 1866. Again no prize was awarded. Lord Strangford, who had been appointed adjudicator of the prize, summed up his judgment by a reference to the plaintiff's essay of the previous year, and stated that none of the essays before him could be held to surpass the essay of L. O. P. in any essential degree, or otherwise than in detached points. He, however, specially commended the defendant's essay in several particulars, though characterizing it as a work "essentially, indeed typically, secondhand, run easily off the pen by a well trained and very able writer." In July, 1867, the defendant issued a circular, calling attention to a book which he intended immediately then to publish, under the title 'The Pedigree of the English People Investigated: an Argument Historical and Scientific, shewing that the present Inhabitants of England have largely, if not mainly, descended from the Celtic Race, and especially from the Ancient Britons.' The circular, after stating that the argument of the book was framed with the view of proving "how largely the Modern are descendants of the Ancient Britons," and laying down the proposition that "the Ancient Britons were not subjected to a war of extermination by either Roman or Teuton," contained this passage:

"The monkish chroniclers, and, following in their wake, almost all English historians have given an account totally fallacious and totally incredible on this subject. Gildas is the great original authority! But who was Gildas? and whence did he derive the materials of his story? History surely has become too much of a science, and ethnology has pushed its researches too far to permit blind reliance any longer on such authority as his." The defendant's book, which was divided into three parts, was accordingly published in March, 1868, by Messrs. Longman, under the title of 'The Pedigree of the English People.' A copy of this book was, in March, 1868, sent to the plaintiff to review it for the *Anthropological Review;* and after reading it for that purpose, the plaintiff came to the conclusion that the defendant in his work had made an unfair, unwarrantable and illegitimate use of his, the plaintiff's, book, in infringement of his copyright. Accordingly he filed this bill. In it he alleged that "nearly the whole of the argument contained in the said third portion of the defendant's said book is copied from and a piracy of the plaintiff's said book; and the defendant has made an unfair and illegitimate use of the plaintiff's said book, so that the book of the defendant does not constitute, as it professes to do, an original work." This allegation was expressly denied by the defendant in his answer. He stated in effect that his book was a genuine original work, alleging that "the manuscript from which my said book was printed" (with the exception of certain appendices inserted at the suggestion of Prof. Max Müller, and of the Index and of some additional sentences and notes principally suggested by Prof. Max Müller and Dr. Rowland Williams) "is verbatim the same manuscript as that which I submitted for competition at the Eisteddfod in 1866, some months before I had ever seen or heard of the publication of the plaintiff's work." He also further stated by his answer that "if any portion of his said book had anything in common with, or corresponded to any portion of the plaintiff's said work, such correspondence had arisen from the fact of their having written on the same subject and drawn their materials from common sources"; and the defendant further expressed his belief that his book did not contain any sentence (with the exception of identical quotations) which corresponded with any part of the book written by the plaintiff, and asserted that he had compiled and arranged the plan of such third part of his said book long before he saw or knew of the existence of the plaintiff's work; and that the plaintiff's said book was not consulted by him, the defendant, until his manuscript was already in substance prepared for publication, and for the purpose only of comparing the same with his own MS., which was then substantially finished; and that his MS. was not substantially added to or altered after or in consequence of his having so consulted the plaintiff's said book.

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The respective plans of the plaintiff's book and of the third part of the defendant's book, as described in their tables of contents, were as follow:

Plaintiff's Book.	*Defendant's Book.*
	PART III.
	The argument for admixture of race. The question to what extent is the English nation of Celtic origin discussed.
CHAP. I.—The historical evidence.	CHAP. I.—The historical argument.
CHAP. II.—The philological evidence.	CHAP. II.—The evidence of philology. CHAP. III.—The evidence of topographical and personal names.
	CHAP. IV.—Evidence of the influence of the Ancient British race upon the Anglo-Saxons supplied by the development of early English law.
CHAP. III.—The evidence of physical characteristics. CHAP. IV.—The evidence of psychical characteristics.	CHAP. V.—The evidence supplied by the physical, mental and moral characteristics of the English.

The bill prayed for an injunction to restrain the defendant from printing, publishing, selling or disposing of any copy of his said work containing the said third part thereof, for an account of gains and profits, and for damages. The plaintiff's contention was not that the defendant had copied passages verbatim from his book, but that the defendant had pirated from the plaintiff's book the plan of arrangement, arguments, ideas, illustrations and references to authorities which he himself had never consulted. The whole of the evidence upon both sides was taken *viva voce* at the hearing, and the effect of it sufficiently appears in the judgment.

A doubt having been raised as to the proper course of procedure where witnesses were to be examined in chief and cross-examined at the hearing of the suit,—

JAMES, V.C. said that the proper course was for the plaintiff's leader to open his case, then for the plaintiff's witnesses to be called and examined, and, if necessary, cross-examined and re-examined, then for the plaintiff's junior counsel to address the Court; and for the same order of hearing the defendant's counsel and the defendant's witnesses to be adopted.

Mr. Grove and *Mr. Jemmett* were for the plaintiff.—Their arguments consisted chiefly of a comparison between the two books and in pointing out the similarities between them.—They cited *Kelly* v. *Morris* (35 L. J. Ch. 423; L. R. 1 Eq. 697); *Scott* v. *Stanford* (36 L. J. Ch. 729; L. R. 3 Eq. 718).

Mr. Kay and *Mr. Osborne Morgan*, for the defendants, argued that the similarity between the two works was due to the similarity of the common subject-matter discussed by both.—They referred to *Bramwell* v. *Halcomb* (3 Myl. & Cr. 737); *Spiers* v. *Brown* (6 W. R. 352); *Wilkins* v. *Aikin* (17 Ves. 422, 425).

Mr. Grove, in reply, urged that the books were so parallel in line of argument, thought and quotation, that their similarity could not be attributable to accident. The mass of coincidences shewn to exist between them amounted to an absolute certainty of unfair use and piracy of the plaintiff's book by the defendant.

JAMES, V.C.—In this case the plaintiff complains that the defendant has piratically availed himself of his, the plaintiff's, labours, so as to be an infringement of his copyright. The plaintiff is the author of a work called 'The English and their Origin.' After this work had been published the defendant published another work called 'The Pedigree of the English People.' The plaintiff says in substance this: "I wrote my book in support of a theory that the English are not, as generally supposed, mainly and substantially of Anglo-Saxon or Teutonic race, but that, on the contrary, they are mainly and substantially of the old Celtic race, the same people which possessed this island before the invasion of the Romans. I proceeded to consider the subject under the heads of—1, The

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Historical Evidence; 2, The Philological Evidence; 3, The Evidence of Physical Characteristics." The defendant has pursued in the third part, which occupies by far the greater portion of his book, precisely the same plan, with this difference, that he has added a chapter on English laws; that he has made a separate chapter of the evidence of topographical and personal names, and that for the word "psychical" he has used "mental and moral." The plaintiff says, "That plan, which is in substance identical with mine, is copied from mine." He further says, "It was necessary to my argument to get rid of a good deal of what had been taught us as history of the Anglo-Saxon invasion, and I accordingly proceeded to shew that the stories of Hengist and Horsa, of Vortigern and Vortimer, and the complete expulsion of the British race by the Saxon invaders were mythical. In the investigation of that subject I traced the whole of what has passed for history to Gildas; and I proceeded to inquire to what extent, according to the canons of modern historical criticism, reliance could be placed on the narrative of Gildas, and I came to the conclusion, on several grounds, that the narrative is wholly untrustworthy. In the defendant's book I find that he adopts exactly the same course of argument,—the early English history is treated as of the same legendary character. I find it traced to Gildas as the sole foundation for it. I find the authority of Gildas then tested by the same canons, and the same conclusion which I had arrived at is also reproduced, and on the same or substantially the same grounds. It is not only the logic which is the same, but the rhetoric shews most singular coincidences." He says, "In my book there is this passage: 'There are probably few educated Englishmen living who have not in their infancy been taught, that the English nation is a nation of almost pure Teutonic blood; that its political constitution, its social customs, its internal prosperity, the success of its arms, and the number of its colonies, have all followed necessarily upon the arrival, in three vessels, of certain German warriors, under the command of Hengist and Horsa. Hengist and Horsa are a necessary part of a child's education; so are Rowena and Vortigern, and the Heptarchy, and many other pretty stories, which have found their way under the disguise of facts into respectable histories. The press even now seems generally to assume that the ordinary Englishman does not carry his historical criticism beyond the point which it reached in his childhood; and a Cambridge Professor of History does not scruple to dilate upon the merits of our Teutonic race.'" In Dr. Nicholas's, the defendant's, book, there are these words: "Before proceeding further, it is necessary to search into the foundation of the popular belief respecting the state of the Britons at the crisis of the Anglo-Saxon invasion, and their complete expulsion by that invasion from the soil of England. That belief is to the effect that the Britons, after the departure of the Romans, were in a completely prostrate condition, were incapable of offering resistance to Picts, Scots and Saxons, and were ruthlessly mown down by the sword without deliverance, a small 'remnant' only barely escaping, like sheep from the jaws of devouring wolves, into the mountains of the west, or as miserable fugitives across the sea to Brittany. This belief instilled to this day alike into the child's mind in the nursery and the student's in the lecture-room is, in all probability, as gratuitous and as impossible of rational credence, as any wild and idle romance ever imposed upon unsuspecting childhood."

The plaintiff further says: "I took especial pains with respect to certain physical characteristics, the colour of the hair and the form of the skull. I said that there was a popular theory starting with two assumptions: 1, That the Anglo-Saxons were a fair-haired, red-haired, or flaxen-haired people; 2, That the English are fair-haired, red-haired, or flaxen-haired people. I proceeded to demolish both these assumptions. The defendant has done the same. As to the second assumption, I proceeded to give the results of my personal examination of 4,848 heads in London, and proceeded further to shew from the population abstracts that London might be considered a fair representation of the whole of England—that it is peopled not exclusively by Londoners, but by natives of all

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parts of the country. I find in the defendant's book a similar statement of identical results of personal investigation; and, what is very extraordinary, I find that though the defendant's results are given as arrived at both in London and the north of England—6,000 in the one and 5,000 in the other—he, too, proceeds to shew, and to shew from the population abstracts, that the population of London is drawn from all parts of the island." "I proceeded," the plaintiff says, "to ascertain what was said by ancient authors, and with what qualifications their statements were to be received as to the hair, colour, eyes, and complexion of the ancient inhabitants of these islands, the Gauls and the ancient Germans. The defendant has referred to the same descriptions, and made the same qualifications. For example, I pointed out that when Tacitus (*Tac. Germ.* 4.) and other writers asserted that all the Germans had blue eyes and *rutilæ comæ* it was to be noted that the Greeks and Romans were generally dark-haired, and may have regarded fair hair as a rare and great beauty, and may have been struck by a proportion of light hair greatly in excess of that which they found among themselves. The defendant has done the same. Again having premised that the passages in which the Gauls or Celts are described have been carefully collected by Pritchard, I made a comment on the passage quoted by Pritchard from *Livy* (lib. xxxviii. 17), that the expression was '*rutilatæ comæ*,' and not '*rutilæ comæ*,'—'reddened,' not 'red.' The same comment is made by the defendant. Having come to the conclusion that the Gauls were in the habit of dyeing their hair of a lighter hue, I made a passing reference to the alleged custom now prevalent in France and England of dyeing the hair red. The defendant has made the same fashion the subject of a rhetorical paragraph."

"I referred to a passage in *Suetonius* (*Suet. Cal.* 47), in which it is stated that certain Gauls were compelled by Caligula to make their hair light or red, and to learn German. The defendant refers to the same passage. I referred to a passage in *Strabo;* the defendant has referred to the same passage. Then" (the plaintiff says) "I applied myself to the evidence afforded by the cranium, and, after examination of the authorities, I arrived at the conclusion that the old Celtic skull was, in the great majority of instances, long, oval, and singularly like the Greek skull. I proceeded to shew that the modern English skull is long and oval, and that the modern Teuton skull is on the whole round and short, and came to the conclusion that all the evidence, without exception, points to the Cymry as the progenitors of that part of the English people which possess the long, oval skull, and which constitutes the bulk of the nation. The defendant has come to the same conclusion from the same premises." The plaintiff says, "In arriving at that conclusion, I referred, among others, to the work of the Swedish author, Retzius, for his conclusion that the long, oval skulls found in the ancient burying-places of the Cimbri, who at some early time had dwelt there in no inconsiderable numbers, proved that tribe to be of Celtic origin, and I made a long quotation from him, in which he calls the long, oval form the true Celtic, and described a shorter Celtic oval form, with the sides more arched, which is Norman, and closely allied to the German; the defendant gives in substance the same things from Retzius."

These are some, and some only, of the points to which the plaintiff's counsel has drawn my attention. I have read both books carefully in the parts complained of, and if the matter rested on a comparison of the two works I could have no doubt whatever that the defendant's work was in these parts a palpable crib from the plaintiff's, transposed, altered, and added to—to use the words of Lord Strangford's award, "essentially, indeed, typically, secondhand, run off easily from the pen by a well-trained writer"—a writer, I would add, skilful in appropriating the labours of another and in disguising, by literary artifices, the appropriation. But the defendant has pledged his oath to this, that his work is an independent work, written substantially before he had seen the plaintiff's work, and that the resemblances are due to the nature of the subject, —to the object, which was common to both, of establishing for the ancient British a large share in the production of the great British nation of the present

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day,—to the obvious nature of the topics which such an object would suggest to any persons who had followed the course of modern historical criticism and anthropological research and speculation, and the like obviousness of the authorities which such persons would refer to and quote. His answer (par. 18) contains the following passage:—

"I say that the MS. from which my said book was printed, with the exception of appendices A, B, and C, which I afterwards inserted at the suggestion of Prof. Max Müller, and of the index and of some additional sentences and notes principally suggested by Prof. Max Müller and Dr. Rowland Williams, is *verbatim* the same MS. as that which I submitted for competition at the Eisteddfod in 1866, some months before I had ever seen or heard of the publication of plaintiff's work."

The defendant has been examined and cross-examined before me at considerable length. He adheres to his statement in par. 18 of his answer, with one most notable exception. He now states that the whole chapter about Gildas was written, or, as he calls it, re-written, after he had seen the plaintiff's book, and after the MS. had been submitted to Prof. Max Müller and Dr. Rowland Williams, and he, not an illiterate man, but an author accustomed to test the truth and estimate the weight of historic testimony, can give no further explanation of the deliberate and emphatic statement in paragraph 18. than that it is stronger than his instructions to his solicitor. It has been pressed on me that I cannot decide against the positive oath of the defendant without convicting him of wilful and corrupt perjury. I have had occasion more than once to say that this is not a criminal Court; that I am trying no one for any crime; I am here bound by my own judicial oath "to well and truly try the issue joined between the parties, and a true verdict give according to the evidence"—that is to say, according as I, weighing all the evidence by all the lights I can get, and as best I may, find the testimony credible or incredible, trustworthy or the reverse. The law which admitted the testimony of the parties and of interested persons was passed in full reliance on the Judges and on juries that they would carefully scrutinize such testimony, and would give it such weight as it deserved and no more, or no weight at all. Is then the result of the defendant's examination and cross-examination such as to entitle me to place reliance on his story? To begin with, I have read carefully through the whole of the notes marked A. and B, which were the materials for his first essay, and I am satisfied that he had not at the time he wrote them the remotest idea of that which is now found in the parts of his book complained of. To the author of A. and B. the common school histories of England were genuine histories. Hengist and Horsa, Vortimer and Vortigern were historic personages; there is no trace whatever of the sceptical criticism which will have it that the whole of that history, fit only for the nursery, is to be carried back to Gildas only, and that Gildas, if not himself a mythical or shadowy personage, is an historic witness wholly untrustworthy. Indeed, the author was so little versed in the subject that he tells us of Gildas copying Bede and putting in darker colours. There is no trace whatever in these notes of the examination of the ancient authorities as to hair and complexion of Britons, Gauls and Germans, and of the numbering of the colours and shades of hair of the present people of the country. There is no trace whatever in these notes of the examination of the evidence afforded by ancient skulls, and of the comparison between that evidence and the results of a careful examination of the existing types of modern heads, English and German. The plaintiff says, "If you did not take all this from my book, tell me where you took it from. Where are the materials from which you elaborated it?" The defendant is unable to say when or where he gathered the materials, or when or where, indeed, he wrote any part of his present essay. The collection of materials for a genuine literary work is a thing of time and labour. You cannot walk by instinct to the proper shelf of a library, take down the right book, open it at the right page, and hit on the right passage, and just

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the book, the page, and the passage which somebody else has found before you. The defendant has not a single rough note to produce, no trace of his quarrying in the British Museum, or any other like quarry, from which the stones of the literary edifice were to be built up. I have before me the defendant's diary from February, 1866, up to the 2nd of July, when the prize essay was sent in. Up to the 17th of May he seems to have been incessantly travelling and canvassing, and certainly does not seem to have had either time, or opportunity, or means for any such literary investigation or labour, nor is there a trace of any such work.

On the 18th and 19th of May I find an entry, "At Carmarthen, writing prize essay"; a similar entry in London on the 25th and 26th, and again on the 5th and 6th of June, the 8th and 9th, 11th and 12th, and on the 13th, "Finished writing do."; on the 14th, 15th, 16th, 17th, 18th, 19th, 20th, 22nd and 23rd, "Revising essay"—which entries are the only light the diary throws on the subject.

It is certainly very singular that an author should not be able to give a single place or time when or where he consulted a single authority, and that he should not be able to produce a single original note, extract or quotation. Then there were some special matters on which he was especially pressed: "You have quoted, says the counsel, *Retzius;* where did you find him?"—"I cannot say." "You have quoted *George Pouchet* (*Pluralité des Races Humaines*, Paris 8vo., 1864); where did you find him?"—"I cannot say." It is to be observed that these works are not in the British Museum.—[In the course of the hearing his Honour had sent to the librarian of the British Museum to inquire whether these books were there, and had ascertained the fact that they were not.]—Again, he was asked about the public meetings at which it is stated in the book that 10,000 complexions had been marked for the purposes of this essay, with the detailed figures and the results obtained. "Can you produce the times and places of these meetings?" He is again unable to fix time or place. I have been therefore obliged to arrive at the conclusion that the account which the defendant has given of his composition of his work in the matters complained of is not probable, is not credible, is not trustworthy; and the result of his answer, his examination and his cross-examination, on my mind, so far from displacing, has confirmed the conclusion produced by the internal evidence and the comparison of the two works. This conclusion, however, is not sufficient to dispose of the case. Plagiarism does not necessarily amount to a legal invasion of copyright. A man publishing a work gives it to the world, and, so far as it adds to the world's knowledge, adds to the materials which any other author has a right to use, and may even be bound not to neglect. The question, then, is between a legitimate and a piratical use of an author's work. In considering this I have not been unmindful of the small comparative extent of literary composition that is traceable from the one to the other; I have not been unmindful that there was some not immaterial exercise of literary labour and skill in the transfusion and transposition which I have held to have been taken, and I have endeavoured to guard myself against any prejudice derived from my hostile conclusions against the defendant, which I have stated. I have considered it as if the defendant had openly borrowed from the plaintiff's book and had candidly acknowledged the source. And I think there is a good deal which he might have done, so doing it. There is no monopoly in the main theory of the plaintiff, nor in the theories and speculations by which he has supported it, nor even in the use of the published results of his own observations. But the plaintiff has a right to say this—that no one is to be permitted, whether with or without acknowledgment, to take a material and substantial portion of his work, of his argument, his illustrations, his authorities, for the purpose of making or improving a rival publication. That the part taken is in this case material and substantial there is no better evidence than the defendant's own circular inviting subscriptions.—[His Honour here read the part of the defendant's circular referring to Gildas, set

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out above.]—The plaintiff has therefore, in my judgment, made out his case, and he is entitled to an injunction to restrain the publication of the book in its present state, or of any book containing the 7th section of chapter 1. of part 3, or section 1. of chapter 5, being the parts connected with Gildas, the hair, colour and the shape of the skulls, and an order for the cancellation of those parts. He is entitled to his costs of the suit, and to an account and payment of damages. I stated at the outset that my view of the damages in cases of literary piracy is that the defendant is to account for every copy of his book sold as if it had been a copy of the plaintiff's, and to pay the plaintiff the profit which he would have received from so many additional copies, and I adhere to that mode of assessment.

LORD ROMILLY, M.R., May 5, 25, 1869.

BASKCOMB *v.* BECKWITH.

38 L. J. Ch. 536; L. R. 8 Eq. 100; 20 L. T. 862; 17 W. R. 812.

Specific Performance—Mistake—Vendor and Purchaser—Purchaser misled by Particulars of Sale.

SPECIFIC PERFORMANCE.—*The defendant contracted to purchase a portion of an estate offered for sale by the plaintiff, relying on a condition that no building on any part of the property should be used as a public-house. The plaintiff, however, owned a small plot of land adjoining the estate, and indeed forming part of one of the fields sold, which was excepted from the sale, in order that a public-house might be built upon it. This fact was not stated upon the conditions of sale*:—Held, *that the defendant was not bound to complete without a covenant by the vendor extending the restrictive condition to the excepted land.*

The plaintiff, being the owner of an estate at Chiselhurst, in Kent, of about thirty-five acres in extent, and called the Manor House estate, put up the whole of it except about one rood for sale by auction, subject to conditions, one of which was thus worded: "Each of the respective purchasers of building land at this sale shall, in the deeds of conveyance to them respectively, enter into covenants with the vendor not to build thereon otherwise than in conformity with the plan annexed to the particulars, and for the observance and performance of such conditions relative to the erection of fences, modes of building and using lots as are mentioned in the general stipulations as to building land annexed to the particulars."

These general stipulations contained a provision that no house should be used as a public-house or place of business or trade, and that no business, trade or manufacture should be carried on on the property.

The particulars also contained a map of the property to be sold.

The property was not sold at the auction, but the defendant contracted for the purchase of the greater part of lot 1, subject to the same conditions so far as they were applicable to a sale by private contract. The part which he bought contained the Manor House and grounds, and was intended for his own residence.

When the defendant entered into the contract, he supposed that the whole of the Manor House estate was being offered for sale, and was therefore subject to the general stipulations as to building land; but he afterwards discovered that the plaintiff was reserving a small piece, about one rood in extent, at a corner where three roads met, intending to build a public-house upon it. He thereupon insisted that the plaintiff's covenants giving effect to the general stipulations as to building land should extend to the reserved piece. The plaintiff, who admitted that he was bound to enter into such covenants in

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respect of all the land offered for sale, resisted this demand, and filed the present bill for specific performance of the agreement.

The defendant denied that he was bound to complete without having the more extended covenants, since he had entered into the contract in the belief that the whole of the vendor's property would be bound by the stipulation.

In his answer he thus explained the mistake: "The said particulars contained a map of the property sold, on which the whole of the lots offered for sale were coloured by different colours or numbered, so as to distinguish the one from the other; while the lands of adjoining proprietors were indicated by their respective names, but were left uncoloured. The plot of land so reserved by the plaintiff is shewn on the said plan, but without being coloured, and in such a manner as to lead any person examining the plan to the conclusion that the same did not form part of the Manor House estate, but either belonged to Lord Sydney or formed part of the Chiselhurst Common; and I myself had no idea from the inspection of the plan that the piece of land now referred to belonged to the plaintiff."

The defendant had been to see the property, and the plaintiff declared that anyone visiting the spot must have seen that the piece of land in question formed part of the Manor House estate.

Sir R. Baggallay and *Mr. Jason Smith*, for the plaintiff.—The defendant is bound by his contract, and no such mistake has been committed as to afford him ground for relief—*White* v. *Bradshaw* (16 Jur. 738); *The Duke of Beaufort* v. *Neild* (12 Cl. & F. 248).

Mr. H. M. Jackson (with whom was *Mr. Jessel*), for the defendant.—The Manor House estate meant, as the purchaser thought, the whole estate; and, but for the restrictions as to building, he would not have agreed to purchase. The Court will not enforce a contract to purchase founded on such a mistake—*Webster* v. *Cecil* (30 Beav. 62), even though the mistake be not common to both parties—*Harris* v. *Pepperell* (L. R. 5 Eq. 1).

Sir R. Baggallay, in reply.—The defendant did not contract in the expectation of obtaining a covenant which would bind this piece of ground. He says, he came to the conclusion that it was not the property of the plaintiff.

The Master of the Rolls (*May* 25) said: The question is, whether the defendant is bound to complete the contract, leaving the plaintiff at liberty to erect any building he pleases on this plot of ground, or to use it for any purpose whatever. I think that he is not so bound. I am of opinion, on the evidence, that he bought the property in the firm belief that no noxious trade could be carried on and no inferior building or public-house could be built on any part of the estate. And, as on all other sides the estate was bounded by Chiselhurst Common, Lord Sydney's property, and the glebe of the rector of Chiselhurst, it was morally certain that no public-house could be placed with any injurious proximity to the residence of the defendant if it were not on the plaintiff's estate.

It is said, on behalf of the plaintiff, that the defendant inspected the property and saw the field a part of which was reserved, and must therefore have perceived that the reserved plot formed part of that field, and that it did not form part of the property put up to auction. This, however, does not, in my opinion, remove the fact, which is sworn to by the defendant and is supported by other evidence, that the defendant and his adviser believed that the covenant would override the whole property of the plaintiff. The fact has great weight with me that nothing in the way of colour or of the name of the proprietor appears on the unsold plot, to mark that it was part of the vendor's esate. If it had been expressly stated in the conditions of the sale that the vendor reserved this plot for the purpose of erecting there a public-house, I cannot doubt that it would have had a very injurious effect on the sale of all the lots in the immediate vicinity of it, and would have seriously diminished the prices bid for them. I think the defendant bought in the firm persuasion that no such use was to be made of the plot in question, and that the acts of the plaintiff's agents in framing

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the conditions of sale as if including the whole estate without any reservation, and so framing and colouring the plan as to contribute to that belief, are such that he cannot now compel the defendant to execute the contract if he insists on retaining this plot free from any restrictive covenant. The defendant, however, cannot compel the plaintiff to complete the contract and prevent him from retaining and using the plot. The plaintiff is entitled, at his option, either to a decree for specific performance, with a covenant including the reserved plot, or to have his bill dismissed. In both cases he will, in my opinion, have to pay the costs of the suit. The error has, in a great measure, been the consequence of the peculiar manner in which the map and conditions of sale were drawn up.

It is very important to remember that the most perfect truth and the fullest disclosure are necessary in all cases in which the specific performance of a contract is required; and that if these are wanting, the same consequence will follow as if there had been intentional suppression, and the Court will grant relief to the man who has been thus deceived, provided he has acted reasonably and openly.

MALINS, V.C., May 25, 1869.

HILL v. ROYDS.

38 L. J. Ch. 538; L. R. 8 Eq. 290; 20 L. T. 842.

Bill of Exchange, Amount of, paid into Bank—Suit by Drawer against Bankers as for Money had and received on Trust—No Privity.

BANKER. BILLS OF EXCHANGE.—*A. having accepted a bill of exchange paid money into his bank upon the express understanding that it was to be applied in taking up the bill at maturity. A. suddenly died before the bill fell due, and the bank retained the money in satisfaction of moneys owing to them upon A.'s general account. The bill was returned dishonoured to the drawers, who thereupon sued the bank in this Court for the amount*:—Held, *that there was no privity to sustain the suit.*

On the 5th of April, 1867, Robert Kershaw, of the firm of John Kershaw & Son, accepted a bill of exchange for 738*l.* 17*s.* 6*d.*, drawn by the plaintiffs Hill & Warren, who carried on business as wool-merchants in Rochdale. The bill was made payable at the London and Westminster Bank four months after date, and would accordingly fall due on the 8th of August. On the 7th of August, Kershaw paid into the defendants' bank (Clement Royds & Co., of Rochdale) the sum of 745*l.* 13*s.* 6*d.*, at the same time leaving with them an advice note of the bill, whereupon Messrs. Royds wrote and advised their agents, the London and Westminster Bank, to take up the bill when presented for payment. The next morning, however, about nine o'clock, Kershaw died suddenly, being at the time largely indebted to the defendants on his general account. Immediately upon hearing of his death they telegraphed to London to stop payment of the bill, and on the 11th of August the bill was returned dishonoured to the plaintiffs.

They now filed their bill for a declaration that the defendants Messrs. Royds & Co. received the above sum in trust to apply the same in payment of the said bill of exchange, and were liable to make good to the plaintiffs the whole amount, with interest and all costs and damages occasioned by the bill having been dishonoured.

The defendants denied that the money was paid into their bank or received by them upon any express or implied understanding as to the payment of the bill in question; on the contrary, they alleged that it was paid into the credit of Kershaw's general account, and that his estate being indebted to them (as was admitted to be the fact), in moneys exceeding the amount then paid in, they were entitled to retain the whole sum in part satisfaction of their debt.

There was some conflict of evidence as to what actually took place at the

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time of payment, but the Court came to the conclusion that the facts were as above stated, and that the evidence supported the allegations contained in the plaintiff's bill.[1]

It appeared that 150*l.* (part of the 745*l.* 13*s.* 6*d.*) was actually advanced by the plaintiffs to Kershaw, at his request, to enable him to meet the bill.

Mr. Osborne and *Mr. Locock Webb*, for the plaintiffs, argued that the defendants having distinct notice of the bill, must be taken to have accepted the money upon trust to pay the bill, and were now liable for breach of trust. In any view of the case they were not justified in countermanding the instructions once sent to their London agents. As between the plaintiffs and the bank there was an implied contract.

Mr. Glasse and *Mr. North*, for the defendants, having referred to *Moore* v. *Bushell* (27 L. J. Ex. 3), and submitted that there was no privity between the plaintiffs and themselves to sustain the present suit, were stopped by the Court.

Mr. Dixon appeared for Kershaw's widow and administratrix.

MALINS, V.C.—Upon the merits of this case I am with the plaintiffs, and should be inclined to give judgment in their favour, but the technical point is too strong. In order to sustain the suit, the plaintiffs must shew some privity between themselves and the bank. No doubt, as drawers and holders of this bill, they have suffered by the bank allowing it to be dishonoured, which is the act complained of. The defendants ought to have given notice of their intention to dishonour the bill, and not to have received the money for the express purpose of taking it up, and then credited the amount to Kershaw's general account. But what is there on the face of the bill to constitute any privity of contract between the plaintiffs and the defendants? There is no undertaking given to the plaintiffs on the part of the bank. The bill is in these terms: "Rochdale, April 5th, 1867.—Four months after date pay to our order 738*l.* 17*s.* 6*d.*, addressed to Messrs. J. Kershaw & Son, King Street Mills, Rochdale," and signed "John Hill & Co." Then across the bill is written in the usual form, "Accepted, payable at the London and Westminster Bank, London. —John Kershaw & Son." The only possible ground upon which the case could be put in this Court is that of trust; accordingly, the plaintiffs charge that the defendants, by receiving money for the express purpose of meeting this bill, became trustees for them as the holders of the bill; but this is clear, that if it could be shewn that the money belonged to the plaintiffs on the 7th of August, when it was paid into the bank, an action at law would lie against the defendants for money had and received to the plaintiffs' use, and the remedy would be at law and not in equity. But here we have the very point expresssly decided by the Court of Exchequer in this case of *Moore* v. *Bushell*. The circumstances of that case are very similar to the present, yet it was held that the drawer, the holder of the bill, could not sue the bankers for the amount, there being no privity to sustain the action. The money therefore is not recoverable at law; and on the same principle there can be no relief in this Court, and I have no alternative but to dismiss the bill.

June 1.—The case was again spoken to on the question of costs.

His HONOUR ordered the bill to stand dismissed, without costs as against the bank. Costs of Kershaw's administratrix to be paid of his estate.

(1) The following allegation in the bill is material with reference to the plaintiff's case. "It was customary when moneys or drafts were paid by the said Robert Kershaw to the credit of his general or current account with Clement Royds & Co. for the particulars of such moneys or drafts to be entered in a printed form, provided by the said bank for that purpose, with a direction that the same should be placed to his credit. But on the other hand, when moneys or drafts were paid by the said Robert Kershaw to his said bankers for the specific purpose of meeting any bills of exchange accepted by the said Robert Kershaw and made payable at either of the said bankers' or their London agents, it was customary for the said Robert Kershaw to pay such moneys or drafts to Clement Royds & Co. and to furnish them at the same time with a copy of such bill or bills instead of entering the particulars of such moneys or drafts upon such form or paying the same to the credit of his general or current account."

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JAMES, V.C., June 11, 1869.

In re KERR'S POLICY.

38 L. J. Ch. 539; L. R. 8 Eq. 331; 17 W. R. 989.

Referred to, *Lippard* v. *Ricketts*, [1872] E. R. A.; 41 L. J. Ch. 595; L. R. 14 Eq. 291; 20 W. R. 898 (V.C.); *Sadler* v. *Worley*, [1894] E. R. A.; 63 L. J. Ch. 551; [1894] 2 Ch. 170; 70 L. T. 494; 42 W. R. 476 (Ch. D.); *In re Drax*, [1903] E. R. A.; 72 L. J. Ch. 505; [1903] 1 Ch. 781; 88 L. T. 510; 51 W. R. 612 (C. A.).

Equitable Deposit—Simple Contract Debt—Interest.

INSURANCE.—*Where a policy of assurance was deposited to secure a simple contract debt, without any agreement as to interest, and the creditor paid the premiums down to the death of the debtor*:—Held, *following* Carey *v.* Doyne (5 Ir. Ch. R. 104), *that the policy was charged not only with the original debt and the amount of the premiums, but also with interest on both sums at 4l. per cent.*

This was a petition, under the Trustee Relief Act, in respect of a fund of 1,073*l.* 16*s.* 6*d.* 3*l.* per cent. Bank annuities, representing a sum of 1,000*l.*, paid into Court by the trustees of the London Life Association. The petition stated that William Grace previously to the 8th of July, 1850, advanced the sum of 300*l.* by way of loan to John Kerr, who promised to repay the same to him; that the repayment of the said sum of 300*l.* "and interest" was secured by the deposit by the said John Kerr with the said William Grace of a policy for 1,000*l.* on the life of the said John Kerr, which had previously been effected by the said John Kerr with the said London Life Association; that due notice in writing of such deposit was given on the 8th of July, 1850, to the London Life Association; that the said William Grace died on the 19th of October, 1862, having by his will appointed the petitioner Thomas Bowman and Walter Bovill executors thereof, and that such will was duly proved by the petitioner alone, Walter Bovill having renounced probate. The petitioner, however, by his affidavit, stated simply that the sum of 300*l.* was advanced, and the repayment thereof secured in the manner above stated, without making any mention of interest.

John Kerr died in 1867 intestate, and in consequence partly of there being no legal personal representative, partly of doubts as to the validity and effect of a deed assigning all his property to a trustee for the benefit of his creditors, of which a notice appeared in the *London Gazette* a few days after, and which was alleged to have been executed a few days before the deposit aforesaid (of which deed the Court ultimately took no notice, it never having been executed by any creditors and having since disappeared), the trustees of the London Life Association paid the said sum of 1,000*l.* into Court. Administration to the estate of John Kerr was soon afterwards taken out by a Mr. Murray.

It appeared that William Grace in his lifetime and since his decease the petitioner, as his executor, paid all the premiums on the said policy which accrued due after the 8th of July, 1850, amounting in the whole to 111*l.* 4*s.* 3*d.* No payment in respect of the said principal sum of 300*l.*, or of the premiums, or of the interest due in respect thereof, had ever been made to the said William Grace or to the petitioner, and the latter now claimed to have paid to him out of the fund in Court 411*l.* 4*s.* 3*d.* for principal in respect of those sums, and 352*l.* 5*s.* for interest thereon, at the rate of 5*l.* per cent., besides costs.

Mr. North, in support of the petition, said that on the question of interest, the only English authorities were *Anon.* (4 Taunt. 876), where interest had been given on a debt secured by a deposit of title-deeds and a promise to execute a mortgage, and *Ashton* v. *Dalton* (2 Coll. 565), where the point was discussed, but it became unnecessary to decide it. But there was an Irish case directly in point, *Carey* v. *Doyne* (5 Ir. Ch. R. 104), which decided that, if deeds are

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deposited by way of equitable mortgage to secure a simple contract debt, the debt bears interest from the date of the deposit, and by reason of it, though there be no express contract that the demand should bear interest. In that case the learned Judge (the Right Honourable Cusack Smith, the Master of the Rolls for Ireland) took great pains to inform himself as to the English practice, and especially as to the facts in the case of *Ex parte Haigh* (11 Ves. 403), erroneously cited in *Christian's Bankrupt Law*, 2nd edit., vol. 2. p. 278, and *Powell on Mortgages*, 5th edit., vol. 2. p. 945, as having decided that no interest must be allowed, if the debt without the deposit would not have carried interest. The general result of his inquiries was that he felt the same doubt as was expressed by Lord Justice Bruce when Vice Chancellor, in *Ashton* v. *Dalton;* but being bound to decide the question, he considered it, and came to the conclusion that interest ought to be allowed.

Mr. Higgins, for Price, the trustee of the last deed of assignment, objected to the claim for interest.—In *Carey* v. *Doyne (ubi supra)*, there was a memorandum of deposit, which was considered equivalent to an agreement to give a legal mortgage, which legal mortgage would naturally include a covenant to pay interest. But here the petitioner does not allege any contract to pay interest, and such a contract will not be implied—*Page* v. *Newman* (9 B. & C. 378); *Chitty on Contracts* (595, edit. 1868); not even in the case of a legal mortgage where the deed is silent on the subject—*Thompson* v. *Drew* (20 Beav. 49). At all events, he cannot have more than 4*l.* per cent.

Mr. Daniel Jones, for the administrator of John Kerr, referred to *Rhodes* v. *Rhodes* (Johns. 653; 29 L. J. Ch. 418); *Atkinson* v. *Jones* (2 Ad. & E. 439); *Price* v. *the Great Western Railway Company* (16 Mee. & W. 244; 16 L. J. Ch. 87).

Mr. Robinson, for the trustees of the London Life Association.

JAMES, V.C. held that the petitioner was entitled to interest, though only at 4*l.* per cent. If he had had to determine the case for the first time he should have determined it in the same way as the Irish Master of the Rolls, who was a very able Judge, had done in the case which had been cited. An equitable mortgage by deposit was, in fact, equivalent to an agreement to execute a legal mortgage in the usual form, which would include a covenant for payment of interest; and, even if that were not so, he would at least be entitled to as much as would cover the damages that a Court of law would award. But anyhow he was bound by the decision of the Irish Court, especially on a point like this, on which it was very important that the laws should be uniform, but mattered little which way it was settled. There would, therefore, be a declaration that the petitioner was entitled to the 300*l.* and the advances for premiums, with interest at 4*l.* per cent. on such sums from the date of the respective advances. The costs of all parties (those of the insurance company as between solicitor and client, but not including any charges or expenses) to come out of the fund in Court, and the balance to be paid to the legal personal representative of Kerr.

CAIRNS, L.J., Nov. 7, 1867.

In re THE RICHMOND HILL HOTEL COMPANY; KING'S CASE.

38 L. J. Ch. 541; L. R. 3 Ch. 10; 17 L. T. 188; 16 W. R. 57: reversing in part, [1867] E. R. A. 804; 36 L. J. Ch. 718; L. R. 4 Eq. 566; 16 L. T. 785 (V.C.).

See, *Bailey* v. *Bowen*, [1868] E. R. A.; 37 L. J. Q.B. 61; L. R. 3 Q.B. 133; 17 L. T. 470; 16 W. R. 396 (Q.B.); *In re Bank of Hindustan, China & Japan*, [1870] E. R. A.; 39 L. J. Ch. 530; L. R. 5 Ch. 400; 22 L. T. 188; 18 W. R. 502 (V.C. & L.J.).

Bankruptcy—Creditors' Deed—Covenant to pay in full at end of Two Years —Future Calls on Shares.

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BANKRUPTCY. COMPANY.—*A deed of arrangement, under the* 192*nd section of the Bankruptcy Act*, 1861, *containing no cessia bonorum, but postponing payment of the creditors' debts for two years, and giving to the creditors no advantage beyond a covenant to pay in full at the expiration of that period, is not necessarily invalid; and where there is no fraud or inequality among the creditors, the Court will not judge of the reasonableness of the deed.*

At the date of the deed the company was still going, but was shortly afterwards ordered to be wound up:—Held (*reversing the decision of* Wood, V.C.), *that as the deed provided only for existing debts, the future calls were not within its scope, and the official liquidator was not precluded by the deed from proceeding against the debtor.*

This was an appeal from the decision of Wood, V.C., reported 36 L. J. Ch. 718, where the facts are stated.

The official liquidator appealed.

Mr. E. K. Karslake and *Mr. W. W. Karslake*, for the appellant.—Since the deed and the schedule of debts, which is in substance part of it, contained no mention of the official liquidator's claim, the deed is bad. The registration is invalid. Creditors who, like the company, are not parties to the deed cannot take advantage of it. Therefore, there is an inequality in its effects upon different creditors. Moreover, the deed is unreasonable in its provisions. The creditors get absolutely nothing for giving up their rights for two years. Dissenting creditors, therefore, are not bound by it.

They cited on these points, *Johnson* v. *Barratt* (35 L. J. Ex. 15; L. R. 1 Ex. 65); *Stone* v. *Jellicoe* (3 Hurls. & C. 263; 34 L. J. Ex. 11); *Ex parte Godden* (1 De Gex, J. & S. 260; 32 L. J. Bk. 37); *The Chesterfield and Midland Silkstone Colliery Company* v. *Hawkins* (3 Hurls. & C. 677; 34 L. J. Ex. 121); *Ilderton* v. *Jewell* (14 Com. B. Rep. N.S. 665; 33 L. J. C.P. 148). In any view of the case we ought not to be precluded from proceeding in respect of calls made after the date of the deed, for those at all events were not covered by the deed. It will be noticed that the company was not ordered to be wound up till after the date of the deed, and there was no reason why it should be assumed that any calls would be made. Therefore, clearly the future calls could not be proved.

Mr. North, for the respondent King, on the first points raised by the appellant, cited, in addition to some of the cases cited below—*Woods* v. *De Mattos* (L. R. 1 Ex. 91; 35 L. J. Ch. Ex. 64); *Gresty* v. *Gibson* (L. R. 1 Ex. 112; 35 L. J. Ex. 74). And on the last point, again relied on *Williams* v. *Harding* (35 L. J. Bk. 25; L. R. 1 H.L. 9).

Mr. E. K. Karslake replied.

LORD JUSTICE CAIRNS.—There seems to be but little difficulty as to the first two calls. The debtor executed a deed under the Bankruptcy Act, 1861, made between himself and his creditors, not by name, but collectively. Every person who was a creditor might have claimed the benefit of the deed, and enforced observance of its provisions. There is therefore no ground for contending that any inequality existed as regards different classes of creditors. Next, it was contended that the provisions were unreasonable, because it gave the creditors no advantage other than they would have had if it had not been executed, but it gave up rights. It is not the duty of this Court to judge of the reasonableness of a bargain between creditors and their debtors. It has only to see that the deed does not bear unequally between different classes of creditors, and that there has been no fraud or undue influence.

If it be free from these objections the law has, whether wisely or unwisely, declared that the majority of creditors shall bind the minority. As to the calls already due, therefore, I am in accordance with the Vice Chancellor. The only difficulty I have felt relates to the last call made after the date of the deed. The argument before the Vice Chancellor does not appear to have called his Honour's attention to the distinction between the two sets of calls, and I have not

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therefore the advantage of his opinion on this question.[1] The 75th section of the Companies Act, 1862, provides that the liability of a contributory to calls shall be a debt in bankruptcy, and that an estimated value shall be put upon future calls; and it was argued that this applies also to a proof under an arrangement deed. But the deed in this case is not in the form given in Schedule D. of the act. It contains no *cessio bonorum*, and is therefore not one of those deeds to which the act provides that the law and practice of bankruptcy should apply. It is a special bargain between the debtor and his creditors, and the Court must take the deed as it stands and endeavour to ascertain what its meaning is.

The recital seems to point to debts in *præsenti* only, and these the debtor is to be allowed time to pay, his property being in the meantime preserved from process. This provision is followed by a covenant by the creditors not to enforce payment of any debts "now due and growing due from him upon any security or otherwise." And then comes the covenant by King that he would at the end of two years pay to each of his creditors "the debt owing by him to such creditor with interest thereon at the rate of 5*l*. per cent. per annum from the date of these presents." It would be absurd to suppose that he would pay interest from the date of the deed upon calls not made till months after the date of the deed. There is a covenant to pay within three months the costs of those creditors who had commenced actions, with a provision as to their rendering accounts of their costs. It might be that future calls were not considered at all; and this seems probable, for specific sums are mentioned relating to calls in sundry companies, but no mention is made of future calls, as if it were thought that by including such calls the whole arrangement might be upset and the assent of the creditors not obtained. I lay a stress upon this point, but rely upon the words of the deed, and I think they do not include future calls. Therefore I must differ from the Vice Chancellor, and decide that the order, so far as it applies to them, must be discharged.[2]

MALINS, V.C., March 3, 1869.

BULMER *v.* HUNTER.

38 L. J. Ch. 543; L. R. 8 Eq. 46; 20 L. T. 942.

Applied, *In re Pennington*, 1888, 5 Morrell 268; 5 T. L. R. 29. Referred to, *McLay* v. *McQueen*, 1898, 1 Fraser 804 (C. S.).

Ante-nuptial Settlement—Voidance of against Creditors—Fraud of Husband and Wife.

FRAUDULENT CONVEYANCE. SETTLEMENT.—*Defendant, pending an action against him for the recovery of a debt, married a woman with whom he had cohabited for several years, and in consideration of the marriage executed a settlement of all his property. The Court, upon the suit of the creditor, finding that the wife had knowledge of the facts, declared the settlement fraudulent and void.*

On the 12th of February, 1867, the defendant Robert Hunter received notice of trial in respect of an action commenced against him by the plaintiff Margaret Bulmer, for the recovery of 150*l*. and certain arrears of interest due to the plaintiff upon the defendant's promissory note.

(1) There seems to have been some misapprehension in his Lordship's mind on this point, as the Vice Chancellor's attention was called to the question of the future calls, and dealt with by him—see the former report, 36 L. J. Ch. p. 721).

(2) See as to including future calls, when the company is already in course of winding-up, *In re Pickering* (38 L. J. Bk. 1); and where the company is a going concern *Martin's Patent Anchor Company* v. *Morton* (37 L. J. Q.B. 98), and other cases cited 38 L. J. Bk. p. 1. note.

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On the 15th of February, Hunter, in consideration of his then intended marriage with Sarah Pounder, settled the whole of his property (including his furniture and other effects) upon trust for her for life, and afterwards for his son by a previous marriage. The settlement (which contained a power of revocation) was prepared by Hunter's attorney in the action. The marriage was solemnized on the 18th of February.

On the 1st of March, the plaintiff recovered a verdict in the action for 183*l.* 17*s.* and costs. Judgment was entered up on the 9th of May; on the 14th, Hunter was arrested for nonpayment of the debt, and after two months' imprisonment was adjudicated a bankrupt.

The plaintiff having proved her debt under the bankruptcy, filed the present bill to set aside the above-mentioned settlement as fraudulent and void, alleging that it had been executed by Hunter with intent to defeat and delay his creditors.

It appeared in evidence that Hunter and Sarah Pounder had cohabited together as man and wife for many years previous to their mariage; and the bill charged that the execution of the settlement and the solemnization of the marriage, while the action was pending was hastily and fraudulently determined upon, with the privity and concurence of Sarah Pounder, in order to defeat the recovery of the plaintiff's debt.

Sarah Hunter (the wife), by her affidavit, admitted that she knew of the action pending against Hunter at the time of the marriage, but stated that Hunter had informed her that he did not owe the money for which the action was brought; she further swore that their marriage had been agreed upon long before, but was put off in consequence of her ill health.

Other facts bearing upon the case will be found stated in his Honour's judgment.

The plaintiff was the only creditor who proved under the bankruptcy.

Mr. Bagshawe, for the plaintiff.—The case comes within the principle of *Colombine* v. *Penhall* (1 Sm. & Gif. 228). It is clear that the intended wife knew of the circumstances and was party to the fraud; and therefore the marriage consideration fails. Moreover, the execution of this settlement left Hunter in a state of utter insolvency, and was in itself an act of bankruptcy within the terms of the 70th section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134).

Mr. Herbert Smith, for the defendants, Hunter and his wife, and the trustees of the settlement.—The consideration of marriage is sufficient to support an ante-nuptial settlement, notwithstanding the indebtedness of the settlor—*Campion* v. *Cotton* (17 Ves. 263); *Ex parte M'Burnie's Trustees* (1 De Gex, M. & G. 441; 21 L. J. Bk. 15). Even if the Court imputes fraud to the husband, the wife is a purchaser for value, and is not shewn to have participated in any fraudulent intent. In the absence of clear evidence to the contrary, the marriage will be presumed to have been honestly contracted, and the settlement must be upheld—*Fraser* v. *Thompson* (1 Giff. 49; 29 L. J. Ch. 402). That case was reversed on appeal (4 De Gex & J. 659), because it was then shewn that the settlor had committed acts of bankruptcy within the knowledge of the intended wife before the execution of the settlement. But there was no act of bankruptcy in the present case. At all events, the settlement, if voluntary as against creditors, will subsist for all other purposes—*Ex parte Bell* (1 Glyn & J. 283); *Smith* v. *Cherrill* (36 L. J. Ch. 738; L. R. 4 Eq. 390).

MALINS, V.C.—The principles are plain. No doubt a man indebted may upon his marriage make a settlement of his property, provided such settlement is made honestly and in good faith. But it is clearly established now that marriage cannot be made the means of committing fraud, although it is necessary to shew that the wife as connected with and party to the fraud to make the settlement invalid as against her. Of course, if there was an act of bankruptcy before the marriage, the property would not belong to the husband at all. But this case does not go to the length of shewing that any act of

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bankruptcy was committed before the marriage. The rule I intend to adhere to is that which is laid down, in *Colombine* v. *Penhall*, by Vice Chancellor Stuart (1 Sim. & Gif. 256): "Where there is evidence of an intent to defeat and delay creditors and to make the celebration of marriage part of a scheme to protect property against the rights of creditors, the consideration of marriage cannot support such a settlement."

Now, what are the facts I have to deal with here? Robert Hunter, the settlor, had been married three times; the third wife died in 1856; his present wife had lived with him during the life of his third wife as housekeeper, and returned to live with him again shortly after the third wife's death. We have her own admission that from the year 1860 she was living alone in the same house with him, therefore she was bound to get married without delay, if there was ever any intention of marriage. Then she states that they had agreed to marry some time before, but her illness prevented it. There is, however, no evidence that she was ill, and I believe it is a mere pretence. There was nothing to prevent their being married before if they had wished it, and I have not a shadow of doubt upon the evidence that they were cohabiting together all those years as man and wife, but there was no contemplation of marriage taking place till after the notice of trial was served upon the settlor.

Then with regard to the plaintiff, we find that she was a creditor of many years' standing; the interest of this money was of great consequence to her, and she frequently importuned Hunter to pay off the debt or keep down the interest, while he as often evaded payment, pretending, amongst other things, that the Statute of Limitations was a bar to her claim, though there can be no doubt that it was a perfectly valid debt. She brought her action, and notice of trial was given on the 12th of February. Under these circumstances, knowing that the verdict and the trial would go against him, Hunter allows his solicitor, who clearly had notice of all the facts, to prepare this instrument, by which, in consideration of the marriage, got up for the mere purpose of giving colour and pretended value to the settlement, and pending the notice of trial, all his property is put into settlement; the deed is executed on the 12th, and the marriage takes place on the 18th of February. There was throughout these proceedings but one object, namely, to commit fraud; and on the principle of *Colombine* v. *Penhall*, to which I have already adverted, the consideration of marriage fails, and the settlement cannot be supported. The fact is, that the doctrines of this Court upon this subject have been much modified in recent times; it is clearly settled, in my opinion, that marriage cannot be made the means of fraud, and if that consideration is merely got up for the purpose of defeating creditors, the intending wife being a party to the fraud, it will not be supported. In the present case, I am satisfied that the wife had knowledge of all the facts and was implicated in the transaction, and the Court would fail of justice if it allowed such an attempt at fraud to prevail. I must therefore declare that this settlement is fraudulent and void as against creditors. When the settlor has satisfied his creditors, then he may give the property away as he pleases. The decree will be with costs against R. Hunter.

LORD ROMILLY, M.R., Jan. 21, 22; Feb. 10, 1869.

DAVIES *v.* SEAR.

38 L. J. Ch. 545; L. R. 7 Eq. 427; 20 L. T. 56; 17 W. R. 390.

Distinguished, *Allen* v. *Seckham*, [1879] E. R. A.; 48 L. J. Ch. 611; 11 Ch. D. 790; 41 L. T. 260; 28 W. R. 26 (C. A.). Referred to, *Wheeldon* v. *Burrows*, [1879] E. R. A.; 39 L. T. 558; 27 W. R. 165 (V.C.): affirmed, [1879] E. R. A.; 48 L. J. Ch. 853; 12 Ch. D. 31; 41 L. T. 327; 28 W. R. 196 (C.A.).

Implied Easement—Way of Necessity—Acquiescence.

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EASEMENTS AND PRESCRIPTION.—*If on the purchase of land there are circumstances shewing a clear intention in the persons interested that there should be a right of way over it, the purchaser, having suffered this intention to be acted on, cannot afterwards dispute the right, although it was not reserved in the conveyance to him.*

The defendant bought the lease of a house with a road leading through it under an archway. The adjoining land was laid out for building so as entirely to surround a central plot (intended to be used as mews) with houses, leaving the road under the archway the only means of access; but the building was then so little advanced that the plot could still be approached in other ways. The lease contained covenants by the lessee to complete the house according to a specified plan, which comprised the adjoining land and buildings; but the defendant declared that he had never seen the plan. No right of way was reserved in the lease or in the assignment to the defendant, but both contained maps in which the site of the arch was described as a gateway. The defendant did nothing for seven or eight months, and then blocked up the archway:—Held, *that he could not dispute the right of way, and injunction granted accordingly.*

The question in this case was whether the plaintiff was entitled to a right of way over the defendant's land. In March, 1867, the lease of the land in question, with an unfinished house (called No. 2, Erskine Road) standing upon it, was assigned to the defendant. The lease contained covenants by the original lessees to complete the house according to a plan and specification approved by the surveyor of the lessor, and not to alter it without the licence of the lessor.

The plan thus referred to extended to a larger plot of ground, of which the defendant's land formed part. In the centre of this plot were mews, surrounded by buildings on every side, and approached only by a road under an archway leading through the house No. 2, Erskine Road. The defendant denied that he had seen the plan before he bought the lease. It had, however, already been partially carried out. The result of the evidence on this point was considered by the Master of the Rolls to be as follows:

In Erskine Road the houses were built and the passage under the house No. 2 was made leading to the spot where the mews were begun; the buildings on one side of the mews were begun; those on the other side were not. Some of the houses in Ainger Road (which ran at right angles to Erskine Road) were begun, but there was still complete access to the mews across the fields from Ainger Road; and, in truth, lime, bricks and other building materials were still constantly carted over the fields. The foot-pavement, however, was interrupted at the archway; the kerbstone was rounded off on each side, and the entrance paved as is usual in entrances to mews.

Neither the lease nor the assignment contained any reservation of or allusion to a right of way, but on both of them a ground-plan of the house was drawn, on which the site of the arch was described as a gateway.

The defendant, seven or eight months after his purchase of the lease, blocked up the archway with the view of turning it into a shop. The plaintiff, who had since the date of the assignment to the defendant become interested in the remaining part of the plot of land comprised in the lessor's plan, under an agreement for a lease, filed the present bill to restrain the defendant from doing so.

Mr. Graham Hastings, for the plaintiff, argued that the defendant having bought, subject to a plan which made the way one of necessity, the right was reserved by implication. He cited *Suffield* v. *Brown* (33 L. J. Ch. 249); *Morland* v. *Cook* (37 L. J. Ch. 825; L. R. 6 Eq. 259); *Pyer* v. *Carter* (1 Hurls. & N. 916; 26 L. J. Ex. 258); *Ewart* v. *Cochrane* (4 Macq. 117); *Dann* v. *Spurrier* (7 Ves. 231).

Mr. Southgate and *Mr. Wickins*, for the defendant, contended that, the grant having been made without reservation, the grantor could not derogate from it; and that the way was not strictly one of necessity. The buildings were

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not raised on all the other sides of the mews at the time when the defendant purchased, and it was then possible that the plans might never be carried into effect. They cited *Dodd* v. *Burchell* (1 Hurls. & C. 113); *Worthington* v. *Gimson* (2 El. & El. 618); *Plant* v. *James* (5 B. & Ad. 791; 3 L. J. K.B. 64); *Thomson* v. *Waterlow* (37 L. J. Ch. 495; L. R. 6 Eq. 36); *Langley* v. *Hammond* (37 L. J. Ex. 118; L. R. 3 Ex. 161).

The MASTER OF THE ROLLS (*Feb.* 10), after stating the facts, said—I am of opinion that this is and was a way of necessity; that it was apparent that it was; that the defendant had notice that it was; and that it is not now in his power to dispute that it was. In the first place, he saw distinctly the archway; he bought the house subject to the archway. For what purpose did he suppose that the archway was made, unless as a mode of access? Moreover, the foot pavement was interrupted, the kerbstone was rounded off and the entrance to the mews paved. The mews themselves were then in course of erection, and one side had been, if not completed, at least sufficiently erected to shew the scope and plan of it, and the words "Erskine Mews" were written over the archway. In my opinion, if he claimed or intended to claim the right of stopping the passage, he was set on inquiry as to the mode in which the lessees were bound to perform, or were about to perform, the building contracts they had entered into. The slightest inspection of the plan would have shewn him that the way under the archway was to be the only way to the mews when the design was completed. Does the defendant do anything? Nothing at all. He sees the houses in Ainger Road gradually rising; he sees the other side of the mews erected; he sees the access at the extremity barred by a wall. It is not pretended that the plan was altered to injure him, and when all this is done he says, "This way may be a way of necessity now, but till the buildings were completed it was not. You might have driven across the fields; and therefore I had no notice." This is not language which a Court of equity will allow a person situated in the position of the defendant to use. It is obvious that unless he wilfully shut his eyes, he must have seen that the plan gradually proceeded on the principle that this way through the archway was the only mode of access to the mews. I agree with the observation of counsel that the case of *Dann* v. *Spurrier* and the other cases of that class apply. The slightest inquiry or the most casual observation would have shewn the defendant, if, indeed, he did not know all along, as I believe he did, what was intended. I am of opinion that the injunction against the defendant in the terms of the first paragraph of the prayer of the bill must be made perpetual, and that the costs must follow the event.

MALINS, V.C., June 24, 1869.

MORLEY *v.* SAUNDERS.

38 L. J. Ch. 552; L. R. 8 Eq. 594; 21 L. T. 132; 17 W. R. 959.

Legacy—Set-off—Non-Payment of Interest by Tenant for Life of Estates charged under Term of Years.

WILL.—*Real estate was devised to trustees for a term of years to secure a capital sum and interest thereon in favour of M, and, subject thereto, to the use of F. for life. F. was let into possession by the trustees, but failed to keep down the interest upon the charge. M. bequeathed a legacy to F, which the executors retained as a set-off against the unpaid interest*:—Held, *that F. was entitled to the legacy, there being no debt as against him, and no right of set-off in respect of the arrears of interest.*

This was a claim by the legal personal representatives of Francis Morley in respect of a legacy of 1,000*l.* bequeathed to him under the will of Mary Morley,

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the testatrix in the cause. The payment of the legacy was resisted by her executors on the ground that they had a right of retainer.

The facts, as shewn by the chief clerk's certificate were as follows: The grandfather of the testatrix, by his will, devised certain real estate to the use of trustees for a term of 500 years, and subject thereto to the use of Francis Morley for life, the trusts of the term being to raise (by mortgage, sale or otherwise) a sum of 9,000*l.*, with interest at 4*l.* per cent. from the death of the testator, and in the mean time to receive the rents and profits of the estate, and after keeping down the interest on the 9,000*l.*, to pay certain annuities and permit the residue of the rents and profits to be received by the person for the time being entitled to the reversion expectant on the term. Under the trusts thereinafter declared Mary Morley became entitled to a moiety of the 9,000*l.* and the interest thereon.

Upon the death of the testator, in 1827, Francis Morley being then an infant, the trustees of the term entered into possession, and received the rents and profits of the estate until 1832, in which year Francis Morley was let into possession, and remained in possession as tenant for life until his death, in 1854. While thus in actual possession he failed to pay the interest in full upon the 4,500*l.*, and at the death of Mary Morley, in 1851, there was due to her for arrears of interest a sum considerably exceeding 1,000*l.*, the amount of the legacy.

The question which now came on for argument upon the further consideration of the suit was, whether as between the two estates there was a right of set-off and retainer in respect of such unpaid interest.

Mr. Cotton and *Mr. Joliffe*, for the representatives of Francis Morley.—The legacy is payable irrespective of any such right of set-off as is here claimed. The fact of Francis having been allowed to receive the whole of the rents and remain in possession as tenant for life, placed him under no personal obligation to keep down the interest on the charge. There is no debt or legal liability as between him and Mary Morley's estate. The remedy, if any, is against the estate; and her executors must recover from us, if at all, through the remaindermen. It is like the case of a mortgagor who has been allowed by his mortgagee to receive the rents without paying the interest on the mortgage debt: the mortgagee has no claim against the back rents.

Mr. Glasse and *Mr. North*, for the executors of Mary Morley.—When Francis was let into possession by the trustees, either there was an agreement with them by which he was bound to pay this interest, or if no agreement, there was notice of the trust, and Francis being cognizant of the breach of trust, and having received the whole of the rents with such notice, is personally liable as for money had and received for Mary Morley's use. There was a positive personal liability, and the executor has a right to set off the debt against the legacy, upon the principle of *Courtenay* v. *Williams* (3 Hare, 539; on appeal, 15 L. J. Ch. 204). There can be no doubt that the charge affects the life interest as well as the remainder, and although it was open to the trustees to arrange with the tenant for life that he should be let into possession, it could only be upon the terms of his fulfilling the trust and doing what they ought to do—*Dixon* v. *Peacock* (3 Drew. 288); *Makings* v. *Makings* (1 De Gex, F. & J. 355).

Mr. Cotton (in reply).—Our contention is, that there was no debt, nor could any arrangement between the trustees and Francis constitute him a debtor as against the testatrix; therefore, the right of set-off cannot arise. The remaindermen are not before the Court, so that their rights, if any, against Francis cannot now be considered.

MALINS, V.C.—This is a claim by the representatives of Francis Morley against the estate of Mary Morley for a legacy of 1,000*l.* bequeathed to him by her will; the payment of the legacy is resisted on the ground that Francis having been allowed to remain for several years in actual possession, as tenant for life, of certain estates charged with the payment of interest upon a sum of

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4,500*l.* due to the testatrix, failed to pay that interest, and so stands indebted to her estate.

The chief clerk, by his certificate, finds that some payments in respect of this interest were made by Francis from time to time while he was in possession, but that there was due to Mary Morley at the time of her death a sum far exceeding 1,000*l.*, which is the amount of the legacy claimed.

Now, if this constituted a debt against Francis Morley, it follows that his estate being actually indebted to the testatrix to an amount in excess of the legacy, there would be a right of set-off, and so the legacy would be annihilated.

It is true that, Mary Morley not having received the full amount of interest upon her moiety of the charge, there is still subsisting an incumbrance upon the estate to the extent of that unpaid interest as well as the principal sum; but has she any personal claim against Francis, or can it be contended that he received this money to her use? He was let into possession as tenant for life: but a tenant for life merely because he fails to keep down the interest upon a charge not created by himself cannot be sued either at law or in equity for the arrears. He may be stopped from receiving any more rents, but he incurs no personal liability which the incumbrancer can enforce against him. The debt, in fact, is a debt created by the original testator, and not by Francis Morley, and he is in nowise personally liable, though undoubtedly as between him and the remaindermen there may be a question of apportionment. The case is quite distinguishable from *Courtenay* v. *Williams*, because in that case there was an actual debt, but here as I have said, there was no debt, the obligation to keep down the interest being an imperfect obligation, and consequently there can be no retainer. As was suggested in the argument, the case is very like that of a mortgagee allowing his mortgagor to receive the rents of the mortgaged estate without paying the interest on the mortgage debt; in such a case the mortgagee cannot call upon the mortgagor to account for back rents, though he is entitled to have his principal and arrears of interest raised out of the estate.

The result will be, that this legacy must be paid over to Francis Morley's representatives, and there will be a declaration accordingly.

LORD ROMILLY, M.R., April 27; LORDS JUSTICES, May 22, 1869.

In re THE NATIONAL PROVINCIAL MARINE INSURANCE COMPANY (LIMITED); MAITLAND'S CASE.

38 L. J. Ch. 554.

Companies' Act, 1862—*Contributory—Infant Transferee—Signature by Father of Infant's Name to Transfer.*

COMPANY.—*A father purchased shares in the above company, and had the transfer made to his son, who was then an infant, and at sea. From the father's evidence it appeared that he, or another of his sons, also an infant, had signed the transfer in the name of his son. The company had since been ordered to be wound up, and on an application by the liquidator to take the son's name off the list of contributories, and to put thereon in its stead either the name of the father or those of the vendors, the latter were ordered by the* Master of the Rolls, *and on appeal by the* Lords Justices, *to be put on the list.*

In the month of December, 1866, Messrs. John Hunter Richardson & Thomas Richardson instructed their brokers to sell fifty shares which the Messrs. Richardson then held in the above company. On the 29th of that month the brokers, in pursuance of the instructions, sold the shares to other brokers, who, in the ordinary course of business, returned the name of "Charles Maitland, of No. 92, St. Paul's Road, Camden Town," as the person

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to whom the shares were to be transferred. A transfer of the shares was accordingly executed to Charles Maitland, and was with the share certificates handed to the purchaser's brokers, who paid the purchase-money.

The company having been ordered to be wound up, the name of Charles Maitland was placed on the list of contributories. His father, John Dundas Maitland, then made an affidavit that at the date of the transfer of the shares Charles Maitland was an infant.

From the depositions of the purchaser's brokers it appeared that John Dundas Maitland had given instructions for the purchase of the shares, that he had paid the purchase-money, and that it was by his order that the name of Charles Maitland had been given as that of the purchaser.

John Dundas Maitland stated, on cross-examination, that at the date of the purchase of the shares Charles Maitland was at sea; that he, John Dundas Maitland, purchased the shares for Charles in accordance with instructions given to him by the latter before he went to sea, and that the shares were paid for out of money belonging to Charles; that he, John Dundas Maitland, believed that the signature Charles Maitland to the transfer of the shares was in the handwriting of Henry Maitland, another of his sons, and who at the date of the transfer, was about thirteen years of age; but John Dundas Maitland would not swear that he had not himself signed the name Charles Maitland to the transfer, and could not recollect whether or not he had signed his son's name to the transfer.

From the evidence of the attesting witness to the transfer it appeared that John Dundas Maitland had produced to him the transfer already signed, and asked him to attest the execution of it, and that the witness had done so, thinking that he was attesting the execution thereof by John Dundas Maitland.

The liquidator had taken out a summons to have the register of members rectified by striking out the name of Charles Maitland as the holder of fifty shares in the company, and entering thereon either the names of John Hunter Richardson and Thomas Richardson, or the name of John Dundas Maitland, as the holders or holder of the shares, and that the list of contributories of the company might be varied by the liquidator accordingly, and that the costs of the application and of Charles Maitland might be paid by the person or persons to be settled on the list.

Mr. Southgate and *Mr. Bagshawe*, for the liquidator.

Sir Richard Baggallay and *Mr. Lawson*, for Messrs. Richardson.—The name of John Dundas Maitland ought to be put on the register instead of that of Charles Maitland. The evidence shews that the father was the real purchaser, and that his object in putting the shares into the name of the son was to escape liability. The father must be taken to have signed the transfer, and having signed it, though using the name of his son instead of his own, he is as much bound as if he had signed it in his own name.—They referred to *Smout* v. *Ilbery* (10 Mee. & W. 1; 12 L. J. Ex. 357). The transaction really was a purchase of the shares by John Dundas Maitland, and a settlement of them by him upon Charles Maitland, and Messrs. Richardson ought not to be prejudiced by the transfer having been made to Charles Maitland direct.

Mr. Jessel and *Mr. Ince*, for John Dundas Maitland, were not called on.

The MASTER OF THE ROLLS said—It is quite clear that I cannot put Mr. John Dundas Maitland on the list. I think it is clear upon the evidence that he has acted very improperly. It is, no doubt, very hard upon the transferor if he is not made aware that the transferee is an infant at the time he makes the transfer; but I am of opinion that I cannot put Mr. John Dundas Maitland on the list as the owner of these shares. Of course, it is entirely without prejudice to any proceedings which the Messrs. Richardson may take at law or in equity to make Mr. John Dundas Maitland answerable to them. Upon that I say nothing. I shall not make the Messrs. Richardson pay the costs. The official liquidator will have his costs, but those are all the costs that I shall give.

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Messrs. Richardson appealed, and the appeal was heard, on the 22nd of May, before the Lords Justices.

Sir R. Baggallay and *Mr. Lawson*, for the appellants, urged that the only person appearing in the transaction was the father, J. D. Maitland. He had given the order and he had furnished the money. It might be said, on the other side, that he had acted by the authority of his son Charles; but Charles was, at the time, a minor, and was therefore incompetent to give such authority. In *Curtis's case* (37 L. J. Ch. 629; L. R. 6 Eq. 455), which was also the case of an infant, the infant had executed the transfers; but in the present case that was impossible, Charles Maitland being, at the time, away from England at sea.

Mr. Southgate and *Mr. Bagshawe* referred to *Curtis's case*. They argued that, whether it were J. D. Maitland's intention to make a present of the shares to his son or to keep them himself, the effect of what he had done was, in any case, to make himself liable to be put on the list of contributories.

Mr. Jessell and *Mr. Ince*, for J. D. Maitland, relied on the evidence both of him and of his brokers in proof that throughout the transaction Charles Maitland had been referred to as the real purchaser. They cited *Ex parte Budd* (3 De Gex, F. & J. 297; 31 L. J. Ch. 4).

Sir R. Baggallay, in reply.

SELWYN, L.J. agreed in the view taken by the Master of the Rolls. It appeared that there had been no mistake in the name inserted in the transfer-deed. The evidence shewed that J. D. Maitland, the father, had told his brokers that he was buying for his son Charles, and by his authority; and it then became incumbent on the brokers to inquire into the circumstances of the transferee. It was admitted that, the transferee being an infant, the transfer could not bind him or take away the liability of the vendors, the Messrs. Richardson. Under these circumstances, his Lordship was of opinion that the appeal must be dismissed; and, according to the general rule, to which, indeed, he himself attached great importance, viz., that costs should follow the result, that it must be dismissed with costs.

GIFFARD, L.J. concurred. He was of opinion that the infant's name was intended to be the one inserted in the transfer, and that the father's intention and agreement was to purchase for him, and not for himself.

LORDS JUSTICES, May 4, 5, 6, 29, 1869.

EARL BEAUCHAMP *v.* WYNN.

38 L. J. Ch. 556; L. R. 4 Ch. 562; 17 W. R. 866: affirmed, [1874] E. R. A.; L. R. 6 H.L. 223; 22 W. R. 193 (H.L.).

Suit to Set Aside Agreement—Jurisdiction—Grant—Description—"Warren of Conies."

MISTAKE.—*The Court has jurisdiction to set aside an agreement on the ground of mistake, but the mistake must be plain and palpable, and it must be possible to replace the parties in that which was substantially their original position.*

GAME.—*The word "warren" may pass an estate in the soil, provided the context of the instrument in which it is used shews that to be the intention, but its primary signification does not mean an estate in the soil.* Co. Lit. 5 b (b) *explained.*

A person having a right of free warren generally may grant a limited right by the grant of "a warren of conies."

The Duchy of Cornwall in 1799 *granted to a person under whom the plaintiff claimed, certain lands, "and all that warren of conies, with all and singular the*

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rights, members and appurtenances whatsoever in B, and that lodge or house thereupon built, commonly called B. Lodge; and all that warren of conies in R, both which said warrens of conies are known by the name of B. Warren, and to extend themselves in and over the wastes or east moors of B, F, S, and A, in the county of Lincoln." The duchy was seised in fee of the soil of the wastes, and had also a right of free warren in gross in them:—Held (*affirming the decision of the* Master of the Rolls) *that by the words "warren of conies," taken with the context, no estate in the soil passed, but only the right or franchise of a "warren of conies" and whatever was fairly incident to or necessary for the exercise of the right of preserving and making profit out of the conies.*

This was an appeal from the decision of the Master of the Rolls dismissing the plaintiff's bill.

The bill sought to rectify or set aside an agreement for exchange on the ground of mistake.

The principal question was, whether, under a grant from the Duchy of Cornwall, made in 1799, to one Thomas Pindar, under whom the plaintiff claimed, the soil in Bromby Common passed or only a right of "warren of conies" therein. The words of the grant, so far as they are material, were: "All that piece or parcel of woodland situate in Bromby, in the county of Lincoln, commonly called Prince's Woods, containing by admeasurement 23 a. 1 r. 11 p., or thereabouts. And all that close or parcel of pasture land situate at the east end of the said woods, and commonly called 'wood and close,' containing by admeasurement 4 a. 3 r. 24 p., or thereabouts, and all that warren of conies, with all and singular the rights, members and appurtenances whatsoever in Bromby aforesaid, and that lodge or house thereupon built, commonly called Bromby Lodge, and all that warren of conies, with all and singular the rights, members and appurtenances whatsoever in Redbourne, in the said county of Lincoln, both of which said warrens of conies are now commonly called or known by the name of Bromby Warren, and do extend themselves in and over the wastes or east moors of Bromby, Frodingham, Scunthorpe and Ashby, in the said county of Lincoln, which said several premises are parcel of the lordship and soke of Kirton-in-Lindsey, in the said county of Lincoln, and parcel of the possessions of the duchy of Cornwall, and were last demised, together with the fishery of the river Trent, by his present Majesty King George the Third, by letters patent under his Exchequer seal, bearing date the 15th day of August, in the year 1777, unto Robert Pindar, of Bromby Hall, in the said county of Lincoln, clerk, since deceased, for a reversionary term of nineteen years, to commence from the 13th of July, 1788, under the several yearly rents of 20*s.* for the said woodlands, and 3*l.* 7*s.* 4½*d.* for the said coney warren; and also all houses, edifices, structures, timber-trees and other trees, mines, quarries, waters, watercourses, roads, ways, easements, profits, commodities, privileges, advantages, emoluments and hereditaments whatsoever in or upon the said woods and lands and the said warren or warrens of conies growing or arising or to the same in anywise belonging or appertaining, at or for the price or sum of 800*l.* of lawful money of Great Britain, to be paid by the said Thomas Pindar within forty days from the date of this certificate of contract into the Bank of England and carried to the account of the Duchy of Cornwall, and from and immediately after the payment of the said sum in manner aforesaid, and the enrolment of this certificate, and the receipt for the said purchase-money in the office of the auditor of the duchy of Cornwall, and thenceforth for ever, the said Thomas Pindar and his heirs, successors or assigns, shall be adjudged, deemed and taken to be in the actual seisin and possession of the said woodland and pasture ground, warrens and premises so by him purchased, and shall hold and enjoy the same peaceably and quietly, in as full and ample manner to all intents and purposes as his said Royal Highness the Prince of Wales, his heirs or successors, Dukes of Cornwall, might or could have held and enjoyed the same, by force and virtue of an act of parliament

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passed in the 38th year of the reign of his Majesty King George the Third intituled an Act for making perpetual, subject to redemption and purchase in the manner therein stated, the several sums of money now charged in Great Britain as a land-tax for one year from the 25th day of March, 1798."

Mr. Jessel and *Mr. F. Walford*, for the appellant.—The duchy was seised of the soil, and had also a right of free warren according to the charter set out in *The Prince's case* (Co. Rep. vol. 4. pt. 8. 14 a). The words " warren of conies " denote a place, and must pass the soil. This is plain if you take the context, " all that lodge built thereupon ": a house cannot be built on a franchise. Besides, this is the usual meaning of the word warren. *Co. Lit.* 5 b (b); *Sheppard's Touchstone*, pp. 89, 96; *Jacob's Law Dictionary*, tit. " Warren "; *Termes de la Ley*, tit. " Warren "; *Rice* v. *Wiseman* (3 Bulst. 82). They also referred to *Legh* v. *Heald* (1 B. & Ad. 622; 9 L. J. K.B. 98); *Marshall* v. *Ullswater Steam Navigation Company* (3 Best & S. 732; 32 L. J. Q.B. 139); *Cooper* v. *Phibbs* (L. R. 2 H.L. 149).

Sir R. Palmer, *Mr. Mellish*, *Mr. Speed* and *Mr. Jeune*, for the respondent. —This grant is to be construed as if it were a grant from the Crown—The *Attorney General to the Prince of Wales* v. *St. Aubyn* (Wightw. 167); and in every grant from the Crown, every intendment is to be taken against the grantee and in favour of the Crown—*Feather* v. *the Queen* (6 Best & S. 257, 283; 35 L. J. Q.B. 200); *The case of Alton Woods* (Co. Rep. vol. 1. pt. 1. 27 a.). Therefore the strict signification of the term " warren of conies " is not to be extended; and *prima facie* that term is descriptive of a right, not of a *situs*. The right to warren and the soil are separate hereditaments, and one is not appurtenant to the other. The right of warren does not pass with the grant of the land, nor does the land pass by a grant of " warren "—*Viner's Abridgment*, tit " Warren "; 4 *Co. Inst.* pp. 298, 314. " Warren " never means both soil and franchise at once, and a man may build a lodge on his warren for preservation of the game when the warren is only a franchise—*Co. Rep.* vol. 6. pt. 12 (22); *Davies's case* (3 Mod. 246). They also referred to *Bingham* v. *Bingham* (1 Ves. sen. 127); *Morris* v. *Dimes* (1 Ad. & E. 654; 3 L. J. Q.B. 200); *Cocking* v. *Pratt* (1 Ves. sen. 400); *Ramsden* v. *Hylton* (2 Ves. sen. 304); *The King* v. *the Inhabitants of Piddletrenthide* (3 Term Rep. 772).

Mr. Walford, in reply.

GIFFARD, L.J. (*May* 29).—The judgment I am about to deliver is the judgment of the Court. Earl Beauchamp, the present appellant and sixth earl, claims through Henry, the fifth earl. He has appealed from a decree of the Master of the Rolls dismissing, first, the original bill in this suit, which was filed by the fifth earl, and, secondly, the supplemental bill which he himself filed. Both bills were dismissed with costs. The questions in the suit arise in this way.—

In October, 1864, Henry, the fifth earl, and the defendant agreed to exchange certain lands and hereditaments, with the rights and privileges belonging thereto. These lands and hereditaments were severally specified in two schedules appended to the agreement. The agreement itself consisted of six articles, and the earl was to pay, by way of equality of exchange, 3,400*l.* to the defendant. The provisions of the agreement are set forth in the 5th paragraph of the bill. The first schedule contained a description of the lands and hereditaments to be given in exchange by the earl. They were as follow: First, 162½ acres, in the parishes of Frodingham, Bottesford and Ashby; secondly, freehold common rights on the East Common of Bromby; thirdly, all the right or stray of rabbits or right of warren in the said East Common, with the appurtenances. The second schedule contained a description of the lands and hereditaments, rights and privileges to be given in exchange by the defendant. They were 55 acres 2 roods and 29 perches, lying in Bromby; secondly, all the freehold common rights or other rights, interests or property in and upon the West Common of Bromby; thirdly, all the freehold moorland in Bromby Moors, as set out by

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boundaries, containing 106 acres, or thereabouts; fourthly, a tithe rent-charge, payable out of the estate of the earl to the defendant; fifthly, a fee farm-rent of 7*l.* 2*s.* 6*d.*, payable out of the estate of the earl to the defendant; sixthly, the right and privilege of the exclusive use for twelve years of the warping-sluice to the defendant; seventhly, all the right and interest of the defendant, as lord of the manor of Bromby, in all that portion of the East Common of Bromby which lies to the west side of the public carriage-road, amounting to 115 acres, or, if less, to be made up to that amount. The agreement was duly executed, and possession given accordingly, since which time acts of ownership have been exercised by the parties on the property so exchanged. There have been no conveyances. In 1865 the late earl and the defendant promoted the inclosure of the East and West Common of Bromby. In November of that year the late earl sent in his claim to the Inclosure Commissioners, and in December, 1865, with a view to substantiate that and another claim, search was made amongst the earl's deeds and muniments of title at Madresfield, the family seat, when on considering a deed of grant from the Duchy of Cornwall it appeared, as the plaintiff alleges and insists, that the East Common of Bromby, and the mines and minerals thereunder, and under certain lands in Frodingham and Scunthorpe, were, by a grant of the Duchy of Cornwall, dated the 27th of March, 1799, conveyed to Thomas Pindar, his heirs and assigns, for ever. It is not disputed that all the property belonging to Thomas Pindar in this district passed from him to the Earls Beauchamp, and were possessed by the late earl, and that they are the property of the present earl. The defendant denies that the soil of the East Common of Bromby, and the mines and minerals thereunder, or under the lands of Frodingham and Scunthorpe, were conveyed by the grant of the 27th of March, 1799, to Thomas Pindar. On the contrary, he alleges that they were conveyed by a grant of the manor of Kirton from the duchy of Cornwall to John Julius Angerstein, on the 9th of July, 1799, and that Bromby, Frodingham, and Scunthorpe are part of the manor of Kirton. The defendant claims through Mr. Angerstein.

It is plain that all parties acted on the assumption that the soil in the East Common of Bromby, and the mines and minerals under the lands in Frodingham and Scunthorpe, belonged to the defendant, and did not pass by the grant of March, 1799. This the appellant alleges (as the fifth earl did before him) to have been a common mistake. He avers that the mines and minerals are of very great value; that, in substance, he gets by the exchange that which was really his without it; and therefore he asks the Court either to rectify the agreement, or to nullify the transaction and set it aside.

It needs no argument to prove that the Court has jurisdiction to set aside an agreement on the ground of mistake, but, as a general rule, the mistake must be plain and palpable—one as to the existence of which opinions can scarcely differ; and it must be possible to replace the parties in that which was substantially their original position.

In the present case the rights of the parties have been assumed to be such as formed the foundation of the exchange during a period of sixty years preceding the present dispute. In 1801 an inclosure act, the act of 41 Geo. 3. c. 74, was passed. Under that an act an allotment was made to Thomas Pindar for his right of warren, and to Mr. Angerstein for his right of soil in certain commons of the manor of Kirton. Again, in 1831, another inclosure act was passed—no doubt was entertained as to the relative rights and positions of the defendant and the then Earl Beauchamp, the defendant being treated and considered as entitled to the soil, the earl to the right of warren as distinguished from the soil: the several transactions under both acts are detailed in the 8th, 9th, 10th, 11th, 12th and 13th paragraphs of the answer to the original bill. Having regard to these transactions, as well as to those which are shewn to have taken place, as mentioned in other paragraphs of the same answer, it is difficult to see any just or sufficient grounds for a suit of this description. It is clear, on the plaintiff's evidence, that the existence of valuable minerals under the land in question

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was known to the fifth earl and his advisers before the date of the agreement for exchange; it is as reasonably certain as anything can be that the grant of March, 1799, was never supposed, either by grantor or grantee, or by anyone, until some sixty years after its date, to have had the effect now sought to be attributed to it; and unless that effect is plain almost to demonstration, and the true construction of the instrument so certain, and the rights of the parties under it so indisputable, as not to be open to serious controversy, we should not hesitate in coming to the conclusion that the suit was rightly dismissed. These considerations lead to a review of the arguments adduced on behalf of the appellant as substantiating that construction of the grant on which he has been advised to rely. They must be summarized so far as is necessary thus: First, *The Prince's case*, in vol. 4. of *Coke's Reports*, part 8, 14 a, was referred to. The charter constituting the grant of the duchy is there set forth, and the following passage, being the grant of free warren, was read, viz., from p. 10: "We have moreover, for us and our heirs, granted, and by this our charter we have confirmed to the aforesaid duke, that the said duke, and the heirs of him, eldest sons, dukes of the same place for ever, have free warren in all the lordships, manors, castles, lands and other places aforesaid, so as the said lands be not within the bounds of our forests, and that none enter into them, to hunt in them or to take anything which to warren appertaineth, without the licence and will of the said duke, or other dukes of the same place, upon pain of forfeiture of 10*l.*" Next, the following passage from *Coke upon Littleton*, lib. 1. c. 15 b, was cited: "So it is of a forest, parke, chase, vivarye, and warren in a man's owne grounde, by the grant of any of them not onely the priviledge but the land itselfe passes, for they are compound." It was stated that this passage was not known, or at all events not quoted, in the Court below. *Sheppard's Touchstone*, and other works of authority, were also referred to, as recognizing and repeating the law as laid down in *Coke upon Littleton*, and the case of *Rice* v. *Wiseman* was cited, and it was said that, inasmuch as the soil belonged to the duchy, it followed on these principles that it passed under the term "warren," and furthermore, that this view was fortified by the context of the grant, and especially by the words, "all and singular the rights, members and appurtenances whatsoever in Bromby aforesaid, and that lodge or house thereupon built," and the words "commonly called or known by the name of Bromby Warren"; and a series of leases was referred to, commencing in the time of Henry the Eighth, and ending with the lease of 1777 mentioned in the grant. It was urged, in addition to these arguments, that the 38 Geo. 3. c. 60, under the authority of which the grant was made by the duchy, did not authorize the sale of such a thing as a right of warren as distinct from the soil, but only the sale of a "tenement," not of a "hereditament"; that the authority given by the act must be taken to have been followed, and therefore that the grant on the occasion of the sale must be taken to be a grant of the soil with its incidents. It may be well to deal with these authorities and arguments, omitting only those founded on the context of the grant, before going to the exact terms of the grant itself. They can be, and in fact have been, completely answered.

First of all, the charter referred to as granting the free warren, as well as the leases, established that there was a right of free warren in gross belonging to the duchy of Cornwall, and extending over Bromby and other places. There is no ground in law for saying that a person having a right of free warren generally may not grant a limited right by the grant of a "warren of conies"; nor, because the term "warren of conies" is used in the leases and in the grant of 1799, and the expression so used differs from the grant in the charter, is an intention to pass all the estate in the soil to be inferred. The intention must be found in the instrument itself. "Warren of conies" is not so extensive as "free warren." The term itself was obviously taken from the leases, particularly that of 1777, and probably originated in the fact of the "conies" being in that locality the only beasts, or, at all events, the only beasts of warren of any value. The terms of the charter, therefore, do not advance the appellant's case.

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With respect to the passage from *Coke upon Littleton*, Mr. Preston, in his edition of *Sheppard's Touchstone*, adds to the passage very significantly this observation,—" generally without any qualification or context." The passage uses the term " warren " generally. The primary signification of that word when speaking of " a right of warren," or of " free warren," or when speaking of " a warren of conies," most assuredly does not mean an estate in the soil. A grant of land or of a manor, according to the authorities, does not pass a right of free warren. A number of Exchequer decrees and proceedings have been quoted, shewing the use of the term " warren " in connexion with terms of locality. From these it is manifest that the use of the word " warren," and more especially of the words " warren of conies," does not necessarily, or usually, or according to any primary acceptation, mean an estate in the soil. To warren of every description there must be a local boundary; and it is impossible, in our opinion, to attribute any other weight or meaning to the passage than that " warren " may be so used as to mean to pass, and may pass, an estate in the soil, provided the context of the instrument in which it is so used shews that to be the intention. Then the case of *Rice* v. *Wiseman* appears from the reports to be this—[His Lordship read the report verbatim from 3 *Bulst.* 82.] The action, as is plain from the report of the case, did not involve any question of the right to the soil, and Lord Coke is reported as plainly admitting that the demise or grant of a warren in a particular locality, " as in his park," does not pass the soil.

There then remains the question said to arise on the act of Geo. 3. It is plain that the act confers a power to sell the two things combined, " land " and " right of warren,"—the greater must necessarily include the power to sell the less; that is, the warren or part of the warren. The estate and interest of the duchy in the soil was the manorial estate and interest in the wastes or commons, the tenants possessing rights as to the surface; and if the terms of the grant, according to their fair construction, do not convey the soil, they can have no artificial or technical meaning, because of the extent or nature of the power conferred by the act. Moreover, a right of warren is a tenement, as shewn by the authorities quoted by the Master of the Rolls.

The leases do not support the appellant's case to any greater degree than they do that of the respondent. They are, to say the least of them, but of doubtful import, and this being so, the question resolves itself into this, viz., what is the true construction, intent and meaning of the terms and expressions used in the grant? Those terms and expressions, so far as they are material, are these—" All that piece or parcel of woodland situate in Bromby, in the county of Lincoln, commonly called Prince's Woods, containing by admeasurement 23 acres 1 rood 11 perches or thereabouts." Here there is a plain description of soil. Then, " and all that close or parcel of pasture land situate at the east end of the said woods, and commonly called " wood and close," containing by admeasurement 4 acres 3 roods and 24 perches or thereabouts." Here, again, there is a plain description of soil. Then, " and all that warren of conies, with all and singular the rights, members and appurtenances whatsoever in Bromby aforesaid," this being a warren of conies with a locality; and then, " that lodge or house thereupon built, commonly called Bromby Lodge;" and then all that warren of conies, with all and singular the rights, members and appurtenances whatsoever in Redbourne, in the said county of Lincoln," again a warren of conies with a locality. And then, " both which said warrens," &c. —[His Lordship read to the end of the grant as set out above.]

The demise of 1777 referred to in the grant contains a description similar in terms to that which I have read from the grant, and it contains this reservation or exception, " Excepting nevertheless and always reserving to us, our heirs and successors, all timber trees, and all fair saplings, oaks apt to become timber, and also sufficient stabbles in every acre of the said woodland according to the form of the statute in that case made and provided, and also all mines and quarries of and in the said premises, which said premises are parcel of the

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lordship and soke of Kirton, or in Lindsey aforesaid, and parcel of the possessions of the Duchy of Cornwall;" and the rent reserved is as follows: "Under the several yearly rents following, that is to say, for and out of the woodland, the sum of 20*s.*; for the coney warren, the sum of 3*l.* 7*s.* 4½*d.*; and for the fishery, the sum of 10*s.*;" and there is a covenant to keep the coney warren stocked and stored with a sufficient number of conies, and a provision for the lease to become void in the event, amongst other things, of default being made in payment of the rents, or any of them and a proviso for re-entry and resumption of the premises. The lease follows the description in former leases. Two only have been produced in which the warren of conies was alone leased without lands being in terms leased with it. In those there was no reservation of mines and minerals. The first observation that occurs is, that there is no grant of moors or wastes; the next, that where land is intended to be granted, the grant and description are unmistakable and explicit; the next, that there is not a grant of "the warren" *simpliciter*, but of all that warren of conies with a fixed locality, that is, as regards the first, in "Bromby aforesaid," as regards the second in Redbourne. Both are further stated to be commonly called, or known as Bromby Warren, and to extend over certain "wastes or east moors." There is not, as has been before said, any grant of the wastes or east moors. The grant of a warren of conies is essentially a grant of the conies and the right to take and kill the conies. A grant of a warren in a particular locality, or "as in a parke," Lord Coke himself admits does not pass the soil, and here there is plainly nothing more. That the warrens are "commonly called Bromby Warren," and are situate in particular places, and extend over particular wastes or moors, in no way extends the meaning of the words "warren of conies" to an estate in the soil, and cannot either in technical legal language, or according to any rule or mode of construction, technical or untechnical, be held to have any such effect. The reservation of mines and minerals in the lease applies to the land plainly and actually demised. The rent is reserved out of the land, but *for* the warren, and the addition of "that house or lodge thereupon built, commonly called Bromby Lodge," seeing that a lodge or house is incident to a warren, and always has been, and always has been leased and dealt with in connexion with the right of warren in question—that "thereupon" may either mean in "Bromby," or built there for the purposes of the warren, or connected with or incident to the warren—seeing this, the addition is wholly insufficient to shew that an estate in the wastes or east moors was intended to pass. In fine, nothing of the kind was intended, but "warren of conies," and "warren of conies" only, and whatever is fairly incident to or necessary for the exercise of the right of preserving and making profit out of conies.

There was yet another ground urged on which it was said that the appellant ought to succeed, viz., that the manor of Bromby was his, and that he had proved his title to it in the cause, as claiming through Thomas Pindar. It is plain, however, that it is part of the manor or soke of Kirton; that during the whole time Courts have been held in Bromby for the whole manor or soke of Kirton, and as plain that he shewed no title to the wastes or moors of Bromby, or any act or right in any way excluding the rights of the lord of the superior manor. We do not think it necessary to go through the details to which the Master of the Rolls referred in his judgment as decisive on this part of the case.

On all these grounds, therefore, we are of opinion that the appellant's case has wholly failed; that the real mistake has been the supposition that his rights have been mistaken; that the bills were properly dismissed with costs in the Court below, and that the appeal must likewise be dismissed, with costs.

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JAMES, V.C., March 6, 8, 12, 1869.

In re THE LONDON AND COLONIAL COMPANY, LIMITED; *Ex parte* CLARK.

38 L. J. Ch. 562; L. R. 7 Eq. 550; 20 L. T. 774.

Referred to, *Ex parte Logan*, [1870] E. R. A.; L. R. 9 Eq. 149; 21 L. T. 742; 18 W. R. 273 (M.R.).

Company—Winding-up—Shareholder Agent—Termination of Engagement —Salary and Compensation—Calls to be Debited in Accounts—Set-off.

COMPANY.—*C. went to Australia as the agent of a company under an agreement by which he was to act as their agent for five years, at a fixed yearly salary, and was also to receive a commission on remittances. He was required to take fifty shares in the company, and to pay up a portion of their value; and it was agreed that the balance which might become due on account of calls should be placed to his debit in his accounts. After he had carried on business as such agent for little more than a year the company was wound up under supervision. For three quarters of a year more he was employed by the liquidators in the winding-up, and was then discharged*:—Held, *that C. was entitled to his salary for five years, and that, having regard to the fact that the liquidators were indebted to him for his services rendered in the winding-up, in a sum nearly as large as the amount due from him in respect of calls upon his shares, they would not be allowed to enforce against him any claim for such calls until the amount due from them to him had been ascertained.*

In this case two adjourned summonses and a motion came on to be heard together. The first summons was on behalf of the liquidators of the above-named company, that R. C. Clark might be ordered to pay to the liquidators 1,000*l.* in respect of a call of 20*l.* upon fifty shares held by him. The second summons was taken out by Clark to oblige the liquidators to come to a settlement with him in respect of his several claims against the company, having regard to a certain arrangement which had been made between him and Alexander Martin, as the company's attorney, and for a direction to prevent the liquidators from enforcing against him the payment of any call due to them until such settlement had been come to. The notion was on behalf of the liquidators to restrain Clark from prosecuting against them certain proceedings in the Supreme Court at Melbourne, Australia.

In September, 1865, Clark was appointed agent of the company at Melbourne. As part of the arrangement between them the company required him to take fifty shares in the company of 100*l.* each, as a guarantee for the faithful discharge of his duties as agent. By an agreement in writing made between Clark and the company, dated the 30th of September, 1865, it was agreed that Clark should proceed to Melbourne, with his wife and family, and be employed there as such agent for five years, at a salary of 750*l.* per annum. He was also to be allowed a commission on all remittances for the company's shipments. He was to conduct his business there as if an independent merchant, but the company were to have a share of his profits. The agreement (clause 8.) further provided, that Clark "having applied for and taken fifty shares of 100*l.* each in the said company, upon which 10*l.* per share is to be paid up at once, and having already paid 2*l.* per share, part of such 10*l.* per share, the company will, on their part, place 8*l.* per share, the balance of such 10*l.* per share on the said fifty shares, to the debit of the said R. C. Clark, as well as all other sums that may become due from the said R. C. Clark from time to time on account of calls to be made on the said shares;" and Clark thereby agreed to give an equitable mortgage to the company of certain property in Ceylon as a security for the payment of 8*l.* per share, and such other sums as might become due from him to the company. This mortgage was subse-

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quently released upon Clark having arranged, in pursuance of an agreement made by him with the managing director and secretary of the company, for the payment of a sum of 2,400*l.* by the trustees of his marriage settlement in respect of the fifty shares.

Clark arrived at Melbourne in December, 1865, and thenceforth commenced his duties as the company's agent under the agreement.

In March, 1867, an order was made for continuing under supervision the winding-up of the company, which had been commenced as a voluntary winding-up. The liquidators of the company continued to employ Clark till January, 1868, when they put an end to his services by Mr. Martin, their attorney in Australia. Thereupon Clark commenced proceedings in the Supreme Court at Melbourne, to enforce his claims against the company for salary, commission, &c. In February, 1868, certain "Heads of Settlement" were arranged for the settlement of the differences between Clark and the company, and were reduced into writing and confirmed, and signed by Martin on the company's behalf. By the terms of this arrangement 1,000*l.* was to be paid to Clark to enable him to proceed to England, and a further sum of 3,000*l.* was to be deposited in the Victoria Bank, Melbourne, in the joint names of the liquidators, Messrs. Morrison, of Melbourne, and Clark, to await the result of the proceedings which Clark undertook to prosecute at Melbourne without delay, in case he should fail to settle with the company within six months after his arrival in England. Clark arrived in England in April, 1868. He had been placed on the list of contributories to the company in respect of the fifty shares. He now claimed to be entitled to set off against the calls his claims against the company. His claims amounted altogether to about 5,986*l.*, made up of 2,187*l.* 10*s.* for two years' and three quarters' salary to December, 1870, at 750*l.* per annum; 348*l.* 10*s.* commission upon goods consigned by the company to Martin and others; 2,570*l.* 11*s.* 6*d.* estimated commission for the remainder of his engagement; and of a further sum on account of expenses of himself and family in respect of his voyage to and from Melbourne, and costs of legal proceedings at Melbourne. The company disputed their liability to pay most of these items.

Mr. Druce and *Mr. C. Hall*, for the liquidators, in support of the motion for an injunction, relied upon the 87th section of the Companies' Act, 1862, by which actions and suits are to be stayed after an order for winding-up.

They referred to *Beauchamp* v. *the Marquis of Huntley* (Jac. 546); *Graham* v. *Maxwell* (1 Mac. & G. 71; 18 L. J. Ch. 225); *The Carron Iron Company* v. *Maclaren* (5 H.L. C. 416; 24 L. J. Ch. 620). In support of the liquidator's summons, and in opposition to Clark's summons, they argued that the arrangement made with him under the heads of the settlement was void, and he was not entitled, under the 8th clause of the agreement of the 30th of September, 1865, which was void and illegal, to set off his claims against the call—*Grissell's case* (35 L. J. Ch. 752; L. R. 1 Ch. 528); *In re Duckworth* (L. R. 2 Ch. 578).

Mr. Kay and *Mr. Higgins*, for Clark, contended that there was an express provision for a set-off of such a claim as this against calls under the 101st section of the Companies' Act, 1862. *Grissell's case* was different. Here there had been an express agreement that Clark should take a certain number of shares, and that the company should debit against him all other sums which should become due from him. Then, again, as regards Clark's discharge: in a case like this, where the business of a company did not at once come to an end upon the company being wound up, the winding-up order was not notice of discharge to the company's servants, but there must be an express notice according to the terms of the contract between the servant and the company—*In re the English Joint-Stock Bank; Ex parte Harding* (L. R. 3 Eq. 341); *Yelland's case* (L. R. 4 Eq. 350). Clark was entitled to six months' notice of dismissal, and to his salary for the whole term of five years, for which he was engaged, and by

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his agreement he was not bound to pay the calls upon his shares till the five years of his service had expired.

Mr. Druce replied. He cited *Habershon's case* (L. R. 5 Eq. 286).

JAMES, V.C., said he thought Mr. Clark was entitled at present to be relieved from the payment of 1,000*l*. It was not necessary in this case to consider *Grissell's case*. He would not express an opinion as to how far a bargain like that contained in the 30th of September, 1865, giving security on the Ceylon estate, and which seemed to imply that there might be a set-off, was good, but having regard to the fact that the liquidators had themselves continued Mr. Clark in his situation as their agent, and that the company was indebted to him in a sum which could not be far, if at all, short of 1,000*l*. for services in the winding-up, and to which he was entitled out of the first assets of the company and not merely as a creditor of the company, he thought it would be monstrous if Mr. Clark were now compelled to pay 1,000*l*. to the company. Therefore, he thought that the liquidators ought not to enforce their claim against Mr. Clark till it had been ascertained what was due from them to him. He thought, also, that he could not allow the company, which was now in liquidation, to say that the agreement made with Mr. Clark in Australia was *ultra vires* either of the liquidators or of their attorney in Australia. Apparently, according to the law of Australia, Mr. Clark was entitled to maintain the proceedings which he had instituted there, and if not, the proper course would have been to have taken steps in Australia to restrain those proceedings, for neither Mr. Clark himself nor the property for the attachment of which those proceedings had been taken were within the jurisdiction of this Court. That being so, the agreement come to between Martin and Clark appeared to be a very proper one, though it required the sanction of the Court, and he should have no hesitation in sanctioning the arrangement by which 1,000*l*. was to be paid to Clark to enable him to proceed home, and 3,000*l*. was to be put *in medio* to abide the result of the proceedings. The company had had the benefit of that agreement, having had all the property beyond such 4,000*l*. put into their hands, and having also the 3,000*l*. secured as he had mentioned. That being so, unless he could see his way to rescind the whole agreement and to place the parties in exactly the same position in which they were when the proceedings in Australia were commenced, he must hold that both parties must act according to it. Under it, Clark had a lien to the extent of 3,000*l*., and to that extent he had a security for anything which might be due to him under the arrangement. It would probably be unnecessary to determine whether he was to come in in priority to or to be paid *pari passu* with the other creditors. He should order the 3,000*l*. to be transferred to this country, and carried to a separate account, to be called the account of the money deposited under the agreement. Further proceedings in Melbourne to be stayed. The costs to be paid out of the estate.

LORD ROMILLY, M.R., July 13, 1869.

In re THE HEYFORD COMPANY, LIMITED; PELL'S CASE.

38 L. J. Ch. 564; L. R. 8 Eq. 222; 21 L. T. 320; 17 W. R. 1054: reversed, [1870] E. R. A.; 39 L. J. Ch. 120; L. R. 5 Ch. 11; 21 L. T. 412.

Company—Contributory—Paid-up Shares.

COMPANY.—*A subscriber to the memorandum of association of a company under the Companies' Act*, 1862, *for shares not expressed on the memorandum to be fully paid-up, but agreed to be issued to such subscriber as fully paid-up shares in part payment of property transferred by him to the company, will be placed on the list of contributories for such shares, but will not be called on*

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to pay more than the balance (if any) which shall be found due from him on setting off, against the calls, what on an inquiry shall be found to be the value of the property transferred by him.

This was a summons, by the official liquidator of the company, to put George Pell on the list of contributories in respect of 1,350 shares, which stood against his name in the memorandum of association.

Pell's case was, that by an agreement he had sold the goodwill and stock-in-trade to the company, and that in payment of the purchase-money the company had agreed to issue to Pell 1,350 shares, of 20*l.* each, which should be credited in the books of the company as fully paid-up, and that such agreement had been expressly adopted by the articles of association of the company.

Pell had transferred the goodwill and stock-in-trade, and the shares had been placed against his name, but he had not been credited in the books of the company with any payment on account of the shares.

Mr. Roxburgh, for the official liquidator, contended that, on the authority of *Miggotti's case* (36 L. J. Ch. 531; L. R. 4 Eq. 238); *Baron de Beville's case* (*ante*, 18; L. R. 7 Eq. 11); and *In re the China Steam Ship and Labuan Company; Drummond's case*,[1] since Pell's name appeared on the memorandum simply for 1,350 shares, he was liable to be placed on the list.

Mr. Westlake, for Pell, contended that he had given more than the value for the shares in the property transferred by him; besides, the public had notice of the arrangement, which appeared fully on the articles of association.

The MASTER OF THE ROLLS.—I think that Mr. Pell must be put on the list of contributories, but I do not say that he will have to pay anything. It is proper to allow him in account what shall be found due to him in respect of the property transferred by him, and there must be an inquiry for this purpose. All he will have to pay will be the balance, if any, which will be due from him after deducting the value of the property from the amount of the calls.

LORD ROMILLY, M.R., July 15, 1869.

In re THE JOINT-STOCK DISCOUNT COMPANY; *Ex parte* THE WARRANT FINANCE COMPANY.

38 L. J. Ch. 565; 21 L. T. 345; 17 W. R. 1001: reversed, [1870] E. R. A.; 39 L. J. Ch. 122; L. R. 5 Ch. 86; 21 L. T. 626; 18 W. R. 102 (L.J.).

Winding-up—Proof against Two Estates—Interest subsequent to Proof.

COMPANY.—*When a company in liquidation is insolvent no interest is payable on its interest-bearing debts after the date of the winding-up order as against other then existing debts; and a creditor, who has received* 20*s. in the pound on the amount then due, wholly or partly in payments by a surety, is to be excluded from participation in further dividends.*

But, if all the other creditors are paid 20*s. in the pound, the creditor before excluded may come in for subsequent interest.*

The Warrant Finance Company were the holders of certain bills indorsed by the Joint-Stock Discount Company, which was now in liquidation. As such they had proved against the Joint-Stock Discount Company for the amount of the principal and interest due on the bills at the commencement of the winding-up, and had received dividends to the extent of 15*s.* 6*d.* in the pound.

They had also proved on the same bills against the acceptors, the Contract

(1) This case, decided by the Master of the Rolls, was, on the 26th of July, reversed by Lord Justice Giffard. It was not reported when the present case was heard.

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Corporation (which was also in liquidation), and had received from them dividends to the extent of 4*s*. 6*d*. in the pound.

This was an application, on the part of the official liquidator of the Joint-Stock Discount Company, that the Warrant Finance Company might be excluded from participation in any further dividend.

Mr. Jessel and *Mr. Locock Webb*, for the official liquidator.—The Warrant Finance Company has been paid in full, except as to interest subsequent to the date of the winding-up order, and to this they are not entitled—*In re the Humber Ironworks Company; Ex parte the Warrant Finance Company* (17 W. R. 780); *Cockerell* v. *Dickens* (3 Moo. P.C. 98).

Sir R. Baggallay and *Mr. Langley*, for the Warrant Finance Company.—The rule established by the Lords Justices in the case of *The Humber Ironworks Company* (ubi supra) applies only to a proof by an unsecured creditor against a single estate. In this case we have a double proof. *Kellock's case* (3 Ch. Ap. 769) does not decide what 20*s*. in the pound means. We are entitled to be paid 20*s*. in the pound on the whole claim, *i. e.*, the amount of the bills and interest up to the present time, and we ought to receive dividends *pari passu* with the other creditors until we have been paid—*Hickie & Co.'s case* (36 L. J. Ch. 809; L. R. 4 Eq. 226); *Ex parte Reed* (3 Deac. & C. 481); *Bower* v. *Morris* (Cr. & Ph. 35; 10 L. J. Ch. 357).

The MASTER OF THE ROLLS, without calling for a reply, said—I think this case is governed by the decision of the Lords Justices in *In re the Humber Ironworks Company*. I need not enter into those niceties which arise in cases of double recourse and double proof. The Lords Justices have laid down the rule that, until the estate is solvent, the interest stops at the time when the winding-up order was made. If so, the Warrant Finance Company cannot receive more money for interest after that time. If the estate ultimately pays the debts in full the Warrant Finance Company is entitled to claim the subsequent interest, but the question does not arise in an estate which is solvent. The case is governed by the decision of the Lords Justices. You say that is Judge-made law: no doubt of it, it is necessarily Judge-made law. They lay down this rule, the tree must lie where it falls. When it falls there is due to you a certain amount You have received that in full. You are not entitled to more until the other creditors are in the same position, and have been paid all their proof, as you have been.

The order will be, that the Warrant Finance Company be excluded from further dividends until all the debts proved against the Joint-Stock Discount Company have been paid in full.

LORD ROMILLY, M.R., July 16, 1869.

PEARCE *v.* MORRIS.

38 L. J. Ch. 566; L. R. 8 Eq. 217; 21 L. T. 287; 17 W. R. 1001: varied, [1870] E. R. A.; 39 L. J. Ch. 342; L. R. 5 Ch. 227; 22 L. T. 190; 18 W. R. 196 (L.C.).

Mortgage—Acceptance of Amount secured—Right to Legal Estate and Title-Deeds.

MORTGAGE.—*Mortgagees by accepting the amount of their principal, interest and costs, admit that the person who tenders it is entitled to redeem, and are bound to convey to him the legal estate, and to deliver up the title-deeds.*

The plaintiff had contracted with the mortgagors of property at Maidenhead for the purchase of it, and at the time of the present suit had accepted the title subject to certain requisitions which had not yet been complied with. Pending the contract the mortgagees transferred their security to the defendant, who forthwith gave notice to the mortgagors of his intention to exercise his power of sale if his principal, interest and costs were not paid within a fortnight. When

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the plaintiff was informed of this he tendered to the defendant the full amount he claimed. The defendant accepted it, and gave a receipt for it, but he refused to give up the title-deeds, or to convey the legal estate to the plaintiff, on the ground that he had notice of the claim of a Mr. Colman to be interested in the property. Mr. Colman alleged that the plaintiff had contracted for the purchase of the property, not on his own behalf only, but as agent for himself and Mr. Colman in a joint purchase. The object of the present bill was to compel the defendant to give up to the plaintiff the title-deeds and convey to him the legal estate.

Mr. Southgate and *Mr. Villiers*, for the plaintiff, cited *Wicks* v. *Scrivens* (1 Jo. & H. 215).

Mr. Jessel and *Mr. Nalder*, for the defendant, argued that the plaintiff, not having accepted the title, had no right to call for the legal estate, even supposing Mr. Colman's claim to fail; that the defendant was bound to reconvey to the persons interested in the equity of redemption according to the terms of the mortgage; and that he had not admitted the title of the plaintiff by accepting the money, since he could not refuse to accept it from anyone claiming the equity of redemption without losing subsequent interest in case the claim turned out valid.

The MASTER OF THE ROLLS said—When a mortgagee refuses to accept his principal, interest and costs from the person who tenders the amount, he does it at the risk of losing subsequent interest, in case the person tendering the money should prove his title to redeem. But if he accepts the money it does not lie in his mouth to say that the person from whom he takes it was not entitled to redeem. He cannot raise the question which he might have raised before. When he receives the money he admits that the person who pays it is entitled to redeem, and therefore also entitled to a conveyance of the legal estate and to the possession of the title-deeds. Then, as I asked Mr. Jessel in the course of the argument, who is damnified? He is not, because he has received everything he is entitled to, nay more, all that he claims to be entitled to. The mortgagors are not injured because they have only to substitute A. for B. They are entitled to have the same account and equity of redemption against A. as they before had against B.

As an ordinary rule, a mortgagee called on to receive his redemption money is entitled to six months' notice, and he has time to ascertain whether the person who has given him notice to redeem has the right to do so. If he threatens to sell the property, unless he is redeemed, he is entitled to inquire of anyone who tenders the money, whether he is the mortgagor or the agent of the mortgagor. If he does not inquire he acts at his own risk. Still he is quite safe if he takes the money and conveys the property. He has nothing more to do with it. Nobody can make him liable for anything. The property is transferred to another, who is liable to a suit for redemption by the mortgagor.

The defendant, therefore, is bound to give up the deeds, and to convey all his estate in the property to the plaintiff, and he must pay the costs of the suit.

LORD ROMILLY, M.R., July 22, 26, 1869.

In re THE AGRICULTURIST CATTLE INSURANCE COMPANY; DIXON'S CASE.

38 L. J. Ch. 567; 21 L. T. 288; 17 W. R. 1036: reversed, [1870] E. R. A.; 39 L. J. Ch. 134; L. R. 5 Ch. 79; 21 L. T. 446; 18 W. R. 77 (L.J.): restored, [1873] E. R. A.; 42 L. J. Ch. 139; L. R. 5 H.L. 606 (H.L.).

Company—Contributory—Questionable Liability—Compromise ultra Vires —Lapse of Time.

COMPANY.—*D. became a shareholder, in* 1846, *on the faith of representa-*

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tions which were never made good, and received a dividend. In 1848 *he applied to have his shares cancelled, on the ground of these misrepresentations; and in* 1849 *the directors, in consideration of* 40*l., resolved to cancel them. This resolution was never communicated to any meeting of the shareholders, but they were aware that money had been received generally on account of cancelled shares. In* 1869 *the official liquidator of the company (which was then being wound up) sought to enforce a call against him*:—Held, *that his name was wrongly placed on the list of contributories.*

This was an application to remove the name of Mr. Dixon from the list of contributories.

Mr. Dixon was, in 1846, requested by Mr. Wilkie, the manager of the company for Scotland, to allow his name to appear as a director, and he consented, as he alleged, to take the necessary number of shares on Mr. Wilkie's undertaking that he should not be responsible as an ordinary shareholder until an act of incorporation had been obtained limiting the responsibility of the shareholders. Mr. Wilkie took ten shares in the name of Mr. Dixon, and paid the deposit on them, and Mr. Dixon's name was entered on the list of shareholders. In 1846 he received a dividend, and he signed a proxy authorizing the manager to act for him at a meeting of the company to be held on the 13th of May in that year. In that proxy he was described as the holder of ten shares.

On the other hand, he never signed the deed of settlement and never paid any calls. Two calls were made in the year 1848, but he refused to pay them. He did not come into the arrangement known as the Chippenham compromise,[1] but he applied to have his shares cancelled, on the ground that the condition on which he had consented to become a shareholder, viz., the limitation of the shareholders' liability by an act of incorporation, had never been fulfilled. The directors agreed to cancel his shares in consideration of a sum of 40*l.*, and on the 17th of April, 1849, they passed a resolution to that effect.

This resolution was never submitted to any meeting of the shareholders, but in the balance-sheet presented to the general annual meeting held on the 23rd of November, 1849, one of the items was a sum received on account of "shares cancelled." The 40*l.* paid by Mr. Dixon formed part of this sum.

The only clause of the deed of settlement under which the directors could claim power to make such a compromise was the 164th, worded as follows:

"That it shall be lawful for the board of directors to pay or discharge any debts or claims owing by or made against the company upon any evidence they shall think proper, and to enter into or make any compromise or composition with respect to any claims made against or owing to the company, and to accept any security, real or personal, for any debt or debts owing to or made by the company, as the board shall think proper; and in case any question or dispute shall arise between the company and any other person or persons, body or bodies politic or corporate, either to refer the same to arbitration, or to settle it in such manner as the board of directors shall think proper."

The company was wound up in the year 1861.

Sir R. Baggallay and *Mr. G. N. Colt*, for Mr. Dixon, argued that the case closely resembled *Lord Belhaven's case* (3 De Gex, J. & S. 41; 34 L. J. Ch. 503), or *Fox's case* (37 L. J. Ch. 257; L. R. 5 Eq. 118) that there was a fair question as to the liability of Mr. Dixon as a shareholder, which the directors had power to compromise; and that if not, the Court would not permit him to be made a contributory after so great a lapse of time. On this head they cited *Prendergast* v. *Turton* (You. & C. C.C. 98; 11 L. J. Ch. 22: affirmed, 13 L. J. Ch. 268); *Clegg* v. *Edmondson* (8 De Gex, M. & G. 787; 26 L. J. Ch. 673).

Mr. Southgate and *Mr. Bush*, for the official liquidator, replied, that *Lord*

(1) See the numerous former reports of cases relating to the above company.

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Belhaven's case (ubi supra) materially differed from the present in the publicity given to the compromise; that the compromise with Mr. Dixon was *ultra vires*, and therefore Mr. Dixon remained a shareholder, and that the case was not distinguishable in principle from *Houldsworth* v. *Evans* (37 L. J. Ch. 800; 3 E. & I. Ap. 263).

Sir R. Baggallay, in reply, cited *Brotherhood's case* (31 Beav. 365; 31 L. J. Ch. 861).

The MASTER OF THE ROLLS said that his opinions on these cases were well known, and that he could not with propriety now recede from the opinions he had expressed in the House of Lords. The decisions of the House of Lords seemed to him to be irreconcilable, and he must determine the present case as he would have done if none of those decisions had been given.

The MASTER OF THE ROLLS (*July* 26) said that the case was not free from difficulty, but he thought that Mr. Dixon's name ought not to be on the list of contributories. In his opinion the compromise was not an absolutely void transaction, only voidable; and after so many years it could not be set aside.

JAMES, V.C., June 7, 1869.

COX *v.* COX.

38 L. J. Ch. 569; L. R. 8 Eq. 343; 17 W. R. 790.

Followed, *Maclaren* v. *Stainton*, 1871, L. R. 11 Eq. 382 (M.R.); *In re Bird*, [1901] E. R. A.; 70 L. J. Ch. 514; [1901] 1 Ch. 916; 84 L. T. 294; 49 W. R. 599 (Ch. D.). Applied, *Stewart* v. *Kingsale*, [1902] 1 I. R. 496 (M.R.). Referred to, *Re Atkinson*, [1904] E. R. A.; 73 L. J. Ch. 585; [1904] 2 Ch. 160; 90 L. T. 825; 53 W. R. 7 (C.A.); *Slade* v. *Chaine*, [1908] E. R. A.; 77 L. J. Ch. 377; [1908] 1 Ch. 522; 98 L. T. 352 (C. A.).

Apportionment — Tenant for Life and Remaindermen — Principal and Interest—Bond to Trustees—Insufficiency of Obligor's Estate.

APPORTIONMENT. ESTATE.—*C. gave to the trustees of his marriage settlement a bond to secure the payment, three months after his death, of a sum which was settled on trust for his widow for life, with remainder to his children. C. died, and his estate was insufficient to pay even the principal due on the bond, in addition to which there was a large amount for interest due thereon*:—Held, *that there must be a calculation what sum, received and invested when the principal debt secured by bond had become due, would, together with the interest thereon, have equalled the amount recovered from C.'s estate at the time of such last-mentioned amount being paid, and an apportionment must be made between the tenant for life and remaindermen on that basis.*

In re Grabowski's Settlement (37 L. J. Ch. 926) *not followed.*

SPECIAL CASE. G. H. R. Cox, in contemplation of his marriage, in 1859, gave a bond to the trustees of his marriage settlement to secure to them the payment, within three months after his death, of a sum of 6,000*l.* and interest at 5*l.* per cent. from that date.

By his marriage settlement the same trustees were to invest the said sum of 6,000*l.* upon receipt thereof, and were to pay the annual produce of the investments to the wife of G. H. R. Cox, if she should survive him, for her life, with remainder, in the events which happened, to the children of the marriage.

G. H. R. Cox died intestate in July, 1862, and letters of administration to his estate and effects were granted to his widow. A suit was shortly after-

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wards instituted, by a simple contract creditor, for the administration of his estate, and a decree made in that suit in July, 1863.

Upon taking the accounts under the decree, the chief clerk found that the trustees of the said settlement were the only specialty creditors of the intestate, and that there was due to them on the bond the principal sum of 6,000*l.* and 1,625*l.* 12*s.* 8*d.* arrears of interest up to the 31st of January, 1868, and that the only assets of the intestate amounted to about 5,700*l.* Under these circumstances the questions arose, first, whether the 5,700*l.* recoverable by the trustees of the settlement ought to be apportioned as between principal and interest; and, secondly, if so, upon what principle such apportionment was to be carried out. The object of this special case was to have these questions determined.

Mr. Phear, for the plaintiffs, argued that there could be no apportionment, but the whole of the 5,700*l.* must be treated as principal. *In re Grabowski's Settlement* (37 L. J. Ch. 926; L. R. 6 Eq. 12) was on all fours with this case.

[JAMES, V.C., said it was clear there must be an apportionment; the only question was, as to the principle upon which it was to be made. There must have been some slip in *In re Grabowski's Settlement*.]

Mr. Speed, for the defendants, cited *Turner* v. *Newport* (2 Phil. 14). The notion of the tenant for life being entitled to interest at 4*l.* per cent. only, which had prevailed in that case, had no application here; for here, by the settlement, the rate of interest was named at 5*l.* per cent. The widow was entitled to the actual proceeds of the testator's estate since the time when the bond-debt became payable.

JAMES, V.C., said the true principle was, that neither the tenant for life nor the remaindermen ought to suffer any loss or receive any benefit from the delay in the administration of the estate of the deceased obligor, except so far as this was inseparable from the fact of the obligor's having made default in payment of the debt. The principal debt ought to have been paid three months after the death of the intestate obligor. The amount received would then have been invested, say at 4*l.* per cent., and the tenant for life would have been entitled to the interim income of such investments.

The proper principle in this case was, to calculate back what sum paid at three months from the death of the obligor, and then invested at interest at 4*l.* per cent., would, together with the amount of such interest, have now produced the amount of the dividend recoverable from the obligor's estate. That sum would represent the capital, and the rest would go as interest to the tenant for life. The costs must come out of the capital.

LORD ROMILLY, M.R., June 29, 1869.

KIRKMANN *v.* LEWIS.

38 L. J. Ch. 570; 21 L. T. 191; 17 W. R. 907.

Will—Mortmain—Bequest void for Uncertainty of Amount.

CHARITY.—*Bequest of residuary personal estate to be applied in the construction of a well and in the erection of a public pump and tank in any suitable place in the parish of L.*:—Held, *to be void under the Statutes of Mortmain (as involving the purchase of land).*

Bequest to a charity of surplus which should be left after carrying out the above illegal bequest:—Held, *to be unascertainable in amount, and therefore void.*

This was the further consideration of a suit for the administration of the estate of a Mr. Kirkmann, whose will contained a bequest by which the testator

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directed his residuary personal estate to be applied in the construction of a well and in the erection of a public pump and a tank in any suitable place in the parish of Llangorse, after which the surplus, if any, was to be paid to the rector, to be expended by him for the benefit of a school in the parish.

The question was whether this was to any and what extent a good charitable bequest.

Sir R. Baggallay and *Mr. Bagshawe*, for the plaintiffs the executors.

Mr. Wickens, for the Attorney General, contended that this was, at any rate, a good charitable bequest to the extent of the surplus. The cost of sinking a well was ascertainable, since persons with local knowledge could always be found who would contract for a fixed price to sink a well in a particular locality until water was reached. Such persons could therefore accurately fix what the cost of sinking a well would be; and an accurate estimate of the cost of erecting a tank and pump could also be made. Supposing, therefore, that the gift of money to sink a well and to build a tank was void, yet its amount, being ascertainable, could be deducted from the amount of the residuary personal estate, and the surplus be thus ascertained; and of this surplus there was a valid bequest to the school. He referred to *Philpott* v. *St. George's Hospital* (2 H.L. C. 338; 27 L. J. Ch. 74); *Fisk* v. *the Attorney General* (L. R. 4 Eq. 521).

Mr. Jessel and *Mr. Bury*, contra, contended that the surplus could not possibly be ascertained unless the void bequest was first carried into effect. The gift of surplus was therefore void for uncertainty. They cited *Chapman* v. *Brown* (6 Ves. 404); *Fowler* v. *Fowler* (33 Beav. 616; 35 L. J. Ch. 574).

Mr. Southgate, *Mr. Kingdon*, *Mr. Edwin Cutler* and *Mr. Sladen*, for other parties.

The MASTER OF THE ROLLS.—The gift to make a well and tank is void under the Statutes of Mortmain, as involving the purchase of land on which to do the work. I think, also, that the cost of making a well cannot be ascertained without actually sinking it. The amount of the surplus is therefore unascertainable, and the bequest of it is void for uncertainty. I must therefore declare the whole bequest of residue void.

LORD ROMILLY, M.R., June 8, 1869.

PETERS *v.* BACON.

38 L. J. Ch. 571; L. R. 8 Eq. 125; 20 L. T. 729; 17 W. R. 782.

Practice—Partition Act, 1868—*Service of Decree*—15 & 16 *Vict. c.* 86. *s.* 42. *r.* 8.—*Consolidated Orders, XXXV. r.* 18.

PARTITION.—*The Court will not allow a sale, which has been decreed under the Partition Act*, 31 & 32 *Vict. c.* 40, *to be proceeded with until all persons interested in the suit have been served with notice of the decree, but will allow such service to be effected by advertisement upon persons out of the jurisdiction, and who cannot be found, with liberty for the plaintiffs to apply as to proceeding with the sale in case the absent parties do not come in after advertisement.*

Adjourned summons. Edward Tann, by his will, gave the rents and profits of certain leaseholds to be divided equally amongst all his grandchildren. The testator, in other gifts contained in his will, proceeded to enumerate his grandchildren as the children of his various named sons and daughters, but he omitted from this list the name of one son, Edward Tann, who had emigrated to California and was believed to have died there, leaving children of whom nothing certain was known, but who were believed to have outlived the testator.

This was a suit by some against others of the grandchildren of the testator for a sale or partition, and one question raised in the suit was, whether the children of Edward Tann would be entitled. This question was still pending, but on the 30th of January, 1869, a decree was made under the Partition Act

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(31 & 32 Vict. c. 40.) for a sale instead of partition, and it was referred to chambers to settle the parties to be served with the decree.

The present summons had been taken out in chambers by the plaintiffs, asking that leave might be given to serve notice of the decree and of the order to be made on the summons upon the children of Edward Tann by advertisement in certain specified newspapers, and that in the meantime the sale directed by the decree might be proceeded with.

Mr. Higgins, in support of the application, referred to *The Partition Act, 31 & 32 Vict. c. 40. ss. 3, 4, 9; 15 & 16 Vict. c. 86. s. 42. r. 8; Consolidated Orders, XXXV. r. 18.*

Mr. Stirling, for the defendants.

The MASTER OF THE ROLLS.—I cannot allow you to sell until these persons have been served with notice of the decree, but I will allow you to serve them with such notice by advertisement. When they have been so served, if they do not come in you may apply as to going on with the sale. It had better be referred to chambers to settle in what papers, in what form, and how often the advertisements shall appear.

LORD ROMILLY, M.R., July 13, 1869.

In re BARNED'S BANK; FORWOOD'S CLAIM.

38 L. J. Ch. 574; 21 L. T. 256; 17 W. R. 981; affirmed, [1870] E. R. A.; 39 L. J. Ch. 133; L. R. 5 Ch. 18; 21 L. T. 411; 18 W. R. 53 (L.J.).

Company—Winding-up—Proof—Secured Creditor—Claim—Date of Claim.

COMPANY.—*Company B. addressed to F. a letter of guarantee, agreeing that, if F. would accept certain bills, company B. would provide F. with funds to meet the bills at least seven days before maturity. Two days before the bills matured, but after company B. had been ordered to be wound up, and after advertisement for claims had been made, F. sent a notary, who presented the original letter of guarantee to the official liquidator, and demanded payment*:—Held, *that this did not amount to the sending in of particulars of claim under rule* 20. *of the General Order*, 1862:—Held, *consequently, that F, who, after this, but before making any further claim, realized certain securities which he held for the bills, was not entitled to prove for the whole amount of the bills, but only for the balance.*

This was an application by Messrs. Forwood, who now represented the firm of Leach, Harrison & Forwood, to be allowed to prove against the estate of Barned's Bank, now in course of compulsory liquidation, for two sums of 9,000*l.* and 6,000*l.* This claim was founded on two letters of guarantee, the first of which, dated the 27th of March, 1866, was as follows:

"Messrs. Leach, Harrison & Forwood.

"Gentlemen,—In consideration of your accepting the drafts of Messrs. T. M. Mackay & Co., at three months' date for 9,000*l.* against the ship "*Naval Reserve*" and her freight, and on your agreeing to renew such drafts for a further period of three months, we agree to provide you with funds to meet such drafts at least seven days before maturity; it being understood that if we are called upon by Messrs. James Baines & Co. to pay you the amount of the drafts, you transfer to us your said security."

The guarantee for 6,000*l.* was for bills drawn against another ship, called the "*Golden Empire*," and was similar to the above, and was dated the 4th of April, 1866.

Barned's Bank stopped payment on the 18th of April, 1866, and was ordered to be wound up on the 27th of April, 1866; and the usual advertise-

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ments were issued calling on creditors to send in their claims by the 22nd of July following.

The bills for 9,000*l.* matured on the 27th of June, and those for 6,000*l.* on the 6th of August, 1866.

On the 25th of June, 1866, Mr. Lowndes, a notary public, employed by Messrs. Leach, Harrison & Co., sent by a clerk the letter of guarantee dated the 27th of April, 1866, to the offices of the official liquidators of Barned's Bank and demanded payment, when Mr. Lowndes's clerk was informed by a clerk of the liquidators that payment could not be made.

A similar application with a similar result was made on the 1st of August with regard to the guarantee for 6,000*l.*

In September, 1866, Messrs. Leach, Harrison & Co. realized their securities by selling the ships, the "*Naval Reserve*" producing 8,314*l.* 3*s.*, and the "*Golden Empire*" 3,005*l.* 18*s.* 7*d.*

On the 18th of March, 1868, Messrs. Leach, Harrison & Co. sent to the official liquidators a formal claim for 2,994*l.* 15*s.*, as the balance due on the guarantee for the 6,000*l.*, dated the 4th of April, 1866.

Messrs. Forwood now asked to be allowed to prove for the whole of the two sums of 9,000*l.* and 6,000*l.*

Mr. Jessel and *Mr. Hemming*, for the applicants, contended that on the authority of *Kellock's case* (L. R. 3 Ch. 769), and in accordance with rule 20. of General Order of the 11th of November, 1862, made in pursuance of the Companies Act, 1862, Messrs. Forwood were entitled to prove for the amount due at the date of their claim, without reference to securities realized between the sending in of the claim and the adjudication thereon; and that in the present case the presentation by the notary of the actual letters of guarantee was a sufficient sending in of particulars of claim.

Mr. Southgate and *Mr. Kekewich*, for the official liquidator, contended that no proper claim was sent in till the 18th of March, 1868.

Mr. Jessel, in reply.

The MASTER OF THE ROLLS.—The sole question is, whether this is such a claim as to bring the case within the authority of *Kellock's case*. First, can it be said that the presentation of this letter of guarantee, the original document on which the claim is based, was the sending in of a claim? Of course the holders of such a document would only shew it; they would not part with it; or, at any rate, if trusting to the honour of a respectable person, they left it in the hands of the liquidator or his clerk, they would not be parting with dominion over it, and would have the right to bring an action for it if it were detained.

Can it be said that, to shew, or even to leave, under such circumstances, a document like this would be equivalent to sending in particulars of claim? Then, looking at the document itself, no doubt it is a document from which any person might have reasonably inferred that a claim might possibly be made, but still, how could the official liquidator know from this document that there was a claim? For all that he could know, the bills might be paid by some person other than the acceptors, who held the bank's guarantee; and the guarantee might have been produced merely in the interest of such other persons.

Rule 20. of the General Order of 1862 is as follows: "For the purpose of ascertaining the debts and claims due from the company, and of requiring the creditors to come in and prove their debts or claims, an advertisement shall be issued at such time as the Judge shall direct; and such advertisement shall fix a time for the creditors to send their names and addresses, and the particulars of their debts or claims, and the names and addresses of their solicitors (if any) to the official liquidator, and appoint a day for adjudicating thereon."

No names of any solicitors have been given, no name and address of any person making the claim, but only the name of the person who, on the face

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of the instrument, might be the director. I hold a claim of this kind to be no compliance with the order, and I think that Lord Justice Wood, in *Kellock's case*, so understood. I hold, therefore, that no particulars of claim were sent in until after the realization of the securities, and therefore that Messrs. Forwood are only entitled to prove for the balance, and not for the whole amount. The summons must be dismissed. The official liquidator to have his costs out of the estate. No order as to the costs of applicants.

LORD ROMILLY, M.R., July 27, 28, 1869.

In re BARNED'S BANK; COUPLAND'S CASE.

38 L. J. Ch. 575; L. R. 8 Eq. 472; 20 L. T. 286; 17 W. R. 1055: affirmed, [1870] E. R. A.; 39 L. J. Ch. 287; L. R. 5 Ch. 167; 21 L. T. 807; 18 W. R. 122 (L.J.).

Company—Winding-up—Proof for Secured Debt—Claim—Date of Claim.

COMPANY.—*In order to entitle a secured creditor of a company to prove in a winding-up under the Companies Act*, 1862, *for his whole debt without regard to the value of his security, the creditor must not only have carried in a claim for the whole debt before realizing his security, but must also at the date of such claim have been such creditor in respect of an actual debt, and not a mere liability of the company.*

Therefore, where C, being the drawer of certain bills of exchange, drawn against a cargo of cotton, and accepted but not paid by company B, and being also the drawer of certain other like bills, which company B. had agreed by a letter of credit to accept but did not accept, after company B. had been ordered to be wound up, but before the cotton was sold, and while the bills were in the hands of third parties, gave notice to the official liquidator that he, C, should be a claimant in respect of the bills, but through ignorance of his rights stated in such notice that the proceeds of the sale of the cotton would be applied in reduction of the amount, and afterwards took up the bills and realized the cotton, and was admitted to proof for and received dividends upon the balance of his debt, and afterwards, becoming aware of his rights, applied for leave to enlarge his claim by the amount of the proceeds of the cotton and to receive dividends thereon:—Held, *that the claim of C. having been made for the balance only, and also at a time when he was not holder of the bills, but only liable thereon, was not a sufficient claim before realization of the security to bring his case within* Kellock's case (L. R. 3 Ch. 769), *and to entitle him to prove for the whole debt without regard to the security afterwards realized.*

This was a summons by Messrs. Coupland Brothers, of Liverpool, and also of Bombay, for leave to increase their claim against Barned's Bank under the winding-up by the sum of 39,035*l.* 5*s.* 2*d.*, under the following circumstances. On the 17th of November, 1865, at the request of Messrs. Daunt, of Liverpool, Barned's Bank gave to Messrs. Coupland a letter of credit authorizing them to draw on the bank bills at six months, to the amount of 23,150*l.*, against bills of lading for cotton, the bills of lading to be given up to the bank on their acceptance of the bills of exchange. Accordingly, Messrs. Coupland drew two bills, amounting to 23,150*l.* 0*s.* 5*d.* in all, which were accepted by the bank against two parcels of cotton of 500 bales each.

On the 2nd of February, 1866, at the request of Mr. Wilson, of Liverpool, the Bank gave Messrs. Coupland another letter of credit, authorizing them to draw on the bank to an amount not exceeding 50,000*l.*, by bills of exchange at six months, to be covered by shipping documents, such as for cotton, &c., on receipt of which documents the bank engaged to honour such drafts.

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Against this letter of credit Messrs. Coupland's Bombay house drew four bills, amounting in the whole to 33,635*l.* 0*s.* 3*d.*, and negotiated the same in India. Before the bills for 23,150*l.* arrived at maturity, and before the bills for 33,635*l.* 0*s.* 3*d.* could be presented to Barned's Bank for acceptance, the bank suspended payment, viz., in April, 1866, and was ordered to be wound up.

By an order dated the 8th of May, 1866, the 22nd of June, 1866, was the day fixed by which creditors were to send in their claims, and on the 8th of June, 1866, Messrs. Coupland sent to the official liquidator these particulars of claim in the following letter: "We beg to intimate to you that we shall be claimants on behalf of our house in Bombay (Coupland & Co.) on Messrs. J. Barned & Co. (Limited), for drafts accepted by them for 11,698*l.* 3*s.* 3*d.* and 11,451*l.* 16*s.* 9*d.*, for which bills of lading will be given up to us for 1,000 bales of cotton, per *Helen Scott*, and the proceeds when sold will be applied in reduction of the amount: and also for drafts drawn on them under letter of credit for [the letter here enumerates the bills, amounting to 33,635*l.* 0*s.* 3*d.*] which were protested for non-acceptance; the proceeds of the following parcels of cotton when sold will be applied in reduction of this amount [the letter then set out particulars of cotton, amounting to 1,545 bales].

In July and August, 1866, the 1,000 bales of cotton, per the *Helen Scott*, were sold and realized 13,953*l.* 4*s.* 2*d.* In October, November and December, 1866, the 1,545 bales were sold, realizing 25,082*l.* 1*s.*

The claim was adjusted on the 23rd of April, 1867, when Messrs. Coupland, who had taken up all the bills claimed, and were allowed to prove for 17,779*l.* 14*s.* 6*d.*, being the total balance due to them on both sets of bills, after deducting 39,035*l.* 5*s.* 2*d.*, the total produce of the sale of the cotton, received three dividends on such claim, of 3*s.*, 1*s.* and 1*s.* in the pound respectively.

Messrs. Coupland now put in an affidavit, stating that at the time they made the claim, and until after the receipt of the last dividend, they were ignorant that, inasmuch as their securities were unrealized at the date fixed for sending in their claim, they were then entitled to prove for the whole debt and not merely for the balance, and they now claimed to be allowed to increase their proof by 39,035*l.* 5*s.* 2*d.*, and also to receive out of moneys now in or hereafter to come into the hands of the official liquidators, payment in respect of the three dividends already declared.

Mr. Jessel and *Mr. Westlake*, for Messrs. Coupland, contended that notice of a claim upon these bills having been sent to the official liquidator in June, 1866, before the security was realized, the right of Messrs. Coupland to prove for the whole amount was not prejudiced by the fact that in ignorance of their rights they offered to allow, and afterwards allowed, credit for the cotton, or by the fact that they were not holders of the bills at the date of the claim being sent in.—They referred to *Kellock's case* (L. R. 3 Ch. 769).

Sir R. Baggallay and *Mr. Kekewich*, for the official liquidator of Barned's Bank, resisted the claim.—They argued that no claim to prove for the whole amount could be considered to have been made before the cotton was sold, inasmuch as Messrs. Coupland had expressly claimed only a balance, and also that at the date of the alleged claim Messrs. Coupland were unable to make it, not having then taken up the bills.

Mr. Jessel, in reply.

The MASTER OF THE ROLLS.—This is a case of great peculiarity, and distinct from the numerous other cases which have followed *Kellock's case*. Here the claimants, before the cotton was sold, only made a claim for the amount of the bills less what the cotton should produce; at this time, moreover, they had not yet taken up the bills. I think therefore that the official liquidator rightly allowed only 17,749*l.* 15*s.* 6*d.* The summons will be dismissed. The costs of the official liquidator will come out of the estate.

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MALINS, V.C., July 2, 1869.

ROSS v. TATHAM.

38 L. J. Ch. 577; 17 W. R. 960.

Executors, liability of—Breach of Covenant by Testator—Exoneration of Executors by Order of the Court—Lord St. Leonards' Act, 22 & 23 Vict. c. 35. s. 27.

EXECUTOR AND ADMINISTRATOR.—*On a petition by residuary legatees for payment out of Court of their legacy the executors applied to have part of the funds set apart to indemnify them against a breach of covenant committed by the testator as lessee. No action had been taken by the lessor on the breach, nor had he made any claim under a decree made in a suit for the administration of testator's estate:*—Held, *that under the circumstances, the lessor had lost all remedy against the executors, who therefore required no indemnification against the breach of covenant.*

Testator, who died in 1864, by his will, gave the residue of his personal estate to the defendants on trust for his widow and his only child, a daughter, as therein declared, and he appointed his said trustees executors.

A suit was instituted for the administration of the testator's estate, and the chief clerk by his certificate found that the testator's residuary personal estate amounted to upwards of 30,000*l.*, and that it was under certain liabilities, of which the following only need be mentioned:

The testator held a piece of ground on a building lease for ninety-nine years from 1860, at a rent of 35*l.*, which lease contained, besides the usual covenants to pay rent, &c., a covenant to build within twelve months on the said piece of land a warehouse of the size and height therein stated at a cost of 1,800*l.* at the least, and to repair and insure the same and yield it up in good repair at the end of the term. The testator had commenced building under the covenant, but the suit of *Weatherby* v. *Ross* was instituted to restrain him from further building, on the ground of its interference with ancient lights, and in 1865, after his death, an injunction was granted, the building was stopped, and a breach of the building covenant thus committed; but no action had been taken by the lessor in respect thereof.

The defendants, as executors and trustees of the will, subsequently sold the testator's leasehold premises, with the approval of the Court, and the purchasers thereof covenanted to indemnify the testator's estate against the liabilities in respect of the said leasehold premises.

By an order made in the administration suit the testator's widow was declared entitled to one moiety of his residuary estate, and his daughter to another moiety on her attaining twenty-one.

The daughter married before attaining twenty-one, and a settlement of her moiety was made. In 1869 she became of age, and the trustees of her marriage settlement now petitioned for the payment out of Court of the moiety to which she was entitled. The respondents, the executors and trustees of the will, claimed to be entitled to retain part of the moiety in Court to indemnify them in respect of the above-mentioned breaches of covenant.

Mr. Owen, for the petitioners.

Mr. Wickens, for the trustees and executors of the testator's will.—It is doubtful whether the present case comes within the 27th section of Lord St. Leonards' Act (22 & 23 Vict c. 35), which applies only to ordinary and usual covenants, not to every covenant contained in the deed, otherwise the special provision in the same section in respect of a covenant to pay an ascertained sum would have been superfluous. Moreover, the covenant must have passed unbroken to the executors to admit the operation of this section. In the present case the covenant was broken in the lifetime of the testator. But further, this is a continuing covenant, and the damages for the breach must be unliquidated.

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They cannot, therefore, be considered to be a liability due and "claimed" by the lessor so as to come within the first part of the section. If, therefore, the money had been out of Court the executors must have set apart a sufficient fund in order to claim the benefit of the second part of the section; the money being in Court, the Court will direct the executors to do as the act provides. The executors could not plead the act in defence to an action on the covenant until they set apart a fund. The act, therefore, alone will not protect the executors, nor will the order of the Court upon this petition protect them.

Mr. Osborne (*Amicus Curiæ*) referred to *Thomas* v. *Griffith* (2 De Gex, F. & J. 555; 30 L. J. Ch. 465) where the executor was held to be exonerated; and see also *In re Green* (2 De Gex, F. & J. 121).

Mr. Owen cited *Bennett* v. *Lytton* (2 Jo. & H. 155); and *Williams* v. *Headland* (4 Giff. 505; 34 L. J. Ch. 20), to the same effect.

Mr. Romer, for the widow of the testator, supported the view of the executors, on the ground that she had a life interest in the other moiety of the residue which was to remain in Court, and would be the only fund for the lessor to go against for damages, unless a fund was set apart to meet them.

Mr. R. Nalder, for the plaintiff, supported the petition.

MALINS, V.C. reviewed the facts of the case, and observed that the breach of covenant took place in 1862, and the lessor was therefore then entitled to recover damages for it. The testator died in 1864; a decree was made for the administration of his estate, and the usual advertisements for creditors were issued. Now, it was clear that upon these advertisements every creditor was bound to bring in his claim within the period provided by the law, and that if he did not he lost his remedy against the executor. It was true he did not lose it against the testator's estate, but he was thrown upon the assets, and must follow them as best he could. Assuming, therefore, that a claim could be made in the present case, the period for bringing it in had expired, and it could not be sustained against the executors, who would therefore require no indemnity. The rule was one of the greatest convenience; for if the executor was not at liberty to distribute the assets now, there was no reason why he should do so twenty or forty years hence, or at any time before the determination of the lease. As to Mr. Wickens's argument that the covenant was continuous, and that therefore there was a continuing breach, the cases of *Williams* v. *Headland* and *Bennett* v. *Lytton* shewed that the executors would in any case be amply protected by the decree of the Court. His Honour based his decision on the law as laid down in those cases quite independently of the section in Lord St. Leonards' Act, which had been cited.

STUART, V.C., July 13, 14, 1869.

CROOK v. HILL.

38 L. J. Ch. 579; reversed, [1871] E. R. A.; 40 L. J. Ch. 216; L. R. 6 Ch. 311; 24 L. T. 488; 19 W. R. 649 (C. A.): restored, [1873] E. R. A.; 42 L. J. Ch. 702; L. R. 6 H.L. 265; 22 W. R. 137 (H.L.).

Marriage—Deceased Wife's Sister—Bequest to "Children" of—Demurrer.

WILL.—*A testator, by his will, described his daughter as Mary the wife of John Crook, and spoke of him as her present husband. The daughter was the sister of the deceased wife of John Crook. There were children of Mary Crook by John Crook whom the testator recognized as his grandchildren, and no other children of Mary Crook*:—Held, *that such children could not take under a bequest to "the children or child of my said daughter Mary Crook."*

Beachcroft *v.* Beachcroft (1 Mad. 430), *and* Frazer *v.* Pigott (1 You. Ex. Rep. 354), *dissented from.*

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The plaintiffs in this suit were the two eldest and infant children of John Crook, by their father, as their next friend; and the defendants were the executors of John Hill, the testator in the suit, and Robert Crook, the third child of John Crook.

The question in the suit was, whether the plaintiffs and the defendant Robert Crook were intended by the testator's will to take as "children of my daughter Mary Crook."

The bill stated the facts of the case, so far as they are material to this report, as follows:

John Crook had formerly been married to Sarah Ann, one of the daughters of the testator. Sarah Ann died in 1851. In 1854 John Crook, with the full knowledge of the testator, went through the ceremony of a marriage with Mary, another daughter of the testator. That union was always looked upon, and treated by the testator, as an existing marriage. Two children of Mary Crook were born after that marriage, and during the lifetime of the testator, viz., the plaintiff Alice Sarah Crook on the 4th of November, 1854, and the plaintiff Ernest William Crook on the 21st of July, 1858. The testator was in the habit of constant and affectionate intercourse with his daughter Mary Crook and John Crook, and always recognized and treated John Crook as his son-in-law and the plaintiffs as his grandchildren.

The testator by his will, dated the 9th of March, 1859, bequeathed three leasehold messuages to trustees upon trust for his widow for her life, and after her decease upon the following trust:

"Upon trust during such part of my term, estate and interest therein as my daughter Mary, the wife of the said John Crook, shall happen to live, to pay the net rents, issues and profits of the said hereditaments and premises unto her my said daughter Mary Crook, or unto such person or persons as she shall from time to time, after the same shall have accrued due, by writing under her hand, notwithstanding coverture, appoint as her agent or agents to receive the same, for her sole, separate and exclusive use and benefit, independently of her present or any after-taken husband, and without being liable to the debts, control or engagements of any such husband, the receipts in writing of her my said daughter, notwithstanding coverture, and of her agents or agent appointed as aforesaid being alone sufficient discharges for the same; to the intent that she shall not have power to dispose of such rents, issues and profits, or any part thereof, by way of anticipation, but that the same shall be in the nature of an inalienable personal provision, and shall be subject to the proviso for cesser hereinafter in that behalf contained. And, subject as aforesaid, I direct and declare that from and after the decease of my said daughter Mary Crook, or such cesser as in that behalf herein mentioned, the said hereditaments shall go, remain and be upon such trusts, for the benefit of all and every or such one or more, exclusively of the other or others of the children or child of my said daughter Mary Crook, upon such conditions, with such restrictions, and generally in such manner as she, my said daughter Mary Crook, shall by her last will and testament in writing, or any codicil or codicils thereto in writing, direct, limit or appoint; and in default of any such direction, limitation or appointment, and so far as no such direction, limitation or appointment shall extend upon trust for the child, if only one, or all the children, if more than one, of my said daughter Mary Crook, who, being a son or sons, shall either before or after the decease of my said daughter Mary Crook attain the age of twenty-one years, or, being a daughter or daughters, shall either before or after the decease of my said daughter Mary Crook attain that age or be married under that age, to take, if more than one, in equal shares as tenants in common." The will then contained *(inter alia)* the proviso for the cesser of the life interest of Mary Crook in the event of her anticipating, incumbering or parting with it; or its becoming vested (as therein mentioned) in any person other than Mary Crook; and a declaration that it should then "devolve on the person or persons entitled thereto next in order of succession under this my will, as if my said daughter

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Mary Crook were then dead; but without prejudice to the powers hereinbefore given to her my said daughter in favour of her children in manner hereinbefore mentioned." The will then contained a gift over of the property in favour or for the benefit of the testator's daughter Emma Hills, and her child or children, as therein mentioned. The testator directed the residue of his estate to be converted, and one moiety of it to be held " upon such trusts, intents and purposes, and subject to such powers and provisoes in favour or for the benefit of my daughter Mary Crook for her life, and of her child and children after her decease as shall correspond with and be similar to the trusts, intents and purposes, powers and provisoes for cesser, and otherwise, which are herein substantially expressed and declared of and concerning my leasehold messuages or tenements hereinbefore devised to or in favour or for the benefit of my said daughter Mary Crook for her life, and of her child and children after her decease." The will contained other bequests and directions, to which it is not now necessary to refer; and the testator thereby appointed the defendants William Hill and William Samuel Simmons and his daughter Emma Hill executors and executrix thereof.

The testator died on the 22nd of March, 1859.

At the date of the testator's will, Mary Crook was, and for about six months had been, *enceinte* with another child. The testator was well aware that Mary Crook was *enceinte* with such child. That child was born on the 27th of June, 1859, and was the defendant Robert Crook. Mary Crook had another child, named Edward Crook, begotten and born after the date of the testator's will, but she never had any other children than those above mentioned.

The testator's widow died on the 19th of February, 1868.

Sarah Crook died on the 2nd of March, 1868, having by her will, expressed to be made in exercise of the aforesaid power contained in that of the testator, appointed the property bequeathed to her by him among her four children equally. The residue of her property she bequeathed to John Crook, whom she nominated her executor.

The bill in the suit prayed a declaration that the infant plaintiffs, and if the Court should be of such opinion the defendant Robert Crook, were intended by the testator's will to take as " children of his daughter Mary Crook," and that the testator's personal estate might be administered and the trusts of his will performed, having regard to such declaration.

The defendants, the executors of the testator's will, by arrangement in order to have the question of construction decided, demurred to the bill for want of equity. The defendant Robert Crook was also by arrangement allowed to be heard by counsel.

Mr. Greene and *Mr. Archibald Smith*, for the executors.—No illegitimate children can take under a bequest made to them by the words " child or children " *simpliciter;* and the children of a marriage between a man and the sister of his deceased wife, are in the eye of the law illegitimate.—(They were then stopped by the Court.)

Mr. Fooks, for the plaintiffs.—The question is whether they are sufficiently described in the will. It is true that they are not named in it, but the testator knew them well and also the position of their parents. He speaks in the will of John Crook as his son-in-law, and his daughter Mary as Mary Crook, the wife of John Crook, and he speaks of " her children." It is true also that he does not say her " present " children, but that is not necessary; for if on the face of the will you can discern a plain intention that illegitimate children are to take as if they were legitimate they will do so. I submit that there is such an evident intention in this will, and that the plaintiffs are therefore entitled—*Wilkinson* v. *Adam* (1 Ves. & B. 422); *Holt* v. *Sindrey* (38 L. J. Ch. 126; L. R. 7 Eq. Ca. 170); *Clifton* v. *Goodbun* (L. R. 6 Eq. 278).

Mr. F. H. Colt, with *Mr. Fooks*.—The authorities upon this subject refer to the cases of illegitimate children of men. With respect to them the law does not recognize their status, independently of reputation at the date of the will which purports to confer the benefit on them. It is otherwise in the case of the

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illegitimate children of women; because, with regard to them, the maternity is ascertained, and the only objection to their taking is the ordinary presumption that the testator intends legitimate children alone to take. Here the testator distinctly recognizes the marriage as a valid existing union, and the words are therefore equivalent to a gift to present and future children. It is impossible to suppose that he did not contemplate these children of his daughter Mary Crook. He cannot, under the circumstances, be presumed to have only contemplated future legitimate children of his daughter. Such a presumption is contrary to the whole scope of the will. In *Savage* v. *Robertson* (L. R. 7 Eq. 176), the words "her two youngest daughters" were much relied upon by the Court; and that case shews that the Court will not look at bare possibilities. *Holt* v. *Sindrey*, ubi supra, was no doubt a different case from this—in respect of the words "begotten and to be begotten." But the words used in this will naturally denote the existing children of Mary Crook. *Beachcroft* v. *Beachcroft* (1 Madd. 430, 443, 444), which was followed in *Dover* v. *Alexander* (2 Hare, 275; 12 L. J. Ch. 175), and *Dilley* v. *Matthews* (13 W. R. 676), are clear authorities in favour of the plaintiffs; particularly the judgment in *Beachcroft* v. *Beachcroft*, every word of which supports our contention. However much that case may have been commented on in subsequent ones, it has never been overruled; nor has there been any case which has decided that even if future legitimate children may have been intended, present illegitimate ones cannot take concurrently with them.

[STUART, V.C.—If you are right in saying that this testator meant "illegitimate" children, must he not of necessity have intended such as had at the date of the will acquired the reputation of children?]

If so, the plaintiffs had then virtually acquired that reputation. *Owen* v. *Bryant* (2 De Gex, M. & G. 697; 21 L. J. Ch. 860) was a case of a gift to a class of children, some of which were legitimate and the others were not. Here, however, we have no concurrent legitimate children.

[STUART, V.C.—If the bequest is to children as a mere class, it must mean children not illegitimate.]

But the bequest here is equivalent to one to the "present and future children" of Mary Crook, under which words it is plain that present illegitimate children might take concurrently with future legitimate children. The words of description in this will are quite sufficient for the purpose; and in *Wilkinson* v. *Adam*, ubi supra, Lord Eldon distinctly affirmed that the Court never would reject words of description in such cases as these. *Evans* v. *Massey* (8 Price, 22, 23), is a direct authority in support of the proposition that if there is sufficient certainty in describing the objects of the testator's bounty to preclude the necessity of having recourse to proof *aliunde*, a bequest to "natural children" is a good bequest. *Holt* v. *Sindrey*, ubi supra, and *Savage* v. *Robertson*, ubi supra, do but carry out the doctrines laid down in *Wilkinson* v. *Adam*, ubi supra. In *Pratt* v. *Matthew* (22 Beav. 328; 25 L. J. Ch. 409; on appeal, 25 L. J. Ch. 686), and many other cases it has been the constant remark of the Judges, that although the intention of a testator to benefit particular objects has been clear, the arbitrary rules of law have alone forbidden the Court to give effect to that evident intention. In this case, however, there is in reality no rule of law against the right of the plaintiffs, but only a legal presumption of intention to give to legitimate children only, which is rebutted by the words of the will, and the intention of the testator to benefit the existing children is abundantly clear.

Mr. J. H. Palmer, for the defendant Robert Crook.—*Holt* v. *Sindrey*, ubi supra, is in favour of this defendant. So, also, is the case of *Barnett* v. *Tugwell* (31 Beav. 232; 31 L. J. Ch. 629). I am not contending for the child begotten and born after the date of the will, but for that one of whose existence and origin the testator was well aware when he made his will; and whom, when he speaks of "the children" of his daughter Mary Crook, it is quite impossible to say he did not contemplate.

STUART, V.C.—I have more than once had occasion to say that I consider

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the case of *Beachcroft* v. *Beachcroft* and the principle upon which it was decided, and also the case of *Fraser* v. *Pigott* (1 You. Ex. Rep. 354) to be inconsistent with the other authorities upon this subject. Sir Thomas Plumer, in his judgment in the case of *Beachcroft* v. *Beachcroft*, proceeded upon this principle: You must suppose that when a testator makes a gift by his will to children as a class, when he is sitting down to make his will, and is intending a bounty to the children of a certain individual, he must have in his mind some present person to fill that character. Sir Thomas Plumer's words (at p. 443, *ubi supra*) are these: "The general presumption is, that a man sitting down to make his will designs a benefit to some existing object; he seldom looks only to the future." No doubt Lord Lyndhurst seems to have satisfied his mind that that was a proper principle. But when you find that a number of Judges have —and Lord Eldon repeatedly has—disapproved of that principle, and decided cases in a manner wholly inconsistent with it, it is impossible to say that any Judge would now act safely in adopting the principle or following the authority of *Beachcroft* v. *Beachcroft* and *Fraser* v. *Pigott* to the disregard of those other decisions. What Lord Eldon's opinion was cannot be shewn in any way more strongly than by reading two lines of his judgment in *Harris* v. *Lloyd* (Turn. & R. 310). That was a case in which by a will the testator gave 5,000*l.* in trust for "all and every the child and children of his son Edward Harris, if more than one, to be equally divided between them, share and share alike, the shares of the sons to be vested at twenty-one," and so on. It was in evidence in that case that there were children of Edward Harris whom the testator treated as his grandchildren, but that Edward Harris had never been married to anybody. There was a woman with whom he cohabited who was the mother of his children. Lord Eldon (at p. 313) says this: "I have not the least doubt that this testator meant illegitimate children; but I am clearly of opinion that there is not enough upon the face of the will to authorize me to carry that intention into effect." There can be nothing stronger than that. The present case is not like the case of *Holt* v. *Sindrey*, where the fact of the illegitimacy was wholly unknown to the testator. In that case the testator had every reason to believe, and probably both the husband and the wife believed, that their marriage was a lawful one. In that case I was of opinion that there were sufficient words of description upon the face of the will, and I therefore felt myself authorized in holding that the children of that marriage (although it was not a lawful marriage) were described in the will and were entitled to take.

But here the case is exactly the converse. This testator knew everything. It is not suggested that there was any fact unknown to him. The marriage was not a legal marriage. The children were not lawful children. If his daughter had married another person and had had children born in lawful wedlock, clearly those children would have been entitled, and that too under the very same description which I am now called upon to say means "illegitimate" children. That would be to my mind contrary both to principle and to authority. I cannot, therefore, adopt that view. The demurrer must be allowed.

MALINS, V.C., July 17, 1869.

In re THE GENERAL PROVIDENT ASSURANCE COMPANY (LIMITED); CROSS'S CASE.

38 L. J. Ch. 583; 17 W. R. 1006.

Company—Contributory—Release of Liability—Notice to Shareholders—Practice—Affidavits filed after Commencement of Case.

COMPANY.—*A shareholder transferred* 150 *shares to the manager and a director "on behalf of the company," on the understanding that the value of them at par should be credited to him as payment in full on other* 50 *shares, of*

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which he retained possession. The company had now power to hold its own shares:—Held, *that the transaction being ultra vires, he could not thus divest himself of his liability without notice to and the knowledge of all the individual shareholders; and that he was still a contributory for the whole number of* 200 *shares.*

Affidavits filed while a case stands over part heard will not be admitted in evidence if objected to.

In the year 1867, Mr. Cross was the holder of 200 shares of 10*l.* each in the above company, in respect of which he had paid 353*l.* In August of that year he transferred 150 of these shares, as recorded in the following board minute of the company, dated the 28th and 29th of August, 1867: "The committee registered the following transfers: viz., 50 shares, B. C. Cross to Thos. Heywood, on behalf of the company; 50 shares, B. C. Cross to W. P. Clift, on behalf of the company; 50 shares, B. C. Cross to Thos. Heywood, on behalf of the company; and it was resolved that Messrs. Heywood and Clift be authorized, as transferees, to hold the shares respectively transferred in the name of the company, and that they be hereby indemnified from any personal liability attached to the same, such shares to be counted as unappropriated and open for re-allotment." Heywood was the manager, and Clift was a director of the company. The company had no power to hold shares of their own.

The company was wound up upon petition in June, 1868, and Mr. Cross's name was retained by the chief clerk on the list of contributories for the whole number of 200 shares originally held by him. The summons was adjourned into Court on the application of Mr. Cross. According to an affidavit filed by Cross, the above transfers were made under the following circumstances. The company owed their bankers a sum of 1,500*l.*, for which some of the directors were personally liable; the bank holding their private security as well as the company's bond for the debt. Cross being applied to to assist the company in its difficulties, consented to do so on the following terms: viz. that the directors should individually purchase 150 of his shares at par (*i. e.*, at 30*s.*) and apply the purchase-money, 225*l.*, to paying up in full his remaining 50 shares; and Cross, on his side, should relieve the directors of their personal liability to the bank. These conditions were accepted, and Cross executed three transfers of 50 shares each to Heywood, Clift, and Broddigan (another director). Broddigan, however, objected to take the 50 shares transferred to him, and they were accordingly also transferred to Heywood, and the transfers were registered as above recorded. Cross denied that he was aware that the transfers had been registered with the words "on behalf of the company," or that he ever intended that the shares should be so transferred, or should be held by the transferees otherwise than as their own individual property; and he contended that the transaction was *bona fide*, and that he was no longer a contributory in respect of these 150 shares.

The official liquidator contended that, the transfers having been made to officers of the company, and the money previously paid by Cross in respect of the 150 shares not having been transferred to the credit of the transferees in their share account, but having been applied to make the 50 shares remaining in Cross's name fully paid, the transaction was not *bona fide*, but was simply intended to relieve Cross of all liability in respect of his shares in the company. In support of this view an affidavit of the secretary to the company was filed, shewing that Cross had been regularly informed from time to time as to the negotiations for the transfer of his shares.

Mr. Glasse and *Mr. N. Higgins*, for the official liquidator, cited *Brotherhood's case* (31 Beav. 365; 31 L. J. Ch. 861); *Spackman's case* (37 L. J. Ch. 752; L. R. 3 H.L. 171); *Stanhope's case* (35 L. J. Ch. 296; L. R. 1 Ch. Ap. 161); *Ex parte Morgan* (1 M'N. & G. 225; 18 L. J. Ch. 265); *Richmond's case* (4 Kay & J. 305); *Musgrave's case* (37 L. J. Ch. 161; L. R. 5 Eq. 193); *Eyre's case* (31 Beav. 177; 31 L. J. Ch. 640),—contending that the transaction was *ultra*

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vires of the directors, as the company could not hold its own shares. It was not a *bona fide* transaction, but a collusion between Cross and the directors without the knowledge of the other shareholders, who were damnified by the diminution of his liability.

Mr. Cole and *Mr. Bush*, for Cross, cited—*Reeve's case* (10 W. R. 817); *Orpen's case* (11 W. R. 741; 32 L. J. Ch. 633 (see 33 L. J. Ch. 67)); *Hollwey's case* (1 De Gex & Sm. 777); *Grady's case* (1 De Gex, J. & S. 488; 32 L. J. Ch. 326),—insisting that the directors were personally liable on these shares; and the official liquidator could not require Cross also to be liable. The entry in the minute-book, representing that the transferees held the shares on behalf of the company, was made without Cross's knowledge and could not affect him. The case was really one to be decided on the facts.

MALINS, V.C. discussed the evidence and came to the conclusion that Cross's original intention had been, as set out in his affidavit, to transfer his share to the transferees named individually; but that, the proposed transferees having objected to undertake any personal responsibility, the transfers had been made to them on behalf of the company with his knowledge and assent, as sworn in the secretary's affidavit. His contract, as originally proposed, had doubtless been that he should be relieved of his shares by the directors individually; but that proposition had not been acceded to, and, according to the final and only contract made and recorded in the minute of the 29th of August, the transferees had taken his shares on behalf of the company.—His Honour then proceeded to say:

If this be the correct view of the facts, the law is perfectly clear. The cases cited have no longer any application. This is a company which has no power of buying these shares; therefore, directly it is shewn that the real transaction was that the directors or managers took these, there is an end of the question; because it is admitted that, *qua* company, they had no right to buy. Mr. Cole particularly relied on *Orpen's case*. I need not go through *The Cattle Insurance Company* and other cases, from *Morgan's case* downwards. *Spackman's case* is only a final embodiment of all those decisions, and all concur in this, that wherever there is a contrivance between the company and the shareholder, by which the company takes upon itself the responsibility of the shares without the knowledge of all the individual shareholders, that will not bind the shareholders; but they will be entitled to look to the shareholder whose shares are so attempted to be got rid of as one of the contributories, liable to meet the common liabilities of the company. Then, with regard to *Reeve's case*, that has no application to this. *Orpen's case*, which is rather relied upon, is a case in which the only ingredient existing here was wanting. *Orpen's case* is one in which Orpen agreed to transfer his shares to one of the managers of the company. When the transfer was produced, it was stated to be on behalf of the company. There was great doubt whether these words formed part of the transaction. Kindersley, V.C. had a jury before him to try whether these words formed part of the original transfer; and they found they did not. The consequence was, that it was a simple transfer. Whether the money was paid to Orpen or not did not matter; he assigned simply to Charlton as an individual; I think that is no authority against this.

The result, therefore, to which I have arrived is this, that this was a transaction to attempt to diminish Mr. Cross's liability by throwing the liability on the company; that is ineffectual, because the company are not authorized to purchase shares. Therefore, I am very sorry (because I think Mr. Cross has been unfairly treated by the company) that I am unable, for these reasons, to do anything else than say he must be put on the list for the 200 shares.

Mr. Glasse asked for costs, and referred to the words of Vice Chancellor Giffard in *Gower's case* (L. R. 6 Eq. 82): "I think it right that, where a contributory raises a costly contest of this kind, he should, except under very special circumstances, pay the costs."

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MALINS, V.C.—If you press for the costs, I do not see any grounds for refusing them.

This adjourned summons being opened and part heard on the 10th of July, stood over till the 17th. On the 16th, Cross filed a further affidavit, to which the other side then filed affidavits in reply. Malins, V.C. said, as a general rule, he would not allow evidence to be filed after a case had commenced; but that in this case, as it had been replied to, he would admit it.

MALINS, V.C., June 4, 5, 1869.

In re BROOKMAN'S TRUSTS.

38 L. J. Ch. 585; L. R. 5 Ch. 186 (n); 17 W. R. 818: reversed, [1870] E. R. A.; 39 L. J. Ch. 138; L. R. 5 Ch. 182; 22 L. T. 891; 18 W. R. 199 (L. J.).

Referred to, *Brookman* v. *Smith*, [1871] E. R. A.; 40 L. J. Ex. 161; L. R. 6 Ex. 291; 24 L. T. 625; 19 W. R. 1029 (Ex.): affirmed, [1872] E. R. A.; 41 L. J. Ex. 114; L. R. 7 Ex. 271; 26 L. T. 974; 20 W. R. 906 (Ex. Ch.).

Marriage Articles—Covenant to give by Will—Death of Object of Covenant after attaining absolute Interest in the Lifetime of Covenantor.

VESTED, CONTINGENT AND FUTURE INTERESTS.—*Testator covenanted by articles made on his daughter's marriage to leave to her by will a "child's share" in his real and personal estate, with remainder to her children on their attaining twenty-one, with remainders over. One child, a son, attained twenty-one, and died in the testator's lifetime*:—Held, *that such son on attaining twenty-one took an absolute interest in the child's share, which passed at his death to his next-of-kin, irrespective of the date of the death of the testator or of the dispositions of the testator's will.*

Jones *v.* How, 7 Hare, 267; 19 L. J. Ch. 324, *discussed, and disapproved of.*

Petition for payment out of Court, presented under the following circumstances:

By marriage articles, dated the 11th of April, 1823, Thomas Brookman covenanted with the trustees therein named that if his daughter Elizabeth Ann Brookman, the intended wife, should survive him (Thomas Brookman), or dying leave any child or children, he would by his last will and testament give, devise or otherwise well and effectually settle and assure to proper trustees, to be named by himself, "a child's share or equal part with all and every his other children or the issue of deceased children, such issue taking only their father's or mother's share," of all the real and personal estate which he, Thomas Brookman, should die possessed of, to the use of Violett (the intended husband) for life, with remainders to trustees to preserve contingent remainders, with remainder to the said Elizabeth Ann Brookman for life, with remainder to trustees as before, with remainder to the child or children of the intended marriage, or any one or more or all or every of them, as the husband or wife or the survivor should appoint, and in default of such appointment to the use of such child or children equally as tenants in common and their heirs and assigns; and in case any one or more of the said children should die under twenty-one years without leaving issue surviving, then, as well as to the original share or shares of as the share or shares surviving or accruing to each child so dying under twenty-one and without leaving issue, to the use of all and every other the child and children of the marriage, equally to be divided between or among them; if more than one, share and share alike as tenants in common, and their several and respective heirs and assigns; and in case all the children but one should die under twenty-one, and without leaving issue as aforesaid, or if there should be but one such child and such one should attain twenty-one, or if dying under

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twenty-one should leave issue, then to the use of such only remaining or only child, his or her heirs and assigns; and in case there should be no child of the marriage, or if all such should die under twenty-one and without any of them leaving issue, to the use of the heirs and administrators (according to the tenure and quality of the same property) of the said Elizabeth Ann Brookman as if she had died sole and unmarried. Then followed a proviso for the cesser of the husband's interest in case of bankruptcy (which event happened), in which case the trustees were directed to pay the rents and profits of the said trust estates to the wife for her separate use during the joint lives of the husband and wife; and in case she should be dead at the time of such bankruptcy, or should afterwards die leaving the husband surviving, then the trustees were to hold the said trust estates upon the same trusts as if the husband were dead; and it was further declared and agreed that the last will and testament of Thomas Brookman and the settlement on the marriage aforesaid should be penned in the most full, clear, explicit and liberal manner to effect the intention of the parties thereto, and should contain all usual powers, provisoes, covenants, &c. It was also provided that in case Elizabeth Ann Brookman died in the lifetime of Thomas Brookman without issue surviving her at the time of her decease the above covenant as to a child's share should cease, it being agreed that Violett, the husband, should have no claim or title to it; and there was a covenant that all property acquired by the wife during the coverture should be settled upon the trusts thereinbefore declared of the property settled by Thomas Brookman.

Thomas Brookman died in 1849, having by his will, dated the 23rd of January, 1840, devised a farm at Stock, in Somersetshire, to James Brookman in fee, subject to the payment of the sum of 149*l*. 7*s*. 6*d*. to trustees therein named, which he bequeathed to them upon the trusts thereinafter declared; and he devised a house and lands at Uphill to Fanny Brookman in fee, subject to the payment of a sum of 267*l*. 16*s*. 3*d*. to the same trustees, which he bequeathed to them upon the same trusts thereinafter declared. And after reciting the said marriage articles, and that he was desirous of specifically performing the said covenant or agreement according to the true intent and meaning of the said settlement, he, the said testator, in part satisfaction and performance thereof, gave to the same trustees, their heirs, executors, administrators and assigns, according to the respective natures and tenures of the same, all that freehold and leasehold property therein described upon the trusts thereinafter declared; and after bequeathing his residuary personal estate in manner therein mentioned, he directed the said trustees to stand possessed of one equal fourth part of his residuary personal estate, together with the said two sums of 149*l*. 7*s*. 6*d*. and 267*l*. 16*s*. 3*d*. so charged and made payable to them as aforesaid upon the trusts thereinafter declared; and he declared that the freehold hereditaments devised as aforesaid to the said trustees should from and after his decease be to the use of the said Violett and his assigns until death or bankruptcy, and after such bankruptcy, in case the said Elizabeth Ann, his wife, should be living, upon trust for her separate use during the joint lives of herself and her husband without power of anticipation; and after the decease of Violett, in case the said Elizabeth Ann, his wife, should then be living, to the use of her and her assigns for her life without impeachment of waste, with divers remainders over for the benefit of all and every or such one or more exclusively of the others or other of the children or child of the said marriage as the husband and wife should jointly or as the survivor should appoint, and in default of appointment, to the use of all and every the children of the marriage, as tenants in common, with benefit of survivorship in case of any child dying under twenty-one without leaving issue; and in case all such children but one should die without issue, or if there should be but one, then as to the entirety of such freehold hereditaments to the use of such remaining or only child in fee; and in case every child of the marriage should die under twenty-one without leaving issue, then to the use of the heirs and assigns of his daughter, the said Elizabeth Ann Violett, as if she had continued sole and unmarried; with remainder to the testator's right

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heirs in case the said Elizabeth Ann died in his lifetime and without leaving issue surviving her; with a declaration of trust with respect to the leasehold and personal property and the two specific sums of money thereby bequeathed similar, as near as might be, to those declared of the freehold hereditaments, but so as not to vest in any tenant in remainder who should not attain twenty-one; and if no person should acquire a vested interest in the said leasehold premises and personal property and sums of money aforesaid, then in trust for the next-of-kin of his said daughter Elizabeth Ann Violett, according to the statute; and the testator declared that the two several sums of 149*l.* 7*s.* 6*d.* and 267*l.* 16*s.* 3*d.*, when added to the value of the said freehold and leasehold premises by him devised and bequeathed as aforesaid to the said trustees, their heirs, executors, administrators and assigns, upon the trusts thereinbefore declared concerning the same, in his estimation made the same of the entire value and amount of "one child's share or equal part" of all his real and personal estate, lands, tenements and hereditaments, according to the true intent of the aforesaid covenant.

There were three children only of the marriage, all of whom died in the lifetime of the testator. One of them only, a son named William, attained twenty-one years, but he died a bachelor.

Violett, the husband, became insolvent in 1850, and thereby ceased to take any interest in the trust property. In 1855 he joined with his wife in conveying and assigning all the trust property devised and bequeathed to the said trustees by Thomas Brookman, "or otherwise subject to the trusts of the settlement of 1823," to Lanatt Smith, upon certain trusts for the benefit of Elizabeth Ann Violett for her life, and after her death as she should by deed or will appoint. Lanatt Smith died in 1860.

Elizabeth Ann Violett died on the 24th of June, 1868, having by her will, dated in 1860, and made in pursuance of the above power, directed that all her estate and interest under the above deed of 1855 should be conveyed and assigned to George Smith, the respondent to this petition, upon certain trusts for sale, &c.; and she gave and bequeathed all the residue of her estate to the said G. Smith absolutely, and appointed him her executor.

The respondent, George Smith, had also become, through various mesne assignments, the sole surviving trustee of the will of Thomas Brookman, and in that character he paid into Court, on the 6th of November, 1868, the sum of 777*l.* 10*s.* 8*d.*, which was admitted to be the amount of the one-fourth share given in trust for Elizabeth Ann Violett by the said will of Thomas Brookman, including the sums charged on the properties devised to James and Fanny Brookman.

The petitioners, James and Fanny Brookman, were the next-of-kin of Elizabeth Ann Violett, if she had died sole and unmarried. And they now presented this petition praying that the sum of 777*l.* 10*s.* 8*d.*, paid into Court as aforesaid, might be transferred to them, on the ground that under the will of Thomas Brookman and in the events that had happened they were entitled thereto.

The respondent, George Smith, on the other hand, claimed the fund as sole and residuary legatee of Mrs. Violett, contending that, under the settlement of 1823 and in the events that had happened, she had power to dispose of the trust estate by will.

Mr. Hardy and *Mr. Everitt*, for the petitioners.—We say that Mrs. Violett had no power of appointment, and that the appointment to the respondent, George Smith, is good for nothing; and we claim under the gift over in the testator's will. William, the only child of Elizabeth Ann Violett who attained twenty-one, died in the lifetime of the testator, and consequently could not take under his will; his interest never vested. All the children of the marriage pre-deceased the testator, who therefore ceased to be bound by the covenant in their favour. The testator's covenant to give by will gave no specific lien to any of the *cestuis que trust;* had he disposed of all his property by deed in

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his lifetime, their only remedy would have been by action on the covenant. The proviso in the articles for the avoidance of the covenant, in case Mrs. Violett died in the testator's lifetime without leaving issue surviving, shews that no child was intended to take who did not survive his mother. If the contest is between the articles and the will, the will, as the last of the two, must prevail—*Remnant* v. *Hood* (27 Beav. 74). They also cited *Jones* v. *How* (7 Hare, 267; 19 L. J. Ch. 324); *Eyre* v. *Monro* (3 Kay & J. 305; 26 L. J. Ch. 757); *Kay* v. *Crook* (3 Sm. & Gif. 407); *Jones* v. *Martin* (5 Ves. 265 n.).

Mr. Glasse and *Mr. Jason Smith*, for the assignees in bankruptcy of Mr. Violett, the husband.—We demand to be heard, although we have not been served with the petition. We also say the appointment to George Smith is bad, but we say the share vested under the articles in the deceased son William, who attained twenty-one, and we claim as assignees of the husband, who took the share of his deceased son William as his next-of-kin. There is a covenant by the husband to settle after-acquired property (which clearly means property other than that coming under the testator's covenant) on the same trusts as those previously declared. A settlement under that covenant must have given the deceased son William a vested interest; and the testator's covenant must receive the same construction. *Jones* v. *Howe* (ubi supra) does not come near the present case. *M'Ghie* v. *M'Ghie* (2 Madd. 368), which might be cited against us, is defective in the marginal note. But *Barkworth* v. *Young* (4 Drew. 1; 26 L. J. Ch. 153) is to the point. There a demurrer to a bill for the performance of a covenant similar to this was overruled, because the testator might have fulfilled his covenant by dying intestate. If this had been a settlement of real estate upon certain trusts, followed by a covenant by the testator to leave one quarter of the real estate of which he should die possessed on the same trusts, could the testator have left it on different trusts? Or if the husband and wife had exercised their joint power of appointment as provided by the articles in favour of a child, and that child died in the lifetime of the testator, could the subsequent death of the child deprive him of his vested interest under the appointment?—*Graham* v. *Wickham* (1 De Gex, J. & S. 474; 32 L. J. Ch. 639).

Mr. Speed, for the respondent, George Smith.

Mr. Hardy, in reply.—If the claim of the father succeeds, it will be directly in the teeth of the articles, which declare that he shall take no interest. The articles only impose on the testator the obligation of devising a certain portion of his property in substantial accordance with certain declared trusts.

[MALINS, V.C.—I go with you to this extent,—that the testator was not bound to do it otherwise than by will.]

Then we must look at all the provisions in the articles as if they were in the will, and none can take who could not take under the will. The marriage articles are a good present settlement as to the after-acquired property; as to the child's share they are entirely executory. *Barkworth* v. *Young* (ubi supra) is not material, but it recognizes the principle of *Jones* v. *How* (ubi supra), and is conclusive that a will, though made under the obligation of marriage articles, is to be construed as a pure will under the Wills Act.

MALINS, V.C. (after referring to the marriage articles and the will, and discussing the circumstances of the case, proceeded as follows:)—Upon the view I take of the case it is perfectly unnecessary to enter into the question of what the operation of the will is, because I am of opinion that the rights of these parties do not depend upon the will, but upon the marriage articles.

It has been argued, and the case of *Jones* v. *How* was relied upon to shew that, inasmuch as these marriage articles are a contract to provide for the husband and wife and the issue of the marriage, no person can take anything by virtue of these articles who did not survive the testator, because no person can take under the will of a man unless he be in existence at the time of the death of the testator, with the single exception that is made by the 33rd section

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of the Wills Act (1 Vict. c. 26). There is no doubt that view is correct: if the contract be to make a will in favour of particular objects, and these objects do not exist at the death of the testator, the contract falls to the ground, and has no operation. In *Jones* v. *How* the question was simply this: the testator by a contract made on the marriage of his daughter covenanted to leave to his daughter absolutely, not to her and her children, "one equal eighth part, or such other part as shall be an equal share with all and each of his children and child of all estates, moneys, real and personal estate, of which he should die possessed." The daughter died in the testator's lifetime; by will, therefore, she was of course incapable of taking anything; had the testator made a will, and had the Wills Act not been in operation, there would have been simply an intestacy.

The case being sent by Sir J. Wigram, according to the unfortunate practice of the day, for the opinion of a Court of law, a question was submitted to the Court of Common Pleas, whether on the events which had happened there was any subsisting contract on the part of the testator, the contract being that he would leave an equal share to her as well as the other children, and the answer of the Court of law was, that there was no breach of contract, inasmuch as he had only contracted to leave by will; and there being no person to take under the will, the contract had no operation.—[His Honour then read and commented on the judgment of Wigram, V.C. as reported (7 Hare, pp. 274-6), and referred more especially to the doubt expressed by him whether the testator might not by will have done for his daughter (dying in his lifetime without issue) that which the Wills Act would have done for her if she had left issue living at her death, and proceeded:]—Now, what ought to have been the decision there? There was a contract by a man for valuable consideration that he would by his will leave to his daughter an equal provision with his other children. If he had performed that covenant, which he ought to have been compelled to do, or his estate left to bear the consequence, what would have been the result? You would have found in that will a bequest to the daughter of one-fourth of his property; if she had left children, the 33rd section of the Wills Act would have come into operation, which would have made the bequest to the daughter take effect; and what would have been the consequence? The property would have vested in her; if the husband had survived her he would have taken it, and have provided for his family; and if he had died in her lifetime, her children as next-of-kin would have taken it; or, if the covenantor had died intestate, her children as her representatives would have taken her share under the intestacy, and the object would have been secured; instead of which, by the narrow construction put upon it by a Court of law and acquiesced in by Sir J. Wigram, the whole object was defeated and came to an end. I entirely dissent from that case, which I should myself have decided in a directly contrary manner, and I decline to follow it in the present instance.

Now, what is the object of the covenant in this case? The covenantor's daughter being about to marry, and he being of course ignorant what his circumstances would be at the time of his death, he did not think fit to bind himself to give her any particular sum. Had he done so, had he covenanted that his executors should after his death pay 10,000*l*., to be settled on the husband for life, the wife for life, remainder to the children attaining twenty-one, nobody could have said that a grandchild was not an object of the trust; the children would have taken a vested interest at birth, and the moment the son William attained twenty-one he would have taken an indefeasible vested interest in that 10,000*l*., which he could have sold or settled, or otherwise dealt with. But here, instead of binding himself to a particular sum, he says, "You shall have the same as my other children have; but if neither you nor any of your children are living at my death, it is unnecessary to provide for them." His contract is this: "If Elizabeth Ann Brookman survive Thomas Brookman," which she did, "or dying leave any child or children, or issue of child or children," which she did not; that is not necessary,—"then the

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said Thomas Brookman will by his last will and testament give, devise and otherwise well and effectually settle and assure," not to her or her children, not to persons incapable of taking, but "to trustees to be named by him, a child's share or equal part with his other children," to be held in trust for the husband till his bankruptcy (which occurred), then to the daughter for her life, with remainder to the child or children as they shall appoint, and in default to all the children, with a proviso that if any die under twenty-one it shall go over to those who attain twenty-one, and if all die under twenty-one over to other parties, *i.e.*, the next-of-kin of the daughter. The son William attained the age of twenty-one, the period for final and absolute vesting fixed by this settlement; he was clearly an object of its provisions; how, then, am I to hold that he is not to take under it, because he happens to die during the life of the testator, and because the amount of the provision was to remain in uncertainty until after the death of the testator? No one doubts, and the authorities are clear, that the testator had full power to alienate all his property up to his death, and that the covenant only bound such property as he might choose to leave.

Besides the case of *Jones* v. *How*, that of *Barkworth* v. *Young*, before Kindersley, V.C., was relied upon; but the judgment in that case scarcely amounted to a decision, being on demurrer, and even so far as it goes it contains an intimation of Sir Richard Kindersley's opinion that a provision of this kind to make a settlement by will does not come to an end by the death of all the children.

Mr. Hardy relied also upon the clause in the articles providing that if the wife should die in the lifetime of the husband without issue surviving at the time of her decease, then the covenant should cease, "it being understood that the said husband should have no claim or title to such child's part or share." The answer to that is, it has no operation because the event did not occur. True, the consequence of its having vested is, that the father takes by the devolution of the property; but I cannot hold that the father can be excluded from taking that which was the absolute property of the son when he attained his majority. The proviso as to after-acquired property goes far to carry out the same view. If I acceded to Mr. Hardy's argument, the consequence would be that if the wife acquired property during the coverture, this contract having, in the events which have happened, come to an end, there would be no settlement of that property whatever; for if there is no settlement of the father's property, neither is there any of the husband's. Upon the whole, I am of opinion that the rights of the parties do not depend on the will, but that the interest in the "child's share" vested finally and absolutely in the only son, William, on his attaining twenty-one, by the marriage articles. The consequence is, that it will go in the usual course of law to his father on his producing letters of administration. The petition must be amended *pro forma* by making the assignee in bankruptcy of the father a respondent.

MALINS, V.C., July 20, 1869.

COOPER *v.* LAROCHE.

38 L. J. Ch. 591.

Will—Conversion—Tenant for Life and Remainderman — Capital and Income.

ESTATE.—*A testator directed his trustees to allow his estate to remain invested as it might be at his decease, if they should think fit, and, subject to such direction, to convert it and pay the income to his widow for her life, remainder over. The trustees proceeded to realize his estate as soon as possible after his death, but in the interval certain ships in which he was interested as*

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partner earned freight, and dividends were paid on certain shares held by the testator in partnership; on the sale of these ships and shares a considerable profit was also realized:—Held, *that the tenant for life was not entitled to the freight or dividends or to the profits on the sales as income, but that they formed part of the capital, and that she was entitled to interest thereon from the death of the testator.*

Testator, at the time of his death, in 1860, was in partnership with a Mr. Fenwick as shipowners and merchants. The firm were part owners of various ships, and also held shares in a colliery and an assurance company. By his will, made in 1860, he gave to trustees, of whom his wife was one, all his estate, upon trust, if they should think fit, to continue such part of his estate as might at the time of his decease be invested in any mine, ship, mortgage or other investment or security, and subject to such discretion, to get in and convert into money all other his estate, and (after payment of legacies, &c. therein mentioned) to invest the residue as therein directed, and from time to time, with the consent of his wife during her life, and after her decease, with the consent of Elizabeth Ann Rowland, thereinafter mentioned, to vary the securities, and to pay the income to his wife or permit her to receive the dividends, interest and annual produce to arise from the stocks, funds and securities on which his estate might from time to time be invested, for her life, and after her decease, to pay the same to Elizabeth Ann Rowland for her life as therein directed; and after the decease of Elizabeth Ann Rowland, over.

This bill having been filed for the administration of the estate, the Chief Clerk by his certificate found that the share of the testator in the said partnership had been realized within eighteen months after his death, and had produced a gross sum of 28,777*l.*, and he included in that gross sum the profits which had been made by the sale of the ships and shares beyond the amount originally paid in respect of them, and also the sum of 3,030*l.* which had been earned as freight by the ships belonging to the partnership in the interval between the death of the testator and the realization of his partnership assets, and also a sum of 330*l.* which had accrued as dividends upon the colliery and other shares of the partnership in the same interval. He also found that the course of dealing in the partnership had been to open an account in the partnership books with respect to each venture, debiting it with the original cost, with losses and with interest, and crediting it with the sums received or earned in the venture, and only on the sale of the property the subject of the venture to balance the books and carry to the debit or credit of each partner the profit or loss made, and to consider such profit or loss as made on the day of closing the account; this course of dealing had been adopted in making up the accounts for the purpose of realizing the share of the testator. He also found that the trustees had paid interest at the rate of 5*l.* per cent. on the said gross sum of 28,777*l.* to the widow of the testator, the first tenant for life.

The cause now came on for further consideration. The question was whether the Chief Clerk was right in adding the aforesaid sums of 3,030*l.* freight and 330*l.* dividends, to the capital of the testator's estate, allowing the widow interest only thereon, or whether the widow was entitled to the corpus of these sums as being "annual produce arising from the securities on which the estate was invested."

Mr. Cotton and *Mr. Hall*, for the plaintiff.

Mr. Glasse and *Mr. C. Russell*, for those in remainder, cited *Brown* v. *Gellatly* (L. R. 2 Ch. 751); *Mousley* v. *Carr* (4 Beav. 49; 10 L. J. Ch. 260).

Mr. J. Pearson and *Mr. Cracknall*, for the widow.—In the cases cited against us, the sales are expressly directed to be made for the benefit of the estate; here the testator distinctly says that his widow shall have the benefit of continuing the investments as he leaves them at his death. They cited *Green* v. *Britten* (1 De Gex, J. & S. 649); *Johnston* v. *Moore* (27 L. J. Ch.

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453); *Ibbotson* v. *Elam* (L. R. 1 Eq. 188); *In re Maxwell's Trusts* (1 Hem. & M. 610; 32 L. J. Ch. 833).

MALINS, V.C.—I think the case is concluded by authority; but independently of authority, I think the account has been taken in a manner very favourable to the widow. The testator being engaged in trade principally as a shipowner, and knowing therefore how desirable it was that there should be no immediate direction to convert his property, as he might die at a time when the markets were low, directs his trustees, "if they should think fit, to continue such part of his estate as might at the time of his decease be invested in any mine, ship, mortgage or other investment or security of whatever kind, and subject to such discretion to convert it," &c. (quoting the words as above.)—Now, it has been contended that the widow is entitled to the produce actually made by the ships and mines of which the testator was the owner, or in which he was interested at his death.—[His Honour then referred to the facts as found by the chief clerk, and proceeded]—The principle upon which the life estate of the widow has been settled has been to treat all the money as capital, including the profits, and upon that capital to give her 5*l.* per cent. from the death of the testator. She is not satisfied with that, but asks for the profits actually made. I was at first considerably impressed with that view of the case, because it certainly does appear that when a man says, "I direct that my property may be continued as I leave it, and my wife, who is tenant for life, is to have the profits of the investment," that she is entitled to the profits produced from the state of the investment as it existed at the time of his death; but further consideration has led me to conclude that that is not a correct view of the matter, especially in this case, where there was no continuance of the trading, and the property was realized as soon as circumstances would permit. It was clearly the most beneficial thing for the widow that she should take the capital as it stood at the death of the testator, including any accretions by the sale, and thus secure her income whatever happened. The opposite view of the case might have deprived her of any income; for if the ships had traded badly, she might have had no income, or actually have lost money, whereas now she is secured an income at 5*l.* per cent. on the value of the ships, &c. But the case is concluded by authority. There is the case of *Mousley* v. *Carr*, where Lord Brougham reversed the decision of Sir J. Leach, and held that the widow was not entitled to any increase on the testator's capital. Mr. Pearson seemed to admit that if in this case the testator had said "to carry on for the benefit of my wife and those in remainder," it would have been governed by *Mousley* v. *Carr*. But the trustees are empowered to continue the investments generally, and not for any period in particular, thus plainly shewing that they were to do it for the benefit of the tenant for life and those in remainder as well. The words are, in fact, implied in the plainest terms, for the trustees are to do so "as long as they think fit"; thus they may do it during the life of the wife or after her death; in other words, do it for the benefit of the tenant for life and those in remainder; and *Mousley* v. *Carr* applies. In *Brown* v. *Gellatly* Lord Cairns began by shewing that *Green* v. *Britten* had no application, because in that case there was an absolute prohibition against converting the ships for seven years, and the tenant for life was therefore entitled to the profits made during that time; but, he said, in the case then before him there was no indication of an intention that the ships should remain unconverted for any specific time; and he went on to say, "in giving to his executors a power to sail the ships for the purpose of making a profit, the testator does not give it as a power to be exercised for the benefit of the tenant for life as against the remainderman, but for the benefit of the estate generally." I must follow the principle of these cases, and must take my law from them, if they are inconsistent (as I do not think they are) with *Johnson* v. *Moore* and *Ibbotson* v. *Elam*, cited against them; and the consequence is, in adjusting the rights of the tenant for life, and those in remainder, it must be on the principle of ascertaining the value of the property at the death of the testator, and giving the tenant

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for life 5*l.* per cent. interest from that date. In this case strictly 4*l.* per cent. only would have been allowed; but 5*l.* per cent. has been given in chambers, and has not been objected to, and will therefore stand.

Declare, that the widow is not entitled to receive for her own benefit the proportion of profit arisen since the death of the testator to his estate from the sale, freight or earnings of the ships, or from the sale of or the dividends on the shares; and declare, that the moneys arising from the sale of the ships and shares, and the sums accruing from the freight, earnings and dividends of the same respectively formed part of the capital of the testator's estate.

JAMES, V.C., June 7, 8, 1869.

AMORY *v.* BROWN.

38 L. J. Ch. 593; L. R. 8 Eq. 663; 20 L. T. 654; 17 W. R. 849.

Referred to, *Harris* v. *Rothwell*, [1887] E. R. A.; 56 L. J. Ch. 459; 35 Ch. D. 416; 56 L. T. 552; 35 W. R. 581 (C. A.).

Pleading—Patent Suit—Infringement—Averment of Novelty in Bill.

PATENT.—*In a suit to restrain the infringement of a patent, it is not necessary that the plaintiff's bill should contain any averment of the novelty of the invention.*

This was a motion for a decree in a suit to restrain the defendant from using a patented invention to which the plaintiffs claimed to be exclusively entitled, for an account of profits, and for damages.

The bill stated the grant of letters patent, dated the 6th of February, 1867, to C. E. Brooman, giving to him, his executors, administrators and assigns, the exclusive right of making and using "an invention for 'a new method of manufacturing pearls or beads,' communicated to the said C. E. Brooman from abroad." The bill contained no further or other allegation of the novelty of the invention. The plaintiffs were the assignees of Brooman and their licensees.

Mr. Amphlett, *Mr. Theodore Aston* and *Mr. Dundas Gardiner*, in answer to an objection raised by the defendant's counsel, that the bill contained no averment of the novelty of the invention, argued that such an averment was unnecessary. The letters patent in themselves in terms stated that the invention was a new one.

[The VICE CHANCELLOR said that, even assuming those terms to be true, they did not shew that the invention had not been before communicated to a hundred persons in this country. He did not recollect ever having seen a bill in a case like this, which did not contain an averment of the novelty of the invention.]

Mr. Tripp, for the defendant, argued that without such an averment the pleadings were defective. The letters patent did not in themselves decide the novelty of the invention. Under the old practice, the question of novelty was frequently determined upon an issue sent to a Court of common law, and such an issue could have been directed only upon the statements in the pleadings—*Walburn* v. *Ingilby* (1 Myl. & K. 61).

JAMES, V.C. (without calling for a reply) said, the plaintiffs had given evidence of the novelty of the invention, which satisfied him that it was an entirely new invention introduced from France, and never before seen or known in this country. It was also an invention of great commercial success, and the extent to which it had been used by the plaintiffs was proof of its great public utility. Mr. Tripp had relied upon the insufficiency of the pleadings, and had urged that the absence of any averment of the novelty of the invention was fatal to the plaintiff's bill. But the objection that the invention was not a novel

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one was an objection which the defendant ought to raise by his answer, in which it was open to him positively to deny the novelty of the invention. He had doubted at first whether the averment of the novelty of the invention was not necessary to support a bill for the infringement of a patent; but on looking at a short form of a declaration at law for damages for the infringement of a patent, he found that it did not contain any allegation of the novelty of the invention, and accordingly he thought the bill sufficient without it; but, even if he had thought otherwise, he would not have allowed the defendant to have taken advantage of a mere technical objection of that sort, but should have directed the hearing to stand over until the defect had been remedied. He was, however, of opinion that the bill was sufficient, and that the plaintiff was entitled to a perpetual injunction.

MALINS, V.C., June 30, 1869.

RAMSHIRE *v.* BOLTON.

38 L. J. Ch. 594; L. R. 8 Eq. 294; 21 L. T. 51; 17 W. R. 986.

Referred to, *Hill* v. *Lane*, [1871] E. R. A.; 40 L. J. Ch. 41; L. R. 11 Eq. 215; 23 L. T. 547; 19 W. R. 194 (V.C.); *Fenelley* v. *Ranscelot*, [1871] E. R. A.; 19 W. R. 966 (V.C.).

Demurrer—Misrepresentation—Fraud—Concurrent Jurisdiction.

FRAUD AND MISREPRESENTATION.—*B. induced R. to advance to him a sum of money, representing to him that it was to be advanced for the benefit of two persons, both of whom he stated to be men of good means, and parties to a bill of exchange held by him; and B. gave to R. a memorandum that he held the bill upon trust as to half of the proceeds for R. The bill of exchange being dishonoured at maturity, he filed a bill against B. to recover the money he had advanced. Upon demurrer by B. stating the above facts, and alleging all the representations to be false:*—Held, *that the allegations of fraud gave jurisdiction to a Court of equity notwithstanding the concurrent jurisdiction at law.*

Demurrer. The allegations in the bill were as follows:

The defendant George Bolton having been for some time intimate with the plaintiff, James Ramshire, in the latter part of 1868 induced him to advance a sum of 237*l.* 10*s.*, by discounting a bill of exchange, to which two persons named Lawley and Ripley were principal parties, although it did not appear clearly which of the two drew upon the other. The defendant assured the plaintiff of the solvency of both of these parties, and particularly that Lawley had recently had a large sum left to him by the will of a person named in a newspaper produced by the defendant to the plaintiff. On the faith of these representations the plaintiff advanced the sum of 237*l.* 10*s.*, and received from the defendant a memorandum to the following effect:

"I acknowledge to hold in my possession an acceptance of F. Lawley, one-half of which belongs to Mr. James Ramshire (the plaintiff) and the other half to myself.

(Signed) "George Bolton."

The bill of exchange was dishonoured at maturity, and the bill prayed for a declaration that the defendant was personally liable to repay the money so advanced, and for an order accordingly. The bill charged that "the defendant was in fact well aware before and at the time of the plaintiff's paying to him the said sum of 237*l.* 10*s.* that the bill would not be met, and that the said Lawley and Ripley were at the time without available means to meet the bill of exchange," and that "at the time the defendant induced the plaintiff to advance the money on the representation that it was intended to be advanced

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to Ripley and Lawley, the defendant never intended so to advance it to them, and in fact never did so."

The bill then went on to charge that the defendant was specially cognizant of heavy liabilities of both Ripley and Lawley, and that his representations that they were men of property were untrue; that the whole transaction was a scheme of the defendant to enable Ripley and Lawley to pay off debts due from them to the defendant; that the whole or a considerable part of the sum advanced was retained by the defendant for his own use; and that the bill of exchange, if there really was any such bill, was held by the defendant without any consideration, and was to his knowledge worthless and void, and not enforceable against the drawer or acceptor thereof.

The defendant demurred for want of equity.

Mr. Glasse and *Mr. Cotterell*, for the demurrer.—This is a mere money demand, for which the remedy is at law.

Mr. Everitt, for the plaintiff.—We charge fraud, which gives this Court jurisdiction—*Colt* v. *Woollaston* (2 P. Wms. 154); *Blair* v. *Bromley* (2 Phil. 354; 10 L. J. Ch. 495), and other cases, referred to in the Vice Chancellor's judgment.

Mr. Glasse, in reply.

MALINS, V.C. [after stating the circumstances as admitted by the demurrer, and concluding therefrom that there was a sufficient allegation of fraud] said: The bill alleges a case which unquestionably entitles the plaintiff to recover this money from the defendant. I was for some time of opinion that the case should go to a jury; and no doubt the distinction is very fine as to what cases can be settled in this Court and what in a Court of law. If a man says when he borrows money that he can pay it at a future time, when he knows he cannot, that cannot be settled in this Court; but if he says "the money will be secured by such and such a good security," knowing the man giving the security to be insolvent and the security void, that is a fraud which entitles a party to maintain a suit in this Court. In *Pasley* v. *Freeman* (3 Term Rep. 51) A. induced B. to advance money to C, knowing that C. ought not to be trusted, and the Court of Queen's Bench held that on that statement B. was entitled to recover the money. But is he entitled to recover in a Court of equity. In *Colt* v. *Woollaston* the Master of the Rolls says, "It is no objection that the parties have their remedy at law, and may bring an action for moneys had and received for the plaintiff's own use; for in cases of fraud the Court of equity has a concurrent jurisdiction with the common law, matter of fraud being the great subject of relief here." In *Burrowes* v. *Lock* (10 Ves. 470), which was a case of misrepresentation, an objection was taken that the remedy was at law, but Sir W. Grant, following Lord Eldon in *Evans* v. *Bicknell* (6 Ves. 173), held that cases of misrepresentation were more fit for equity than for law, and at least that there was a concurrent jurisdiction. Can anything be more gross than the misrepresentation stated here? The plaintiff is told that two persons are solvent and that there was a consideration for the transaction, when the defendant who made the statement knew that they were not solvent and that there was no consideration. If these statements be proved to be true, it is clear that the defendant must have a decree against him, and that this is a case which is cognizable in this Court. *Cridland* v. *Lord de Mauley* (1 De Gex & Sm. 459; 17 L. J. Ch. 190) is precisely to the same point. *Blair* v. *Bromley* seems to go on another ground. *St. Aubyn* v. *Smart* (L. R. 5 Eq. 183; 3 Ch. 646) is entirely on all-fours with this case, and was confirmed on appeal. *Slim* v. *Croucher* (1 De Gex, F. & J. 518; 29 L. J. Ch. 273) was a case of innocent mistake, in which the plaintiff filed a bill on the ground of misrepresentation, and Stuart, V.C. made a decree in his favour, which was confirmed on appeal. That was precisely the same as this case, except that that was an innocent misrepresentation, while here there is a wilful and gross mis-statement; that is to say, the defendant has obtained money from the plaintiff by false repre-

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sentations. No doubt if a man obtains money by false pretences he may be criminally prosecuted, but that does not prevent the plaintiff from having his remedy in this Court. The bill therefore rests upon the ordinary and firmly-established jurisdiction of this Court; where money is obtained by false representation, that is fraud, a ground upon which the jurisdiction of this Court and the Courts of law are concurrent.

The demurrer must be overruled with costs, the defendant to have a month to answer.

MALINS, V.C., July 7, 1869.

BOWERS *v.* BOWERS.

38 L. J. Ch. 596; L. R. 8 Eq. 283; 21 L. T. 134; 17 W. R. 1004: reversed, [1870] E. R. A.; 39 L. J. Ch. 351; L. R. 5 Ch. 244; 23 L. T. 35; 18 W. R. 301 (L.C. & L.J.).

Will—Survivorship.

WILL.—*Where there is an absolute gift in a will to a class, "with benefit of survivorship in case any should die without issue," and a gift of the parent's share to children in case the parent should die leaving children, that survivorship is to be referred to the death of the testator. Therefore, where a testator left his estate upon trust for his four children with those words attached to the gift:*—Held, *that all four children, having survived the testator, took absolutely.*

The testator, Richard Bowers, who died in 1856, by his will devised and bequeathed all his residuary real and personal estate to William Bowers, Henry Bowers and John Haigh, on trust to get in his personal estate and then to divide the whole amongst his four children, William, Henry and Richard Bowers and Elizabeth Haigh, share and share alike, as tenants in common, and not as joint tenants, with benefit of survivorship in case any of them should die without issue, and in case any of his said children should die leaving any child or children, then he directed that the share, whether original or accruing, of him, her or them so dying should go, belong and be divided between such children in equal shares, if more than one, and if only one then the whole to such one and only child; and he appointed his trustees executors of his will.

All the testator's four children survived him and were living at the filing of this bill. Three of them, Richard, William and Elizabeth, had issue living; Henry was married, but had never had a child.

This bill was filed for the administration of the testator's estate, the question being whether the four children of the testator having survived him took absolute interests in their shares, or life estates only, with remainder to their children, if any, and in default of children, to the survivors or survivor of themselves.

Mr. Shapter and *Mr. Vincent*, for the plaintiff, supported the first view.

Mr. J. Pearson, for grandchildren, referred to *Farthing* v. *Allen* (2 Madd. 310); 2 *Jarman on Wills*, 730, in favour of the second construction.

Mr. Whitworth, in the same interest, cited *Woodburne* v. *Woodburne* (3 De Gex & Sm. 643; 19 L. J. Ch. 88); *Gosling* v. *Townshend* (17 Beav. 245).

Mr. Brodrick, for an executor.

Mr. Hardy and *Mr. Humphrey*, for the trustees.

MALINS, V.C. said, if the gift in the will had stopped before the mention of survivorship, the gift would have been unquestionably absolute: did the succeeding words divest it of that character? That would be their effect if the expression " die without issue " meant " die at any time without issue." But this could not be the intention of the testator; his only object in using those words was to prevent a lapse in the case of a child dying in his own lifetime without issue. If therefore the words were read in that sense, the will would be

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clear and consistent. The contrary decision in *Farthing* v. *Allen* was irrational, and opposed to the current of modern decisions. He should follow *Gee* v. *the Mayor of Manchester* (17 Q.B. Rep. 737; 21 L. J. Q.B. 242); *Woodburne* v. *Woodburne; Home* v. *Pillans* (2 Myl. & K. 15; 4 L. J. Ch. 2); and *Ware* v. *Watson* (7 De Gex, M. & G. 248), which was the leading case on the subject, and hold that where there was an absolute gift to a class, followed by "benefit of survivorship in case of any of them should die without issue," that survivorship was to be understood to refer to surviving the testator, and was a mere provision against lapse, which would cease to operate at the death of the testator. In the present case, therefore, all the four children, having survived the testator, had become indefeasibly and absolutely entitled to their shares.

STUART, V.C., July 14, 17, 19, 20, 1869.

GIFFARD v. WILLIAMS.

38 L. J. Ch. 597; L. R. 8 Eq. 494; 21 L. T. 575; 18 W. R. 56: reversed, [1870] E. R. A.; 39 L. J. Ch. 735; L. R. 5 Ch. 546; 21 L. T. 575; 18 W. R. 776 (L.C. & L.J.).

Partition Suit—Plaintiffs' Title (a legal one) disputed by the Defendants—Jurisdiction—Evidence—Tithe Commutation Acts—Decree.

PARTITION.—*A bill in equity for a partition ought not to be made the means of trying a title, which should be properly tried at law. But, although a plaintiff on such a bill must prove his title to that part of the property which he seeks to have divided, there is no rule that a bill for a partition cannot be maintained, if the defendant denies the title of the plaintiff, and that title is purely a legal one. If, in such a case, the partition of the property is the primary object of the bill, and the establishment of the plaintiffs' title is incidental only to that relief, the Court will make a decree for a partition, and with costs where the right to a decree is resisted.*

EVIDENCE.—*Principles on which the written statements of third parties (since deceased) are admissible as evidence, discussed.*

The proceedings (properly authenticated) of the Commissioners acting under the Tithe Commutation Acts, are public evidence of the matters therein stated, and to be received as such.

Slade *v.* Barlow, 38 L. J. Ch. 369; L. R. 7 Eq. Ca. 296, *and* Bolton *v.* Bolton, L. R. 7 Eq. Ca. 298, *observed upon.*

The plaintiffs in this suit were Walter Peter Giffard, Walter Thomas Courtenay Giffard, William Reginald Herbert and Charlotte Josephine, his wife, and James Wyley and George Holyoake. The defendants were Richard Williams and Catherine Margaret, his wife, Robert Davies and John Craddock.

The bill in the suit stated that the estate known as Plas Ucha, situate in the township of Nerquis, in the parish of Mold, in the county of Flint, was about the beginning of the last century owned by a Mr. Roberts, whose daughter Helena married Peter Giffard, of Chillington, in the county of Stafford, the ancestor in title of the plaintiffs. Through that marriage the estate passed to Peter Giffard, and from him by divers acts in the law to Elizabeth Giffard, and on her decease to Thomas William Giffard, late of Chillington, aforesaid, as tenant in fee simple.

Thomas William Giffard, by his will, dated the 18th of July, 1855, devised all his freeholds of inheritance to the plaintiffs James Wyley and George Holyoake for the term of 1,000 years from his death, upon the trusts therein declared concerning the same, and subject thereto to the use of his first and

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other sons successively in tail male, with remainder to the use of his first and other sons successively in tail general, with remainder to the use of his brother the plaintiff Walter Peter Giffard for his life, with remainder to the use of the plaintiff Walter Thomas Courtenay Giffard (then the only son of the plaintiff Walter Peter Giffard) for his life, with divers remainders over (which failed), with remainder to the plaintiff Charlotte Josephine Herbert, the eldest daughter of the testator, and the wife of the plaintiff William Reginald Herbert, as tenant in tail.

Thomas William Giffard died on the 21st of January, 1861. He left no son. Walter Peter Giffard was the tenant for life under the will of the estates therein comprised, including the Plas Ucha estate, and Charlotte Josephine Herbert was entitled to the first vested estate of inheritance under the will. The Plas Ucha estate had always since it had been in the family of the Giffards included one undivided moiety of a field, called Gwergloed Vadock, or Wereglodd Fudog.

The plaintiffs, by their bill, shewed, in support of their claim to the moiety of the field, that the tenant of the field had always (at least since 1738) paid rent for one moiety of it to the owner for the time being of the Plas Ucha estate, and that the tenants, or some person representing them, had always attended the rent-days of those owners; that in 1771 the Plas Ucha estate was parcelled out into farms, and that upon that parcelling out one moiety of Wereglodd Fudog was assigned as a separate holding to Edward Williams, at the rent of 1*l.* 10*s.* a year; that the owners of the Plas Ucha estate had from time to time repaired the fences of the field, and done other acts of ownership in relation thereto, and that a commutation and apportionment of the tithes took place in 1838, in which apportionment and the plan annexed thereto, one moiety of Wereglodd Fudog was stated to be the property of the said Elizabeth Giffard, and that Miss Elizabeth Henrietta Jones, who was then the owner of the neighbouring estate of Tyntwyll, and entitled as the owner of the other moiety of the field, raised no objection to that description.

The bill further stated that the other undivided moiety of the field had for many years past constituted part of the Tyntwyll estate, of which the defendant Catherine Margaret Williams, the wife of the defendant Richard Williams, was the owner in fee simple. The ancestors in title of the plaintiffs generally let their moiety of the field to the owners for the time being of the Tyntwyll estate, who in their turn let the entirety of the field as part of the farm of Tyntwyll and Tydryn, which letting was alleged by the plaintiffs to be, as to one moiety of the field, a sub-letting.

It had recently been discovered that valuable veins and mines of coal and iron existed under the surface of the Wereglodd Fudog field, and the defendants Richard Williams and his wife had in consequence and for the first time insisted that the defendant Catherine Margaret Williams was the absolute owner of the field, subject only to a rentcharge of 2*l.* a year, payable out of the whole of the Tyntwyll estate, and vested in the plaintiffs as the owners of the Plas Ucha estate.

The defendants Richard Williams and his wife had assumed to demise the entirety of the field to the defendant Robert Davies as tenant thereof from year to year.

Since the 25th of March, 1861, the defendant Richard Williams had excluded the plaintiffs from the receipt of any part of the rents of the field, and had received the rents for the entirety of it.

The bill further stated that the defendants alleged that the plaintiffs were entitled to a divided moiety of the field, and not to an undivided moiety. The plaintiffs, however, shewed that the ancestors in title of the defendant Catherine Williams, the wife of the defendant Richard Williams, were from time to time tenants under the ancestors in title of the plaintiffs of the moiety of the field, and that if such moiety was a divided one, such tenants confused the boundaries

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of the estates, and the boundaries thereof could not now be ascertained without the aid of this Court.

There were no visible boundaries dividing the field, and no boundaries were known to the persons who had been longest acquainted with the field.

The bill then prayed a declaration that the plaintiffs were entitled to an undivided moiety of the field called Wereglodd Fudog; that a partition might be made of the field; but that if the Court should be of opinion that the plaintiffs were entitled to a divided moiety of the field, the boundaries of such moiety might be ascertained and defined, for an account, and payment of all rents received by the defendants Richard Williams and his wife, or either of them, in respect of the field (which relief, however, was ultimately waived); that the rights of the several parties in the field might be ascertained and declared, and that the defendants or one of them might pay the costs of the suit.

The defendants, by their answer (or by so much of it as is material to this report), denied that the Plas Ucha estate ever included the field in question or any part of it. They said they believed that neither the tenant of the field nor any other person had ever paid rent for any part of the field to the owner of the Plas Ucha estate, or to any other person than the owners of the Tyntwyll estate or farm. The defendants Richard Williams and his wife became entitled to that estate in 1846, and since that date the tenant of the field for the time being had regularly paid rent to them for the whole of it. In 1832 the Rev. Robert Jones, the then tenant for life of the Tyntwyll estate or farm, and who was the predecessor in title of the defendants Richard Williams and his wife, brought an action of ejectment against Robert Roberts, the then occupier and tenant under the said Robert Jones of the Tyntwyll farm, and recovered possession of the Tyntwyll estate or farm, including the entirety of the Wereglodd Fudog field, since which time the owners of the Tyntwyll estate or farm had been in the undisturbed possession of the rents and profits of the whole of the field.

They further stated that they had never seen or heard of any such tithe commutation or apportionment as the plaintiffs alleged to have been made in 1838; and that at that time Miss Elizabeth Henrietta Jones, the owner in tail of the Tyntwyll estate or farm, and as such entitled to the whole of the field in question, lived at a considerable distance from the estate, and was never informed and knew nothing of the alleged commutation and apportionment. They admitted that in 1848 they cut some timber on the field, but they insisted that they had a right to do so. They further said that in 1863, the plaintiff Walter Peter Giffard had brought an action against them to try the right to the rent of a divided moiety of the field, but had afterwards abandoned that action. They stated (paragraph 9. of their answer) that some of their former tenants, and of those of their predecessors in title, were employed by them and their predecessors to make certain payments in respect of charges on their estates, and that amongst other payments directed by them and their said predecessors in title to be made, such tenants as aforesaid had for fifty years and upwards made certain payments to the plaintiffs or their ancestors in title on account of a certain annual sum or rentcharge of 40*s*. which (as the defendants believed) was payable out of or charged upon the whole of their property at Nerquis (and not out of or upon the said field in particular) to or in favour of the plaintiffs or their ancestors by way of equality of exchange, on the occasion of certain exchanges of land effected many years ago between their predecessors in title and the predecessors in title of the plaintiffs; but they said that such payments were not made in respect of rent or otherwise in respect of the Wereglodd Fudog field, but by way of rentcharge or quit-rent on the whole of their Nerquis estates, and were in the receipts given for the same expressed to be so made.

Mr. Fry and *Mr. Cozens Hardy*, for the plaintiffs.

Mr. Osborne Morgan, for the principal defendants.—We take two preliminary objections to the bill. A great part of the plaintiffs' case rests on alleged payments of rent by the ancestors of the defendants to the predecessors of the plaintiffs. Those payments are attempted to be proved by the production

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of the rent-rolls of the Nerquis estate or farm, and entries made in certain books belonging to the plaintiffs themselves. There are also some other receipts which they rely upon. We say, first, that the bulk of that evidence is inadmissable. The entries in the books were made by third parties now dead, but it is not proved that they were made by such parties either in the due course of their business or against their own interest—*Price* v. *Lord Torrington* (1 Sm. Lead. Cas. 290); *Outram* v. *Morewood* (5 Term Rep. 121). With respect to the other receipts, we also produce some which rebut the proof intended to be established by those of the plaintiffs.

[STUART, V.C.—I think I had better hear Mr. Fry. You can reserve the objections and argue them when you open the defendants' case.]

Mr. Fry.—The plaintiffs, the owners in fee of a moiety of this field, commence their title to it with a deed dated the 17th of December, 1672, in which the field is mentioned by its present name of Wereglodd Fudog or Fadog. —[He then stated the title, and the facts of the case, *ut supra*.]—No doubt much of the plaintiffs' evidence is of the nature alluded to, but the receipts objected to are proved to have been given by agents of the plaintiffs' predecessors in title who were authorized by them to receive the money. So also the entries in the books are shewn to have been in the handwriting of their agents, and are found among the papers of such agents. Among other documents there is (in one of the books produced) a column of "observations," proved to be in the handwriting of the solicitor and agent (since deceased) of a predecessor in title of the plaintiffs. Those observations related to "the rental of the Flintshire estate from Michaelmas to Lady Day, 1818," and there occurs in them the words "Rob. Roberts has ½ of Wereglodd Fudog." Robert Roberts was a predecessor in title of the plaintiffs. The rent-rolls of the Nerquis estate, or at all events most of them, are proved to be in the handwriting of former "stewards" of that property. It is impossible, therefore, for the defendants to object to such evidence as that. The plaintiffs' title is, no doubt, a legal one, but this case is different from that of *The Mayor of Basingstoke* v. *Lord Bolton* (1 Drew. 270; 22 L. J. Ch. 305). That was a case of heriots and reliefs, and the Court allowed a demurrer to the bill. But even there the demurrer was allowed without costs, and with liberty to amend the bill.

[STUART, V.C.—I think, Mr. Fry, you have now stated enough to shew that your clients have a *prima facie* case; and it is for Mr. Morgan to make out that of the defendants.]

Mr. O. Morgan.—We say then, first, the plaintiffs' evidence which has been referred to is, for the reasons given, inadmissible. It really amounts to no more than an affirmation of some one, produced by the plaintiffs themselves, that the estate which the defendants claim belongs to the plaintiffs, but it is no proof that the property does belong to them—1 *Starkie on Evidence*, edit. 1842, p. 32. Secondly, we further say that this Court has no jurisdiction to entertain this suit. The Bill is one for a partition *simpliciter*, but under the cloak and colour of which the plaintiffs seek the decision of this Court upon their title. That title is a purely legal one, and is absolutely and *in toto* denied by the defendants. *Slade* v. *Barlow* (38 L. J. Ch. 369; L. R. 7 Eq. 296) shews that a suit of this nature will not be allowed. Sir John Rolt's Act, the 25 & 26 Vict. c. 42. s. 4, expressly exempts this class of cases, viz., ejectment bills. The proper course for the Court to adopt in this case is to follow *Bolton* v. *Bolton* (L. R. 7 Eq. 298), cited in *Slade* v. *Barlow* (*ubi supra*), and the practice laid down in *Potter* v. *Waller* (2 De Gex & Sm. 418), and not to order the bill to be taken off the file, but to retain it for a year, with liberty to the plaintiffs to bring such action at law as they may be advised; all the authorities, from those of *The Bishop of Ely* v. *Kenrick* (Bunb. 322) and *Baring* v. *Nash* (1 Ves. & B. 551) to the present day, shew that a partition suit in this Court cannot be made the vehicle of trying a disputed legal title. Thirdly, as to the merits of the case: they strengthen the objections to it, founded on the want of jurisdiction in the Court. The plaintiffs are in possession of the rent of this field and the

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defendants of the land. The bill does not ask that the rent may be raised. If it had done so we should have paid the money into Court. But we say there is on the merits a substantial legal question to be tried, and one which ought only to be settled by a jury in a Court of law.

[STUART, V.C.—If the partition sought by the plaintiffs in this suit were a mere pretext, your view might perhaps be correct; but the discovery of the minerals under this field increases the value of the property and makes the partition of it a matter of extreme importance to those interested in it.]

Mr. O. Morgan.—We say that the partition which the plaintiffs seek is a mere sham. Of what value is the evidence adduced by the plaintiffs? It consists of the following particulars: A. Their title-deeds. B. The rent-rolls and entries in the plaintiffs' own books. C. The tithe commutation maps. D. A statement that half the field is tithe free. E. Some alleged repairs of the fences of the field by the plaintiffs, or their predecessors in title.—A. First, as to their title-deeds. In a very early one, dated so long ago as 1730, the field in question is described as "a messuage or tenement," which is clearly insufficient; and there is in fact no proof of a house having ever been situated on the field. Then between 1730 and 1843 there is no description of the field at all, and the subsequent descriptions are irreconcilable with each other and the original ones. B. Even if the rent-rolls and entries are admissible, they are inconsistent with the recitals and descriptions of the field in the plaintiffs' title-deeds, and there is no attempt made to reconcile those discrepancies. Moreover, there is nothing in any of the plaintiffs' evidence to shew the correct acreage or the tithings of the field. The plaintiffs have not proved, and cannot prove, by whom this rentcharge (for such it is) is payable; and it is for them to shew who is their own tenant. The result of the ejectment of 1832, and the abandonment of the other action in 1863, are facts which make strongly in the defendants' favour. C. The tithe commutation maps are not admissible as evidence unless the requirements of the Tithe Commutation Acts have been strictly observed—6 & 7 Will. 4. c. 71. ss. 60, 61, 63, and 64; 7 Will. 4. & 1 Vict. c. 69. s. 2. Here those requirements are not shewn to have been followed out. Moreover, it is sworn in the answer of the defendants that their predecessor in title lived at a distance from the field, and knew nothing of the commutation or the apportionment. She was not privy to or bound by it; neither, therefore, are the defendants, who also now live twenty miles from the field. D. Then it is said that half the field is tithe free. But if the documents last mentioned are inadmissible, there is nothing but reputation in support of that assertion, and reputation is not sufficient to establish a private matter such as this or a form modus. Even if it did tend to support it, there is enough in the defendants' case to rebut such proofs. E. The plaintiffs claim to have repaired the fences of this field, but the title-deeds of the defendants shew that they have always dealt with, and sometimes conveyed the entirety of it; and as, in 1848, they cut down some timber on this field, so at other times they have uninterruptedly exercised various acts of ownership over the whole of it.

Mr. Williams (of the common law bar) with *Mr. Morgan.*—A partition suit must be based on the assumption that no litigation affects the property sought to be divided, and that the title of the plaintiffs is undisputed. We now deny their title; and it is in evidence that there was an action of ejectment brought in 1832, by the tenant for life of the Tyntwyll estate, in which he recovered the whole of the field now in question. The plaintiffs' evidence is more consistent with a title to a divided than to an undivided moiety of his field. As to the entries, to be admissible as evidence they must be shewn to have been made contemporaneously with the events of which they speak and by a person whose duty it is to make them. That is not shewn in this case—*Price* v. *Torrington* (*ubi supra*); *Poole* v. *Dicas* (1 Bing. N.C. 649; 1 Sc. 600; 4 L. J. C.P. 196); *Chambers* v. *Bernasconi* (1 Tyrw. 342: in error, 4 Tyrw. 531; 2 L. J. Ex. 373).

Mr. Palmer was for the defendant Craddock, a mortgagee.

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STUART, V.C.—I will not trouble you, Mr. Fry, to reply.

The principal question in this case is that of jurisdiction. It was said that the Court ought not to entertain this suit because there is a dispute as to the title; and two recent decisions have been referred to which are, no doubt, cases of importance. They are authorities, however, which it is plain from the arguments in the present case may be very easily misunderstood.

In the case of *Bolton* v. *Bolton* the main purpose of the suit was, not a partition, but the establishment of the plaintiffs' title upon the construction of a will. It was the case of a bill filed by a person out of the possession of the property, and the object of the suit was to recover the possession. That being so, it appears that a bill in equity for a partition ought not to be made a means of trying a title, which should properly be tried at law.

In the same way, in the case of *Slade* v. *Barlow*, which came before James, V.C., he took exactly that view. He treated that case as I did that of *Bolton* v. *Bolton*, and as the Lords Justices treated it, as a case in which, under colour of a bill for a partition, what was sought was to establish a title to the property, of which the plaintiff was out of the possession.

In the present case the circumstances of the property are peculiar. In this, as in all other cases, the plaintiffs on a bill for a partition must prove their title to the undivided part of that property which they seek to have divided. There is no such rule, so far as I am aware, as that a bill for a partition cannot be maintained if a defendant denies the plaintiff's title and the title is purely a legal one. I never heard such a rule laid down anywhere. No doubt the title must be proved, but even where a plaintiff has come for a partition, and has not at once succeeded in proving his title, this Court has given him an opportunity of producing further evidence of it without sending him to a Court of law. In the case of *Baring* v. *Nash*, Sir Thomas Plumer, at the end of a judgment of great research, and with which he took extreme pains, says, "Where the legal title is under suspicious circumstances a Court of equity may well pause in directing partition; but if the title is clear a partition is a matter of right; and it is expressly stated in *Parker* v. *Gerard* (1 Amb. 236) that there is no instance of not succeeding in such a bill, but where there is not proof of title in the plaintiff; and in the case of *Cartwright* v. *Pultney* (2 Atkyns, 380) the Court gave leave and time for the plaintiff to make out his title." Of course if a title cannot be made out the right to the partition must fail entirely.

The question, therefore, in the present case is this: the bill in the suit is one, primarily, for a partition. The great object of the suit is the partition, and the reason for wishing to effect that object is the increased value of the property in consequence of the discovery of some minerals below the land. That being so, the prime object of the suit being the partition of the property, and the establishment of the title to it being only incidental to the partition, the question which the Court has to consider is, whether these plaintiffs have established their title to an undivided moiety of this small close of land?

The circumstances of the case are, as I have said, extremely peculiar. The plaintiffs have gone very far back in proving their title. Upon a review of the whole of their evidence as contrasted with that of the defendants, who deny the title of the plaintiffs, it seems to me, certainly, that the plaintiffs have proved their title very clearly indeed.

To begin with their deeds. The first is a deed dated so long ago as 1672. The close of land in question is, by its proper name, included in the conveyance; and was conveyed to that family through whom the plaintiffs derive their title. The next deed is a deed of 1730. In that deed the close of land is again very clearly mentioned. But it is mentioned with this peculiarity: being mere land, it is, nevertheless, spoken of as "All that other messuage or tenement commonly called or known by the name of Gwergloed Vadock, now or late in the tenure, possession or occupation of Robert Williams, at or under the yearly rent of 1*l.* 10*s.*" It has been fairly enough argued that there is no messuage upon

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this close of land; and that the words "messuage or tenement" are not a proper description of a close of land containing four acres. But, looking at all the other circumstances of the case, I have not the slightest doubt that the parcel there described is the identical close of land now in question. It is to be observed that, although the description contains the word "messuage" there is also the word "tenement." That word clearly is, I think, enough to signify the land, without any messuage at all upon it. Moreover, this estate passed in the beginning of the eighteenth century, about 130 years ago, by marriage to the family of the Giffards. A member of that family, Peter Giffard, through whom the plaintiffs claim, married an heiress of the name of Roberts, who was entitled to this land. The title is, therefore, traced down. The property remained in the family; and they not being obliged to mortgage the land, no other title-deed occurs until a comparatively recent period. But the clear and important evidence in this case in favour of the plaintiffs is, the proof of the payment of rent for this land to the family of the Giffards; and the fact that those claiming under them, as to one undivided moiety of this close of land, held it as tenants in common with the owner of the neighbouring estate.

As to the whole of that evidence, however, the plaintiffs' case is met by a denial on the part of the defendants, that the rent-rolls or rentals are evidence at all. Some cases were then cited which really have nothing to do with the question, beyond this, that in *Outram* v. *Morewood* (*ubi supra*), a case before the Court of Queen's Bench, in which entries by a third party—entries made, not in the discharge of any duty, but simply by a third party—were not admitted to the legititmate evidence. In that case a distinction was taken between entries by a third person deceased and entries by a steward. In *Starkie on Evidence* (*ubi supra*), which is, perhaps, the best text-book on the subject of "the law of evidence," I find, on looking at his statement and summary of the case of *Outram* v. *Morewood*, that he says this: "In *Outram* v. *Morewood*, Lord Kenyon said that, although a general right might be proved by traditionary evidence, a particular fact could not. There the question was, whether Cow Close had been part of the estate of Sir J. Zouch, out of which certain rents and coals had been reserved; and the Court held that the fact could not be proved by entries made by a third person, deceased, in his books of receipts of rents from his tenant; such entries being considered as no more than a declaration of the fact by such third person, which was different from entries by a steward, who thereby charged himself with the receipt of money."

It has been said, although, I think, with no very great force, that such entries, not being against the interest of the person making them, are inadmissible. The fact of the entries being against the interest of the person who makes them is said to be the circumstance that gives them credibility and establishes them as evidence. But I think that is not entirely an accurate view of the matter. I quite assent, however, as other Judges have assented, to the statement of Mr. Starkie, at p. 347 of the same volume. He there says this: "It may, however, be observed that the consideration that the entry was made in the course of discharging a professional or official duty, or even in the ordinary course of business in which the party was engaged, seems both in reason and upon the authorities, to afford a much safer warrant for giving credit to such evidence than is supplied by the consideration that the entry or declaration might, possibly, have been used to the prejudice of the party," &c. Lord Hardwick, in *Manning* v. *Lechmere* (1 Atkyns, 453), speaking of what is evidence, says, "Where there are old rentals, and bailiffs have admitted money received by them, those rentals are evidence of the payment, because no other can be had."

Therefore, in my opinion, all the objections to the reception of these rentals as evidence in this case are entirely unfounded.

I should not have noticed the authorities upon that part of this case if it had not been that so much stress was laid and the case so strongly pressed upon them by Mr. Morgan. I think, however, that he has, to say the least, been

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obliged, for the purpose of his argument, to employ them in a way in which they cannot legitimately be used.

Then, looking at these rentals themselves, they extend over the greater part of a century and a half, and leave to my mind not the slightest doubt that the rent—the payment of which they purport to shew—was paid to the owners of the Plas Ucha estate in respect of this particular close of land. That alone would be enough to establish clearly, to my satisfaction, the claim of the plaintiffs. But when I look at the case set up by the defendants, that of the plaintiffs is, I think, greatly strengthened. The defendants cannot deny that rent has been paid, and they cannot deny that rent has been paid by tenants. In their answer *(ubi supra)*, they affect to say that the rent—which, according to the entries, has been paid for more than a century and a half, and was probably paid before that—was paid in respect of rent due for equality upon the occasion of certain exchanges. That is deliberately and distinctly stated in their answer. They there say—[His Honour then read paragraph 9. of the answer *(ut supra)* down to the words "certain exchanges of land effected many years ago between our predecessors in title and the predecessors in title of the plaintiffs," and continued]—Now, the defendants' case upon that completely broke down; indeed, I think that statement was not even mentioned by Mr. Morgan in his argument. But it is impossible to get over it, and it is equally impossible to get over the further statement in the same paragraph of the answer. That statement is to this effect—[His Honour read the remainder of the paragraph *(ut supra)*, and continued]—That is—"expressed to be made as a quit rent, or in respect of equality upon the occasion of exchanges." Three receipts were produced—from the custody of the defendants—but they totally contradict their case. Those receipts are ordinary receipts for rent, such as are given to a tenant upon a proper payment, by the proper hand to receive the rent. It seems to me unnecessary to go minutely through the other parts of the case, but they also strengthen that of the plaintiffs. It must be observed, however, that in the year 1838, which is now thirty-one years ago, and more than thirty years before the bill in this suit was filed, the Tithe Commissioners, in discharge of their duties, apportioned the tithe-rentcharge on this estate. The statute makes the entries by the Commissioners in their proceedings, when properly verified, evidence of the matters therein stated. In the document produced, and authenticated by the Tithe Commissioners, one undivided moiety of this very close of land is stated as part of the property in respect of which they discharged their duty. That was, however, attempted to be got rid of in this way: it was said, in effect, that the predecessor of the defendants, the persons who oppose the title of the plaintiffs, lived a great way from the property in question; that the defendants themselves now live twenty miles from it, and that they or their predecessor did not hear of the commutation, and probably had no notice of it. But the act of parliament requires these things to be done, not in a corner, but upon notice in all the most public places; so that it is impossible to treat this document otherwise than as a public one, and as public evidence that at that time the owner of the undivided moiety of this field was aware of the facts. That being so, it appears to me that the plaintiffs have established their title; and that, they having established a title against a case, which though deliberately set up by the defendants' answer, has failed, this case does not come within the ordinary rule as to the costs of a partition suit. Mr. Fry, do you ask for costs?

Mr. Fry.—Yes, I do.

STUART, V.C.—Well the case is one in which the title of the plaintiffs has been disputed upon grounds which, in my opinion, have entirely failed. I think therefore that the plaintiffs must have the declaration which they pray by their bill, viz., that they are entitled to an undivided moiety of the field called Wereglodd Fudog; and there must be a decree that a partition shall be made of the field, with costs.

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STUART, V.C., July 27, 1869.

GIBBS v. HARDING.

38 L. J. Ch. 604; L. R. 8 Eq. 490; 21 L. T. 322; 17 W. R. 1093: varied, [1870] E. R. A.; 39 L. J. Ch. 374; L. R. 5 Ch. 336; 18 W. R. 361 (L.C. & L.J.).

Husband and Wife—Agreement to Live Apart; for the Execution of a Separation Deed; and for securing an Annuity to the Wife—Specific Performance—Decree.

HUSBAND AND WIFE.—*On the 5th of July, 1865, a husband and his father-in-law, on behalf of his daughter, the wife, entered into a contract, by which it was agreed that the husband and wife should live apart, and that the husband should, when required, execute a deed of separation with all usual and proper clauses, and should secure a sum of 40l. a year to the wife for her maintenance and that of their child. The wife was not named a party to, but she signed, the contract. The husband and wife separated. The wife was for some time afterwards maintained by her father, and he supported her child. The husband paid the annuity regularly till October, 1867. The father-in-law, in pursuance of the contract, prepared a separation deed, by which the annuity was to be secured by a charge on some landed property of the husband, and he was to covenant for the payment of the annuity for a term of ninety-nine years, if his wife should so long live. The proposed deed, however, contained no covenant by the father-in-law to indemnify the husband against his wife's debts. The husband refused to execute the deed. The father-in-law and the wife then instituted a suit for the specific performance of the agreement of the 5th of July, 1865:*—Held, *that the plaintiffs were entitled to have a proper separation deed executed by the husband; that he was bound to secure the annuity, though not by a charge on his landed property; and that he must pay the costs of the suit.*

The plaintiffs in this suit were Mr. Joseph Gibbs and Alice Harding, his daughter, the wife of the defendant Mr. Thomas Archer Harding, by her father as next friend. The defendants were Mr. Harding and Victoria Maria, his infant daughter.

The bill in the suit stated that on the 1st of March, 1857, Mr. Harding married Alice Gibbs. No settlement was executed on the marriage. There were issue of the marriage four children, three of whom died prior to 1865, and the fourth, Victoria Maria Harding, was now residing with Mr. Gibbs. Differences arose between Mr. and Mrs. Harding, in consequence of which it was agreed between them and Mr. Gibbs that Mr. and Mrs. Harding should thenceforth live separate and apart. The following agreement was accordingly entered into between the plaintiff Joseph Gibbs and the defendant Thomas Archer Harding, and signed by them and Mrs. Harding: "Memorandum of agreement, made this 5th day of July, 1865, between Thomas Archer Harding, of the one part, and Joseph Gibbs, of the other part. Whereas, differences having arisen between the said Thomas Archer Harding and Alice his wife, the daughter of the said Joseph Gibbs, it hath been agreed between the said Thomas Archer Harding and the said Joseph Gibbs, on behalf of his said daughter, that the said Thomas Archer Harding and his said wife should live apart, and the said Thomas Archer Harding doth hereby agree with the said Joseph Gibbs, when thereunto required, to execute and sign a deed of separation, to be prepared by Messrs. Bradford & Foote, to contain all usual and proper clauses, and also to secure the sum of 40*l.* a year, to commence from this date, and to be paid by equal quarterly payments by the said Thomas Archer Harding, for the maintenance of his wife and child; but if the said wife should now be in the family-way and have another child within eight months from this time, then the sum of 40*l.* shall be increased to 50*l.*, to be paid in like manner as the 40*l.*

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provided for so long as such child shall live, and the cost of the deed of separation and of this agreement shall be paid in equal portions by the parties hereto.

(Signed) "Thomas Archer Harding.
"Joseph Gibbs.
"Alice Harding."

Mrs. Harding was not in the family-way at the date of the agreement, and had no child born since the date thereof.

The bill then stated that ever since the date of the agreement, and on the faith and in pursuance of it, Mrs. Harding had lived separate and apart from her husband, and had forborne from suing him for, or otherwise endeavouring to obtain or claiming from him any restitution of conjugal rights, or return to cohabitation, or alimony or maintenance for herself or her child (save that the said annuity of 40*l.* had been claimed, but the last two quarters thereof had not been paid pursuant to the agreement), and she had in all respects performed the agreement. She lived with and was maintained by her father from the date of the agreement to the 12th of October, 1865, when she went into a situation as a domestic servant, where she had ever since continued, and was now maintaining herself by her labour. The infant defendant, her daughter, had from the date of the agreement to the present time lived with the plaintiff Mr. Gibbs, and been chiefly maintained by him. He had, with the aid of what Mr. Harding had paid on account of the annuity, maintained Mrs. Harding during the aforesaid period of three months, and the infant defendant during the aforesaid period of between two and three years, in reliance on the agreement and on the annuity; and he had, in reliance on the agreement, forborne from suing Mr. Harding for the cost of such maintenance (which had exceeded the annuity) or for any part thereof; and he had, on the faith and in pursuance of the agreement, paid one moiety of the costs of it. He had also caused to be prepared, by Messrs. Bradford & Foote, the engrossment of a deed of separation pursuant to the contract, and paid one moiety of the cost thereof; and he, as well as Mrs. Harding, had in all respects performed and caused to be performed the agreement on his part. The bill further stated that Mr. Harding had paid the annuity to Mr. Gibbs as trustee, and upon the trusts aforesaid, in pursuance and part performance of the agreement, save the last two quarterly payments thereof; but he had refused to make those payments, or to pay the annuity for the future, or to execute any separation deed whatever pursuant to the agreement, or in any way to secure the annuity of 40*l.*, or perform the agreement for the future. Mr. Gibbs caused to be prepared, pursuant to the agreement, and submitted to Mr. Harding for his execution, a deed of separation, charging the annuity on certain real estates of Mr. Harding, at Wansborough, to which he was entitled in fee simple, subject to certain charges thereon; and the plaintiffs were ready and willing and thereby offered to execute that or any other proper separation deed pursuant to the agreement; but Mr. Harding wholly refused to execute any separation deed whatever.

Mrs. Harding was of the age of twenty-six years or thereabouts, and the value of the annuity for her life exceeded 500*l.*

Mr. Gibbs had expended on the maintenance of Mrs. Harding and of her daughter since the date of the agreement a sum considerably exceeding the annuity of 40*l.* from that date. Mr. Harding had not contributed to such maintenance beyond the payment of the annuity, so far as he had paid the same as aforesaid.

Neither Mrs. Harding nor her daughter had any property or means of subsistence save the annuity of 40*l.* The bill charged that the rents and profits of Mr. Harding's real estate at Wansborough were sufficient to meet the annuity, and that he ought thereby or otherwise duly to secure the same, and that the infant defendant in respect of the annuity was a proper party to the suit. The bill then prayed that Mr. Harding might be decreed specifically to perform the agreement of the 5th of July, 1865, and to execute the said separation deed so prepared as aforesaid, or some proper separation deed to

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be approved by this Court according to the agreement, and to pay the annuity and do all other acts pursuant to the agreement, the plaintiffs thereby offering specifically to perform the agreement on their part; that if necessary an account might be taken of the annuity, and the defendant Mr. Harding decreed to pay the same; that he might pay the costs of the suit; and that for the purposes aforesaid all proper inquiries might be made and directions given.

Mr. Harding, by his answer, raised several matters of defence to the bill, of which the Court expressed its disapprobation, but to which it is not necessary more particularly to refer. He also denied several of the plaintiffs' allegations. He stated with respect to the non-payment of the two quarters of the annuity that, in the month of January, 1868, he tendered the sum of 10*l.* as a quarterly payment of the annual sum of 40*l.*, to Mr. Foote, the plaintiffs' solicitor; that Mr. Foote refused to accept it, alleging that the plaintiffs would prefer to have a gross sum (mentioning the sum of 500*l.*) paid in full discharge of the annuity, or to have it secured by a charge on land belonging to Mr. Harding. He refused to entertain either proposal; but (as he subsequently deposed) he, rather than incur litigation in the matter, consented to pay 350*l.* in satisfaction of all claims against him. That proposal was however declined. He further stated by his answer that, in May, 1868, he went to the office of Mr. Foote, and offered him, on behalf of Mrs. Harding, the sum of 20*l.* for two quarters of the annuity; that Mr. Foote refused to accept it, and said that as the matter had gone so far it must proceed, as there would be expenses to pay; that he again tendered the 20*l.*, saying, "Here is the money," but that Mr. Foote refused to accept it.

Mr. Foote in his evidence positively denied those allegations of Mr. Harding as to the tender of the 10*l.* and the 20*l.*

Mr. Harding further stated, with respect to his refusal to execute the deed of separation which Mr. Gibbs had caused to be prepared, that some time after the 5th of July, 1865, Mr. Foote called Mr. Harding into his office and asked him to execute a deed of separation between himself and his wife. Mr. Harding had never before seen that deed. He thereupon requested Mr. Foote to read it over to him, which Mr. Foote proceeded to do. But when Mr. Harding found it was intended that by the deed his small landed property at Wansborough should be charged with the payment of the annuity, he refused to execute the deed. Those allegations were also contradicted or qualified by the evidence of the plaintiffs.

It appeared, however, that the draft of the deed had proposed by way of an additional security for the annuity, that Mr. Harding should covenant with Mr. Gibbs to pay it for a term of ninety-nine years if Mrs. Harding should so long live, but the draft contained no covenant by Mr. Gibbs to indemnify Mr. Harding against his wife's debts.

Mr. Greene and *Mr. Bagshawe*, for the plaintiffs.—The simple question in this case is whether the plaintiffs are not entitled to the execution by Mr. Harding of some separation deed, which shall contain all the covenants usual and proper in such cases, and which shall also provide the best security he can give for the payment of the annuity. It is too late now to say that agreements of this nature cannot be enforced—*Wilson* v. *Wilson* (14 Sim. 405; 14 L. J. Ch. 204: on appeal 1 H.L. C. 538; 5 H.L. C. 40); *Walrond* v. *Walrond* (Johns. 18; 28 L. J. Ch. 97). It is true that Mrs. Harding is not named a party to the contract, but her father is, on her behalf, as trustee for her. In that way she can make a valid contract with her husband—*Williams* v. *Bailey* (L. R. 2 Eq. 731). There is no want of mutuality in the agreement; there is a good consideration for it; it has been acted on by the parties to it; and the Court will, therefore, give the plaintiffs the relief they pray by their bill.

Mr. Dickinson and *Mr. W. W. Karslake*, for the defendant Mr. Harding.—This case is one that ought never to have been brought into Court. 1. The agreement is vague and uncertain in its terms. It does indeed say that the

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proposed deed of separation is to contain "all usual and proper clauses"; but it does not specify them, neither does it make any provision for indemnifying the defendant against his wife's debts, nor point out who are to enter into the requisite covenants. The plaintiffs cannot therefore call upon the defendant to execute any deed "in accordance with the agreement." But that agreement is their only pretence to an equity. 2. The agreement is entirely voluntary. The fact of Mr. Gibbs having for a time maintained Mrs. Harding and her child forms no consideration for it. Mr. Harding is still liable to keep them, and would be even if he were to execute the deed. Further, Mr. Harding paid the annuity regularly till October, 1867. It was refused (as we contend) by the solicitor of the plaintiffs early in 1868. The bill in this suit was filed in June, 1868, after Mr. Harding had so far fulfilled his part of the contract. But those payments which Mr. Harding made cannot in any way operate as an acknowledgment by him that he is otherwise bound by the agreement to execute the proposed deed. 3. There is no mutuality in the agreement. It is in terms binding only on Mr. Harding. Even if Mr. Gibbs can sue him upon it (which however we deny) it is perfectly plain that he cannot compel Mr. Gibbs to perform it. Furthermore, Mr. Gibbs is not bound by it to enter into any covenants with Mr. Harding. But he is entitled (if he executes a separation deed) to a covenant from Mr. Gibbs to indemnify him against his wife's debts—*Walrond* v. *Walrond* (*ubi supra*). 4. The agreement is an illegal one. Mrs. Harding is not a party to it; and even if she were so, as there is no consideration for it, that would not avail. Whatever may be the state of the law now as to contracts between a husband and his wife for a separation between them, this is a contract (if a contract at all) between a husband and his father-in-law that the husband will live apart from his wife. That is a contract by which it is evident one man cannot bind another, even if it be not (as in fact it is) contrary to public policy, and void on that account. 5. The original agreement in this case was intended for the benefit of both Mrs. Harding and her child; but the deed contains no provision for the maintenance of the infant defendant. The proposed covenant that Mr. Harding shall pay the 40*l*. a year "for ninety-nine years if his wife shall so long live," will, if he executes it and dies to-morrow, leave his property charged with the annuity, which is not what he intended; and, moreover, if his widow were then to die the child would not be benefited by that arrangement. But in strict law, this Court cannot enforce any agreement for the maintenance of the child. Then, again, this agreement is silent as to any landed property of Mr. Harding. It is neither a charge on his land nor a covenant to create one, nor to do any act that shall at a future day create a charge on his real estate. This Court will not therefore make a decree for that purpose—*The Countess of Mornington* v. *Keane* (2 De Gex & Sm. 292; 27 L. J. Ch. 791); *Wilson* v. *Wilson* (*ubi supra*) was a very different case from this. There the consideration for the deed was a valuable one. Among the covenants inserted in the deed by the Master was one to indemnify the husband against the wife's debts. The husband, however, contended that he was entitled to a covenant to indemnify him against all the debts which he owed when he entered into the articles, in pursuance of which the separation deed was to be executed. But that was a mistake. Moreover, in that case, the abandonment of some proceedings in the Ecclesiastical Courts formed part of the consideration. *Walrond* v. *Walrond* (*ubi supra*) was much more like this case. Upon the whole the bill ought to be dismissed, and with costs.

Mr. A. Langley, for the infant defendant.

STUART, V.C.—The agreement in this case is one for the separation of the husband and the wife; and the parties to the agreement are the father of the wife, on her behalf, and the husband. The agreement is signed by the parties to it, and also by the wife.

No doubt the wife is a married woman; but as such she is, in my opinion, as much bound by the agreement as any married woman can be.

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It was argued that there is no sufficient consideration for the agreement. As to that, the agreement is, in terms, to the effect that the husband and wife shall live apart. The agreement, so expressed, is made and entered into between the father of the wife, on her behalf, and the husband; and it stipulates that the husband will, when thereunto required, execute and sign a deed of separation, to be prepared by Messrs. Bradford & Foote, to contain all usual and proper clauses; and also to secure the sum of 40*l.* a year, to commence from the date of the agreement, and to be paid quarterly by the husband for the maintenance of his wife and child. The annuity of 40*l.* was to be increased to 50*l.* a year in case there was another child born within eight months afterwards, and for so long as that other child should live.

The agreement has been acted on by the father of the wife, who is now maintaining the only child of his daughter, and by the husband, the defendant Mr. Harding. But where the facts of a case shew that something has been done by the parties to a contract, in pursuance of it, and on the faith of its being fully completed, this Court will, if the agreement be one that is not in other respects illegal or improper, enforce the specific performance of it.

It appears from the evidence in this case that the father of the wife has caused a deed to be prepared pursuant, as he states, to the agreement. The deed is a short one. The husband having agreed to "secure" the 40*l.* annuity, the deed proposes to carry out that part of the contract by charging the annuity on certain lands at Wansborough, to which the husband is entitled in fee simple. In my opinion, however, there is not in the original agreement sufficient to justify the plaintiff Mr. Joseph Gibbs in calling upon Mr. Harding to secure the annuity by a charge on his landed property.

It also appears that Mr. Harding was advised not to execute the deed as prepared, and he has not done so. No doubt, it might have been advantageous for the parties if he had done so; and, if he is well advised, he may even now execute it. He is bound to see that a proper and sufficient security is given for the annuity. I am not disposed to make a decree in the exact terms of the prayer of the bill. But if Mr. Harding will not execute the proposed deed, I must direct a reference to chambers with respect to the execution of one in pursuance of the agreement; such deed to contain the clauses usual and proper in separation deeds, and to effectually secure the payment of the annuity according to the contract.

Having regard to the position and conduct of the parties to this suit, I cannot but feel the greatest possible reluctance to make any decree in it. Still, upon the whole case, I am bound to make one, and it must be a decree for the specific performance of this agreement of the 5th of July, 1865, accompanied with the reference to chambers (if necessary) for the purposes I have stated. I think also that Mr. Harding must pay the costs of the suit.

JAMES, V.C., June 3, 1869.

In re THE EUROPEAN CENTRAL RAILWAY COMPANY (LIMITED); GUSTARD'S CASE.

38 L. J. Ch. 610; L. R. 8 Eq. 438; 21 L. T. 196.

Referred to, *In re European Central Railway Co.; Holden's case*, [1869] E. R. A.; L. R. 8 Eq. 444; 21 L. T. 197; 17 W. R. 875 (V.C.).

Company—Contributory—Application—Alteration in Amount of Shares—Allotment—Practice—Right to Begin.

COMPANY.—*The prospectus and memorandum of association of a limited company stated that the capital of the company was divided into shares of* 20*l. each, and that the first issue would be of* 20*l. shares. The memorandum and*

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articles of association contained a provision for consolidating the 20*l. shares into shares of larger amount. Upon the faith of the prospectus and memorandum of association G. applied for twenty-five shares in the company. Subsequently to his application, in pursuance of the provision in that behalf, all the shares of the company, before any of them had been issued, were converted from* 20*l. shares to* 40*l. shares. Twenty* 40*l. shares were allotted to G. He was not aware of the alteration in the amount of the shares till some time afterwards, and never acquiesced in the alteration. On a summons by the official liquidator of the company for G. to shew cause why he should not be settled upon the list of contributories*:—Held, *that G. was a contributory to the company in respect of twenty shares of* 20*l. each.*

Upon G.'s counsel admitting that he was prima facie a shareholder in the company,—Held, *that he had a right to begin on a summons in the form above mentioned.*

This was a summons, taken out by the official liquidator of the above-named company, for Mr. Gustard to shew cause why he should not be settled on the list of contributories in respect of twenty shares of 40*l.* each.

Mr. Kay, for the official liquidator, in support of the summons, claimed the right to begin.

Mr. Amphlett, for Mr. Gustard, said that by the summons he was called upon to shew cause, and was therefore entitled to begin. In reply to the Vice Chancellor, he said he admitted that Mr. Gustard was *prima facie* the holder of the shares, his name being on the register in respect of them. Thereupon the Vice Chancellor said that Mr. Amphlett had the right to begin and shew cause.

The above-named company was registered on the 20th of January, 1864, with a memorandum and articles of association. The memorandum of association contained the following statement: "The nominal capital of the company is 1,400,000*l.*, subject to be increased or modified. First issue 700,000*l.*, in 35,000 shares of 20*l.* each, the remaining 700,000*l.* to be raised hereafter in shares, bonds or obligations as the board of directors may from time to time deem advisable." The articles of association also contained the following clauses: "The nominal capital of the company shall consist of 1,400,000*l.* sterling, to be paid at the time and in manner hereafter provided. The first issue thereof, consisting of 700,000*l.*, in 35,000 shares of 20*l.* each. The The remaining 700,000*l.* to be raised hereafter in shares, bonds or obligations as the board of directors may from time to time deem advisable. But the board may from time to time, by a resolution passed by a majority consisting of not less than two-thirds of the whole number of directors, consolidate the shares into shares of a larger nominal value, so that the shares when consolidated shall together be equivalent in nominal value to the nominal value of the original shares before consolidation."

About the beginning of the year 1864, a prospectus was issued marked "Private and confidential," which stated that the first issue of capital would be 700,000*l.*, in 35,000 shares of 20*l.* each.

On the 24th of January, 1864, Gustard, at the instance of K. A. Holden, the principal promoter and contractor for the works of the company, applied for twenty-five shares in the company (without specifying the value of such shares in his application).

On the 24th of March, 1864, before any shares in the company had been issued in pursuance of the provisions contained in the articles of association, a special resolution was passed by a majority of two-thirds of the whole number of directors, increasing the nominal value of the shares in the company from 20*l.* to 40*l.* each. Printed copies of this resolution were annexed, in the form of a memorandum, to certain copies of the memorandum and articles of association, but it was not registered by the registrar of joint-stock companies.

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On the 22nd of April, 1864, twenty shares of 40*l.* each were allotted to Gustard in pursuance of his said application. The letter of allotment did not mention the value of the shares, and made no reference to the alteration in their value. Gustard duly paid the allotment-money upon these twenty shares, but he now stated that he made his application upon the faith of the statements contained in the prospectus and memorandum and articles of association, that the shares were of the amount of 20*l.* each, and that he accepted the twenty shares in ignorance of the alteration of the value of the shares, and supposed he had taken 20*l.* shares.

In April, 1865, an agreement was entered into between Holden and the company, by which it was provided that Holden should transfer to the company 1,250 specified shares, among which were mentioned the twenty allotted to Gustard, in exchange for debentures to the amount of 7,500*l.* Accordingly, with a view to the performance by Holden of this agreement, Gustard, on the 16th of May, 1865, executed a deed of transfer of his twenty shares to Holden. This deed of transfer was duly left with the company to be registered, but was never registered by them, and Gustard's name remained on the books of the company as the holder of the twenty shares. After this transaction, in May and August, 1865, and in January and June, 1866, there were four calls made upon Gustard in respect of the same shares. But the only statement or notice on call-papers as to the value of the shares was in the form of the receipt on the fly-leaf to be filled in by the company's bankers on the calls being paid. Gustard never paid anything in respect of these calls, and he now stated positively in his affidavit that he had never heard of the resolution to increase the value of the shares till May, 1866, a year after the date of his transfer to Holden, by which he had supposed he had been relieved of all liability in respect of the shares allotted to him.

Mr. Amphlett and *Mr. Locock Webb*, for Mr. Gustard.—The resolution passed to alter the value of the shares was *ultra vires*, and therefore nugatory and invalid. The company were bound by their prospectus and memorandum of association to make the first issue one of 20*l.* shares. The provisions of the Company's Act, 1862, which authorized a company "to consolidate and divide its capital into shares of larger amount than its existing shares" (Stat. 25 & 26 Vict. c. 89. ss. 12, 25, 28), obviously could not apply to a case like the present, where at the time of the consolidation there had been no shares in existence. The provision in the articles of association also had reference to shares which had been issued and gave the board power to deal only with existing shares. They could not be empowered to alter the memorandum of association, which distinctly stated that the first issue was to be of 20*l.* shares—*In re the Financial Corporation* (36 L. J. Ch. 695; L. R. 2 Ch. 714). But this case was stronger than that in Gustard's favour, for he never became a shareholder at all. He applied for twenty-five 20*l.* shares, and they gave him no such thing, but twenty 40*l.* shares instead. Then with regard to the questions of laches and acquiescence. Gustard had no notice or knowledge of the alteration till May, 1866, and the company since then by their conduct and apparent acquiescence in the agreement with Holden, to which they themselves in a manner were parties, had deceived Gustard into a state of acquiescence.

Mr. Kay and *Mr. Bardswell*, for the official liquidator.—If Gustard at the time knew the allotment to him was of 40*l.* shares, then the allotment was good.

[JAMES, V.C.—He has sworn positively he did not know it, and you have not cross-examined him.]

He now comes too late, and has lost any ground for relief he might have had earlier—*In re the New Zealand Banking Corporation; Sewell's case* (L. R. 3 Ch. 131).

JAMES, V.C. (without calling for a reply) said: I am of opinion that this gentleman is entitled to relief to the extent of half his liability; that is, he is

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only liable to be dealt with as if he were a shareholder of twenty shares of 20*l.* each.

The memorandum of association is registered at the office of the Registrar of Joint-Stock Companies, and is a document which every applicant for shares is supposed to read. He makes his application with reference to that; he is bound by it, and therefore is entitled to have the benefit of it. He is told there the first issue of shares is a certain number of shares of 20*l.* each. There was, it is true, in the private breast of the company (if I may use such a phrase as applied to a company) a resolution or an intention to raise the shares from 20*l.* to 40*l.* Mr. Gustard, who has not been cross-examined, swears positively he never heard of that resolution at all. Then, taking the memorandum of association alone, which is the only thing I can look at, he applies for twenty-five shares, and receives an answer back from the company, not referring to any resolution or intimation of any change, but saying, "in answer to your application for twenty-five shares, we have allotted you twenty." Now, I apprehend that that was a complete and binding contract between the company and Mr. Gustard. The company could not have said, "We will not give you anything but 40*l.* shares;" and he would have no right to have shares of more value than he asked for. The very day that the letter of allotment was sent to him it became a binding contract between him and the company, by which he was entitled to have and they were bound to give him twenty shares of 20*l.* each; and that being the contract, he became, in law and equity, a shareholder to the extent of 400*l.* only. But, say the company, we meant to allot you 800*l.* worth of shares, and you are bound by your knowledge of that intention. He says in reply, "I really never knew of this intention till May, 1866." Now, if they meant to give the shareholders notice that the shares were 40*l.* each, I must say I never saw anything more carelessly or more clumsily done in my life. There is nothing in any document to shew that he was paying upon 40*l.* shares, except the thing on the fly-leaf, which, in all probability, Mr. Gustard would never dream of reading, being merely a receipt for the money which he never paid. I therefore give entire credence to Mr. Gustard when he says, "I never looked at it." He never paid any call at all, though he received notice of the calls; therefore, if he never got a receipt for it, he never could have read the receipt. Then it is said, at all events he did know in May, 1866, that these were 40*l.* shares, and was therefore guilty of laches. But you must look at all the circumstances of the case; and at this time there was some sort of bargain by which the company had agreed with Mr. Holden to accept these shares, and under that agreement Mr. Gustard executed a transfer to Holden, who took it to the office of the company; and Mr. Gustard never heard anything more about it. He never thought afterwards he had anything more to do with it. I do not think, under those circumstances, that a transferor who has executed to a transferee a transfer of his shares, such as here, was bound, when he received notice that the shares were 40*l.*, to take steps to get the matter altered. He had a right to assume, as it seems to me, that he had ceased to have anything to do with the company, and that the company were treating Holden as the real owner of the shares. I think there is not sufficient to say that a new contract has been, by conduct of acquiescence, or whatever it may be called, entered into between the company and Mr. Gustard, by which that which was a contract originally for 400*l.* became a contract for 800*l.* Nothing has taken place to make a new contract having that effect, and therefore I am of opinion that the thing stands, as between Mr. Gustard and the company, exactly as it did on the day he received the letter of allotment. I cannot hold that their attempt to make the shares 40*l.*, which attempt he knew nothing of, could bind him; and, on the other hand, I do not think he can say, "Because you attempt to foist upon me other shares and seek to make me a shareholder for 800*l.*, therefore I am not a shareholder for 400*l.*"; nor can he say, "I thought I had done with the shares altogether, and you partly led me to that belief. I sent

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the shares to the office, and I never heard that the transfer had been refused or declined; and that being so, I had every reason to believe that you had accepted the transfer." Now, I am of opinion that the company are under no obligation to send notice to the transferor of their refusal to accept the transfer. It is for the transferor to see that everything is complete, and there is no duty which the company violated in that respect. The length of time is a matter which cannot affect the company. Their rights remain exactly the same, Mr. Gustard still having whatever rights he may have against Holden, who is, of course, bound to indemnify him; but he is liable to the extent of twenty shares of 20*l.* each, upon which 4*l.* deposit has been paid.

LORD ROMILLY, M.R., June 28, July 13, 14, 1869.

WILKINSON *v.* LINDGREN.

38 L. J. Ch. 613; 17 W. R. 1000: affirmed, [1870] E. R. A.; 39 L. J. Ch. 722; L. R. 5 Ch. 570; 23 L. T. 375; 18 W. R. 961 (L.C.).

Will—Construction—Charitable Bequest—Uncertainty—Resulting Trust.

CHARITY.—*Bequest of legacies to various charitable institutions by name, followed by bequest of residuary personal estate to trustees upon trust "to divide the same to or amongst the different institutions or to any other religious institution or purposes as they, the said trustees, may think proper, which disposition I leave entirely to their discretion":*—Held, *that "purposes" meant religious purposes, and not purposes generally, and that there was consequently a good charitable bequest.*

This was the further consideration of a suit for the administration of the estate of Mary Davison, who, by her will, after having bequeathed legacies to various charitable institutions by name, gave the residue of her personal estate to her executors, T. Fletcher and J. Wilkinson, upon trust "to divide the same to or amongst the different institutions or to any other religious institution or purposes as they the said T. Fletcher and J. Wilkinson may think proper, which disposition I leave entirely to their discretion."

The question was, whether this was good to any extent as a charitable bequest, or raised a resulting trust for the next-of-kin.

Sir R. Baggallay and *Mr. C. Hall*, for the surviving trustee, contended that this was either a good charitable bequest or at least gave the trustees a discretion as to whether they would pay the residue to the charities or to the next-of-kin.

Mr. Roxburgh and *Mr. Phear*, for the next-of-kin, contended that the gift being for general benevolent purposes was void, and that there arose a resulting trust.

On the occasion (*June* 28) the charities were not represented, and

THE MASTER OF THE ROLLS held that the gift of residue failed; and directed an inquiry as to who were the next-of-kin.

On the 13th of July the case was re-argued, the charities named in the will having obtained leave to appear.

Mr. Southgate and *Mr. Bunting*, for the charities, contended that the adjective "religious" qualified the word "purposes" as well as the word "institution." There was, therefore, a good charitable bequest. They referred to *Morice* v. *the Bishop of Durham* (10 Ves. 532); *Baker* v. *Sutton* (1 Keen, 224).

Mr. Roxburgh and *Mr. Phear*, contra.

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The MASTER OF THE ROLLS.—I think I was wrong the other day. I cannot make the word "religious" apply to "institution" only, and not to "purposes." If this were done it would be an arbitrary construction introduced to create an intestacy. There must be a declaration that there was a good charitable bequest of the residue.

JAMES, V.C., July 31, 1869.

In re THE OXFORD AND CANTERBURY HALL COMPANY (LIMITED).

38 L. J. Ch. 614; L. R. 8 Eq. 691; 17 W. R. 1086: affirmed, [1870] E. R. A.; 39 L. J. Ch. 775; L. R. 5 Ch. 433 (L.J.); 18 W. R. 793.

Winding-up — Proof — Creditor realizing Security — Purchase-money remaining unpaid—Rescission of Contract.

COMPANY.—*The mortgagees of a company contracted to sell their security after the commencement of the winding-up, but before sending in a claim for the amount of their debt. After sending in their claim they entered into a new contract, whereby the rights and obligations of the original purchaser were transferred to two other persons, the first contract being declared to be cancelled, but the deposit already paid being considered as paid on account of the new contract*:—Held, *that the mortgagees having converted their security could only prove for the balance of their debt, and that as between them and the company the subsequent transfer or rescission of the contract made no difference.*

Whether, if the purchaser had become bankrupt before the purchase was completed, the mortgagee could then have proved against the company for his whole debt, quære.

Adjourned summons.

By deed, dated the 3rd of July, 1867, containing the usual power of sale, the company mortgaged their premises in Oxford Street and Lambeth respectively to the London and County Bank, to secure an advance of 11,000*l.* and interest. The company was wound up on the 23rd of June, 1868. In September of the same year the bank put up the Oxford Street part of the mortgaged premises for sale by auction, but the property was not sold till the following January, when a Mr. Syers contracted to purchase the Music Hall for 8,500*l.*, and also the fixtures, which were subsequently valued at 758*l.* The sum of 1,000*l.* was paid by way of deposit.

On the 24th of March, 1869, a claim was for the first time sent in by the bank for 11,652*l.* 8*s.*, as the amount due for principal and interest at the date of the winding-up order.

Mr. Syers being unable to complete his contract, a new contract was signed on the 29th of June, 1869, whereby it was agreed that the former contract should be considered as cancelled, and that the property therein comprised (including the fixtures) should be purchased by a Mr. Taylor and a son of the former purchaser for 9,025*l.*; the deposit of 1,000*l.* to be considered as paid on account of the new contract, and the balance of the purchase-money, 8,025*l.*, to be paid on the 1st of April, 1870. The new purchasers were also to pay, by four equal instalments, interest at 6*l.* per cent. on the last-mentioned sum as from the time when the former purchase was to have been completed.

Under these circumstances the official liquidator opposed the claim of the bank, on the ground that they had realized their security, and could only be allowed to prove for the balance after deducting the amount of the purchase-money for which the premises were sold to Mr. Syers, and to receive a dividend on the smaller amount.

Mr. Kay and *Mr. Waller*, for the bank, relied mainly on *In re Barned's*

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Banking Company; Kellock's case, and *In re Xeres Wine Shipping Company; Ex parte the Alliance Bank* (L. R. 3 Ch. 769); and also referred to *Wright's case* (14 Jur. 498), and *Mason* v. *Bogg* (2 M. & Cr. 443).

Mr. Eddis and *Mr. Higgins*, for the company, cited *Lockhart* v. *Hardy* (9 Beav. 349; 15 L. J. Ch. 347); *Palmer* v. *Hendrie* (No. 2) (28 Beav. 341); *Walker* v. *Jones* (35 L. J. P.C. 30; L. R. 1 P.C. 50); *Burrell* v. *Smith* (38 L. J. Ch. 382; L. R. 7 Eq. 399).

JAMES, V.C. was of opinion that the case was not governed by *Kellock's case*. The principle was clear, that the time to ascertain the amount due is the time when the claim is sent in. A mortgagee selling, or contracting to sell, would stand in the same position as if the mortgagor had on that day handed over the property to him on a contract that he should take it in partial satisfaction of the debt. It was no answer to say that the money was not actually received, that being his own choice. As long as the contract was in force he had exercised his power of sale, and could not consider himself a creditor for the whole debt; and as between him and the mortgagor he could not rescind the contract capriciously, and a mere transfer would make no difference; though he was not prepared to say that the absolute loss of the purchase-money by the bankruptcy of the purchaser or otherwise would not alter the case. The proof must stand only for the balance of the debt after deducting the proceeds of sale. Costs of all parties out of the estate.

LORD ROMILLY, M.R., July 16, 1869.

In re THE SOUTH BLACKPOOL HOTEL COMPANY; JAMES'S CASE.

38 L. J. Ch. 616; L. R. 8 Eq. 225; 21 L. T. 258; 18 W. R. 5.

Referred to, *Mersey Steel Co.* v. *Naylor*, [1882] E. R. A.; 51 L. J. Q.B. 576; 9 Q.B. D. 648; 47 L. T. 369; 31 W. R. 80 (C. A.): affirmed, [1884] E. R. A.; 53 L. J. Q.B. 497; 9 App. Cas. 434; 51 L. T. 637; 32 W. R. 989 (H.L.).

Debenture—Set-off—Covenant to Indemnify.

COMPANY.—*By articles of association a certain sum was to be paid by the directors to C, he indemnifying them against certain costs. Some of these costs being unpaid were proved in the winding-up against the company*:—Held, *that the assignee of debentures payable to the holder granted to C. in part satisfaction of his claim could not prove on them without deducting from each of them a rateable part of the unpaid costs by way of set-off.*

Mr. James, the holder of three debentures, sought to prove on them against the company.

The only question was whether the official liquidator was entitled to a set-off.

Under the articles of association a sum of 1,750*l.* was due to Mr. Carter, he "indemnifying the directors from all costs, damages and expenses" (except as therein mentioned) "down to the allotment of the shares." Mr. Carter accepted in payment of this sum 50*l.* in cash and seventeen debentures of 100*l.* each, payable to the holder. Three of these debentures came into the hands of Mr. James. Of the costs covered by the indemnity sums amounting to 208*l.* 2*s.* remained unpaid, and had been proved against the company in the winding-up. The question was whether this sum could be set off against the proof of the debenture holders.

Mr. Jessel and *Mr. Gardiner*, for Mr. James, contended that neither at law nor in equity could damages for breach of a covenant to indemnify be set off against a debt, and that the assignee took subject only to the equities attaching to the debentures at the time of the assignment. They cited *In re the Blakely*

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Ordnance Company (37 L. J. Ch. 418; 3 Ch. Ap. 154); *In re the Natal Investment Company* (37 L. J. Ch. 362; 3 Ch. Ap. 355); *In re the General Estates Company* (3 Ch. Ap. 758).

Mr. Ford North, for the official liquidator, was not called upon.

The MASTER OF THE ROLLS said: This is not a question to be determined on mere technicalities, but on the plain common sense of the case. There is a sum of more than 200*l.* which the company has to pay in respect of the expenses covered by the indemnity. The case must be treated as if these sums had been already paid, and as if the debentures were in the hands of Mr. Carter. I am of opinion, therefore, that, upon the principle of the case of *In re the Natal Investment Company*, decided by Lord Justice Lord Cairns, the company is entitled to set-off against the holders of the debentures these debts which have been proved against it. The seventeen debentures are bound to contribute rateably. The order, therefore will be that Mr. James's proof be allowed, deducting from each of his debentures one-seventeenth of the sum provable against the company under Mr. Carter's guarantee.

JAMES, V.C., June 7, 26, 1869.

SOWERBY *v.* FRYER.

38 L. J. Ch. 617; L. R. 8 Eq. 417; 20 L. T. 868; 17 W. R. 879.

Clergy—Right of Vicar to cut Timber—Dilapidations—Injunction.

ECCLESIASTICAL LAW.—*Although, as a general rule, a vicar has a right to cut timber for the purposes of applying it specifically to repairs of the vicarage premises, and possibly a right to sell the timber and buy with the proceeds an equivalent amount of timber in a more convenient place for the purpose of using it in such repairs, he has no right to cut timber for the purpose of selling it to raise a fund to repair dilapidations in the vicarage premises arising from his own previous neglect to repair.*

This was the hearing, upon motion for a decree, of a suit against the Rev. C. G. Fryer, vicar of Eltham, in Kent, and the other persons interested in the advowson, praying for an account of all timber and other trees and underwood cut down by the vicar, and of the moneys arising from the sale thereof; for an injunction to restrain the defendant C. G. Fryer, from cutting timber, &c., and for damages.

The plaintiff was the equitable owner by purchase at a sale in 1860, under an order of the Court, of the several terms or presentations to the vicarage of Eltham so often as the same should become vacant during the life of Helen Elizabeth Fryer, the wife of the defendant C. G. Fryer, with the appurtenances to the said rights of presentation belonging.

The defendant C. G. Fryer, the vicar of Eltham, was about sixty years of age, his wife, the said Helen Elizabeth Fryer, being about forty-eight years of age. The vicarage comprised (*inter alia*) a vicarage-house, with offices and outbuildings, garden and pleasure-grounds of little more than half an acre, and adjoining to these a meadow of about four and a half acres. Part of this meadow did not belong to the vicarage in 1860, when the plaintiff purchased his contingent rights of presentation, but was taken in November, 1861, in exchange for an outlying portion of glebe land. The portion of the meadow so acquired in exchange had in it a double row of elm trees, containing about eleven trees in each row, the trees in the one row being lofty and of considerable age, those in the other row being of about thirty years' growth. There were also ten other old trees in other parts of the meadow. The defendant shortly before the filing of the plaintiff's bill had cut down a number of these old trees, as the plaintiff alleged, without obtaining the consent of any other person whose consent to

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such an act was required by law No portion of the fallen timber had been sold or removed previously to the institution of this suit; but the defendant admitted that (subject to the issue in the suit) he intended to sell a part thereof for the purposes stated in his answer.

The defendant, by his answer, alleged that in consequence of the close vicinity of so many large trees the vicarage-house, which was a low old-fashioned building with a good deal of woodwork about it, had become exceedingly damp and unhealthy, and with the object of procuring timber for necessary and proper repairs of the said house and premises, as well as of remedying this evil, and at the same time improving the growth of the row of younger trees hereinbefore referred to, and the condition of the said meadow, which was rapidly deteriorating, from being so much overshadowed by the said older trees, he had directed twenty of the said old trees to be cut down. He further alleged, that he never had intended to apply the felled timber, or the proceeds thereof, for his own exclusive use and benefit; but he had, and then intended to apply so much of the timber as should be suitable for the purpose, and the proceeds of the sale of the rest, in necessary and proper repairs of the house, buildings and premises; and if any surplus should remain, he had been and was willing to retain and apply the same for future repairs, or otherwise for the permanent benefit and substantial improvement of the vicarage premises; and he asserted that the removal of the trees was a great improvement to the house, making it more airy and habitable.

Mr. Kay and *Mr. Osborne Morgan*, for the plaintiff.

Mr. Karslake and *Mr. J. N. Higgins*, for the defendant, the vicar.—The vicar had a right to cut timber on glebe land to be used in repairs, and he was entitled to cut and sell the timber and apply the proceeds in repair of the vicarage premises.

They cited the following cases: *Bartlett* v. *Phillips* (1 De Gex & J. 414); *Holden* v. *Weekes* (1 Jo. & H. 278; 30 L. J. Ch. 35); *Knight* v. *Moseley* (1 Amb. 175); *The Duke of Marlborough* v. *St. John* (5 De Gex & Sm. 174; 21 L. J. Ch. 381); *Strachy* v. *Francis* (2 Atk. 217); *Jefferson* v. *the Bishop of Durham* (1 Bos. & P. 105); *Wither* v. *the Dean of Winchester* (3 Mer. 421).

Mr. Freeling, for the other defendants.

JAMES, V.C. (without calling for a reply).—In this case the plaintiff, in my judgment, is clearly entitled to the relief he asks by the interposition of the Court. The question is simply whether what the defendant is doing is legally justified. If what the defendant has done is not legally justified, the plaintiff, as the immediate owner of the advowson, has a right to interfere on behalf of the advowson. He is the proper person to apply to this Court for an injunction to prevent the mischief which, to a certain extent, he is still in a position to prevent, and which has been done, or is about to be done, by the defendant. The defendant is the vicar. He has been vicar, I am told, for upwards of twenty years. During these twenty years it was his duty to keep the vicarage in repair. It is said he has allowed it to fall into such a state of dilapidation, and especially the woodwork, that it is in a disgraceful state. Then he has cut down a great number of elm trees which formed part of an avenue of trees, in fact, the whole of one row of the avenue. The plaintiff says, You have no right to cut timber as a general rule. That is true. The vicar or rector has no right to cut timber except for a certain limited purpose, which is, that he has a right to cut timber to be applied specifically; that is, to timberwork that is required for the repairs which are about to be done. Or he may perhaps do this,—for some of the cases would seem to justify it;—having the right to cut down timber for that purpose, he may procure an equivalent amount of timber by disposing of the timber on the spot where he actually cuts it, and getting some other timber at a more convenient place. The illustration given by one of the Judges was this: If a man had a right to cut down the timber on outlying places, half a dozen or ten miles off, it would be absurd to make him drag what timber he wanted from that place if he could get timber close by or at another place which was more

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convenient; that is to say, the amount of timber required for the woodwork is the limit. It really does not signify whether that amount of timber is the absolute amount required or whether it is in substitution of other timber. But it is quite clear from all the cases that a man has no right to cut down timber from the glebe land for the purpose of forming a fund to repair the dilapidations which he ought never to have allowed to have occurred to relieve him from any liability for the amount of those dilapidations when his successor comes in. The case upon the evidence is this: It is not pretended that this amount of timber was ever meant to be applied, or was ever intended to be applied, to the repair of that portion of the building which is said to consist of woodwork. All is left perfectly vague. They say, "A great deal more repairs were required than the value of this timber would amount to "—(that may be true)—" and there is upon this property, especially upon the out-buildings, which are of no value at all, and which I may be obliged to keep up, a good deal of woodwork, for which some of this may be required "—one-third, I think, it was. Of course that would not justify what he did. The plaintiff, finding the defendant cutting down timber in violation of the law, comes here, as he has a right to do, for he is fully justified in saying, I must get an injunction to prevent your doing anything more. It is no answer for a wrongdoer to say, In my own breast I have determined not to cut down a single tree more, therefore you are premature in coming to this Court for an injunction. A man has committed a wrong; there is nothing to shew that he will not commit a further wrong. The plaintiff, therefore, was justified in coming to this Court for the purpose of preventing the defendant committing any further wrong. But, more than that, he was in time to stop the defendant from doing another wrong. He was clearly entitled to prevent the defendant from selling the timber. In those cases of *Knight* v. *Moseley* and *Holden* v. *Weeks* it was held that the plaintiff could not get an account of the past proceeds of what the defendant had done, cases which, I am bound to say, to my mind, are utterly unintelligible (although of course I am bound by them), because I never could make out why the owner of an advowson could not require the proceeds taken by a wrongdoer to be invested for the benefit of the advowson. In this particular case, the timber which has been cut down has not been converted into money; it was still on the ground when the plaintiff came for his injunction, and the plaintiff is entitled to have that specific timber. I think I can go to that extent without violating the decision, or supposed decision, in *Holden* v. *Weeks* or *Knight* v. *Moseley*, that the plaintiff was entitled to have the proceeds of the particular timber invested for the benefit of the advowson. I therefore make the injunction perpetual, and order the timber to be sold, the proceeds to be brought into Court; and I order the defendant to pay the costs of the suit, this being one of those cases in which the costs must abide the event. The proceeds of the sale of that timber being brought into Court, I will allow the defendant liberty to apply in chambers for the application of any part of it before sale for the purpose of being applied specifically to the timber repairs about to be actually done to the property.

June 27.—Upon the matter being mentioned to the Court upon the minutes, His Honour, at the request of the defendant C. G. Fryer, instead of having an auction, gave him liberty to purchase the timber which he had cut, and which was still lying *in situ*, at a valuation to be made thereof by the valuer of the Ecclesiastical Commissioners, Mr. Clutton, and then to apply at chambers as to the costs of having such valuation made.

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MALINS, V.C., June 29, 1869.

PUGH *v.* ARTON.

38 L. J. Ch. 619; L. R. 8 Eq. 626; 20 L. T. 865; 17 W. R. 984.

Questioned, *In re Glasdir Copper Mines, Ltd.*, [1904] E. R. A.; 73 L. J. Ch. 461; [1904] 1 Ch. 819; 90 L. T. 412 (Ch. D.).

Landlord and Tenant—Fixtures, Right to remove—Forfeiture of Lease—Re-entry.

FIXTURES.—*In whatever mode a lease be determined, the tenant has no right (unless protected by special contract) to remove his fixtures after he has ceased to be in lawful possession.*

Where a tenant forfeited his lease by an act of bankruptcy, and the landlord re-entered:—Held, *that the landlord was absolutely entitled to all fixtures remaining upon the premises at the date of the re-entry.*

The plaintiff, Edmund Lechmere Pugh, was landlord of a shop and other premises at Worcester, which had been demised to John Vaughan, a stationer and bookseller, for a term of seven years from the 25th of March, 1865. Among other provisions, the lease contained a proviso that, if the lessee should become bankrupt or execute any assignment for the benefit of his creditors, or enter into any composition for the payment of his debts, it should be "lawful for the plaintiff, his heirs or assigns, immediately or at any time thereafter, to enter into and upon the hereditaments thereby demised, or any part thereof in the name of the whole, and the same to repossess and enjoy as of his or their former estate, as if that indenture had never been made." The lease contained no provision in respect of fixtures.

On the 2nd of March, 1868, Vaughan executed an assignment of all his estate and effects to the defendant George Arton, for the benefit of his creditors; the deed was registered in bankruptcy on the 11th of March.

Under the authority of this deed the defendant Arton advertised for sale all Vaughan's stock-in-trade, including shop-fixtures, gas-fittings and other fixtures in and upon the premises. The plaintiff, however, upon the 12th of March, served the defendant with a formal notice to the effect that all the fixtures belonged to him as landlord, and that, as the interest of the lessee had become forfeited by breach of the conditions of the lease, he (the plaintiff) claimed possession of the premises and all the fixtures, articles and things affixed thereto, and should hold the defendant liable for any loss sustained by their removal.

Notwithstanding this notice, the defendant threatened to proceed with the sale of the fixtures, whereupon the plaintiff filed his bill and obtained an injunction to restrain the sale. The order directed an inquiry as to which of the fixtures enumerated in the catalogue of sale were affixed to the premises at the date of the lease, and which had been affixed by Vaughan during the tenancy, and whether the fixtures were such as between the plaintiff and Vaughan could not be removed from the freehold without the plaintiff's consent; also, as to the value of any which had been already sold by the defendant.

The chief clerk certified that the fixtures in question were tenant's fixtures; that many of them had been purchased by Vaughan from a prior tenant, and others had been put up at Vaughan's own expense, but all of them were claimed by the plaintiff on the ground that the tenant's right to remove them was barred by the forfeiture and subsequent entry of the landlord.

This point now came on for argument upon further consideration of the cause.

Mr. Glasse and *Mr. Elderton*, for the plaintiff, argued that after the determination of the lease, whether by forfeiture or otherwise, the tenant's right to remove the fixtures was barred. In the absence of any special contract of reservation, all fixtures not removed by the tenant while he remained in lawful

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possession became the property of the landlord. The rule applied still more strictly where, as in this case, the determination of the lease was caused by the tenant's own act—*Woodfall's Landlord and Tenant*, 9th edit. 533; *Weeton* v. *Woodcock* (7 Mee. & W. 14; 10 L. J. Ex. 183); *Lyde* v. *Russell* (1 B. & Ald. 394; 9 L. J. K.B. 26); *Bishop* v. *Elliott* (11 Ex. Rep. 120); *Poole's case* (Salk. 368).

Mr. J. Pearson and *Mr. Hadley*, for the defendant, contended that the breach of covenant did not *ipso facto* determine the lease; it must be followed by the landlord's re-entry, and then a reasonable time must be allowed to the tenant for removing his fixtures—*Sumner* v. *Bromilow* (34 L. J. Q.B. 130). The policy of the law had been greatly relaxed of late years in favour of the rights of the tenant, and it would be a dangerous precedent to establish that any landlord could arbitrarily avail himself of a breach of covenant to come in and take immediate possession of all a tenant's fixtures without allowing a reasonable time for their removal. They also cited *Hellawell* v. *Eastwood* (6 Ex. Rep. 295; 20 L. J. Ex. 154); *Stansfield* v. *the Mayor of Portsmouth* (4 Com. B. Rep. N.S. 120; 27 L. J. C.P. 124).

MALINS, V.C.—This case involves an important question between landlord and tenant, the plaintiff being the landlord and the defendant, as the tenant's assignee, being in the same position as the tenant himself. Under a lease, dated the 17th of February, 1865, a house was demised by the plaintiff to John Vaughan for a term of years, which, in point of time, has not yet expired. That lease contained a covenant or proviso that if the lessee should do certain acts, amongst which is the execution of an assignment for the benefit of his creditors, the landlord should have an immediate right of re-entry; that is, in fact, a forfeiture, not of course absolute, but at the option of the landlord, and therefore the lease would in that respect become voidable, not void, on the happening of any one of the specified events. On the 2nd of March, 1868, Vaughan made an assignment for the benefit of his creditors, which, beyond all doubt, amounted to an act of bankruptcy, and was a forfeiture of the lease. That did not become known to the plaintiff until the 11th, on which day the deed was registered under the act. On the 12th he gave notice to Vaughan that he intended to treat the lease as forfeited, but he did not enter until the 14th, on which day he actually determined the lease, and thereby revested the estate in himself. Vaughan's business was that of a bookseller, and there were certain fixtures in and about the house or shop which are now admitted on both sides to be tenant's fixtures, that is, things which, though in a certain sense attached to the freehold, the tenant had still a right to remove during the continuance of his tenancy or lease. If, therefore, the lease had not been forfeited the tenant would at this moment have that right, because the law is clear that where such fixtures are put in by the tenant he has a right at any time during the continuance of the lease to remove them; and it is equally clear that if he omits to remove them during the currency of the lease, after its expiration it is too late for him to do so without the consent of the landlord; and I was surprised to hear the case argued as if there was any doubt on this point, for it was long ago settled, as I always thought, in *Lyde* v. *Russell*. Nothing can be more distinct on the subject than the point there raised, and decided by Lord Tenterden. That was a case in which the tenant brought an action of trover for bells which had been put up at his own expense, and which he would have had an unquestionable right to remove during his tenancy; but it was held that by remaining fixed to the freehold after the expiration of the term they became the property of the landlord.—[His Honour referred at length to Lord Tenterden's judgment in the case, and continued]—Mr. Glasse cited several other authorities, but I need not refer to them as they are all collected in *Woodfall's Landlord and Tenant*, at page 534 of the last edition. It is there laid down that where a lease expires, whether by effluxion of time or by forfeiture, which is the act of the tenant (the right being the same in either case), if the tenant does not remove the fixtures during the continuance of the lease or while he remains in lawful possession, it is too late for him to do so after the landlord has entered. Against this rule

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two cases were relied upon, by Mr. Pearson and Mr. Hadley, namely, *Stansfield* v. *the Mayor of Portsmouth* and *Sumner* v. *Bromilow*, both of which proceed upon the footing that there was a covenant between the landlord and the tenant that certain things should remain and certain things should be removed; it was held that if the tenant had a right by virtue of his covenant to remove particular fixtures he must have a reasonable time for doing so after the expiration of the lease, but all that those cases decide is, that where there is an express contract that the tenant shall have a right to remove fixtures he does not lose that right the moment his term ends or is forfeited, but he must have a reasonable time after the lease determines. They do not, therefore, vary the old law on this most important principle, nor do I accede to the argument that it has been varied or gradually relaxed: I think it remains unaltered. Where there is an express contract between the parties the Court will put a reasonable construction upon it, and allow the tenant a reasonable time; but unless the tenant protects himself by a contract, giving him the right to take away the fixtures after the expiration of the term, there is no such right. Whether the lease is determined by lapse or by the act of the tenant (of which he must necessarily have the best notice) he must protect himself, for when once the landlord has re-entered he is back in his possession. Upon the principle of *Lyde* v. *Russell*, the law presumes a gift to the reversioner. That being the state of the facts here, and there being no special contract, the plaintiff is entitled to such of the fixtures as were not removed during the continuance of the lease, that is, before the plaintiff took possession under the forfeiture on the 14th of March, and he must have a decree. At the same time I think this a most unconscionable and ungracious claim, seeing that these are trade fixtures, put up at the tenant's own expense or bought by him from a previous tenant, and I shall not give the plaintiff any costs, although as a general rule the costs would follow the result.

JAMES, V.C., June 28, 1869.

COOPER *v.* COOPER.

38 L. J. Ch. 622; L. R. 8 Eq. 312; 21 L. T. 197; 17 W. R. 1007: affirmed, [1870] E. R. A.; 39 L. J. Ch. 240; L. R. 5 Ch. 203; 22 L. T. 1; 18 W. R. 299 (L.C.).

Power of Appointment, Exercise of—Agreement for a Settlement by Appointee giving Appointor a remote contingent Interest—Pecuniary Consideration given by Appointor—Fraud on the Power.

POWERS.—*By articles made upon the marriage of G. D, her father, T. D, covenanted that he and his wife would, in exercise of a power of appointment among their children given to them by their marriage settlement, appoint a share of certain trust funds to G. D, and he also covenanted to give to trustees a bond for the payment of a sum nearly equal to the appointed share. The same articles provided that the appointed funds and the moneys secured by the bond should be so settled as that, in case of default of issue of G. D.'s marriage, the ultimate remainder in them should be vested in T. D. absolutely. In pursuance of these articles T. D. and his wife appointed to G. D. a share of the trust funds, subject to their settlement. T. D. executed the said bond, and the moneys so appointed and secured were settled as agreed. There was no issue of G. D.'s marriage*:—Held, *that the appointment was a valid execution of the power, notwithstanding the contingent interest which T. D, one of the appointors, obtained under it by the above-mentioned arrangement.*

This suit was instituted to contest the validity of an appointment of trust funds under a power, upon the ground that the appointment was a fraud on the power.

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By an indenture of settlement, dated the 8th of September, 1806, and made in contemplation of the marriage of Thomas Daniell and Lucy Maria, his intended wife, a trust fund of consols was settled, subject to life interests thereby given to Mr. and Mrs. Daniell, " in trust for all and every or such one or more of the child or children of the said intended marriage at such age or ages, time or times, and in such parts, shares and proportions, manner and form, and under and subject to such provisoes, conditions, restrictions and limitations over, being for the benefit of some or one of such child or children as the said T. Daniell and his wife should at any time or times during their joint lives " by deed appoint; and in default of such joint appointment as the survivor of them should appoint; and " in default of any such direction or appointment, and in the meantime and until any such direction or appointment should be made, and as to so much of the said Bank annuities or such right or interest therein to which any such direction or appointment, if incomplete, should not extend, in trust for an only child of the said then intended marriage, if there should be but one child, and if there should be more than one, then in trust for all and every the child and children of the said then intended marriage, equally to be divided amongst them, share and share alike," the shares of sons to vest at twenty-one, and the shares of daughters at twenty-one or marriage. The said settlement also contained a hotch-pot clause. There were five children of the said marriage, of whom the defendant Maria Gertrude Daniell, on the 14th of February, 1832, married George O. B. Trevanion, since deceased.

By articles of agreement, dated the 11th of February, 1832, made in contemplation of such last-mentioned marriage, reciting the power of appointment contained in the settlement of 1806, and that Mr. and Mrs. Daniell had agreed to make a joint appointment of one-fourth of the moneys thereby settled in favour of their daughter Maria Gertrude Daniell, and reciting that Thomas Daniell had also agreed to secure by his bond the sum of 4,567*l*., to be paid as thereinafter mentioned, and reciting that as well the sums of money so agreed to be appointed and the said bond as future property of the said Maria Gertrude Cooper, were agreed to be settled in manner thereinafter expressed, G. O. B. Trevanion covenanted with Thomas Daniell, his executors, administrators and assigns, that he, G. O. B. Trevanion, would settle certain moneys intended to be appointed in his favour by his father, John Trevanion, in manner therein mentioned; and Thomas Daniell, for himself and his wife, Lucy Maria Daniell, covenanted and agreed with G. O. B. Trevanion that they, Thomas Daniell and Lucy Maria, his wife, would, immediately after the said appointment so intended to be made by the said John Trevanion should have been duly executed in due form of law, execute the said recited power of appointment vested in them as aforesaid in favour of their said daughter, in order that the same might be settled to and for the several trusts, intents and purposes thereinafter mentioned; and also that he, the said Thomas Daniell, would, immediately after the said appointment so intended to be made by the said John Trevanion should have been duly executed, execute to the trustees of the settlement a bond for payment to them, in the year 1840, of the sum of 4,567*l*., with power to pay off the same at an earlier period, with interest at 5*l*. per cent. from the date of the bond, payable half-yearly; and it was declared and agreed that G. O. B. Trevanion, Thomas Daniell and Lucy Maria, his wife, and Maria Gertrude Trevanion should, as soon as might be after the solemnization of the said intended marriage and the said deed of appointment should have been duly executed by the said John Trevanion, legally and effectually convey, settle and assure to the trustees of that deed all and singular the moneys and premises thereinbefore mentioned and intended to be settled as aforesaid, and also all other estate or property to which the said Maria Gertrude Daniell might become entitled as aforesaid, to hold the same unto the said trustees upon the trusts thereinafter expressed, being trusts in favour of G. O. B. Trevanion and Maria Gertrude Daniell for their respective lives, with remainder amongst their children and issue as therein mentioned; and it was thereby provided that in case there should

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be no child or children of the said intended marriage who, or whose issue, should acquire a vested interest in the said trust funds, then and in such case the moneys intended to be settled by the said G. O. B. Trevanion should go and belong to his executors, administrators and assigns, and the moneys intended to be settled by the said Thomas Daniell and Lucy Maria, his wife, should go and belong to the executors, administrators and assigns of the said Thomas Daniell.

By a deed-poll, dated the 10th of April, 1832, Thomas Daniell and his wife absolutely and irrevocably appointed one equal fourth share of the moneys, stocks, funds and securities liable to the trusts of their settlement of the 8th of September, 1806, which were in the said deed-poll stated to consist of the sum of 11,834*l.* 1*s.* 6*d.* consols and the sums of 4,000*l.* and 3,590*l.* sterling, as and for the portion of the said Maria Gertrude Trevanion, and that the same should immediately become a vested interest in her so as to be transmissible to her executors, administrators and assigns, and should immediately upon the decease of the survivor of them, the said Thomas Daniell and Lucy Maria, his wife, or so soon after as circumstances would permit, be transferred to the said Maria Gertrude Trevanion, her executors, administrators or assigns, for her own use and benefit.

The deed of appointment provided that nothing therein contained should preclude Maria Gertrude Trevanion from taking a share in the unappointed funds, subject to the original settlement on bringing the moneys now appointed to her into hotch-pot.

On the 11th of April, 1832, a settlement of Maria Gertrude Trevanion's appointed share and property to be after acquired, was duly executed in accordance with the articles of February, 1832.

G. O. B. Trevanion died in September, 1832, and there was no issue of his marriage.

In June, 1841, Maria Gertrude Trevanion was married to the plaintiff Frederick Bathurst Cooper. By a settlement made in contemplation of such marriage it was agreed that the trustees of the settlement of April, 1832, should stand possessed of the funds thereby settled to which the said Maria Gertrude Trevanion was entitled for her life or otherwise, upon trust during the joint lives of herself and the plaintiff to pay a moiety of the interest thereof to her for her separate use, and the other moiety of the interest to the plaintiff, and after the death of one of them to pay the interest to the survivor for life.

In the year 1834, Sophia (another daughter of Thomas and Lucy Maria Daniell) was married to J. H. England (since deceased). In contemplation of such marriage, Thomas Daniell and Lucy Maria (his wife), by a deed-poll, dated the 3rd of May, 1834, made an appointment of one-fourth part of the said funds subject to their marriage settlement in favour of their said daughter Sophia, in similar terms to the appointment in favour of Maria Gertrude hereinbefore mentioned.

By a settlement of even date with the last-mentioned deed-poll, reciting that upon the treaty for the said intended marriage it had been agreed that Mr. and Mrs. Daniell should appoint one-fourth part of the funds liable to the trusts for the settlement of the 8th of September, 1806, to or in trust for Sophia England, in manner effected by such deed-poll, and that the part so to be appointed to the said Sophia England, and all other her interest in the same trust premises, and all her after-acquired property, should be settled in manner thereinafter expressed, and that Thomas Daniell should execute a bond to the trustees of the settlement for payment to them of 4,000*l.*, with interest as therein mentioned (which bond was duly executed), the share so appointed to Sophia England and the moneys payable under the bond were settled upon trusts in favour of Mr. and Mrs. England and the survivor of them, during their respective lives, with remainder amongst their children and issue as therein mentioned; and in default of children who, or whose issue, should become

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entitled, upon trusts in favour of Thomas Daniell, his executors, administrators and assigns, similar to those contained in Mrs. Trevanion's settlement.

There were six children of the marriage of Mr. and Mrs. England, of whom five had attained twenty-one, and thereby acquired vested interests in remainder under their parents' marriage settlement.

In August, 1844, Mr. and Mrs. Daniell appointed the unappointed moiety of the funds, subject to the trusts of the settlement of September, 1806, to their children Ralph Allen Daniell and Marianne Daniell. Thomas Daniell, in the year 1835, was declared a bankrupt. Up to his bankruptcy he had duly paid the interest due upon the two bonds, and the bond debts were duly proved in the bankruptcy; and in 1843 and 1845 dividends to the amount of one-fifth of the principal sums secured were paid thereon. In May, 1849, the assignees in bankruptcy of Thomas Daniell assigned for value to Sir Alexander Duff Gordon and others, as trustees of the Economic Life Assurance Society, the reversionary interest of the said Thomas Daniell under the articles and settlement executed upon the marriage of Mr. and Mrs. Trevanion, in the one-fourth share of the trust funds appointed to Mrs. Trevanion as aforesaid, and also in the amount received under the bankruptcy of the said Thomas Daniell, as dividends upon his said bond debt of 4,567*l.* Thomas Daniell died in March, 1866, having survived his wife. Upon the death of the said Thomas Daniell the trust funds, subject to the settlement of September, 1806, were divided by the surviving trustee of that settlement among the persons who were entitled or conceived to be entitled thereto, one-fourth being paid to the trustees of Mr. and Mrs. Trevanion's settlement, and another fourth to the trustees of Mr. and Mrs. England's settlement. The plaintiff submitted that the appointment of the one-fourth of the trust funds made to his wife upon her former marriage with Mr. Trevanion was a fraud upon the power of appointment, by reason of the same being made for the purposes of a settlement, which conferred an interest therein upon Thomas Daniell; and he contended that such one-fourth share was now distributable among the persons entitled thereto in default of appointment, and for the same reasons he contested the validity of the appointment of one-fourth to Mrs. England.

Mr. Kay and *Mr. W. C. Druce*, for the plaintiff, in support of their argument that the appointment was a fraud upon the power, by reason of its having been made for the purposes of a settlement which limited an interest in the fund appointed to the donee of the power, cited *Goldsmid* v. *Goldsmid* (2 Hare, 187; 12 L. J. Ch. 113); *Birley* v. *Birley* (25 Beav. 299; 27 L. J. Ch. 569); *Pryor* v. *Pryor* (2 De Gex, J. & S. 205; 33 L. J. Ch. 441); *The Duke of Portland* v. *Topham* (11 H.L. C. 32; 34 L. J. Ch. 113); *Palmer* v. *Wheeler* (2 Ball & B. 18); *Sugden on Powers*, 8th edit. 613; *Lane* v. *Page* (Amb. 233).

Mr. Fischer, for Mrs. Cooper, urged that there had been no antecedent bargain with her regarding the terms of the settlement. He cited *Arnold* v. *Hardwick* (7 Sim. 343); *Salmon* v. *Gibbs* (3 De Gex & Sm. 343; 18 L. J. Ch. 177).

Mr. Hemming (*Sir Roundell Palmer* with him), for the Economic Assurance Society, argued that the appointment to Mrs. Cooper was good. The rule acted upon by the Court was, that where the purpose and object of the appointment was to benefit the appointor, there the appointment was bad, but the principle could not be carried so far as to vitiate every appointment under which the donee of the power might receive a benefit, or by which there might be a remote chance of anything coming back to him. If that were so, every appointment made by a father to a daughter upon her marriage with a view to a settlement in the ordinary form by which an ultimate limitation, in default of children, was reserved in favour of the daughter's next-of-kin to the exclusion of her husband would be invalid. The case of *Askham* v. *Barker* (17 Beav. 37; 22 L. J. Ch. 769), summed up the law upon the subject. In order to make the appointment fraudulent there must be an improper and sinister purpose of giving some advantage to the appointor. Such a purpose, whether direct or indirect, would

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vitiate the appointment, but the mere fact that the donee of the power might remotely derive some benefit from his exercise of it would not necessarily invalidate the appointment. In this case, Thomas Daniell had given to the trustees of Mrs. Cooper's settlement made upon her marriage with Mr. G. O. B. Trevanion a bond nearly equal in amount to the share of the trust funds, subject to his own settlement, which he and Mrs. Daniell had appointed to her; and an arrangement was made that, upon his giving such a bond, he should be entitled in an improbable or, at least, remote event to a contingent benefit in the appointed share. There was nothing in that indicating an improper or sinister motive. Besides, the arrangement had been acquiesced in and acted upon for a number of years by all parties, and a considerable amount of the money due upon the bond had actually been recovered, and the plaintiff himself was taking benefits under it. He could not now, in any case, come and disturb the arrangement. He referred to *The Duke of Portland* v. *Topham* (11 H.L. C. 32; 34 L. J. Ch. 113); *Daubeny* v. *Cockburn* (1 Mer. 626); *Jebb* v. *Tugwell.* (7 De Gex, M. & G. 663; 25 L. J. Ch. 109).

Mr. Eddis and *Mr. Hamilton Humphreys*, for Mrs. England and her children, argued that the appointment and settlement would be upheld. At all events, if the ultimate limitation in favour of the appointor were bad, the other parts of the settlement, which could readily be distinguished from it, were perfectly unimpeachable. And, even with regard to the appointment, although the condition upon which it was made might be bad, yet the appointment itself might be good—*Fitzroy* v. *the Duke of Richmond* (27 Beav. 190; 28 L. J. Ch. 750); *Lane* v. *Page* (Amb. 233); *Palsgrave* v. *Atkinson* (1 Coll. C.C. 190); *Sadler* v. *Pratt* (5 Sim. 632); *Topham* v. *the Duke of Portland* (1 De Gex, J. & S. 517; 32 L. J. Ch. 257); *Rucker* v. *Scholefield* (1 Hem. & M. 36; 32 L. J. Ch. 46); *Ranking* v. *Barnes* (33 L. J. Ch. 539).

Mr. W. F. Robinson, *Mr. Deverell* and *Mr. Swan*, for other parties.

Mr. Kay replied.—The question to be regarded in considering the validity of the appointment was the motive in the mind of the appointee; and if there was, in the exercise of his power, any motive or influence there not consistent with the trust imposed upon him, the appointment was bad. The plaintiff was not bound to take any proceedings to upset the appointment till the death of Mr. Daniell, the previous tenant for life.

JAMES, V.C.—The case of the plaintiff in this suit appears to me to be an illustration of a class of cases in which rules laid down by the Court of Chancery for the prevention of fraud are endeavoured to be strained, upon some technical grounds, for the purpose of producing fraud in such a way that one sometimes cannot help wishing that there were a Court of equity to correct what the Court of Chancery is doing in these matters. Luckily, in this case one is able to deal, not with any technical rule, but with the substance and truth of the case; and, regarding merely the substance and truth of the case, it is this: A father and mother, having a power of appointment among their children, upon the marriage of one of the daughters, who is now the wife of the plaintiff, executed an appointment of one-quarter of the fund to the daughter. The appointment is in terms perfectly unimpeachable; it is an appointment to the daughter absolutely, so as to be a vested and transmissible interest in her. But it is said that, looking at the whole transaction and looking at the articles of agreement which were made before that appointment was in form executed, the Court is able to see that there was some corrupt purpose, some indirect and sinister purpose in the mind of the father, who joined in the appointment, which makes this appointment a fraud in equity. The sinister purpose is this, that it was agreed by those articles of agreement that there should be a marriage settlement, by which, in certainly not a very probable event, or at all events, a remote event, the fund so appointed should come back to the father. The fund was settled upon the daughter for life, with remainder for the husband for life, with remainder for the children and issue of the marriage, and then with an ultimate trust, in default of issue, to the donee of the power, the appointor.

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That, no doubt, if it stood alone, would be a grave ground for impeaching the settlement. I do not mean in the slightest degree to question those cases which hold that if a donee of a power directly or indirectly obtain for himself a personal benefit by reason of the execution of the power, that will not do; but in this case, what the father did was this (because you must look at the whole transaction), he not only executed the power of appointment by appointing a sum of 5,000*l.* for his daughter, but he binds himself in a bond of about 5,000*l.*: he being a man at that time in credit, the bond was not a sham. The interest of the bond seems to have been paid for a number of years, and even after his bankruptcy there has been realized for this very trust on account of the bond debt the not inconsiderable sum of 1,500*l.*; he himself puts into settlement that bond of 5,000*l.*, and gives an immediate interest to the wife, an interest to the husband, and an interest to the children in this fund. Therefore, taking the whole bargain together, it is this: "I will appoint to you the 5,000*l.*" (or whatever the exact sum is) "provided you will enter into a bargain with me that for 5,000*l.* more, which I am going to pay down directly, you will give me a contingent reversion in this fund." In that case I must look at the substance. Was that an indirect advantage to the father at all that he should be buying a future reversion of this kind for that high price? If I were to set aside the transaction, I must set it aside *in toto*. For instance, if a man say, "I will appoint White Acre to you, one of the objects of the appointment being that you will sell it to me for 1,000*l.*, could it be contended that the person could sell White Acre and keep the 1,000*l.*? It appears to me the substance of the transaction was a bargain intended substantially for the benefit of the daughter, who was the object of the power, and that the contingent benefit which the father got was a thing for which he gave value over and over again, and therefore it is not within the rules at all which apply to these cases. Upon that ground, I am of opinion that the appointment is perfectly good, and it seems to me that upon other grounds it would be utterly impossible for this plaintiff, whose wife was a party to the whole transaction, who took the whole benefit under the settlement when he married her, the settlement executed upon his marriage with her referring to the prior settlement, and who is now taking the benefit of the purchase-money of the father's bond, it appears to me to be utterly impossible to allow him, after taking the advantage of all the interest, to have it set aside.

I do not know that I should have heard the case out upon that ground, but I thought possibly he might have some ground for setting aside the appointment to Mrs. England, which he was not estopped from by reason of his being a participator in the benefits of it: but I think it is impossible to allow him to question that. The appointment to Mrs. England seems to stand upon the same ground as the appointment to Mrs. Cooper; the one is perfectly good, and independently of that, there is a second ground. The money having got home to the trustees of Mrs. England, and there having been this acquiescence and consent, I do not think I should allow him to disturb the whole family arrangements, made on the footing of that, when he did not know anything of the facts at the time. But both of these are subsidiary grounds. I base my judgment upon the broad principle that there was no corrupt, fraudulent or sinister purpose in the father, that it was an honest settlement made by him in execution of the power of appointment for the benefit of his daughter. The bill must be dismissed, with costs.

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JAMES, V.C., May 25, 26, June 4, 1869.

PARKES v. STEVENS.

38 L. J. Ch. 627; L. R. 8 Eq. 358; 17 W. R. 846: affirmed, [1870] E. R. A.; 18 W. R. 233; L. R. 5 Ch. 36; 22 L. T. 635 (L.C.).

See, *Murray* v. *Clayton*, [1872] E. R. A.; 20 W. R. 649; L. R. 7 Ch. 570 (L. JJ.); *Harrison* v. *Anderston Foundry Co.*, 1876, 1 App. Cas. 574 (H.L. Sc.); *Clark* v. *Adie*, [1877] E. R. A.; 46 L. J. Ch. 585; 2 App Cas. 315; 36 L. T. 923; 26 W. R. 45 (H.L.).

Letters Patent—Specification—Successive Patents—Part of a Combination —Sliding Door.

PATENT.—*Where a patentee has taken out a fresh patent for improvements on his original invention it is sufficient if, reading his second specification with the first, an artisan would have no substantial difficulty in ascertaining what was claimed.*

A patent for an entire combination is not a valid patent for a part when that part would not of itself be patentable, nor (semble) *when, though new and useful for other purposes, such part has no bearing on the professed object of the patented invention.*

Therefore, when the subject of a patent was declared to be an invention for producing "a glazed lamp, the frame of which shall throw little or no shadow, and yet at the same time possess the requisite strength and also facilities for lighting and cleaning":—Held, *that the substitution of a sliding door for a hinge, which diminished the danger of breakage, but gave no facilities for lighting and cleaning, and had nothing to do with the strength or the shadow, was not protected by the patent.*

Semble—*that there can be no patent right in the mere substitution of a slide for a hinge in the door of a house, of a carriage, or of a lamp.*

A patent was entitled, for "improvements in the manufacture of railway station and other gas lamps," but the specification claimed only (by reference to a former specification) improvements in "that class of lanterns suitable for suspension in railway stations and other public places." Whether the patent was confined to lamps suspended, quære.

This was a suit to restrain an alleged infringement of a patent, in which the following issues were by consent directed to be tried before the Court itself without a jury:

1. As to the novelty of the alleged invention, the subject of the patent.
2. As to its utility.
3. Whether it was or was not a proper subject for a patent.
4. Whether the specification was sufficient.
5. Whether there had been any infringement by the plaintiff.

In 1862 the plaintiff took out a patent for "improvements in gas lanterns," and filed the following specification:

"My improvements in gas lanterns relate to that class of lanterns suitable for suspending in railway stations and other public places, and are of a globular form, the framework consisting of a series of segmental ribs to which the glass is fitted and makes up the globular form, each piece being a section of a sphere. I employ three rings in the frame, two small ones, one each at top and bottom, and one large one at the middle or equatorial line. The small rings I make of a thin strip of metal, presenting the edge to the light, and consequently to throw little or no shadow. The middle bead is unlike that in ordinary use, being narrow and without openings, the only opening in the lamp being above and below, the one at the bottom, for admission of the air, and the other at the top, for the escape. The section of metal of which I form the segmental ribs

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and the large ring consists of a flat strip with a hollow bead united thereto on the outside, the whole being kept as narrow as consistent with the strength necessary. I support this lamp with three rods united to the middle bead and meeting at top in a single pendent arm or branch, or they may be otherwise supported. From the absence of apertures in the middle bead and the disposition of the metal in its upper and lower rings and ribs, which are few in number, comparatively little surface is presented to intercept the radiation of light, and consequently little or no shadow is thrown. The gas duct passes down one of the arms to the mid ring and there enters the globe and descends to a suitable position for the jet. The stop-cock I prefer to place immediately under the jet and concentric with the lower opening in the lamp, the elbow being formed with a stop-cock in which the gas passage emerges at one end of the axis with a view to that object. The parts of the frame are united by soldering, brazing or otherwise, and the glass which is inside the frame is fixed by means of metal strips coinciding with the ribs and large metal ring and fixed thereto inside and upon the edges of the glass, or the glass may be fixed with putty and otherwise in the ordinary manner of fixing the glass in similar kinds of lamps."

The plaintiff subsequently observed various points in which his lamp might be improved, and, in particular, that the form of door used, viz., one of the segmental ribs of the globe opening outwards on a hinge, gave rise to frequent breakages, owing to the two convex surfaces of the glass coming into contact at a point. He therefore, in 1865, took out a second patent for "Improvements in the manufacture of railway-station and other gas lamps." The specification was as follows: "My invention relates to the construction of lamps of a class forming the subject of a patent granted to me, bearing date the 26th of June, 1862, No. 1876, which lamps are particularly applicable for suspension in railway stations or in large exposed areas, either inclosed or open, the great object of the improvements being to produce a glazed lamp the frame of which shall throw little or no shadow, and yet, at the same time, possess the requisite strength and also facilities for lighting and cleaning the lamp. According to my improvements, I make the ribs, which stand in a vertical plane, of a strip of copper or other metal drawn into the form of a round bead in cross section with narrow flanges, one on either side, throughout the length. The parts of the metal where curled to form the bead do not touch, a narrow space being left between for the reception of a rib or feather-piece on edge, which projects from the flat or flange side of the bead and inside the lamp. These ribs are united in a circular band above and below, pins entering the ends of the beads through the bands, and the whole being riveted and soldered together. A metal band is carried round at the largest diameter of the lamp, united to the whole of the upright ribs; this midband is of a half-round, bead-like form, with flanges, and of larger size than the upright ribs, which are dovetailed across and into it flush on the inside. This band is also strengthened by a rib on edge in the interior of the bead, which is introduced in sections between the feathers of the upright ribs and flush therewith; these projecting ribs or feathers inside the lamp serve to receive the glass, which is puttied therein and introduced from the inside. There are six (more or less) pieces of glass in the upper half and six in the lower, each piece being in the form of a section of a sphere. The top ring is double, one part being fixed to the upright ribs, the other part fitting within the fixed one and rotating therein freely, but held by pins working in slots; this movable ring supports the door of the lamp at the top, which door consists of one of the panes of glass fixed in a separate frame; the door is further supported at bottom by a part or parts fitted in a slot or slots in the large mid-bead in the direction of which it is traversed round in opening or closing the said door. This door is formed of a light frame of U-shaped metal to receive the glass and lie close on the outer surface of the lamp. The glass of the upper half of the lamp, in addition to the holding of the putty to keep it in place, is received at its upper edge between two flange-like parts of the upper fixed ring. These

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lamps are suspended by three rods or tubes, one forming the gas-duct, which unite with the lamp at equidistant points around the mid-bead, and at points where the upright ribs intersect. To make the junction of the suspending parts, I apply a ball or enlarged like piece, having at one part a four-pronged like projection which fits on and embraces the intersecting parts of the ribs and mid-band, the whole being fixed through with a pin and soldered in that pendent conducting the gas. I make the four-pronged like piece separate from the ball or enlargement which in this case embraces also the stop-tap, the parts being fixed together by a hollow nipple instead of the pin before mentioned, but also soldered in addition. The gas passes from this point to the burner through one of the upright ribs instead of by a tube within the lamp as formerly; an upright stand-pipe from the bottom ring and gas-rib carries the burner. The feather in the gas-rib is omitted in the interior of the bead, to leave the channel free. The top piece, or canopy, in which the three rods unite I cast hollow in one piece, instead of forming it in pieces as formerly. I tin the whole of the metal of the lamp to protect it from the action of the gas."

The specification then gave in detail a description of the drawings thereto annexed, and concluded as follows: "Having described the nature of my invention and the manner of performing the same, I declare that what I claim as my invention, to be protected by the hereinbefore in part recited letters patent, is the arrangement and combination of parts hereinbefore described and represented in the drawings annexed in the manufacture of railway-station and other gas lamps."

The plaintiff charged that certain large globular lamps supplied by the defendant for lighting up New Palace Yard, Westminster, were an infringement of his patent; in particular in the use of the peculiar revolving or sliding door invented by the plaintiff, with the merely colourable difference that the door was put in the lower instead of the upper section of the lamp. The defendant's case was, that the only resemblance was in the sliding door, which was no essential part of the plaintiff's invention, and was, in fact, too obvious and familiar a contrivance to be the subject of a patent at all.

Mr. Kay, *Mr. Webster* and *Mr. Everitt*, for the plaintiff, referred to *Crane* v. *Price* (4 Man. & G. 580; 12 L. J. C.P. 81); *Harmar* v. *Playne* (11 East, 101; Davis's Patent Cases, 311); *Lister* v. *Leather* (8 El. & B. 1004; 27 L. J. Q.B. 295); *Haworth* v. *Hardcastle* (1 Bing. N.C. 182; 3 L. J. C.P. 311); *Neilson* v. *Harford* (8 Mee. & W. 806; 11 L. J. Ex. 20); *Cook* v. *Pearce* (7 Jur. 764); *Crossley* v. *Beverley* (3 Car. & P. 513; 7 L. J. K.B. 127); *Thomas* v. *Welch* (35 L. J. C.P. 200). The nature of the arguments will sufficiently appear from the judgment.

Mr. Amphlett and *Mr. Bagshawe*, for the defendant, referred to *Bush* v. *Fox* (2 W. R. 269; 9 Ex. Rep. 951); *Foxwell* v. *Bostock* (12 W. R. 723); *Jordan* v. *Moore* (L. R. 1 C.P. 624; 35 L. J. C.P. 268).

JAMES, V.C.—In this case I have to deliver my verdict on each of the several issues which have been set down for trial before me without a jury.

The defendant in this case was employed to place, and has placed, in Palace Yard, certain lamps of a globular form, the lamps being divided into segments,—as he lawfully might. One of those segments was a door opening as occasion might require for the purpose of lighting and cleaning. It is not contended that it is not open to any one of Her Majesty's subjects to make a globular lamp in segments, with one of such segments made to act as a door, but the plaintiff says it was not lawful for the defendant in his globular lamps to make the door segment open and shut by sliding along grooves left in the framework of the adjoining segment or segments instead of revolving on a hinge or hinges. The plaintiff says, "That is part of an invention the subject of letters patent granted to me in December, 1865, and your use of it is an infringement of my patent right." The plaintiff produces two patents, one of 1862 and one of 1865. It is not suggested that there has been any infringement of the patent of 1862; it has however been necessary to refer to it.—[His

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Honour read the material parts of the two specifications.]—The particulars of the infringement are as follows.—[His Honour read the particulars, the substance of which has been already stated.]—The defendant has given in his particulars of objections, the nature of which, so far as is material, sufficiently appears from the issues directed to be tried. The first, second and third issues may be taken together, the first being whether the alleged invention was or was not a new invention, new within the United Kingdom; the second, whether such alleged invention was an invention of public utility; the third, whether such alleged invention was or was not a proper subject for letters patent to be granted to protect it.

Upon those issues I am of opinion that the plaintiff has produced, by a skilful and ingenious arrangement and conbination of the parts of the framework of his lamp, an article of manufacture of great neatness and elegance of form and calculated to produce the desired end, *i. e.*, a framework which throws little or no shadow, while at the same time it possesses the requisite strength, with facilities for lighting and cleaning. There is evidence, not contradicted, that the arrangement and combination of the parts were new. It required some thought to design it, and some labour to give the design practical form and effect; and it seems to have answered better, taken as a whole, than any lamp previously designed for the same object.

My verdict on the first three issues is in favour of the plaintiff; but the defendant contends that the specification is not sufficient, and he relies for this objection upon the judgment of Lord Westbury in the case of *Foxwell* v. *Bostock*, to the effect that a patent for the infringement of a machine must, with sufficient distinctness, describe the particular part of the machine which is alleged to be an improvement, and the particular improvement for which the protection is claimed. I need not say that I should feel myself bound by that decision if I did not, which I do most entirely, concur in it. It is obvious that a patentee does not comply as he ought to do with the conditions of his grant if the improvement is only to be found, like a piece of gold, mixed up with a great quantity of alloy, so that a person desiring to find out what was new or what was claimed as new, must have to get rid of a large portion of the specification by eliminating from it what was old and commonplace, bringing to the subject not only the knowledge of an ordinary skilled artisan but that of a patent lawyer or agent. For example, suppose a compensation pendulum was for the first time invented, it would not do to patent improvements in clocks in general terms and give a specification of the whole machinery of a clock, introducing somewhere in the course of the description the mode of making a compensation pendulum, and then claim the arrangement of a compensation pendulum and improvements. He must say expressly, "I claim an arrangement of a compensation pendulum, and I make it thus." But I am of opinion that that case does not apply to or govern such a case as the present. After all, the question of the sufficiency of the specification is not a question of law; it is a question of fact in each particular case. In this case I am of opinion that the patentee has a right to have his specification of 1865 read with his specification of 1862; and reading them together, I do not think any maker of lamps would have any substantial difficulty in ascertaining what was claimed under the general description of "the arrangement and combination of parts hereinbefore described and represented in the drawing annexed."

But the patent being for an arrangement and combination of parts so as to form an entire lamp, and not being for or claiming to be for any particular part, the last question arises, Is the introduction into a lamp, which is not alleged in any other respect to adopt any part of the plaintiff's arrangement and combination, of a sliding door, an infringement? The plaintiff's counsel have contended that it is, on the authority of *Lister* v. *Leather*, the marginal note of which is as follows: "A patent for a combination does not import a claim that each of its parts is new, and the patent may be valid though each part is old; but the use of a subordinate part only of a combination may be an infringement of a

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patent for the combination, if the part so used be new and material." The authority of that case has been pressed upon me as if it really established that which would be a most startling proposition, that a patent for a combination or arrangement would be a distinct patent for everything that was new and material which went to make up the combination. The marginal note, if read hastily, is calculated to give some colour to that contention, but if the judgment be read it will be found to give no warrant whatever for what I must call such a baseless notion. The law is summed up at page 1023 of the volume I have before me as follows: "A valid patent for an entire combination for a process gives protection to such part thereof as is new and material for that process without any express claim of particular parts, and notwithstanding that parts of the combination are old,"—which is really nothing more than stating, in other words, that you not only have no right to steal the whole, but you have no right to steal any part of a man's invention; and the question in every case is a question of fact: is it really and truly a substantial part of the invention?

I will again refer to the illustration of a clock. Suppose a clock was now for the first time invented and patented as a machine for measuring and indicating time, a man could not evade the patentee's right by substituting a spring for a weight, or by leaving out the whole of the striking apparatus. But the principle of that case has no application whatever, in my judgment, to the present case; and even if there had been any sufficient novelty and merit in the substitution of a sliding door for a hinge, I should have held that that was no part of the invention for producing "a glazed lamp, the frame of which shall throw little or no shadow, and yet at the same time possess the requisite strength and also facilities for lighting and cleaning." The sliding door has nothing to do with the strength, and gives no facilities for lighting and cleaning. The advantages are altogether collateral to the expressed object of the invention, and indeed so far as the sliding goes, it diminishes the facilities of cleaning. The advantage claimed and proved is, that in the hands of the class of men employed to light and clean the lamps they are far less liable to breakage, but that ought to have been the subject of a distinct claim, if it was intended to have been and could have been protected. But I am clearly of opinion that there can be no patent right in the substitution of a slide for a hinge, whether applied to the door of a house, the door of a carriage, or the door of a lamp or lantern, whether large or small, suspended or not suspended.

It was hardly contended before me that the introduction of the door alone would have been sufficient to sustain a patent; but it was contended that because it was, as alleged, a novel part of a novel combination and arrangement, it was so protected. To say that a patent for an entire combination is a valid patent for a part, when that part would not of itself be patentable, is, in my judgment, a *reductio ad absurdum* of the supposed principle of *Lister* v. *Leather*.

I do not think it necessary to say more on the other part of the patent than this: I doubt, and perhaps more than doubt, whether the plaintiff's patent is not confined to gas lamps suspended. My verdict on the issue as to the infringement will therefore be for the defendant.

JAMES, V.C., July 9, 1869.

In re HOTCHKISS'S TRUSTS.

38 L. J. Ch. 631; L. R. 8 Eq. 643.

See, *Hall* v. *Woolley*, [1870] E. R. A.; 39 L. J. Ch. 106; 18 W. R. 129 (V.C.). Discussed, *Atkinson* v. *Atkinson*, 1872, Ir. R. 6 Eq. 184 (M.R.); *Adams* v. *Adams*, [1872] E. R. A.; 20 W. R. 881; L. R. 14 Eq. 246; 27 L. T. 505 (V.C.). Referred to, *West* v. *Orr*, [1878] E. R. A.; 47 L. J. Ch. 294; 8 Ch. D. 60; 38 L. T. 5; 26 W. R. 409 (C. A.). Discussed, *In re Woolrich*;

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Harris v. *Harris*, [1879] E. R. A.; 48 L. J. Ch. 321; 11 Ch. D. 663; 41 L. T. 309 (V.C.); *In re Chinery; Chinery* v. *Hill*, [1888] E. R. A.; 57 L. J. Ch. 804; 39 Ch. D. 614; 59 L. T. 303 (Ch. D.). Applied, *In re Brown; Brown* v. *Brown*, [1889] E. R. A.; 58 L. J. Ch. 420; 37 W. R. 472 (Ch. D.). See, *In re Musther; Groves* v. *Musther*, [1890] E. R. A.; 59 L. J. Ch. 296; 43 Ch. D. 569 (C. A.).

Will—Construction—Substitution—"May die in my Lifetime"—Legatee dead at Date of Will.

WILL.—*A testator gave a sum to be equally divided between his first cousins, and then gave "the share or shares of those my first cousins, if any, who may die in my lifetime unto all and every the children of all my first cousins who may so die in my lifetime share and share alike, such shares to be taken per capita and not per stirpes":*—Held, *that the children of a first cousin who was dead at the date of the will were excluded.*

In re Potter's Trusts (L. R. 8 Eq. 52), *doubted, but distinguished.*

The will of Thomas Hotchkiss, dated the 4th of July, 1865, contained the following clause: "I give and bequeath the sum of 2,000*l.* free of legacy duty unto my first cousins either on my father or mother's side, to be equally divided between them, and I give the share or shares of those my first cousins, if any, who may die in my lifetime, unto all and every the children of all my first cousins who may so die in my lifetime, share and share alike, such shares to be taken *per capita* and not *per stirpes*.

The testator died on the 16th of August, 1865, and his will was duly proved in 1866 by the executors thereof.

On the 24th of October, 1867, John Cranstown, the surviving executor, paid the money into Court under the Trustee Relief Act, and filed an affidavit stating that, in answer to advertisements inserted in the *London Gazette* and certain local papers, the several persons thereinafter named had sent in their claims to participate in the said legacy as first cousins of the testator, or children of first cousins who died in his lifetime.

By order of Vice Chancellor Wood, dated the 16th of November, 1867, upon the petition of one of the claimants, an inquiry was directed "who were the first cousins of Thomas Hotchkiss deceased, living on the 4th of July, 1865, the date of his will, and whether any and which of such cousins are since dead, and if so, when they died, and as to any of them who shall be found to have died in the lifetime of the testator, whether they or any of them left any child or children who survived their respective parents and the said testator, and, in case any of such first cousins or children of first cousins of the said testator have died since the said testator, who are their legal personal representatives"; and it was ordered that the matter of the said petition should stand adjourned till the result of the said inquiry should be certified.

The chief clerk made his certificate accordingly, dated the 4th of April, 1869, to the effect that the only first cousins of Thomas Hotchkiss living on the 4th of July, 1865, were the eleven persons thereinafter named, all of whom were still living; and that "there were no first cousins of the said testator Thomas Hotchkiss who died in his lifetime after the said 4th of July, 1865, leaving any child or children who survived their respective parents and the said testator.

On the petition coming again into Court,

Mr. Eddis appeared for the four children of John Yapp, a first cousin of the testator, who died prior to the date of his will.

Mr. Kay and *Mr. Ford*, for some of the first cousins who survived the testator.—The rule recently laid down by Malins, V.C. in *In re Potter's Trusts* (L. R. 8 Eq. 52), viz., that "Wherever there is a gift to a class, with a gift by substitution to the issue or children of those who shall die, the children take

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what their parents would have taken if living at the testator's death, without regard to the question whether the parents died before or after the date of the will, unless a contrary intention is shewn," is not justified by the cases there cited. It amounts in fact to saying that the Court has power to make a will for a testator, and such a will too as it is by no means clear that the testator would have desired to make; for in the very case put by the learned Judge of a gift by a parent to his children of definite parts of his whole property, he having at the date of his will living children, and also grandchildren the children of a deceased child, it might well be that he knew the grandchildren to be already provided for.

[JAMES, V.C.—The rule might even extend to children of a person who had died before the testator came into existence.]

The particular words used in the case before Malins, V.C. "the share that his, her or their deceased parent would have taken if living," might perhaps be considered as alternative rather than substitutional, and thus be held to warrant his decision, though not the principle on which he grounded it, and *Loring* v. *Thomas* (1 Dr. & Sm. 497; 30 L. J. Ch. 789) is still more easily distinguishable on the same ground; but the general rule is that of *Christopherson* v. *Naylor* (1 Mer. 320), which has been followed again and again—*Crook* v. *Whitley* (7 De Gex, M. & G. 490; 26 L. J. Ch. 350[1]; *Stewart* v. *Jones* (3 De Gex & J. 532).

[JAMES, V.C.—That case has no bearing on the question.]

Ive v. *King* (16 Beav. 46 (see p. 53, "The distinction which is to be found," &c.); 21 L. J. Ch. 560); *Butter* v. *Ommaney* (4 Russ. 70; 6 L. J. Ch. 54); *Gray* v. *Garman* (2 Hare, 268; 12 L. J. Ch. 259).

Mr. T. Hughes, for other persons in the same interest, referred to *Gowling* v. *Thompson* (16 W. R. 1131), in which *Christopherson* v. *Naylor* was treated as a case of undoubted authority, though there a contrary intention was inferred from extrinsic evidence.

Mr. Eddis, contra.—This is not, properly speaking, a substitutionary clause. There is first a gift to a class, viz., first cousins, who are to be ascertained at the death of the testator; then follows, not a proviso, but another substantive gift, to "the children of all my first cousins who may so die in my lifetime." It is admitted that the words "may so die" do not necessarily import futurity; neither does the word "share" necessarily import substitution. The Court always leans to inclusion rather than exclusion; and, as was pointed out in *Loring* v. *Thomas* (1 Dr. & Sm. 511) the solution of the question must depend on the particular language used in each case; and the language may be so wide and general as to embrace every class of issue. *Butter* v. *Ommaney* and *Gray* v. *Garman* were cases of pure substitution, and *Christopherson* v. *Naylor* could only be supported on the same ground; but the latter case was disapproved of by Stuart, V.C. in *Parsons* v. *Gulliford* (10 Jur. N.S. 221) and *Phillips* v. *Phillips* (13 W. R. 170), not to mention the recent decision of Malins, V.C. in *In re Potter's Trust*. Then again, such expressions as "them," "the said," "such children," which have sometimes been considered as limiting the class described in the second clause to those who could have taken under the first clause, are all absent here; it is an independent gift, as in *Bebb* v. *Beckwith* (2 Beav. 308); *Coulthurst* v. *Carter* (15 Beav. 421; 21 L. J. Ch. 555); *Tytherleigh* v. *Harbin* (6 Sim. 329; 5 L. J. Ch. 15).

Mr. Haddan, *Mr. Jackson*, *Mr. Russell* and *Mr. Swan*, for other claimants.

Mr. R. R. A. Hawkins, for the executor.

JAMES, V.C. said that, if the words of the will had been the same as in *In re Potter's Trusts*, he should have followed that decision without giving any opinion as to its correctness, at the same time expressing a wish that the matter might be brought before the Lord Chancellor, since nothing could be more

(1) The passage in the judgment which deals with this question, and lays stress on the expression "present" nieces, is only to be found in the *Law Journal Reports*.

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unseemly than to have conflicting principles laid down in co-ordinate branches of the Court. But, in fact, there was a substantial, and not a merely verbal distinction between the two cases. *In re Potter's Trusts* might have been decided on the ground that the gift was to a class which, according to a fair construction, might be held to consist of two distinct classes: first, the nephews and nieces then living; secondly, the issue of all nephews and nieces, whether living or not at the date of the will. But here the class was clearly described, and limited to first cousins living at the date of the will; and, to read the second clause as equivalent to "I give the share or shares of any cousin who would have taken if living at my death," would be introducing words of contingency which were not in the will at all. His Honour added, that his construction would have been the same if it had been an instrument *inter vivos*.

JAMES, V.C., June 25, 1869.

HARVEY *v.* LLOYD.

38 L. J. Ch. 634; 17 W. R. 990.

Will—Codicil—Revocation—Re-acquired Property—Republication.

WILL.—*A testator (before the Wills Act) devised two freehold messuages to his wife, who pre-deceased him, for life, and after her death to E, in fee, to whom he also gave certain legacies. Afterwards, by settlement on the marriage of E, he conveyed the same two messuages to the use of E.'s husband for life, remainder to E. for life, remainder to certain uses which did not take effect, with ultimate remainder to his own right heirs. Afterwards, by codicil (also before the Wills Act), reciting the provision made for E, by the settlement, he revoked the legacies, and in other respects, except as therein mentioned, confirmed his will. By the death of E. and her husband (after the testator), leaving no issue, the ultimate remainder to the testator's right heirs took effect in possession*:—Held, *following* Jackson *v.* Hurlock (2 Eden, 263) *that the specific devise in the will was revived by the codicil, and passed the re-acquired fee.*

SPECIAL CASE. The material facts were as follows.

David Morgan, late of the parish of St. Mary, Haverfordwest, Esq., made his will, dated the 20th of August, 1821, duly executed and attested as by law then required for passing freehold estates of inheritance by devise, and thereby he devised all his real estates unto his wife, Martha Morgan (who predeceased him), and after her decease he gave and devised two messuages or dwelling-houses therein described unto his niece, Elizabeth Lloyd, her heirs and assigns for ever. The will contained a residuary devise to certain persons, to the uses and upon the trusts to be thereinafter declared, but no uses or trusts, except as to certain parts of the property, ever were declared; and it also contained divers bequests of and concerning his personal estate, including a legacy of 1,000*l.* to his said niece, Elizabeth Lloyd. The testator made a codicil on the 9th of November, 1832, not affecting the devise or bequest to Elizabeth Lloyd.

By an indenture of settlement, dated the 5th of April, 1823, the testator, in consideration of the marriage then intended and shortly afterwards solemnized between James William James and the said Elizabeth Lloyd, and in consideration of his natural love for his niece, the said Elizabeth Lloyd, and for increasing her portion, granted the two messuages therein described, situated in Dew Street, in the said parish of St. Mary, Haverfordwest (being the same two messuages as the testator had by his said will devised to his said niece Elizabeth Lloyd as aforesaid), unto Thomas Lloyd, his heirs and assigns, to the use (after the solemnization of the said intended marriage) of him the

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said David Morgan and his assigns for his life, with remainder to the use of the said James William James for his life, with remainder to the use of the said Elizabeth Lloyd, if she should survive the said James William James, for her life, with remainder to the use of the issue of the said intended marriage as therein expressed, with remainder to the use of the right heirs of the said David Morgan for ever.

The said testator, David Morgan, afterwards made a second codicil to his said will, dated the 6th of May, 1826, which, after making certain alterations in his said will, proceeded as follows: "And whereas I have by my said will directed the sum of 1,000*l.*, other part of the residue of my personal estate, to be paid unto my niece Elizabeth Lloyd, now Elizabeth James, the wife of, &c., to whom I gave and bequeathed the same, now since [upon?] the marriage of my said niece Elizabeth James I have already settled certain real and personal estates to certain uses expressed in the settlement made upon the said marriage, I hereby revoke and make void the last-mentioned direction and bequest;" and, after varying certain other of the legacies given by his said will, the said codicil concluded as follows: "And lastly, I do hereby ratify and confirm my said will, and all devises and bequests, matters and things therein mentioned and contained, excepting so far as the same is or are by my said former codicil revoked, altered or varied, and also my said former codicil and all devises and bequests, matters or things therein mentioned or contained, so far as my said will and former codicil respectively are not hereby or herein revoked, altered or varied."

The testator died on the 11th of May, 1826, and his said will and codicils were duly proved in 1832.

There was issue of the marriage of the said James William James and Elizabeth, his wife, one child only, a daughter, who died in her parent's lifetime, an infant and unmarried.

Elizabeth died on the 23rd of March, 1865, and her husband on the 7th of December in the same year.

The ultimate remainder or reversion in the two messuages in Dew Street, to which the testator was entitled under the settlement of 1823, having thus taken effect in possession, the question now to be decided was, whether it passed to the testator's right heirs as in case of intestacy, or to the right heirs of Elizabeth James under the will as revived by the codicil.

Mr. Kay and *Mr. Freeling*, for the plaintiffs, the trustees of the will of David Morgan Lloyd, the heir-at-law of Elizabeth James, relied on *Jackson* v. *Hurlock* (2 Eden, 263), and commented on and distinguished the case of *Cowper* v. *Mantell* (22 Beav. 228).

Mr. F. J. Wood, for the defendants claiming under the will of William Morgan, the heir-at-law of the testator.

JAMES, V.C., said he must follow the decision in *Jackson* v. *Hurlock*, and hold that the codicil operated as a republication of the will, and passed the reversion.

JAMES, V.C., July 26, 27, 1869.

IRVINE *v.* SULLIVAN.

38 L. J. Ch. 635; L. R. 8 Eq. 673; 17 W. R. 1083.

Discussed, *In re Fleetwood; Sidgreaves* v. *Brewer*, [1880] E. R. A.; 49 L. J. Ch. 514; 15 Ch. D. 594; 29 W. R. 45. Referred to, *In re Baillie*, 1886, 2 T. L. R. 660 (Ch. D.). Followed, *In re Downing's Residuary Estate*, 1888, 60 L. T. 140 (Ch. D.). Referred to, *Clancarty* v. *Clancarty*, 1893, 31 L. R. Ir. 531 (M.R.: reversed C. A. *ibid.*). Approved, *In re Williams; Williams* v. *Williams*, [1897] E. R. A.; 66 L. J. Ch. 485; [1897] 2 Ch. 12; 76 L. T. 600; 45 W. R. 519 (C. A.). Referred to, *In re Maddock*, [1902] E. R. A.; 71

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L. J. Ch. 567; 86 L. T. 644; 50 W. R. 598 (C. A.); *In re Atkinson; Atkinson* v. *Atkinson*, [1911] E. R. A.; 80 L. J. Ch. 370; 103 L. T. 860 (C. A.).

Will—Construction—Gift to a Legatee "absolutely," trusting she would carry out Testator's Wishes verbally communicated to her—Beneficial Gift.

WILL.—*A testator, by his will, gave his real and personal estate to trustees, upon trust to sell the same, and after payment of his debts, &c., to pay the same, and he thereby gave and bequeathed the same, to D. I. (to whom he was engaged to be married), "absolutely, trusting she would carry out his wishes with regard to the same, with which she was fully acquainted." Shortly before the date of his will the testator had verbally expressed to D. I. his wish that she should make certain gifts out of the property to be bequeathed to her, and she had afterwards written down his wishes for her own use, but not in the testator's presence:*— Held, *that D. I. took the property beneficially, but subject in part to the wishes which the testator had expressed to her, and as to which she had bound herself.*

This was the further consideration of a suit for the execution of the trusts of the will of General de Pontes, and for the administration of his estate and effects.

The testator, by his will, dated the 21st of February, 1865, devised and bequeathed all his estates and effects, real and personal, to E. C. Sullivan, the wife of Major-General Sullivan, D. Macloughlin, and F. T. Robins, their heirs, executors, administrators and assigns, "upon trust," as soon as conveniently might be after his decease, to sell and convert into money all such parts thereof as should not consist of money, in such manner and subject to such conditions as they should think proper; and he declared that the receipts of the trustees of that his will should be sufficient discharges for the purchase and all other moneys payable to them. And the said testator proceeded as follows: "I direct that the moneys arising from the said sale, and otherwise forming or representing my estate and effects, after payment of my just debts and funeral and testamentary expenses, and the expenses of carrying out the trusts of this my will, shall be paid by my said trustees, and I hereby give and bequeath the same to Emblyn D'Arcy Irvine, of Ryde, in the Isle of Wight, widow, absolutely trusting that she will carry out my wishes with regard to the same, with which she is fully acquainted;" and the said testator appointed the said Mrs. Sullivan, D. Macloughlin and T. F. Robins, executors of his said will.

The testator died on the 30th of March, 1865, and his said will was duly proved by his executors. Shortly before the date of his will the testator had expressed to the plaintiff Mrs. Emblyn D'Arcy Irvine, to whom he had for upwards of four years been engaged to be married, his wish that she would out of the property which he would leave to her make certain gifts of sums of money, pictures, plate and jewellery to certain friends, relatives and dependents, including 1,000*l.* to each of his three executors. A few days after the date of the said will, the testator, at Mrs. D'Arcy Irvine's request, repeated to her his wishes, and she then, at her own instance, and for her own use only, wrote them down on paper, but not in the testator's presence, nor was the memorandum shewn to him.

The testator was a native of France, and a general in the French service, but he had obtained a certificate of naturalization as an English subject, and at the time of his death was the owner of an estate at Eyford, in Gloucestershire, and other lands and immovable property, as also of certain movable property in England and of movable and immovable property in France. But at the time of his death the domicil of the testator was in France, and previously to this suit proceedings had been taken in the French Courts by the testator's next-of-kin for the purpose of having the testator's will to the plaintiff declared void according to the law of France. The result of these proceedings had been a decree in the plaintiff's favour, and accordingly the Chief Clerk, [redacted] in this suit, certified that Mrs. Irvine was absolutely entitle[redacted]

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personal property. Hence the question now to be determined related solely to the testator's real estate in England. The plaintiff contended that under the gift in the will she was beneficially entitled to the testator's residuary estate. On the other hand, the co-heirs of the testator claimed the property by virtue of a resulting trust in their favour.

Mr. Willcock, *Mr. Amphlett* and *Mr. Law*, for the plaintiff.—No valid trust was created, and the plaintiff is absolutely and beneficially entitled to the whole estate—*Heptinstall* v. *Gott* (2 Jo. & H. 449; 31 L. J. Ch. 776); *Mcredith* v. *Heneage* (1 Sim. 542: and on appeal to the House of Lords, 1 Sim. 561); *Sale* v. *Moore* (1 Sim. 534, 540); *Podmore* v. *Gunning* (7 Sim. 644; 5 L. J. Ch. 366); *M'Cormick* v. *Grogan* (L. R. 4 Ir. Ap. 82); *Bardswell* v. *Bardswell* (9 Sim. 319; 7 L. J. Ch. 268); *Wood* v. *Cox* (2 Myl. & Cr. 684); *Clarke* v. *Hilton* (L. R. 2 Eq. 810); *Dawson* v. *Clark* (15 Ves. 409); *King* v. *Denison* (1 Ves. & B. 260); *Briggs* v. *Penny* (3 Mac. & G. 546; 21 L. J. Ch. 265); *Bernard* v. *Minshull* (Johns. 276, 292; 28 L. J. Ch. 649); *Fenton* v. *Hankins* (9 W. R. 300); *Morice* v. *the Bishop of Durham* (10 Ves. 252); *Webb* v. *Woods* (2 Sim. N.S. 267; 21 L. J. Ch. 625). If there is a presumption in favour of the heirs-at-law, evidence is admissible to disprove it—*Mallabar* v. *Mallabar* (Ca. temp. Talb. p. 79); *Hall* v. *Hill* (1 Dru. & War. 94). The question of the admittance of parol evidence in a case like the present has never arisen and been argued. The testator has spoken of his trustees in another part of his will, and evidently meant to distinguish between those who were named by him as trustees to carry into execution the purposes of his will, and the plaintiff whom he intended to benefit.—They also referred to *Dobson* v. *Bowness* (37 L. J. Ch. 309; L. R. 5 Eq. 404).

Mr. Mackeson and *Mr. T. Stephens*, for the defendant Robins.—You cannot import into the will words which are not part of it—*Baker* v. *Mosley* (12 Jur. 740). "Absolutely" may perhaps be read together with "trusting," in the sense of "implicitly trusting."

Mr. Little and *Mr. Caldecott*, for Dr. Macloughlin.—There was an understanding in the nature of a contract between the testator and Mrs. Irvine, and she is bound by the obligation of that contract. We say this is the case of *Wood* v. *Cox*, *ubi supra*. The heirs-at-law say it is the case of *Briggs* v. *Penny*, *ubi supra*.

Mr. Roupell, for General and Mrs. Sullivan, said they had confidence in the honour of the plaintiff, and declined to argue the question against her.

Mr. Kay, *Mr. Fry* and *Mr. Busk*, for the testator's heirs-at-law, argued that the will of the testator shewed that he intended the whole of his property given to the plaintiff to be affected by some trust, but that trust had not been sufficiently declared, and failed on that account. That fact, however, could not entitle the plaintiff to retain the property beneficially, but she was bound in conscience to take it upon some trust, which if not declared by the testator would be a resulting trust for the heirs-at-law, who not being bound in conscience by any expressed trust could hold it for their own benefit. They distinguished from this case the authorities cited on behalf of the plaintiff, and also cited the following—*Stubbs* v. *Sargon* (2 Kay, 255, and 3 Myl. & Cr. 507; 6 L. J. Ch. 254: and 7 L. J. Ch. 95); *The Corporation of Gloucester* v. *Wood* (3 Hare, 131); *Barrs* v. *Fewkes* (2 Hem. & M. 60; 32 L. J. Ch. 52); *Saltmarsh* v. *Barrett* (3 De Gex, F. & J. 30; 30 L. J. Ch. 853).

Mr. Willcock having, in reply to a question by the Vice Chancellor, intimated that the plaintiff intended to carry out the testator's wishes as stated in the paper she had written, and that he had no wish to address in reply any argument to the Court against the persons entitled under that paper:

JAMES, V.C. (without calling for a reply) said, I do not think that I should derive any aid if I took further time to consider this case, which I feel to be a case just balanced between the principles laid down in two of the cases which have been cited; but on the best consideration I am able to give to the matter, I have come to the conclusion that this is not governed by *Briggs* v. *Penny*, but

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that it is governed by those two cases of *Bernard* v. *Minshull* and *Wood* v. *Cox*, which seem to me to mark the distinction on the one side and the other.

If the words here amounted on a fair construction to what was said in *Briggs* v. *Penny*,—if it was a gift to Emblyn D'Arcy Irvine, of Ryde, in the Isle of Wight, widow, "upon trust to carry out my wishes with regard to the same, with which she is fully acquainted,"—if that had been the true construction, I should hold it would be utterly impossible that she could take anything beneficially; and then the wishes not being manifested in such a way as that this Court can take notice of them, the trust would have failed, for the benefit of the heir-at-law. The question is, whether that is the true meaning of this will. There is an observation of Vice Chancellor Wood, in *Bernard* v. *Minshull*, which I think it may be as well to repeat: "In other words, these canons of construction are valuable as affording a general rule by which the Court is to be guided in the absence of particular expressions in the will; but in the construction of every will the whole instrument must be carefully weighed and considered." In truth, in that case of *Briggs* v. *Penny*, the whole instrument was carefully weighed and considered, and it is impossible not to see that whatever may be the words in which part of that judgment is couched, the Court was more influenced by the fact that Miss Penny's beneficial interest was marked by the two legacies. The two legacies there given to her, one of 2,000*l*. in her character of legatee, and 3,000*l*. in her character of executrix, were considered as marking the extent of her beneficial interest. The Court seemed to me very readily to come to the conclusion that she was a trustee, and nothing but a trustee, but a trustee for the purpose of giving effect to those wishes, that was to say, that it was for the purpose of the gift to her.

Then, in the case of *Wood* v. *Cox*, on the contrary, the Lord Chancellor came to the conclusion that that was not the purpose of the gift to Sir George Cox, but that the words of the gift to him, "for his own use and benefit, trusting and wholly confiding in his honour that he will act in strict conformity to my wishes," were capable of being reconciled by reading "trusting" as being the imposition of a duty upon him; that he took the thing beneficially, but subject in that case to a trust which was limited to the extent of the wishes which the testator had communicated to Sir George Cox.

It appears to me that there are some points of singular resemblance between the case of *Wood* v. *Cox* and the case now before me. In the first place, there was there a gift to the executors, and then there being a gift to executors and trustees that was altered to a gift to one of them, and then to somebody else as the legatee, and the Lord Chancellor considered that very strong as shewing that the legatee was not made by him a trustee *simpliciter*, because supposing he was a trustee *simpliciter*, it would have been the simplest thing in the world to have confided that same trust to the executors whom he appointed trustees. Here the testator appoints three persons as trustees, and having appointed those three persons trustees for every executorship purpose, except that of ascertaining the net residue, giving them the power of selling his estate, and all the powers and authorities which by law are considered to be conferred upon and given to executors and trustees,—having given them all those powers, he then says, "I direct the net proceeds of my estate" (that is the substance of it) "to be given to Mrs. Emblyn D'Arcy Irvine." That seems to me to be even stronger than the case of *Wood* v. *Cox*. One can hardly conceive why she should have been selected as trustee, if trust was the purpose which the testator had in view in his will. Then I think it is very difficult to imagine, having regard to the admitted relationship between the testator and Mrs. D'Arcy Irvine, which is proved and not denied, and which is a thing that one can look at in construing a will, namely, that, under the circumstances in which they were placed, she was a person as to whom he had some motives of bounty; it is very difficult to believe that he merely meant to make her a bare trustee, without giving her any beneficial interest whatever. That is a strong circumstance.

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Then I think it is also a very strong circumstance here that the word "absolutely" has been introduced, because it is, "I direct that the money shall be paid by my said trustees." It is not merely "shall be paid by my trustees to Mrs. Emblyn D'Arcy Irvine, of Ryde, in the Isle of Wight, widow," but it is, "shall be paid by my said trustees to her, trusting that she will carry out my wishes." Then he introduces emphatically the words, "And I hereby give and bequeath the same to her absolutely." Of course the words "absolutely" may mean, as was very well suggested by Mr. Kay and Mr. Fry, extent of interest, that is to say, to the entire unlimited interest. It may mean that, but it may mean something a great deal more; and I think the natural grammatical meaning of the word "absolutely" is unfettered and unlimited. It implies both the words which occur in *Meredith* v. *Heneage* (1 Sim. 542, 561), that it is unlimited in point of estate, and unfettered in respect of any condition or trust. The word "absolutely" does naturally imply both those words. That being so, I think I am following the cases which come nearer to this in holding that the gift was a gift to Mrs. D'Arcy Irvine absolutely in the sense that she took it beneficially, but not, as was expressed by the Lord Chancellor in *Wood* v. *Cox*, absolutely with regard to the entire property, but subject, so far as the testator had made it subject, in part to the wishes which he had expressed to her, and as to which she had bound herself.

That being the conclusion I have arrived at, I must declare that there was a good gift to Mrs. D'Arcy Irvine of the net residue of the estate, but subject to the performance of the wishes communicated to her by the testator, and set out in the bill. The costs of all parties must come out of the estate.

Following *Wood* v. *Cox*, the Vice Chancellor held, that the charges on Mrs. D'Arcy Irvine's legacy were to be treated as legacies carrying interest at 4*l.* per cent. from the expiration of one year after the death of the testator.

HATHERLEY, L.C., Jan. 13, 15, 16, 18, Feb. 11, 1869.

TURQUAND *v.* MARSHALL.

38 L. J. Ch. 639; L. R. 4 Ch. 376; 20 L. T. 766; 17 W. R. 935: reversing, [1868] E. R. A. 610; 37 L. J. Ch. 582; L. R. 6 Eq. 112; 18 L. T. 385; 16 W. R. 719 (M.R.).

See, *Stringer's case*, L. R. 4 Ch. 475; 20 L. T. 591 (L. JJ.). Explained, *Overend & Gurney* v. *Gibb*, [1873] E. R. A.; 42 L. J. Ch. 67; L. R. 5 H.L. 480 (H.L.). See, *Leeds Estate Co.* v. *Shepherd*, [1888] E. R. A.; 57 L. J. Ch. 46; 36 Ch. D. 787; 57 L. T. 684; 36 W. R. 322 (Ch. D.). Distinguished, *In re National Bank of Wales*, [1899] E. R. A.; 68 L. J. Ch. 634; [1899] 2 Ch. 629; 81 L. T. 363; 48 W. R. 99 (C. A.): affirmed, (sub nom.) *Dovey* v. *Cory*, [1901] E. R. A.; 70 L. J. Ch. 753; [1901] A.C. 477 (H.L.).

Company—Winding-up—Losses occasioned by Misconduct of Directors—False Balance-sheets—Dividends improperly Declared—Loan to Directors.

COMPANY.—*The deed of settlement of a banking company provided that if at any time the losses of the company should have exhausted the whole of the surplus fund and also one-fourth of the paid-up capital of the company, the directors should, as soon as possible, call a special general meeting of the proprietors, and submit to it a full statement of the affairs of the company; and if it should appear at such meeting that the losses of the company had exhausted the surplus fund and also one-fourth of the paid-up capital, the company was to be dissolved. Losses having been incurred to the extent of more than one-fourth of the paid-up capital, a special meeting was called, in* 1842, *at which it was resolved that the company should go on, and from that time till* 1863 *the company continued to be carried on, the directors issuing favourable balance-*

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sheets and declaring dividends. Further capital was lost, but no meeting was called again, and when the company was wound up, in 1863, *the debts very considerably exceeded the assets. Upon a bill filed by the official liquidator, seeking to make the directors liable for the losses subsequently incurred, it was* held *(reversing the decision of the* Master of the Rolls*), that as the shareholders were aware of the position of affairs when it was resolved to continue the bank the directors were not liable for not calling another meeting and stopping the concern.*

The bill also sought to charge the directors with the loss sustained by allowing one of themselves to overdraw his account:—Held *(reversing the decision of the* Master of the Rolls*) that as this was within the powers conferred on the directors by the deed of settlement they were not liable, and the bill was dismissed without costs.*

This was an appeal from a decision of the Master of the Rolls, reported 37 L. J. Ch. 582, where the facts of the case are fully stated.

The suit was instituted by the official liquidator of the Herefordshire Banking Company, suing on behalf of the company against the directors and representatives of deceased directors of the company, to recover damages for losses occasioned to the company by the misconduct of the directors, such misconduct consisting of the following particulars:

First, that they had not, in accordance with the 108th clause of the deed of settlement,[1] proceeded to wind up the company, the whole of the surplus fund and one-fourth of the paid-up capital of the company having been lost in 1846, and the loss having gone on increasing until the winding-up of the company.

Secondly, that from 1846 until the winding-up of the company the directors had annually presented to the shareholders false reports of the progress and proceedings of the company and false balance-sheets; that they had recommended the declaration of dividends upon repeated false statements that profits had been earned when no profits had been really made; that they had printed and circulated false balance-sheets among the shareholders, purporting to be issued under the 90th clause of the deed of settlement, and that many persons had been induced by such false reports and balance-sheets to become members of the company; and dividends amounting to upwards of 14,000*l.* had been paid out of capital.

And thirdly, that they had allowed Mr. Higgins (formerly one of the directors) to overdraw his account by upwards of 8,000*l.*, in violation of the 53rd clause in the settlement, and all this money had been lost by the death of Mr. Higgins insolvent.

The defendants were, 1. Messrs. Grayston and Sowdon, who were directors in 1846 and from that time to the winding-up of the company, Mr. Sowdon having been appointed managing director in 1850. 2. The representatives of Mr. Crowther, who was appointed a director in 1849, and had died since the winding-up; the representatives of Mr. Smeeton, who was appointed a director in 1855, and had also died since the winding-up; and the representatives of Mr. Powell, a director from 1846 to 1856; and of Mr. Edwards, a director from 1846 to 1851.

The bill prayed that the damage caused to the company and the shareholders, by the continuance of the business of the company after it ought to have been wound up under the 108th clause of the deed of settlement, might be ascertained; that an account of the dividends declared since 1846, with interest

(1) The 108th clause provided, that if at any time the losses of the company should have exhausted the whole of the surplus fund and also one-fourth of the paid-up capital of the company, the directors should as soon as possible call a special general meeting of the proprietors, and submit to it a full statement of the affairs of the company; and if it should appear at such meeting that the losses of the company had exhausted the surplus fund, and also one-fourth of the paid-up capital, the chairman was to declare the company dissolved, and it was to be dissolved accordingly.

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at 5*l.* per cent., might be taken; that the damages caused by allowing directors and others to overdraw their accounts to an undue extent, by allowing bad debts to remain so long outstanding that they became irrecoverable, by publication of false reports and balance-sheets, and by all other breaches of trust committed by the directors, might be assessed; and that it might be declared that Grayston and Sowdon, and the estates of Crowther, Smeeton, Powell and Edward were jointly and severally liable to make good the amount of such damage, and of the dividends so distributed.

The Master of the Rolls held that the defendants could not, in a suit instituted by the official liquidator, be made responsible for issuing false balance-sheets and false reports of the affairs of the company, or for paying dividends improperly, for that the injury done by these acts was to individual shareholders, and in different degrees, and did not affect the whole body of shareholders. He held, however, that they were liable in such a suit for losses occasioned by continuing the business after the surplus fund and one-fourth of the paid-up capital had been lost, and also for the loss occasioned by allowing Mr. Higgins to overdraw his account; and that the estates of the deceased directors were liable to make good such losses, as no distinction could in that respect be drawn between the position of directors and that of ordinary trustees, and the maxim of *actio personalis moritur cum persona* did not apply.

The executors of Crowther and of Smeeton appealed.

Mr. Druce and *Mr. W. W. Cooper* appeared for Crowther's executors; and *Mr. Jessel* and *Mr. Everitt*, for Smeeton's executors.

Sir Roundell Palmer, *Mr. Roxburgh* and *Mr. Swanston*, for the plaintiff.

The following cases were cited—*Harrison* v. *Brown* (5 De Gex & Sm. 728); *Ernest* v. *Weiss* (2 Dr. & Sm. 561; 32 L. J. Ch. 113); *Bovey* v. *Tracey* (2 Eq. Cas. Abr. 163); *The Corporation of Ludlow* v. *Greenhouse* (1 Bligh, N.S. 17); *The Society for Practical Knowledge* v. *Abbott* (2 Beav. 559); *In re the Torquay Bath Company* (32 Beav. 581); *Bowes* v. *the Hope Life Insurance Company* (11 H.L. C. 389); *The Charitable Corporation* v. *Sutton* (2 Atk. 400); *The Attorney General* v. *Wilson* (Cr. & Phil. 1; 10 L. J. Ch. 53); *The York and North Midland Railway Company* v. *Hudson* (16 Beav. 485; 22 L. J. Ch. 529); *The Western Bank of Scotland* v. *Baird* (24 Sess. Rep. 2nd series, 859); *Clifford* v. *Brooke* (13 Ves. 131); *Davidson* v. *Tulloch* (3 Macq. 783); *Walsham* v. *Stainton* (1 De Gex, J. & S. 678; 33 L. J. Ch. 68).

The Lord Chancellor (*Feb.* 11).—This case is one which has given me considerable anxiety, because the bill is in itself essentially a bill of first impressions, at least in this country, there being no case at all similar to it except the case of *The Western Bank of Scotland* v. *Baird*, and I have had to consider, first, how far the decree of the Master of the Rolls could stand under any circumstances, and, secondly, whether any other decree could be made which would be adequate to the exigencies of the case.

Now, I confess, I have not been much troubled with the technical difficulties that have been raised, either on the ground that this banking company is not of that class called a registered company, or that Mr. Turquand is suing as the official liquidator on behalf of the company. Those are difficulties which I think the Court would at all times struggle to overcome, and which I should have little difficulty in overcoming. The real substance of the case goes, first, to the relief sought, and the grounds upon which that relief is asked; secondly, the form of the decree which the Master of the Rolls has made; and lastly, to whether or not there could under the circumstances of the case be any relief given in a suit of this description.

I have had great difficulty in ascertaining exactly on what ground the bill is placed, whether it was meant to be founded on fraud or negligence, or both together; nor did I know exactly whether the relief asked was simply the recovery of the money lost by the neglect of the directors to inform the shareholders when one-fourth of the capital was exhausted, so as to enable them to withdraw the remaining three-fourths of the capital, or whether it was asked on

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the ground of misrepresentation, which had induced the parties to become shareholders, or whether it was on the ground also of capital having been paid away as dividend. But it seems to me, in substance, that the bill stands more on neglect or default than on anything else. I think I must treat the bill as proceeding on the neglect of the directors to comply with the 108th section of the company's deed, which directed them, when one-fourth should have been ascertained to have been exhausted, to call a meeting of the company together and put it to them whether they desired or not that the company should proceed. It is alleged that there was a breach of that duty, that the loss was concealed from the shareholders by means of false accounts until the whole of the capital became exhausted, and there were heavy debts, amounting to 37,000*l.* when the company was wound up, occasioning considerable loss to those who had to pay those debts. Then it is said, taking a different view, that the defendants are liable for all the money they have paid in dividends, which is no doubt a somewhat singular claim, as the recipients of the dividends are the persons complaining, so that it would be saying, in effect, Pay us again that part of our capital which you paid us before in the shape of dividend. And then there was a special prayer directed, not against Mr. Higgins in particular, but against all undue advances made by directors or otherwise. All that portion of the bill is of a completely different character from that which seeks the replacing *simpliciter* of the capital, and the making the directors accountable for its loss; because a bill for that purpose would not be at all improper or inaccurate, although probably the same result might be obtained under a winding-up.

It was said in the argument of counsel in opening this case, that the object of the suit was to make the directors liable for breaches of trust in having in various ways fraudulently abstracted large sums from the funds of the company, and systematically neglected the provisions of the articles of association; but I do not think it was intended to impute personal fraud in the matter, or to say that the directors in any way benefited themselves, whatever may have been their conduct towards the shareholders. The whole scheme of the bill is to represent a series of balance-sheets annually laid before the company at their general meetings, in which were contained false entries misleading the whole of the shareholders into a belief in the prosperity of the company, when it was in fact failing, and hiding from them the fact that one-half of the capital had been exhausted together with the surplus funds. In the 15th paragraph of the bill I find this charge: "The trial balance-sheet for the year 1846 has been discovered among the papers of the company, and from that it appears, as the fact is, that the first item of assets on the credit side of the balance-sheet for 1846, namely, the current account, 83,163*l.* 15*s.* 9*d.*, is made up by including in one aggregate sum, good, doubtful, and bad debts of the company, at their full amount, without distinction. Amongst other sums forming part of the said item is a sum of 3,015*l.* 14*s.* 10*d.*, which is taken from the above-mentioned account, called the 'bad and doubtful debt account,' in the current account ledger of the company, and which sum is fraudulently treated as an asset."—That is the single instance in which the word occurs. I think the Master of the Rolls has in truth reduced the objects of the bill to two main subjects, viz., the non-stoppage of the bank at the time when the loss accrued of one-fourth of the capital, and the particular debt to Mr. Higgins, which I keep apart as a separate transaction.

I entirely concur with his Lordship's judgment on all that part of the case in which he rejected the claim to dividends and the interest upon them. It is totally impossible in this Court that persons who must be taken to have been the receivers of that money out of capital should be able to sustain a special demand in respect of that which they have so improperly received because it was represented as something which it was not.

The case, then, is reduced to this simple breach of engagement to the shareholders in not stopping under the 108th clause when they should have done so, and the Master of the Rolls has considered it immaterial at what date that

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breach may have occurred, because, although it is alleged to have occurred in 1846, before either Mr. Smeaton or Mr. Crowther (whose executors are appellants) had become a director, he conceived it to be a continuing breach of trust, rendering them liable for all the losses that had been incurred in respect of non-compliance with the 108th clause.

It is very important, first, to see what are the exact provisions of the deed, and what the transaction was in 1841 and 1842. In the first place, the 108th clause, with which we have mainly to deal in this case, provides that when the losses shall have exhausted the whole of the surplus fund and also the one-fourth of the actual paid-up capital, without regard to amount, the directors of the company "shall as soon as possible after the above-mentioned state of the said company shall have become known to them, call a special general meeting of the proprietors or shareholders." I quite go with the Master of the Rolls in the view he has taken, namely, that if there was nothing special in the case beyond the mere circumstance of the loss having occurred, and the directors having ascertained that loss, and then having reduced their capital by a certain amount, the new business would be carried on with reference to the altered state of circumstances upon the same principles, unless something or other had appeared to the contrary which rendered that impossible or impracticable; and it might be taken that the directors would still be under an obligation, if the one-fourth of the capital was wasted with their knowledge, to call together a meeting of shareholders. But a great deal more appears with reference to the meeting in 1842 and the anterior meetings, than the simple fact of the reduction of the capital which then took place to the extent of one-fifth; because it is plain, when we come to consider the whole of the balance-sheets, that it was known distinctly to the company at that time, and known beyond all possibility of doubt, that the one-fourth of their capital was gone. When you have the facts before you that the shareholders knew everything that it was necessary for them to know, and exercised a judgment on that point, and agreed to receive a dividend at 4*l.* per cent., you cannot say, after they agreed to go on with the capital diminished to below the one-fourth, that the directors are liable under the 108th section for not stopping the company immediately. It is the secret, I am afraid of all these cases, that no shareholder will inquire, for fear a dividend should not be forthcoming, and they take care after that time never again to inquire, and this will be found to be the key to the whole of this history.

Now, I shall state in the strongest manner against the directors the case that arises on behalf of the shareholders. The directors have the sole control of the concern, and the sole management of the books. Nobody is to examine the books in any manner besides themselves, unless it be in the course prescribed in the deed, which does not wholly leave the shareholders defenceless, but exposes them to the impossibility of correcting on their own knowledge, and without a process which very few shareholders like to resort to, any misrepresentation or misstatement which may be made; because the shareholders are to have no access to the books, except such as may be produced at the general meeting. They have only this safeguard, that it is competent to any shareholder to move that there should be a committee of inquiry; and something of that kind seems to have taken place in the early part of the history of the concern, when, in 1836, although dividends had been paid, somehow or other it must have oozed out that matters were not so comfortable as they were represented to be, and accordingly there was an examination into the affairs of the company determined upon. A very large general meeting took place on the 3rd of June, 1840, specially convened for the purpose of looking into the whole affairs of the company, and receiving a report made by a gentleman appointed to investigate. The auditors found that the preliminary account, which was stated in January to amount to 8,962*l.*, was spent as follows: 2,500*l.* in the purchase of a business at Hereford, which does not seem to have turned out very prosperous, certain sums in acquiring the goodwill of a house of business, and other sums applied to current expenses for different

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purposes. Then they go into an acount of the net profits, and say, in substance, "There was only one year in which an honest dividend could properly be paid; you have nevertheless had profits divided for a series of years." They then give an account of the bad debts, which they say amount to 6,517*l.*, and which, added to the capital taken to make up the yearly dividends, made a sum of 8,629*l.*, the then present loss of the company. Nothing can be more fair and open than the whole statement made by the auditors of every bad and doubtful debt upon full inquiry and examination. That being so, we come to the meeting in February, 1841. On the 5th of February a report was made, and the directors submitted to the shareholders a statement of the affairs of the bank. "They thought it right to inform such as were not present at the special general meeting held in June last, for the purpose of receiving the auditor's report and on other affairs, that it was then resolved that the company's affairs and accounts be again investigated and examined, for the purpose of testing the accuracy of the report then read, and they have now the satisfaction of informing the proprietors that the same has been certified to be correct in every respect." Then they say they have appointed Mr. Hastings as manager, and continue: "The transactions of this company being now reduced to the establishment at Hereford, and the Leominster and Evesham branches, the directors have to call the attention of the shareholders to the circumstance of their being able materially to lessen the amount of expenditure; and by the business being less divided, the manager will have that superintendence and constant vigilance over the whole which is extremely desirable." They further say, "It will appear by these accounts that the directors are not in a situation to pay *bona fide* dividends"—that is a very proper statement to make—"they have therefore passed the whole of the profits now realized to a fund for reduction of the debts and preliminary expenses." That is quite right. They see that the preliminary expenses, instead of being an asset, are nothing at all. They have been paid, and they must be provided for. It forms no longer a part of the capital of the company, and they therefore wish to realize a fund for the reduction of the debts and preliminary expenses, and hope by so doing and pursuing the policy which has guided their management since the last meeting, ultimately to realize those expectations of profit which it is desirable they should obtain,—though we find even then a gentleman who does not like being paid no dividend proposes a dividend of 4*l.* per cent. for the past half-year. Then came the important meeting of the 2nd of February, 1842. At that meeting the report of the directors was read. It states: "The directors have much pleasure in meeting the shareholders at the fifth annual meeting, and in submitting to them the usual balance-sheets and profit and loss statements, which are now laid upon the table for their inspection. The proprietors are reminded that a very considerable portion of the bank's capital has been expended in its formation, which, in a limited capital, may be considered excessive, and has tended much to paralyze the exertions of the directors." With respect to the preliminary expenses, they give the goodwill of the business at 4,000*l.*, and a number of other items, the total being 9,872*l.* Then they say, "After a careful estimate of the bad and doubtful debts (which have been reduced since last meeting, 1,768*l.* 13*s.* 7*d.*) they are found to be 3,635*l.*, making with the preliminary expenses a total of 13,507*l.*" I observe that 13,507*l.* is within a few hundred pounds, one-fourth of the capital then paid up. They continue: "The directors therefore recommend to the proprietors to consent to a positive reduction of an amount equal to 2*l.* 10*s.* per share from the capital stock of the bank, for the purpose of clearing off the bad debts and a portion of the preliminary expenses. The directors have to report that the profits upon the business of the bank for the past year, after deducting the current expenditure, amount to 1,969*l.* 12*s.* 3*d.* They feel thus justified in recommending a dividend of 4*l.* per cent., after the rate of 8*s.* per share, and they recommend the striking off the 2*l.* 10*s.* paid in the interval." The report concludes by congratulating the proprietary upon the very great progress the bank had made. Then comes

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this account, which represents the preliminary expenses of 9,872*l.*, and they propose that the 2*l.* 10*s.* which has been raised should be applied in paying off part of the bad debts and part of the preliminary expenses. The very next year it appeared that, although there was an attempt at reduction and a good deal of the preliminary expenses had been cleared off, there still remained 6,000*l.* So it went on for several years, until it was a good deal reduced, and the bank got into a somewhat better condition. The present shareholders must be taken to know all that the original shareholders knew, and therefore they must have been perfectly well aware while going on with these dividends at 4*l.* per cent. that, in effect, if the company had been wound up the preliminary expenses could not have been provided for. Therefore, there being something considerably over one-fourth gone at that time, it seems to me that from that moment these gentlemen must be taken to know what was done, and cannot go back afterwards and fix those directors who have come in at a subsequent period with a continuance of that which, with the knowledge and sanction of the shareholders, had been already done.

However, the case does not quite rest there as regards the position of these directors and their shareholders. The two great heads of what are called false charges in all the subsequent reports are these: the one of the past-due bills, in respect of which it is said that they were all credited with their full value, though it was well known the full value could not be recovered, and the purchase of shares in the company by the company itself. But that was perfectly legitimate according to the provisions of the deed. Whether it was wise and prudent is not for me to say, but there are two express provisions in the deed—one that the company may deal with all things, including the shares of the company, and another, that the investments to be made by the company of their capital are to be, among other things, in shares of the company. This is a clear and express provision. Further than that, in the report of 1841, there is an express entry of 12,000*l.* paid in the purchase of shares. Again, I say, therefore the shareholders knew that the directors were doing what they were authorized by the deed to do. It would have been better undoubtedly if that had been brought out in each balance-sheet, but it was thought, I suppose, that the outside world would not like to know that the company was dealing with its own shares, as that would not give very great confidence in the bank. They knew there was that power, and had moreover the safeguard of the register, because it is sworn distinctly that the register was open to the shareholders. They knew, on the one hand, by the actual balance-sheet, that shares had been purchased to the extent of 12,000*l.* at that time, and ultimately to a much larger extent. 2,900 shares, or more than half of the whole shares of the company, were afterwards bought by the company itself. That was a fact which the shareholders were perfectly capable of ascertaining for themselves whenever they pleased.

As regards the past-due bills, it is only just to say, on the part of some of the directors, although not on the part of those who were actually engaged in making out the accounts, that it would not be so easy altogether to fix them with wilful default for not ascertaining whether the past-due bills were recoverable or not, or for not ascertaining whether the debts were recoverable or not, though there might be cases so palpable, such as bankruptcy or the like, as would make it impossible to put down a debt as an asset which could not by any possibility be recovered; or you might fix the directors with knowledge wherever they have entered a debt in the list of bad debts, and say they themselves treated it as a bad debt, and they ought not to have introduced it as an asset.

The main feature of the case is as to whether or not, under the 108th section of the deed, the directors are now liable in respect of any loss accruing by reason of their not having stopped the concern at that time. Upon looking carefully through the evidence, it appears to me that, with the fullest knowledge on the part of the shareholders, the shareholders persisted in being paid dividends when they knew from the accounts laid before them that more than a fourth of the

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capital must have been exhausted, because the preliminary expenses must be deducted entirely from the assets. In that state of circumstances, it is impossible to say that the parties have not agreed to waive the provision made by the 108th section. Had it not been so, I confess, it appears to me that the whole matter would be surrounded with the greatest difficulty, because it is stated that all these things were done before 1846—before Smeeton became a director—and that at that time nearly the whole of the capital was exhausted. It is somewhat difficult to fix a director who came in after Smeeton, when nearly the whole of the capital was gone, with the full amount of the capital, because he did not take some proceedings against his co-directors in order to enforce the replacing of the capital. To do that you would have required him to be fixed not only with knowledge of the 108th section of the deed, but also with the knowledge of the state of the accounts when he joined the company. He comes into the concern, seeing a certain state of accounts which have been from year to year adopted by the shareholders, with the statements in them of this heavy outstanding item of preliminary expenses. It is said that in that state of circumstances he stands exactly in the position of a trustee, who, finding that there is a trust fund which ought to be in his hands, does not take steps to recover that trust fund and bring it back to the trust. I should have found great difficulty even upon that view of the question. There is an item of that loss supposed to have been incurred by the company of 37,000*l.* over and above the capital. A loss so attempted to be fixed upon the directors would again be a matter of much greater difficulty than the question of replacing the fund, because I am bound to say, after the argument I have heard, that I am far from being satisfied that that is a loss which could be recovered by any such proceeding as is now before me, not on the technical grounds only, but on really substantial grounds. A trustee may well be fixed with the detriment that is done to the estate in his possession. He may be fixed also with the duty of recovering an asset for which he was once responsible but which somebody else had wasted, or which he had made himself responsible for by dealing with it and not taking steps to get it in. I know no instance whatever of a trustee being made responsible in the fashion which is here attempted, because being a trustee for a number of persons who have invested their capital in a business, certain losses are incurred by them owing to their names having been kept longer in the concern than he had any right to keep their names so engaged; and they have thereby been exposed to the general creditors who have forced them to pay up in respect of that loss. That appears to me to be distinctly a loss which would be recoverable in an action at law. How far it would be so the Lord Justice Clerk seems to have had some doubt in the case I have mentioned of *The Western Bank of Scotland*, because he thinks the loss rather a remote one, which there might be considerable difficulty in establishing. I do not deal with that question at all, and I pronounce no opinion upon it. It appears to me that each shareholder must recover for himself at law, and would be in the position in which the Master of the Rolls considers Mr. Skey's case to be, with reference to any loss he may have incurred by purchasing shares in consequence of a false representation. Every person's case would be a separate case, and no action could be brought until the loss was actually ascertained. A man who paid no part of the contribution could bring no action until he paid it. Each man would have to bring his action when the damage accrued, in respect of the damage. It is not a concern in which the whole body of the shareholders can call upon the directors to pay into the funds of the concern that sum which is the amount of the loss occasioned by their continuing too long in the business in which they had been engaged. It occurred to me that it was difficult to imagine an exact example of a case likely to occur independently of joint-stock companies. It does not occur with regard to executors who keep their testator's assets in a business, because if he has given them his sanction to employ a portion of his assets, the estate is only liable for the amount so employed, and the executor remains personally liable to outside creditors, who have no claim on the assets of the testator beyond the amount

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lawfully employed in the business. It appears to me, therefore, in every view, that the difficulties which beset the case would have been very considerable if I had got beyond the first difficulty. On the one hand the directors are to be fixed with all the knowledge of what took place previously to their entering into the contract; and on the other hand, the shareholders must be taken to know all that the previous shareholders knew, and they cannot recover that which the previous shareholders could not have recovered against the directors. I cannot conceive that upon a bill filed in 1844, if there had been this loss, they could have succeeded in making the directors responsible. I have had no difficulty in treating the directors as trustes so far as the trust fund goes. Call them agents, or by whatever name you like, they are trustees for the shareholders to the extent of all the assets committed to their charge; and in respect of those assets they must be made liable to account. It is satisfactory to find that really in no sense is fraud alleged as shewing that any single step taken by the directors has been taken with a fraudulent view to their own benefit, or for their own purposes, or otherwise than for the purpose, as they thought, of aiding the prosperity of their company, however incorrect the course pursued must be taken to have been. My belief is that in that respect they had a clever, and somewhat unscrupulous, agent who seems to have done what he thought best, and no doubt with the motive of doing his best for the company. He, however, seems to have done a great many acts which he ought never to have done; but he kept up the delusion in the minds of the directors, and I am sorry to say induced them to do what they were not entitled to do.

I must now deal with Higgins's case, which is a separate matter. His case is stated in a very perfunctory manner as a part of the general case of misrepresentation. It is only in two passages of the bill that he is mentioned at all. The first is where it is said William Higgins, who had for some time been a director, was permitted by the other directors of the bank to become indebted to the bank to an amount which appears from the accounts of the company to have been at this time 8,134*l.* 2*s.* 11*d.* In June 1858, the solicitor of the company was instructed to take proceedings with reference to a portion of this debt. It appears from a resolution of the directors under date the 9th of February, 1859, that it was resolved not to accept an offer made by Higgins of 3*s.* 4*d.* in the pound. In the report from the manager of the Hay branch of the said banking company, bearing date the 4th of July, 1859, and made to the directors of the company, is the following statement: "About a twelvemonth ago, Mr. Higgins made a complete smash of it, and everything was sold off. Then William Higgins died insolvent in 1860. The debt was included as a good debt in the general item of current account in the balance-sheet presented to the shareholders at every subsequent annual meeting. No portion of this sum has he ever paid." That is the specific statement, and it comes in, in a general statement of the improper conduct of the directors in inserting bad and doubtful debts as part of the assets of the company. There is another passage in which it is referred to as follows: "A trial balance-sheet for the year 1861 has been discovered among the papers of the company, and from that it appears, as the fact is, that the first item of assets on the credit side of the balance-sheet for 1861, namely, current accounts, 117,534*l.* 8*s.* 1*d.*, is made up in the manner before stated, and includes in an aggregate sum the bad and doubtful debts owing upon the current accounts, including the 11,753*l.* 11*s.* 9*d.* so carried to 'imperative accounts,' as before shewn, and also the debt of 8,134*l.* 2*s.* 1*d.*, due from Higgins as before mentioned," and also the nominal value, at 10*l.* per share, of the shares that have been bought by the directors. That is stated exactly in the same way as every improper entry in the account. There is nothing specific beyond that averred. Nothing is said about the impropriety of lending, beyond throwing out a suggestion that money was lent by his brother directors, and therefore it was wrong in that sense. Paragraph 3. of the prayer runs thus: "That the damages caused to the said company and to the shareholders thereof by allowing directors and others to overdraw their accounts to an

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undue extent, and by allowing bad debts to remain so long outstanding as to become irrecoverable, by the publication of false reports and balance-sheets, and all other breaches of trust which may be shewn by the plaintiff to have been committed by the said William Crowther, Edward Smeeton, Thomas Powell, Henry Edwards, James Grafton, and Thomas Snowdon, or any one or more of them, may be assessed by this Honourable Court." Now, as regards this, it is all swept into one prayer, and nothing specific is mentioned as to Higgins, as being improper in the sense of being *ultra vires*. Under such circumstances, it would not have been *ultra vires*, but the charge is that they are to be fixed with wilful default for allowing people to overdraw to an undue extent. That is idle. They were entrusted with full powers of lending the money. It was part of the business of the concern to trust people with money, and their trusting to an undue extent is not a matter with which they can be fixed, unless there is something more than that alleged, namely, that it was done fraudulently and improperly, and not merely by a default of judgment. Whatever may have been the amount lent to anybody, however ridiculous and absurd it would seem, it is a misfortune for the company that they chose such unwise directors; but as long as they kept within the powers of the deed, I could not interfere with the discretion exercised by them. If a bill were filed to stop their lending money, the Court could not have interfered so far as to put them out of the trust, and there would be no dealing with it on that score. As regards the case of Higgins, it seems to have been assumed that it was impossible to lend money to a director. There was no such impossibility. It only required certain useful preliminaries to be gone through, namely, that there should be a vote of the board with reference to any advance to a director, and that in that voting the particular director himself should not take a part. There is no allegation in the bill or in Mr. Turquand's evidence that the precautions were not taken. It is wholly put on this, that they have no power to lend money. I really have no evidence or material before me to judge of this, nor do I think that under the circumstances of this case I can deal with it on such a bill as this, or allow upon such a shred of a case any relief to be given to the plaintiffs; the more so because it is perfectly open to them to deal with it in the winding-up; because, in the winding-up, the accounts of the directors can be taken. They may be made to account for every farthing, and for every farthing they have paid to Higgins without an order they would be liable. It appears to me that must be so, without wishing to decide it. Either they can or they cannot shew a discharge. If they cannot shew a discharge, they will be fixed with it in taking the accounts in the winding-up. If they can, I ought not to deal with it. It appears to me, therefore, that the bill really entirely fails, and it is not a bill in which it is possible for the Court to give relief.

I have passed over a great many points in the case as to the delinquencies of the directors and the impropriety of their conduct, but I have to consider that with reference to the remaining question of costs. At first sight, I was struck by the fact of this not being a suit by the whole body, but the suit of Mr. Skey, he having indemnified the official liquidator with reference to the litigation. But on the other hand Mr. Skey has much to complain of, and one fact has convinced me of the propriety of dismissing the bill without costs, viz., the circumstance of Mr. Skey attending a meeting, Mr. Smeeton himself (a director against whom there is the least to be said), being present, and putting questions of some importance, and those questions being answered in a manner in which undoubtedly they ought not to have been answered without very careful inquiry, because they were questions requiring thought and consideration. No doubt there have been grave and grievous errors committed by some of these directors. I ought to remember that two of those who are said to have committed these are dead, and it is a most unfortunate thing, especially as regards Mr. Crowther, that, the petition for winding-up being presented in June, 1863, and Mr. Crowther not having died till 1865, no steps should have been taken in the matter when he could have defended himself, or would have been in a position

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to give some account of his conduct. It is impossible for his executors to do so, and all that they could say is, that they know nothing at all about it. If Mr. Skey, upon those questions being answered as they were answered, had a right of action, that right he will retain, independently of anything here done, but the bill by the general shareholders will not stand upon that ground. Finding, then, Crowther apparently actively engaged in one of these very imprudent transactions—it is only justice to his memory to say he was ignorant of everything else that was going on—finding him in that position when these questions were asked by Skey, and assenting and consenting to the responses which were given (which he either did with knowledge of the facts, or, if not, he allowed them to be given in a solemn way without taking the trouble to ascertain the facts), I cannot say it is a case in which the Court can properly mark its opinion of the conduct of the directors in the subject-matter before it otherwise than by dismissing the bill without costs. The costs, therefore, of the appeal will be costs in the cause. There will be no costs in fact.

JAMES, V.C., July 16, 1869.

ROGERS *v.* POWELL.

38 L. J. Ch. 648; 18 W. R. 282.

Referred to, *Hughes* v. *Seanor*, [1870] E. R. A.; 18 W. R. 108 (V.C.); [1870] E. R. A.; 18 W. R. 1122 (L.C.). Adhered to, *Morley* v. *Finney*, [1870] E. R. A.; 18 W. R. 490 (V.C.).

Evidence—Parol Promise by Deceased Person, Uncorroborated Statement as to.

EVIDENCE.—*The Court will never give a person anything on his own uncorroborated statement against another after that other's death.*

This was a bill to restrain an action of ejectment by the devisee of George Rogers, deceased, against the plaintiffs, Robert Rogers and Harriet Frances, his wife, on the ground of a verbal promise by the testator to buy the land in question for the said Frances Rogers and of expenses incurred by the said Robert Rogers on the faith of such promise. The plaintiff Robert Rogers was, as he alleged, previously to and in the year 1856, the tenant and occupier of two pieces of copyhold land at North Hayling, in the county of Southampton, known as Tye Piddle, under one John Bulbeck, who was then owner thereof for an estate of inheritance according to the custom of the manor of Southampton Hayling.

Harriet Frances Rogers stated by her affidavit as follows: "In the month of December, 1856, George Rogers, then of North Hayling aforesaid, yeoman, since deceased, the first cousin of my husband the said R. Rogers, and who was a neighbour of and on terms of very intimate friendship with me and my said husband, stated to me that he was desirous to do something for me in return for the many acts of kindness I had done him and his late wife, with whom I had been on terms of friendship, and asked me if I would like him, the said George Rogers, to buy a piece of land for me, and I told him, the said George Rogers, I should like him to do so, and he, the said George Rogers, then said he would try and buy two pieces of copyhold land called Tye Piddle, which my said husband, Robert Rogers, was then occupying. On the 31st of December, 1856, the said George Rogers called on me and told me he had been to Havant and had bought the said two pieces of land for me. What took place at this interview between me and the said George Rogers was, to the best of my belief, as follows: The said George Rogers said, 'I have bought the two pieces of land for you; one piece you can build a house on, and the other you can make a little market garden or turn a horse out, which you like. I will read you the piece of paper (meaning thereby the contract entered into by him the said George Rogers for the purchase of the said two pieces of land), and you shall hear what Mr. Bulbeck

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says; as soon as he is admitted in you shall be. Mr. Bulbeck says that as Mr. P. (meaning thereby the then lord of the manor) and he are not on very good terms, he does not intend that Mr. P. shall have any of his money at present, and you can't be admitted till Mr. Bulbeck is.' At the same time he gave me a copy of the said contract entered into by him for the purchase of the said two pieces of land and read the same to me, and said, 'You can take care of this until such time as you can be admitted; you will be all right. I have got nothing else.' The contract entered into by the said George Rogers as aforesaid was dated the 31st of December, 1856, and made between John Bulbeck the younger of the first part, and the said George Rogers of the other part, and was to the effect set forth in the 5th paragraph of the bill filed in this cause. The said G. Rogers, by what he said and did at the interview last aforesaid, effectually gave the two pieces of land to me, and the said G. Rogers well knew that both I and my said husband believed, and he intended us to believe, that he, the said G. Rogers, had effectually and absolutely given to me the said two pieces of land, and that he, the said G. Rogers, also well knew that my said husband was expending his own money in building a cottage on one of the said pieces of land, and was bringing the said pieces of land into cultivation under such belief; and that he, the said G. Rogers, with such knowledge as aforesaid, advised and encouraged my said husband to build the cottage and cultivate the said land, and assisted him in the said building by conveying some of the materials purchased by my said husband on to the said land for the purpose of such building. The said cottage and outbuildings were built and the said land brought into cultivation by my said husband under the belief that the said two pieces of land had been effectually and absolutely given to me, and with the knowledge, on the part of the said G. Rogers, that my said husband in so doing was acting under such belief. I and my said husband entered into the occupation of the said cottage some time in the year 1857, and have ever since been and now are in the possession, use and enjoyment of the said cottage and pieces of land. Since the said 31st of December, 1856, we have not, nor hath either of us, paid any rent for the said pieces of land and cottage, nor made any acknowledgment of title or otherwise to any person in respect of the said pieces of land or cottage. The said G. Rogers never made any claim on me or my said husband, or either of us, for rent or otherwise, in respect of the said pieces of land or cottage, and since the said 31st of December, 1856, no claim has been made in respect of the said pieces of land or cottage by any other person until the claim by the defendant mentioned in the bill filed in this suit. On the 30th of January, 1864, I drove to Portsea in my own cart, and took the said G. Rogers to the office of Mr. Way, his solicitor, in Portsea, and brought the said George Rogers back with me from Portsea to North Hayling. On the journey home the said G. Rogers told me that he had made his will, to which I replied, 'You have not put me in one corner, I suppose?' or to that effect. He answered, 'No, you did not want me to. I have given you the ground you have got your house built on, and assisted you all I could in the carriage' (meaning the carriage of the building materials as aforesaid), 'and I will do something more for you before I die.'"

Nearly the whole of this statement was contradicted by affidavits on behalf of the defendant.

The case coming on upon motion for decree,

Mr. Hardy and *Mr. Bovill*, for the plaintiffs, referred to *Ramsden* v. *Dyson* (L. R. 1 E. & I. Ap. 129), especially the rule laid down by Lord Kingsdown at p. 170.

Mr. Kay and *Mr. F. H. Colt*, for the defendant, were not called upon.

JAMES, V.C.—Mankind would not be safe if this kind of evidence were admitted. The affidavits seem to be framed so as to fit in with reported decisions and the language of judgments, and the expenditure seems an afterthought. But I never will give a person anything on his own uncorroborated statement against another after that other's death. The bill must be dismissed, with costs, including costs of the motion.

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LORDS JUSTICES, June 25, 26, 1869.

In re LUSH'S TRUST.

38 L. J. Ch. 650; L. R. 4 Ch. 591; 21 L. T. 376; 17 W. R. 974.

Referred to, *Arnold* v. *Woodhams*, [1873] E. R. A.; 42 L. J. Ch. 578; L. R. 16 Eq. 29; 28 L. T. 351; 21 W. R. 694 (V.C.); *Cahill* v. *Cahill*, [1883] E. R. A.; 31 W. R. 861; 8 App. Cas. 420; 49 L. T. 605 (H.L. Ir.).

Baron and Feme—Married Woman's Reversionary Interest in Personalty—Equity to a Settlement—Fraud—Negligence.

HUSBAND AND WIFE.—*A married woman may by fraud deprive herself, not only of her equity to a settlement out of moneys to which her husband may become entitled in her right, but (obiter per* Giffard, L.J.) *of any right to a reversionary interest falling due after his death.*

On the sale by a husband of his wife's reversionary interest in a sum of stock, a document was produced in the handwriting of the wife, purporting to be an ante-nuptial assignment to him of her interest in the fund, and in a suit for specific performance instituted by him against the purchaser and the wife, and which was heard as a short cause, a decree was made by consent (no evidence being entered into) declaring the plaintiff to be absolutely entitled, but no decree was made for specific performance. The purchase was not completed, and the husband afterwards contracted to sell the same interest to a reversionary interest society, who, on the production of a letter signed by the wife acknowledging the ante-nuptial assignment, completed the purchase, the wife receiving a portion of the purchase money. Upon the falling of the reversionary interest into possession, the trustees transferred the fund into Court, and the reversionary interest society presented a petition for a transfer thereof to them. The Court was of opinion upon the evidence that the assignment was in fact executed after the marriage; but held, reversing the decision of the Master of the Rolls, *that the wife had by the subsequent letter been guilty of a fraud which deprived her of any equity to a settlement out of the fund, and that no such negligence could be imputed to the society as would deprive them of their right to it.*

On the 3rd of February, 1858, Ellen Louisa Buckland intermarried with Edward Bowren, being entitled, under the will of her grandfather, Charles Lush, Esq., to one-sixth share of a sum of 5,640*l.* new 3*l.* per cent. annuities, and of 1,540*l.* 3*l.* per cent. consolidated annuities, in remainder expectant upon the death of her mother.

On the 20th of May, 1858, Bowren agreed to sell this reversionary interest to John Collins, who refused to complete the purchase on the ground that a married woman's reversionary interest in personalty was not assignable. Thereupon Bowren, on the 7th of July, filed his bill for specific performance against Collins and Mrs. Bowren, alleging that he had become absolutely entitled to the reversionary interest in the stock by virtue of a document signed by his wife, and bearing date the 1st of February, 1858, two days before the marriage. This document was as follows:

"I, Ellen Louisa Buckland, of Shaftesbury, Dorset, spinster, being about to marry Edward Bowren (and upon his marrying me), I, in consideration of such marriage, give up to him, the said Edward Bowren, for his own sole use and benefit, the whole of my interest under the will of Charles Lush, Esq., late of Hoxton, Middlesex, and in case of such marriage I hereby request and direct the trustees of the said will to pay over to the said Edward Bowren the whole of such interest of me the said Ellen Louisa Buckland under such will, and I, Ellen Louisa Buckland, have assigned my interest under the said will to the said Edward Bowren before my marriage. As witness my hand this 1st day of February, in the year of our Lord Christ, 1858.

"Ellen Louisa Buckland."

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On the 14th of July, Collins put in his answer without oath or signature, stating that he was a willing purchaser, and willing to complete on having a good marketable title made out.

The cause was heard as a short cause at the Rolls, on the 17th of July, no evidence being entered into, and a decree was made by consent, declaring that the plaintiff was absolutely entitled under the document of the 1st of February to his wife's reversionary interest under her grandfather's will; but the decree contained no order for specific performance, and the contract never was in fact performed, being abandoned by mutual consent.

On the 20th of August, in the same year, Bowren put up the reversionary interest for sale by auction, and it was purchased by the Law Reversionary Interest Society for 400*l*. Before completing their purchase, the solicitors to the society required notice of the ante-nuptial assignment already mentioned to be given to the trustees, and accordingly Mrs. Bowren, on the 11th of October (her husband being at the time a prisoner for debt in Whitecross Street Prison), signed the following letter addressed to one of the trustees of the fund:—

"Dear Sir,—I beg to inform you that previous to my marriage with Edward Bowren, on the 3rd day of February last, I assigned to the said Edward Bowren all my interest under the will of Charles Lush, Esq."

The purchase was completed on the 14th of October, 1858; the money was received by Bowren's solicitor, and after certain payments made out of it by Bowren's direction, the residue was handed to Mrs. Bowren.

The reversionary interest fell into possession in October, 1867, and the trustees of the will transferred Mrs. Bowren's share of the stock into Court, and the Law Reversionary Interest Society presented a petition for a transfer of the fund to them. This was opposed by Mrs. Bowren, who claimed an equity to a settlement, and filed an affidavit denying that she had before her marriage signed any paper relating to the trust fund. Her statement was as follows: "About two months after my marriage with Edward Bowren, that is to say on or about the 3rd day of April, 1858, the said Edward Bowren and I were lodging in the house of one William Howard, who had married a sister of my said husband. The said Edward Bowren told me that if I signed a paper which he had in his possession he would borrow a sum of money on my reversionary property. We were then in great distress for want of money. He assured me that by signing such paper I was not parting with my property, or in any way injuring myself, and that such paper was wanted merely for the purpose of borrowing money. He forced me to sign such paper, and said that if I did not he would leave me, and I should have to return home. I at first objected to sign the paper, as he wished it dated previous to my marriage, and to be signed in my maiden name, but he forced me to sign it. At length, when I could resist no longer, I yielded to his persuasion, and signed some paper writing, the terms of which he dictated to me."

She alleged that the sale to Collins was fictitious, and that the Chancery suit, of which she denied that she had ever heard until after the presentation of the petition, was got up by Bowren and Collins, for the purpose of depriving her of her right. In fact no answer had been put in by or required from her.

The petition came on to be heard before the Master of the Rolls, who came to the conclusion that the document, dated the 1st of February, 1858, was in fact written after the marriage, and was therefore inoperative as an assignment, nor, as Mrs. Bowren had signed it under coercion, could she be made responsible for the fraud. He therefore ordered the costs to be paid out of the fund in Court, and the dividends on the residue to be paid to Mrs. Bowren for her separate use until further order.

The Law Reversionary Interest Society appealed from this order.

Mr. Jessel and *Mr. Bristowe* contended that Mrs. Bowren's evidence could not be relied upon to rebut the presumption that the document, dated the 1st of February, was executed on that day; but at all events Mrs. Bowren, by her

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subsequent acknowledgment that it was ante-nuptial, had been a party to a gross fraud which deprived her of the right to the protection of the Court.

They cited—*Derbishire* v. *Home* (3 De Gex, M. & G. 80); *Vaughan* v. *Vanderstegen* (2 Drew. 363; 23 L. J. Ch. 793); *Clive* v. *Carew* (1 Jo. & H. 199; 28 L. J. Ch. 685); *Barrow* v. *Barrow* (4 Kay & J. 409; 27 L. J. Ch. 678); *Savage* v. *Foster* (9 Mod. 35); *May* v. *Roper* (4 Sim. 360).

Sir Richard Baggallay and *Mr. Cutler*, for Mrs. Bowren, supported the order of the Master of the Rolls.

SELWYN, L.J.—Although I cannot concur in the conclusion at which his Lordship the Master of the Rolls has arrived in this case, I do not think there is any difference of opinion between that learned Judge and this Court with respect to the law which is applicable to cases of this description, for I observe that in his judgment he refers with approbation to the decision of Vice Chancellor Kindersley in the case of *Vaughan* v. *Vanderstegen*. In that case the Vice Chancellor stated in a very few words a proposition of which I apprehend at the present time no doubt can be entertained—viz., that it is well established that a married woman is capable of committing a fraud, and is liable to be visited with the consequences of the commission of that fraud. Then he refers to the case of *Savage* v. *Foster*, in which the husband and wife concurred in the fraud. In that case there was not such an active participation in the fraud as we find in the present case; it was a case of standing by and allowing the purchase to take place in ignorance on the part of the purchaser of the real state of the title, which the husband and wife were aware of. Now, there is no doubt that in cases of separate estate, and especially in cases where that separate estate is coupled with a restraint upon anticipation, many questions may arise as to how far the Court can, in dealing with cases of fraud on the part of married women, overrule a declaration of the settlor or of the testator in respect of the separate estate, and the restraint upon anticipation, and some cases have gone so far as to say that, although it may be very greatly for the benefit of the married woman that that restraint should be removed, still, if the settlor or testator has imposed it, the Court has no power to take it away, even for the benefit of the married woman. But in the present case we are relieved from any consideration of this kind, because we find that this lady was absolutely entitled in her own right to this reversionary interest. That, upon her marriage, would pass to the husband, subject, of course, only to the rights which she might have in the event of her surviving him, and to her equity to a settlement. That equity to a settlement is certainly an interest which this Court will control, and will not, as we have had occasion to say in the very recent case of *Barnard* v. *Ford* (L. R. 4 Ch. Ap. 247), allow the equity to a settlement to be made an engine of fraud, or, as it was expressed by my learned Brother in that case, to be enforced where it would be contrary to good conscience to do so.

I think, therefore, the question we have now to consider is whether, under the circumstances proved in this case, it would be contrary to good conscience to allow this lady to assert an equity to a settlement.

With respect to the facts: in the first place, we have a document which is entirely in her own handwriting, which bears date the 1st of February, 1858, two days before her marriage on the 3rd of February. That is a document, certainly, open to the observations which have been pressed upon us with great force by Sir R. Baggallay, as being a document of a very unusual character, but at the same time it is one which calls most pointedly the attention of the person who writes it to the circumstance that it was very material indeed to make out that it had taken place before her marriage. Then the representation which the lady now makes with respect to that document is, that, in point of fact, it was not written until the month of April; that she did it then under the influence of her husband, and under the influence of a threat that unless she signed it her husband's circumstances would compel him to leave her and send her home.

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She says she did it very reluctantly, and only in consequence of the exercise of that influence, and under the pressure of that threat.

Then the first question is, are we to take it as being established that that document was not in fact written until after the date of the marriage? Because I think that, supposing it to have been written before the marriage, it is perfectly clear that it would be sufficient to exclude any equity to a settlement. With respect to that I cannot help saying that I agree in the conclusion at which the Master of the Rolls arrived, because, although it is, no doubt, very dangerous to trust to the unsupported testimony of a person who has been an actor in such a transaction, when she comes to say that a document, written by herself, and signed by herself in her maiden name, and dated on the 1st of February, 1858, was actually written by her when that was no longer her name—when she had been married several months; although, I say, it is very dangerous to listen to such testimony, still I think that there are corroborative circumstances here which induce one to believe that her representation with respect to that is correct. Beyond that, there is this very extraordinary suit, which I think I ought not to pass over without some comment, because I entirely agree with the observations which the Master of the Rolls has made upon that suit, as being a means of making the Court an instrument of fraud; a suit having for its only proper and legitimate purpose that of binding the interest of a married lady, by proving as against her a fact which she denies. The bill was filed on the 7th of July; the answer was put in on the 14th; the decree was obtained on the 19th, and upon the face of that decree it appears that that which was the only essential thing in the suit at all, viz., the evidence, was omitted altogether. That being so, I am of opinion that it is sufficiently established that this document of the 1st of February, 1858, was not written until after the marriage of the lady. But the document itself is most material for the purpose of shewing that this lady's attention must, at the time when she wrote it, the whole being in her handwriting, have been most pointedly called to the transaction, and her own statements clearly shew that, her husband being in great difficulties, she was aware that attempts were being made to raise money upon the footing of this security.

Then, that being so, it brings us down to the date of the suit which I have already mentioned; then to the transaction in October, when the sale by auction took place. Now, with respect to that I cannot entertain any doubt that the purchase was a *bona fide* one, made at a price which seems to me to have been a very fair and reasonable price. The purchase was not made at all at an undervalue by this society at the sale by auction; and I cannot help expressing my very strong belief that the matter, as far as the society were concerned, was entirely *bona fide*, a purchase by auction under ordinary circumstances. Then they proceeded to investigate the title, and although I agree that the document has certain marks of singularity upon it, and although the suit was one of a most singular character, and one which, if the suspicion of the purchasers had been aroused, would have been calculated to increase that suspicion, still I do not think that those circumstances were of such a character as to induce the Court to say that the purchasers must have known (I believe they did not know) that any fraud or deception had been perpetrated with regard to it. I think that the transaction is very fairly represented in the letter produced this morning, which was written on the 12th of October, 1858, from Mr. Dalton, writing in the name of his firm, to one of the trustees, in which he says, "As we thought it would probably be satisfactory to the trustees to have a letter from Mrs. Bowren stating the fact of her having made over her interest under Mr. Lush's will prior to her marriage, we required the vendor's solicitor to obtain one, and we now inclose it. Perhaps you will be kind enough to put it away with the papers you have relating to the trust. We have not yet completed the purchase, but expect to do so in the course of the week, when we will send you the usual formal notice." I think that letter correctly represents what really took place, and it is, to my mind, quite conclusive that these purchasers were acting *bona*

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fide in this matter, and that they required this letter for the purpose of preventing any possibility of doubt as to it.

Of course, in all these transactions we must ascertain whether the lady was in truth acting as a free agent; because, although a married lady may be, as I have already said, guilty of a fraud, and may consequently be visited with the consequences of that fraud, on the other hand, she is entitled to the same protection as any other person, and she is not to be rendered liable for acts which were not done of her own free will, and in respect of which she was acting under such coercion as prevented her from being a free agent. Now, in the first place, even assuming that she was acting under some species of coercion in this transaction, still, the very fact which she states as to the pressure put upon her must have left an impression upon her mind which would render her exceedingly sensitive with respect to all subsequent transactions relating to the same matter; and when we find by her own admission that she was aware that money was about to be raised upon the security of this reversionary interest, when she knew that she had written and signed a document which she says herself she wrote and signed with very great reluctance, knowing that it did not express the truth,—knowing that it was signed by her in a name which was no longer hers, and that it bore a date which was not the true date, under these circumstances, an application was made to her to write the other letter, which bears date the 11th of October, 1858. It is true that the body of that letter is not, like the body of the former document, altogether in her own handwriting; but although she originally denied her signature, it is now clearly proved, and, in fact, is admitted at the bar on her behalf, that that letter was signed by her. At that time she was under no coercion; her husband was in prison, and she was living separate and apart from him, and the question of fact which we have to try (and this is, in truth, the question upon which my opinion differs from that of his Lordship the Master of the Rolls) is, whether she was a free agent when she wrote that letter. I say, having regard to the circumstances stated by herself and to the pointed manner in which her attention must have been directed so recently as April in the same year to this transaction; having regard to the fact that she admits that she knew that money was about to be raised upon the security of this reversionary interest, and to the fact that she also admits that she actually herself received some portion of the money which was raised by means of this transaction, it is impossible to believe that she could have signed so short a document as that of the 11th of October, 1858, without being fully cognizant of the contents, meaning and object of it. I say that, she having written that, the parties who were about to advance the money, and who did advance it four days afterwards, were entitled to believe the representations so made by her, and I think she cannot now be heard to say that they ought to have disbelieved those representations and ought to have said: "We do not believe that you did assign to Edward Bowren previous to your marriage all your interest under that will." I think it would be contrary to equity and good conscience to allow a lady who has made, under such circumstances, a declaration so clear and distinct as that, to set up afterwards a claim to an equity to a settlement, so as to defeat the interest of the purchasers, who, upon the faith of that representation, have paid the purchase-money in respect of this lady's interest. Consequently, I think that the order made by the Master of the Rolls must be reversed, and that there should be an order directing the payment out of the fund of the costs of the trustees in the usual form, both here and in the Court below, and the payment of the remainder of the fund to the reversionary society.

GIFFARD, L.J.—The propositions of law which are applicable to this case are, to my mind, very simple and such as are not disputed, and they are simply these, viz., that a married woman may by fraud preclude herself from her equity to a settlement; and added to that, I have no objection to this, although I do not think it necessary for the decision of this case, that she may also preclude herself by fraud from any right to a reversionary interest falling due

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after the death of her husband. In fact, if that were not so, it would be contrary to what has been decided over and over again in this Court, viz., that a married woman who chooses to commit a fraud may be held responsible for that fraud. Then the next question is, whether in this case there has been fraud in the statements made by this married lady? Taking all the circumstances into consideration, I have no doubt that the documents which she represents to have been signed on some day after the marriage in February, 1858, was, in truth, signed on the day which she so represents. With reference to that document, what she says is, that her husband threatened to leave her if she did not sign it; and she says, in her cross-examination: "I think I must have known that he was trying to borrow money upon my property. My husband told me that if I would sign exhibit I. he could borrow money upon my property, and I signed it with the intention of enabling him to do so." The whole of that document is written in her hand; it is written in a very plain hand and in a very firm hand; and I can have no hesitation in saying that a married woman who signs a document of that description under those circumstances, if she turns round afterwards and affects to come to this Court and to say that she is entitled to make a claim as against that document, must be treated as having committed a fraud. In this case there is no evidence of any such pressure or influence as would do away with the effect of that act which she did; and there is a very wide difference indeed between a case where it is a matter of contract and a case where it is a matter such as this, viz., a matter of false representation and fraud. Then, that being so, the next question really is, whether the reversionary society were cognizant of the fraud? It is quite plain that they were not, because this was a sale by auction; they bought it at the auction in the usual way and paid a fair consideration for it, and, indeed, that they were cognizant of the fraud has never been suggested. Then there is this further question, viz., was there any such negligence on their part as would visit the society with the same consequences as if they had been cognizant of the fraud? I think there was no negligence. I think it would be a monstrous thing, where property is put up for sale by public auction and documents of this description are produced, which, on the face of them, would lead any person to believe that they were *bona fide*, in the absence of proof full and conclusive to the contrary, that they should be bound to make any further inquiry than that which would appear on the face of these documents. This document itself is not an unusual document; it was no improbable document for a married lady to have executed; it is neither more nor less than this, that this lady, being entitled to a certain sum of money expectant on the death of her mother, gives up her right to a settlement to her husband. There would be nothing very extraordinary in that, nor anything very extraordinary in its being done by a document of this description. Then, as to the decree. To that decree all necessary persons were parties. It is true that the decree does not recite that there was any evidence; but you cannot impute to persons that when a decree is brought to them, because it does not recite that there is any evidence, therefore it is put upon them to inquire whether there was any evidence or not. When such a document as this and such a decree as this are presented to the purchaser, I cannot hold him liable for negligence because he makes no further inquiry. But here there is an additional fact that, beyond all question, this lady must have known perfectly well, when her husband was in prison, that his solicitor was trying to raise money, and was raising money upon the footing of the very document which she signed in the month of April previous. In the course of that transaction, because the trustees had said that they had had no notice, a request is made that she would sign a letter stating that she had executed this document antecedently to her marriage. She signs that letter, and, although she has forgotten it, I have no hesitation in imputing to her, and in saying that every Court must impute to her, a knowledge of the contents of that letter. It would be most monstrous, and, in fact, the transactions of life could not go on if, after putting her signature to a document of

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that description, she could be heard to come into Court and assert such a right. For these reasons I am clearly of opinion that, whether this is an equity to a settlement or whether it is a reversionary interest, it would be most unjust that this lady should be allowed to come forward and to assert in this Court, contrary to all good conscience, any right of any kind or description. I cannot help saying that I think, considering what the acts done were, she ought not to have made this claim in any shape or form, and that it was not an honest thing to do. I quite agree that she is very much to be pitied, because she has contracted a most imprudent marriage, and because she has been deserted by her husband, and because, in all probability, her husband influenced her more or less; but that is no reason why a married lady who chooses to commit a fraud should afterwards come forward and say, Notwithstanding that fraud, I am entitled to property which other persons have been induced to purchase upon a misrepresentation which I knew at the time I made it to be utterly and wholly untrue. For these reasons I am of opinion that the order below must be discharged, and that the reversionary society must have the money.

HATHERLEY, L.C., Feb. 10, 11, March 24, 1869.

THE ATTORNEY GENERAL *v.* SIDNEY SUSSEX COLLEGE.

38 L. J. Ch. 656; L. R. 4 Ch. 722.

Will—Construction—Devise to Two Colleges for Educating in Piety and Learning—Usage.

CHARITY. WILL.—*A testator, in* 1641, *devised lands to two colleges, one at Cambridge and one at Oxford, for educating ten of the descendants of certain persons named in his will in piety and learning*:—Held, *that this was a gift to the two colleges as tenants in common, subject to the trust of educating the persons specified in the will in piety and learning, according to the course and usage of education in the colleges respectively, and according to the regulations and discipline thereof.*

In construing a will, the Court has regard to the period when and the circumstances under which it was framed; and where the will is of ancient date, if there is any ambiguity in the construction, the course of action on the bequest since the will came into operation may be referred to in aid of the construction which has been adopted, on the ground that it is not to be assumed that a continued series of breaches of trust has been committed in the presence of those who are interested in an opposite conclusion.

Decree of the Master of the Rolls *varied.*

Francis Combe, by his will, dated the 1st of May, 1641, infeoffed the defendants, Sidney Sussex College, Cambridge, and Trinity College, Oxford, "and theire successors for ever with all I have in Abbotts Langley and the lordship there, and the meadow in St. Stephen's with the appurtenances, equally between the said colleges, for the only use, education in pietie and learninge of foure of the descendants of my brothers and sisters, and three of the descendants of the brother and sister of my first wife, and three of the descendants of the brothers and sisters of my second wife, or in default of such to their next poor kindred, for the first by the father's side, for the second by the mother's side."

His will, which was comprised in numerous heads or articles, contained many other devises and bequests, and among them a gift out of his lands at Hemel Hempstead of 10*l.* a year for ever "to a free schoole for teaching poore to cast accompt, to read English, and to write." It also contained other

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bequests for charitable and educational purposes, which are sufficiently referred to in the judgment of the Lord Chancellor.

The colleges had from the death of the testator been in the habit of educating those and those only of the " descendants " specified in the will who from time to time came to them for education, and claimed the benefit of the trust; and, if none such presented themselves, they had from the year 1646 down to the latest period adopted the plan of adding the rents arising from the land at Abbotts Langley to the general funds of the colleges and using them for the purposes to which those funds were applied.

This information was filed at the relation of Joseph Greenhill, a descendant of a brother of the second wife of the testator, for the purpose of obtaining a decision on the construction of the devise to the two colleges, and for a scheme to carry into effect the trusts as declared by the Court; and by an order made on further consideration in the cause on the 20th of November, 1868, by the Master of the Rolls, his Lordship declared that, according to the true construction of the will of Francis Combe, his real estate at Abbots Langley was vested in the two colleges in equal moieties as tenants in common, in trust to educate or to provide for the education in piety and learning of ten of the descendants of the persons named in the will, such ten persons to be selected in turns by each of the colleges, and that the term " descendants " included females as well as males, and was not confined to persons of an age to receive education at either of the said colleges; and that in default of such persons being in existence and being so selected and educated as aforesaid, the poor kindred of the testator's wives were entitled to the gifts given by the testator for their own absolute use and benefit, and that the term " kindred " included both male and female, first by the father's and secondly by the mother's side, and also that a scheme for the purpose of carrying into effect the educational purposes of the testator, as nearly as the circumstances of the case and the altered condition of society would permit, should be settled by the Judge at chambers.

From this decision both the colleges appealed.

Mr. Cole and *Mr. Rigby*, for Sidney Sussex College, and

Mr. Jessel and *Mr. Vaughan Hawkins*, for Trinity College.—When a person endows a college with a fund for the purpose of education, it will be presumed that he was cognizant of the rules and regulations of the college, and intended that the objects of his bounty should be educated according to those rules and regulations, and in the manner in which the college was in the habit of educating those who came to it for instruction; that is a principle which follows from the decisions in *Ex parte Inge; In re Catherine Hall* (2 Russ. & M. 590) and *The Attorney General* v. *Pearson* (7 Sim. 290), which latter case is a type of the manner in which similar endowments are treated by this Court. Besides, the colleges have applied the funds according to the construction for which they now contend for more than 200 years, and this long usage by them is not to be thrown out of view in seeking for the true construction, nor is it to be presumed against them that they have been committing a breach of trust for so long a time in the face of interested persons who have been in existence and competent to dispute their construction of the devise—*The Attorney General* v. *Smythies* (2 Russ. & M. 717, 749); *The Attorney General* v. *Caius College* (2 Keen, 150; 6 L. J. Ch. 282); *The Attorney General* v. *the Corporation of Rochester* (5 De Gex, M. & G. 797, 822); *The Attorney General* v. *the Master and Fellows of Catherine Hall* (Jacob, 381, 394); *The Attorney General* v. *the Mayor of Bristol* (2 Jac. & W. 294). Then, as to the gift over in default of descendants to poor kindred, if that is not for educational purposes, it is bad; for a gift merely to poor kindred *in perpetuum* cannot be upheld as a charity—*Thomason* v. *Moses* (5 Beav. 77).

Mr. Hinde Palmer and *Mr. Bedwell*, for the relator, contended that if a college accepted a trust, it did so on the terms of properly executing the trust when ascertained, and the fact that the colleges had virtually applied the gift

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for their own benefit for 200 years, would not absolve them from at last doing their duty by the gift.

[The LORD CHANCELLOR.—The question is, whether the colleges have not fulfilled the trust by providing education within their own walls: are they compellable to do it in any other way?]

If they are not, the scope of the devise is narrowed. There is in the devise a devotion to educational, *i.e.*, charitable, purposes generally; and the mode of dealing which the colleges have adopted, cuts that down.

Mr. Wickens, for the Attorney General.

Mr. Hemming, for other "descendants."

Mr. Cole and *Mr. Vaughan Hawkins*, in reply, referred to *The Incorporated Society* v. *Richards* (1 Dru. & War. 258); *In re the Chelmsford Grammar School* (1 Kay & J. 543, 565; 24 L. J. Ch. 742).

The LORD CHANCELLOR.—The principal point which arises in this case is, whether under the devise to Sidney Sussex College, Cambridge, and Trinity College, Oxford, the testator intended that the property devised to them should be taken by them upon trust to educate ten of the class of persons specified by the will in piety and learning in the ordinary manner in which those colleges were in the habit of educating all who resorted to them for education, or whether it is a trust imposed on the colleges of providing generally for the education of such ten persons, whether boys or girls, somewhere or other, and in some manner which, if not adjusted by the colleges themselves, would be subject to the directions and regulations of this Court. I can find no case in the books, nor has any been cited by the learned counsel at the bar in which there is a bequest worded in a manner precisely similar to this, or even so analogous to it as to afford me any useful help in forming my judgment. I am therefore obliged to consider it principally upon the actual shape and form of the will as the words in it express, or are intended to express, the testator's meaning, and to come to the best conclusion I can upon it, having regard at the same time to the period when and the circumstances under which the will was made.

Now, the will is dated in the year 1641. It is very informal in its arrangements; it is comprised in certain heads or articles, and must have been subject to certain interlineations and additions from time to time. It contains a vast number of dispositions, the general character of which was to make provision for the relations of both his wives. We find, also, in the fifteenth article, that he intimates some regard to the two colleges in question, for he there directs that all his books, except some few his friends might desire, should be given equally to the two colleges. Then we find further a direction as to one part of his property, in article seventeen, in which he gives the overplus of his goods to those who want most of his next kindred, and gives his house by Abbotts Langley Church, for ever, one half of the rent thereof to the poor there quarterly, and the other half of the rent to any quarterly that will teach poor children English there for ever. And then there is another bequest with reference to teaching poor children at Hemel Hempstead. There is to be a free school there for teaching the poor children to cast accounts, to read English and to write. So that it is clear that the testator had his own ideas with reference to those who are to be instructed at these schools. In one of them he simply directs the teaching the poor of the district; in the other he indicates the sort of education which he thinks will be appropriate to them, namely, reading, writing and arithmetic, a notion in which he seems to have agreed with one very prevalent at the present day. Then, in the 22nd article, which I now have to construe, he proceeds thus.—[His Lordship read the devise to the colleges.]

His Lordship the Master of the Rolls seems to have been led in a great measure to the conclusion at which he arrived by the argument which has been addressed to me here, namely, that this is only a gift to the two colleges, that no place of education is named, that it does not follow necessarily that because

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a gift is made to a college, therefore it should be for the purpose of educating there, and that it may have been that the testator selected these two colleges as persons upon other occasions have selected for the purpose of continuous charities, a corporate body for the administration of the charities without the corporate body being called upon itself in any way to assist in the due administration of the charity beyond seeing that the trust is executed. No doubt there are such cases, and there is a well-known case, that of *Sonley* v. *the Clockmakers' Company* (Dru. & War. 306), referred to in *The Incorporated Society* v. *Richards*, in which a corporation is made a trustee simply and entirely for private purposes. Of course that may be done. But the question here is different; we have here to consider what it is when a person gives to a corporate body, itself providing education in "piety and learning" (on which I shall say a word presently), a sum of money for the purpose of bringing up his descendants in piety and learning. I apprehend that a person at first sight—and this was my first impression, and continues to be my impression—would say that when the corporate body to whom the property is given does that very thing which the testator desires to be done, does take in hand the education of persons requiring to be educated, and does specially educate them in piety and learning, that in such a case the intention is that the persons in whose favour the trust is created shall be dealt with in the manner in which the corporate body deals with all other persons committed to its charge for the purpose of such instruction. I put the case (it is *idem per idem* no doubt) of a gift to one of the corporate trading bodies in the city of London of a sum of money for apprenticing young men. Surely the first impression would be this, that it was for apprenticing them to the craft to which the corporate trading body belonged. I mean, of course, a gift made at the time when it was necessary that all persons who were to be apprenticed to a certain craft should be under some control before they were allowed to enter upon the trade itself. Take, again, a gift to Bartholomew's Hospital (a corporate body) by a testator, on say that the hospital is bound to seek out all over England any ten of his sick relations. Could anybody suppose it was not to be done at the hospital, which is a place undoubtedly appropriated for it, and could any one reasonably say that the hospital is bound to seek out all over England any ten of his relations who might be existing if it was found incumbent to remove them to St. Bartholomew's Hospital, provided the hospital was always ready, and offered on its own part that which it considered to be the trust and duty imposed upon it?

That being so, I have next to inquire whether or not these colleges were, in 1641, as they are now, in the habit of instructing people in piety and learning. And if there were any doubt on the point, I find that the very charter of incorporation of Sidney Sussex College contains these identical words, and that that college was incorporated for the express purpose of promoting "piety and learning." That is the common expression to be found over and over again in books which refer to the Universities as being places for instruction. Sometimes the expression used is, "sound learning and true religion," sometimes "piety and learning," and that is the very object for which these several societies seem from the earliest time to have been incorporated.

Further, also, there is, in aid of the construction which I put on the devise, the singular fact that the testator has not chosen one college only to be his trustee, as would probably have been the case if the only purpose he had in view was that the trust might have a perpetual endurance, but the devise is made to two colleges, one at each University, who are constituted tenants in common of the property.

Finding, therefore, as I do find, a deed of gift to two bodies expressly incorporated to inculcate that which the testator desires to inculcate in his descendants, it appears to me that the plain, ordinary construction is this, that he makes the devise to the two colleges for the purpose of giving to the objects pointed out by his bounty the benefit which these colleges confer upon all

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others who resort to them for the purpose of instruction at all; and I cannot come to any other conclusion than that this was the original intention of the testator's gift.

But the case does not rest there, because the appellants are entitled to claim in aid of the construction which they put upon the bequest, the principle of the Court, which says, that if there be any ambiguity at all, the course of action upon the bequest may be called in aid as shewing this, that the persons who are concerned in the trust have not been committing a breach of trust from the commencement downwards to the present time. The reason the Court relies upon that rule with reference to charities where there is anything doubtful in the construction of the will (and there must be something doubtful here for the Master of the Rolls to have arrived at a conclusion different from mine) is this, that there always have been persons alive who have been competent to controvert any such conclusion; and it is not to be assumed that in the face of many persons interested in controverting such a conclusion a course of action has been adopted which has been a plain and clear breach of trust. The cases are very numerous on the subject, but I think one of the latest is *The Attorney General* v. *the Corporation of Rochester* (5 De Gex, M. & G. 822), where Lord Justice Turner (though deciding against the usage because he thought the will was not doubtful) put it thus: "Undoubtedly if an instrument be doubtful in its terms contemporaneous usage may be referred to; and if there has been a long usage in the application of funds to purposes which may be warranted upon one construction of the instrument, but which may not be warranted upon another construction of the instrument, the Court will lean to that construction of the instrument (provided it be doubtful) which will best correspond with the mode in which the funds have been for so long a period applied."

It is not necessary, as I have said before, to have recourse to this rule of practice, because I think enough is derivable from the terms of the will itself; but it appears to me, at the highest, there cannot be more said than this, that it might admit of the opposite construction; and in the case of a general trust you look back to see what has been done. Then the case in that point of view is extremely strong, because observe what were the circumstances. The testator appointed four or five supervisors of his will; one of them was his father (Greenhill, as he called him, that is, his father-in-law), who would be interested in looking after the interest of the Greenhills; another was his brother Greenhill, whose descendants were entitled to the benefit of the trust; and these supervisors having been appointed both the colleges appear from the first to have adopted the plan of educating those, and those only, who came to be instructed by them. But more than that: Sidney Sussex College, Cambridge, from the very earliest period, in 1646, down to the very latest period, made a resolution that when anybody did not come the funds should go into the general funds of the college which are not (as has been often pressed upon me) for the benefit or behoof of the college itself in any other sense than this, that they go to instruct other people, for exhibitions, and for the purpose of instructing those who needed instruction; and that having been laid down as their rule, Trinity College, Oxford, did, as well as Sidney Sussex College, Cambridge, act upon the same rule. In Sidney Sussex College, Cambridge, this was laid down as the definite rule very soon, some five or six years after the bequest, when these supervisors must in all probability have been alive, and when certainly there must have been persons interested in disputing anything they were doing; and that course of action they pursued to the latest period, so that there have been abundant opportunities of disputing it, if disputed it ought to be.

The other part of the case I can dispose of much more shortly. It is a question what is to be done with reference to the second bequest, which is undoubtedly a somewhat different one as to its true construction, for it is very imperfectly expressed, namely, after the descendants of the brothers and sisters it says, "Or in default of such to their next poor kindred, for the first by the father's side, for the second by the mother's side." The Master of the Rolls

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has made a declaration that it is a good charitable bequest to these kindred. But what strikes me on the present occasion is this, that as these poor kindred are not represented before me I ought not to make a declaration in their absence which may affect them. Moreover, it appears that the descendants of the persons named in the will are exceedingly numerous, and that there is no chance of their failing. It would therefore be improper to direct any inquiry now which might bring the poor kindred before me, and in their absence, I repeat, I ought not to make any declaration concerning them. The decree, therefore, of the Master of the Rolls must be varied, and I shall declare that, according to the true construction of the will of Francis Combe the defendants the College or Corporation of the Master and Fellows of Sidney Sussex College, Cambridge, and the defendants the College or Corporation of the President, Fellows and Scholars of Trinity College, Oxford, became entitled on his decease in equal shares as tenants in common in fee simple to the testator's property at Abbotts Langley in the will mentioned, with the appurtenances, subject to the trusts imposed upon the said colleges respectively by the said will of educating in piety and learning, according to the course and usage of instruction in the said colleges respectively and according to the regulations and discipline thereof, four of the descendants of the brothers and sisters of the testator, three of the descendants of the brother and sister of his first wife, and three of the descendants of the brothers and sisters of his second wife; and it appearing that there still exist many of such descendants as aforesaid but no other poor kindred than such poor descendants of any of the persons in that behalf mentioned in the said will have come in and made any claim under the original decree made in this cause, this Court doth not think fit further to prosecute that inquiry directed in the original decree as to the poor kindred of the testator's brothers and sisters or the poor kindred of his first and second wives, but this decree to be without prejudice to such rights, if any, of the poor kindred other than the descendants of the testator's brothers and sisters and of the brothers and sisters of his first and second wives.

HATHERLEY, L.C., May 25, 1869.

TENNANT *v.* TRENCHARD.

38 L. J. Ch. 661; L. R. 4 Ch. 537 (L.C.): affirming, [1869] E. R. A.; 17 W. R. 640 (V.C.): other proceedings, [1869] E. R. A. 178; 38 L. J. Ch. 169; L. R. 4 Ch. 537; 20 L. T. 856 (L.C.); and [1872] E. R. A.; 41 L. J. Ch. 779 (L.C.).

Trust Estate—Sale by Court—Trustee an Incumbrancer—Application by, for Leave to Bid.

TRUST AND TRUSTEE.—*The Court, when it has directed the sale of a trust estate, will not, in opposition to the declared wishes of adult cestuis que trust, and prior to any attempt to sell, grant leave to the trustee to bid, notwithstanding that, besides being trustee, he is entitled to a charge on the estate, and that the sale has in fact been ordered with a view to the payment of such charge. But*

Semble—*on the failure of previous attempts to sell, the trustee may be accepted by the Court as purchaser.*

This was an appeal from an order made, by Vice Chancellor James, on an adjourned summons.

Charles Tennant, the plaintiff in the suit of *Tennant* v. *Trenchard*, was managing trustee under a settlement made by his mother of an estate near Swansea, comprising important canal property; but he alleged that he had been *de facto* divested of the trust since the year 1859, when a receiver and manager of the trust estate was appointed by the Court. He claimed to be an

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incumbrancer on the trust estate for charges amounting in the aggregate to 46,301*l.*, besides arrears of interest about equal in amount to the principal, and the suit was instituted by him for a foreclosure of his charges, which he maintained considerably exceeded the value of the premises. Vice Chancellor Giffard thought the plaintiff entitled to foreclose; but his order was, on appeal, reversed (38 L. J. Ch. 169) by Lord Chancellor Hatherley, who held the plaintiff's charge to be a charge simpliciter, with the incident, not of foreclosure, but of sale only, which he accordingly ordered. Thereupon the plaintiff applied to Vice Chancellor James, in whose chambers the sale was to be conducted, to have leave given him to bid. His application was resisted by certain of the *cestuis que trust* who were of full age, and the Vice Chancellor refused it, on the ground that the plaintiff, according to the Lord Chancellor's view, retaining still the character of trustee under the settlement, could not be allowed to place himself in a position where his duty and his interest would be in opposition. He appealed. It appeared that it had not been as yet determined who was to have the conduct of the sale, and no reserved bidding had therefore been at present settled.

Mr. E. K. Karslake and *Mr. W. W. Karslake*, for the appellant, contended that the Vice Chancellor had treated the point as not *res integra*, but, as, in fact, concluded by the Lord Chancellor's judgment in the suit. They argued that the reason of the rule against a trustee's bidding, which was instituted for the protection of the *cestuis que trust*, did not apply here, where it would be rather for their protection against the estate being sold at an undervalue that he should be allowed to bid.—They cited *Ex parte Lacey* (6 Ves. 625), and distinguished *Ex parte James* (8 Ves. 337).

Mr. John Pearson and *Mr. Hume* appeared for the defendant Dr. Trenchard, who, however, had not now been served, and had not appeared in the Court below. They did not consent to the appellant's application, but they declined to argue the case.

Mr. Freeling and *Mr. Speed*, for the *cestuis que trust* (the children of the late Henry Tennant, the settlor's eldest son), who opposed the plaintiff's application, contended that a trustee, whether also an incumbrancer or not, could not purchase without the consent of the adult *cestuis que trust*, and that the Court had no power to consent for them. This disqualifying of a trustee as a purchaser was to prevent his duty and his interest from conflicting, and the dissent of a single *cestui que trust* was sufficient to prevent the removal of the disqualification—*Ex parte Lacey* (*ubi supra*); *Ex parte James* (*ubi supra*); *In re Bloye's Trust* (1 Mac. & G. 488; 19 L. J. Ch. 89); *Hamilton* v. *Wright* (9 Cl. & F. 111); *Campbell* v. *Walker* (5 Ves. 680); *Price* v. *Byrn* (5 Ves. 681); *Parkinson* v. *Hanbury* (2 De Gex, J. & S. 450); *Ex parte Bage* (4 Madd. 459); *Carter* v. *Palmer* (8 Cl. & F. 657). The same principle which made it unlawful for a trustee to purchase the trust estate prevented the Court from authorizing him to bid—*Sir George Colebrooke's case* (6 Ves. 622); *Lewin on Trusts*, 364. It was, moreover, especially necessary to adhere rigidly to the rule in a case like the present, where the trustee had possessed such vast powers of management.

Mr. E. K. Karslake was heard in reply.

The Lord Chancellor said.—In this case the peculiarity of the position does not consist in the circumstance of the same gentleman being trustee and incumbrancer, for that may happen, and does happen, in a great many instances. A person may take an interest under an instrument in which he is trustee, and that interest may require a sale of the property to give it effect. Certainly I do not intend to depart—and I hope I did not do anything by the decree which I made on the former occasion which could in any way be held to depart—from the trusts of the deed; but it appeared to me that this gentleman certainly had been trustee with very large powers vested in him as trustee, and that this constituted the peculiarity of the case, his powers being almost equivalent to ownership by the express terms of the deed itself; while at the

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same time he had acquired a very large interest as mortgagee. There cannot be the least doubt that a very large sum of money is owing to him, and also very large arrears of interest in respect of that principal sum. He was proceeding to foreclose the estate; but it appeared to me that under any circumstances of the case that was not his right.

I thought, in the first place, upon the terms of the deed, it was rather a charge which was to be raised by sale; and, secondly, I thought, even if there had been more doubt upon that point than I on the whole entertained, regard being had to the rather ambiguous expressions of this deed, still, regard being had to the fact that the whole scope and object of the deed were to save the estate, and that he had been appointed trustee for that purpose, that it was his duty as trustee to do what he could towards saving the estate if it could be saved, and if that could not be altogether done, then to seek to save some portion of the surplus after paying all charges when a sale should become absolutely necessary, for the benefit of those interested under the species of settlement that had been made. That being so, and finding that he had this large sum due to him, I varied the decree which had been made for foreclosure by directing a sale; and I have no hesitation in saying that I intended (and I am, therefore, glad of the course which has been pursued in chambers) that the sale should be immediate. It appeared to me quite plain that this gentleman had been long kept out of his money, and there appeared no intention on the part of those who are creating these difficulties, and no means on their part, to pay him. Therefore, the only course that was left was to give him the advantage of having his money paid within a reasonable time; and also, on the other hand, to give them the advantage of a chance of obtaining any surplus that might remain after payment of these very heavy debts.

One therefore approaches the case without any difficulty, founded on the idea of the decree having, by directing a sale, altered his position as trustee. Trustee he was and trustee he still continues to be. His having been replaced by a receiver of the property does not alter the position which he fills as trustee under the instrument. The point has been extremely well and ably argued by Mr. Freeling and Mr. Speed upon this part of the case; but it appears to me quite plain that the authorities bind me to this; nay, I may say more, I think that the nature of the case, the justice of the case, and what is proper to be done between all parties, would bind me to this, that this gentleman should not have liberty to bid until some attempt had been made at least to sell the property, and it had been shewn that that attempt was abortive. I think the authorities go to this extent, and there are *dicta* which go much further. There are authorities which go to this full extent, namely, that the Court in the first instance will set aside every purchase, or attempted purchase, that is made out of Court by a trustee. The Court even goes a step further than setting aside the sale, and says it will not set it aside at the instance of the trustee, but will fix him, if the *cestui que trust* so desires, with the price he has agreed by his contract to give; but it will also, if the *cestui que trust* desires, render it necessary for the trustee to submit to put up again the property for re-sale; it will take the property away from him if more be offered, and it will leave him fixed to the purchase if more be not offered. Then when the case comes before the Court, in several instances it has been asked that the person who had out of Court made an improper purchase should, now that the matter was in Court, be at liberty to bid, and the Court has, principally in bankruptcy cases, declined allowing that course to take place. In bankruptcy it has declined also to allow the solicitor to be admitted to bid in that case for reasons which are extremely sound, namely, that if he be allowed to bid, even on his offer at once to abandon the solicitorship of the estate, he, having been solicitor during the whole of the time, and placing only some new person in office as solicitor for the mere purpose of the particular sale, has brought himself within the reason which has led to this rule, on the part of the Court, as to purchases by trustees, viz., that he had acquired information which he was bound to convey to those for

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whom he acted; and that the Court could have no security that he would communicate the information to those who were now placed in the adverse position to him of vendors, in order that they might have the benefit of his knowledge to raise the price as against himself. Accordingly, the Court has laid down the principle, which is one of general application undoubtedly, viz., that it is hazardous in the extreme so to place the interests of a man in opposition to his duty as to make it impossible for the Court to exercise any control over him because it could not know what was passing in his mind, or the extent of the information which he had acquired; and that, therefore, it would be better for the interests and the safety of mankind that the Court should lay down the positive rule, that he should have no part whatever in bargaining in his own interest for the acquisition of the property; and in those cases the Court has refused to allow the solicitor to become a bidder, even though he may have offered at that time to lay down his functions as solicitor to the trust estate.

The application of this rule to trustees is as strong in principle though not in practice, because probably the solicitor knows much more about the estate than a trustee. But in this particular case before me, I have a stronger exemplification of it than I could have in any other case, because in this case, though this gentleman has a large debt, and I feel the great hardship he has suffered in not having his money paid at once, he must be acknowledged to be a person having a very large knowledge of the estate, and the estate is a very peculiar one. The whole question has been before me in chambers when Vice Chancellor many times. It is a case in which there is a canal, the trade of that canal depending a great deal upon the goodwill, so to speak, of the persons who may choose to send their goods upon it. This gentleman has been managing it, it appears to me, very skilfully and beneficially for many years. He has been doing all he could towards the improvement of the estate, and has an amount of knowledge with regard to the estate which it is difficult for any other person to possess. Therefore, these *cestuis que trust* have a right to say "Let us have the full benefit of your knowledge on this point without any motive in the shape of interest which would induce you to withhold it or to diminish aught of the value which you know the estate possesses, because you may fancy the price may be enhanced against yourself; let us have your advice as an utterly free and disengaged person, willing to give us the whole benefit of your information about the estate, and as to putting out the estate to the best possible advantage in the eye of an intending purchaser; do not, therefore, put yourself in the list or category of purchasers."

Then, again, taking it in the converse way, allowing him to bid, would it tend to damage on general principles the sale of the estate? Mr. Karslake has said once or twice, and his junior repeated, that the more bidders the better. That may be very true in one sense. On the other hand, it may well be, as was said in the case before Lord Eldon, that the appearance in the field of a bidder who has a knowledge which the other intending bidders do not possess, may very well keep out everybody else from the field, because they would say, We know exactly what will happen; he will bid me up to what he knows to be, and he knows far better than we, the exact value of the estate; and if we bid above that he will leave us in the lurch, and leave us fixed at a sum greater than the value which the estate possesses: this will be the probable course; as he knows intimately the exact value of the estate, he will be sure not to let us have it at a farthing below that value, and he will desert us when it comes above that sum; therefore, why should we go to the sale at all when everything is likely to be against us and nothing for us? In the first place, I hold the rule to be (I purposely avoid at present saying more) that if those interested in the estate say they believe it to be contrary to their interests that one who is their trustee should be allowed to bid, that estate not having been put up for sale, and no attempt having been made to dispose of it in any other way, the Court will certainly give weight to their objection, and say that until

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it is distinctly demonstrated to the Court that other ways of selling it have failed, it will not interfere with the reasonable right which they have to object to the trustee being allowed to come into competition as purchaser or bidder at the sale. It is not necessary to say more than that, since no attempt has yet been made to sell the estate. On the other hand, I should be very much startled to find it asserted that any authority has gone so far as to say, if a trustee has a right to have the estate sold because he has a charge on it, say by way of legacy, of 20,000*l*., then that, though no other way can be found of disposing of the estate, it shall be utterly impossible under the eye of the Court, and after the Court has satisfied itself that nobody else would buy, to constitute the trustee a purchaser. No authority, I think, has gone so far as that. I think a way may be found of getting over that difficulty, if such a difficulty should occur. It appears to me that the authorities go to this length, that the Court will not, adversely to those who are adult and who are interested in the estate in the first instance, allow the trustee to come as a bidder. I am therefore obliged to refuse this motion, and I think I must refuse it with costs. But at the same time, I do not think it was necessary for Dr. Trenchard to employ two counsel to say that he did not consent, for Mr. Pearson disclaimed any intention of arguing the case, and considering that Dr. Trenchard was not served with this notice of motion, I think those costs must not be included. The costs of Mr. Freeling's and Mr. Speed's clients will be allowed. The motion will be dismissed with costs as against their clients.

LORDS JUSTICES, June 8, 1869.

CATT *v.* TOURLE.

38 L. J. Ch. 665; L. R. 4 Ch. 654; 21 L. T. 188: affirming, [1869] E. R. A.; 38 L. J. Ch. 401, 416; 20 L. T. 551 (V.C.).

Followed, *Luker* v. *Dennis*, [1878] E. R. A.; 47 L. J. Ch. 174; 7 Ch. D. 227; 37 L. T. 827; 26 W. R. 167 (Ch. D.). Considered, *Zetland* v. *Hislop*, 1882, 7 App. Cas. 427 (H.L.). See, *Donnell* v. *Bennett*, [1883] E. R. A.; 52 L. J. Ch. 414; 22 Ch. D. 835; 48 L. T. 68; 31 W. R. 316 (Ch. D.); *Clegg* v *Hands*, [1890] E. R. A.; 59 L. J. Ch. 477; 44 Ch. D. 503; 62 L. T. 502; 38 W. R. 433 (C. A.). Considered, *Metropolitan Electric Supply* v. *Ginder*, [1901] E. R. A.; 70 L. J. Ch. 862; [1901] 2 Ch. 799; 84 L. T. 818; 49 W. R. 508 (Ch. D.).

Covenant restrictive of User of Land—Exclusive Right to supply certain Goods—Restraint of Trade—Want of Mutuality—Injunction.

CONTRACT. INTOXICATING LIQUORS.—*Upon a conveyance of land, made by the plaintiff (a brewer), a deed of covenant was executed by the grantees that the plaintiff, "his heirs and assigns, should have the exclusive right of supplying all ale, beer and porter which might be consumed in every house or other building which might be erected on any part of the said piece of land, and which should be opened or used as an inn, public-house or beer-shop." The defendant became a subsequent purchaser of the land with notice of the covenant; he afterwards opened a public-house upon the land and supplied it with ale, &c. of his own brewing:*—Held, *affirming the decision of one of the Vice Chancellors, that the covenant was not invalid either on the ground of uncertainty, want of mutuality, or as being in unreasonable restraint of trade. A demurrer to a bill stating the above facts and praying an injunction restraining the defendant from committing a breach of covenant was overruled.*

This was an appeal from the decision of Stuart, V.C., which is reported 38 L. J. Ch. 401, where the facts and arguments of counsel are very fully stated.

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Mr. Greene and *Mr. Townsend*, for the appellant, the defendant.

Mr. E. K. Karslake and *Mr. Ayrton*, for the plaintiff.

Mr. Greene, in reply.

SELWYN, L.J.—This is an appeal from a decision of Vice Chancellor Stuart, overruling a demurrer to the bill for want of equity; and the appellant therefore comes before us having thrown upon him the burden of shewing that, under the circumstances stated in this bill, the plaintiff cannot be entitled to any relief whatsoever. Now the bill states that the plaintiff has for a considerable time carried on and still does carry on the business of a brewer, and that he was entitled to "certain land in the town of Brighton which was suited for building, and so capable of being and was intended by him to be dealt with in a manner to promote his business." It then states the purchase by a certain society of a portion of that land; it states the treaty which led to that purchase and the deeds which were then executed; and after stating the deed by which the conveyance was made, it states the deed of even date, which contains the covenant in question, which is a covenant, amongst other things not material to the present purpose, "that the said Charles Catt, his heirs and assigns, should have the exclusive right of supplying all ale, beer and porter which might be consumed in every house or other building which might be erected on any other part of the said piece of land, and which should be opened or used as an inn, public-house or beer-shop." It then states that "the defendant purchased the said lot with notice as a member of the said society, or with notice in fact, or, but for his neglect to make proper inquiry into title in his said purchase, would have had express notice of the hereinbefore-stated indenture of covenants, or the defendant became otherwise bound by the same indenture." It then states that "the plaintiff, in exercise of his exclusive right, has always been and now is ready and willing, and previously to the institution of this suit has offered to the defendant, to supply to the orders from time to time of the defendant for consumption in the said 'Duke of Edinburgh' beer-house, ale, beer and porter, all of good quality, in requisite quantities, and at market or fair and reasonable prices, as specified in the same offer; but the defendant refuses such offer, and denies the plaintiff's said exclusive right, and insists that the defendant has the right of supplying the said beer-house from breweries other than the plaintiff's." Then the prayer of the bill is in accordance with the paragraph which I have just stated, repeating the same offer and asking for an injunction in support of the exclusive right so set up. Now, in answer to that case, many objections have been raised to the legality of this covenant and to the jurisdiction of this Court to enforce such a covenant, or, at all events, as to the propriety of the Court interfering in such a manner as to grant the relief which is sought; and it has been said that, even if the plaintiff has any right, he ought to be left to assert that right in a Court of law. I think, in the first place, it is very material to consider the question which has been discussed as to whether covenants of this nature, or this covenant, actually do or does run with the land. We had occasion very recently[1] to consider the authorities applicable to this question, many of which have been cited to us to-day. The first is the case of *Tulk* v. *Moxhay* (11 Beav. 571; 18 L. J. Ch. 83: on appeal, 2 Ph. 774), before Lord Cottenham, who says: "That the question does not depend upon whether the covenant runs with the land is evident from this, that if there were a mere agreement and no covenant, this Court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased." Then he went on to observe with respect to questions which have arisen with reference to devolutions of covenants of this kind having been decided upon certain definite principles as regards the covenants running with the land. In like manner, in the case of *Wilson* v.

(1) His Lordship was referring to the case of *Keates* v. *Lyon* (38 L. J. Ch. 357).

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Hart (35 L. J. Ch. 569; L. R. 1 Ch. Ap. 463), which was decided by the then Lords Justices, where the owner of a freehold house entered into a covenant with the plaintiff who was a previous owner, that the building should not be used as a beer-shop, and the house was afterwards let to the defendant as tenant from year to year without express notice of the covenant, it was held, affirming the decision of the present Lord Chancellor, that although the covenant might not at law run with the land the defendant was bound by it in equity; and the late Lord Justice Knight Bruce, in the case of *De Mattos* v. *Gibson* (4 De Gex & J. 276, 282; 21 L. J. Ch. 165), put the matter as a matter of principle, not depending upon any such distinction. He says, "Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another with knowledge of a previous contract lawfully and for valuable consideration made by him with a third person to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract, and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller." Now it appears to me that upon the statements in this bill the defendant is clearly bound by notice of the present covenant; and that therefore, assuming the covenant to be otherwise unobjectionable, he cannot be heard to say that he, having purchased this property, and no doubt having purchased it at a smaller price in consequence of the title being incumbered with the restrictions contained in this covenant, can now openly disregard the provisions of the covenant. The objections which have been raised are, first, that this covenant is void for uncertainty; but I think the material question to consider is, what is it which the vendor here covenants for? In the first place, this is a covenant entered into as a part of a transaction which resulted in the sale and purchase of a piece of land; it is one of the covenants contained in the deed of even date contemporaneously with the conveyance of the land; it is a part of that transaction; and what the vendor covenants for is that he shall have the exclusive right of supplying all ale, beer and porter which shall be consumed in any building erected on this particular piece of land which shall be used as a beer-house. Now that is a right which, of course, is capable of being abused,—capable of being waived,—capable of being lost; and if at any time, either in the progress of this suit, or at any other time, it can be shewn that it has been so abused, so waived, or so lost, then there would be good ground for saying that this Court ought not to interfere in favour of a person who might otherwise be entitled to the benefit of it. But I am at a loss to see how it can be said that there is anything like uncertainty in this covenant. It might be said that the covenant is too wide, that it is too general; but how can it be said to be uncertain when it is the exclusive right of supplying all ale, beer and porter that might be consumed in this house? It appears to me to be impossible to say, with any reasonable chance of success, that this is a covenant in any degree uncertain. But then the authority of *Collins* v. *Plumb* (16 Ves. 454, 460, 461) is cited, and it is stated that is a clear authority for the proposition that a covenant of this kind is so uncertain that a Court of equity will not enforce it. I confess I entirely agree with the learned Vice Chancellor that the case of *Collins* v. *Plumb* does not in the least degree govern this case. Lord Eldon observed, as stated in the report, that it was very infirm in its terms. It was a covenant not to sell or dispose of water from a well to the injury of the proprietors of the waterworks, their heirs, executors, administrators and assigns; and then Lord Eldon says, "I never met with such a covenant as this, upon which I must try in each instance whether the act of selling the specified quantity of water is a prejudice to the proprietors of these waterworks." He is there obviously referring to the very peculiar language of that particular covenant; and the question as to whether it was or was not to the prejudice of the proprietors of the waterworks was necessarily involved in the very terms, and expressed by the terms of the covenant itself; of course

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it must, therefore, have been expressed in the terms of the injunction; and therefore he said that a Court of equity could not have any jurisdiction which it ought to exercise upon such a covenant as that. But that covenant has no resemblance to the present covenant, because this is not a covenant not to sell ale, beer or porter to the prejudice of the plaintiff; it is a covenant that he shall have the exclusive right of supplying all ale, beer and porter consumed upon these premises. Therefore, the question as to whether it is to his prejudice is one that cannot be raised, because the extension of a man's trade is of course to his benefit, and the diminution of that trade must be to his prejudice. Therefore it clearly appears to me that the case of *Collins* v. *Plumb* has no application to the present case. Then it is said, secondly, that there is a want of mutuality. What I have already said with respect to the nature of this covenant, and the right which is acquired thereby by the vendor, and the circumstances under which that right was acquired, I think has disposed of that objection as to the want of mutuality. But I go even further than that, and I say that even supposing it had been expressed in terms as being a mere option, supposing there had been a covenant for a valuable consideration, being a part of the transaction of the sale and purchase of the land, that so long and so often as the vendor chose to exercise a particular right,—that is, the right of supplying all ale, beer and porter,—he should have that exclusive right, would it be said, because it was optional on his part, therefore there was a want of mutuality, and therefore it could not be enforced? I apprehend that, being for valuable consideration, such a covenant, although it was expressed to be only conditional upon the exercise of a volition on the part of one side or the other, that being expressed in the covenant would not be any objection to the validity of such a covenant. I think, therefore, there is no objection as to the want of mutuality. Of course, a right so acquired is one which, like all other rights, must be reasonably exercised; and of course, as Mr. Greene put it, if a man having a right to sell ale, beer and porter, were to sell some poisonous concoction which he chose to call ale, beer or porter, that would not be a reasonable exercise of that right; neither would it be so if he were to sell good ale, beer and porter at an unreasonable price. Then the third objection that has been urged is, that this is an unreasonable restraint of trade. Now, in the first place, I think the rule which is laid down in the leading case which has been cited, and which is always referred to, of *Mitchell* v. *Reynolds* (1 P. Wms. 181), is, that where the restraint is not general, but partial, and is for valuable consideration, then it cannot be said to be an unreasonable restraint. But here it is said that it is unreasonable in one respect, because it is perpetual. I think the rule upon that subject has been well settled by authority, and, as I understand, the rule is this, that where there is a restraint on a person from carrying on trade, when it is unreasonable in law, then the person carrying on trade can apply to the Court to have it removed. The restraint may be limited as to space, though general as to time, and falls within this rule, that a restraint preventing a person from carrying on trade within a certain limit of space, though unlimited as to time, may be good, and the limit of space may be according to the trade he carries on. As an instance of these covenants, I may mention also the case of *Wilson* v. *Hart*. It was a specific covenant entered into with a person, his executors and assigns. And then with respect to this particular covenant, it does seem to be one which the Court cannot fail to take judicial notice of as being a covenant which is extremely common; and every Court of justice has had occasion to consider these brewers' covenants: and therefore the Courts must be taken to be cognizant of the distinction between what are called free public-houses and brewers' public-houses, which are subject to this very covenant. Certainly, in my opinion, we should be introducing very great uncertainty and confusion into a very large and important trade if we were now to entertain any doubt, or suggest any, as to the validity of a covenant so extremely common as this is. I think there would be no ground for that sort of distinction which has been relied upon; namely, that

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such a covenant might be good for twenty-one, fifty or one hundred years, but that it is not good if it is entered into as part of a transaction where the fee simple of a property is conveyed; and in accordance with such conveyance the covenant is made with the vendor, his heirs and assigns. I think, therefore, that no such objections to the covenant can be sustained, especially when they are raised, as they are raised, at the present stage of this cause; because, although at some future period of this cause, upon a motion, as in the case of *Hills* v. *Croll* (2 Ph. 60; 14 L. J. Ch. 898), circumstances may be shewn which render it improper for the Court to interfere, or, as has been suggested, it may be shewn at some future time either that the right claimed by the plaintiff is one which he has placed himself in such a situation as that he ought not to be allowed to exercise it, or that the defendant had not notice of the covenant when he purchased the property. All of these things may be proper grounds of objection upon the hearing of the motion or upon the hearing of the cause, and then it might possibly be said that the case of *Hills* v. *Croll* might have some application to the question. But this raises the general abstract question, whether a person stated to have notice of such a covenant is to be bound by it or not? Then if we are to look at those cases, in my opinion, it is very difficult to reconcile the case of *Hills* v. *Croll* with the case of *Lumley* v. *Wagner* (1 De Gex, M. & G. 604; 5 De Gex & Sm. 485; 21 L. J. Ch. 898), which last-mentioned case has been repeatedly followed; and if *Hills* v. *Croll* is to stand with that case at all it can only be upon the particular circumstances of the case. What we have to deal with here is the general abstract question, and upon that I can only say, that I entirely agree with the conclusion at which the learned Vice Chancellor has arrived, and I think this appeal must be dismissed, with costs.

GIFFARD, L.J.—The appeal in this case is from an order overruling a demurrer, and therefore the whole question to be decided is, whether upon the statements in the bill the plaintiff is entitled to any relief. One thing at least I think is certain, and that is, that if the plaintiff cannot sustain a bill in this Court he is without remedy altogether. It is pretty plain that this is a covenant which does not run with the land. Then with respect to the allegations in the bill: the transaction is a simple one; it is a sale by the plaintiff of land; and when he sold that land he stipulated for a particular covenant. The bill states that the plaintiff was at the date of the sale, and has been and still is, a brewer, carrying on a particular business at a particular place in Brighton, and it states that the defendant had notice of the covenant in question, and then it states this, which is very material, in the 14th paragraph of the bill, that "the plaintiff, in exercise of his exclusive right, has always been and now is ready and willing, and previously to the institution of this suit has offered to the defendant, to supply to the orders from time to time of the defendant for consumption in the said 'Duke of Edinburgh' beer-house, ale, beer and porter, all of good quality, in requisite quantities, and at market or fair and reasonable prices, as specified in the same offer"; and the terms of the covenant are, "that Charles Catt, his heirs and assigns, shall have the exclusive right of supplying all ale, beer and porter which may be consumed in every house or other building which may be erected on any other part of the said piece of land, and which shall be opened or used as an inn, public-house or beer-shop." And Mr. Catt himself is plaintiff, therefore we have nothing to do with what the state of things might be if he had assigned the deed, or if he had died, or anything of that description; but simply the question between Mr. Catt being vendor and this gentleman, who purchased this property with notice of the covenant in question. Now, first of all, upon that covenant it was said that the case was like *Collins* v. *Plumb*, which it certainly is not. If, in the case of *Collins* v. *Plumb*, the words had been left out at the end of the covenant, "to the injury of the plaintiff," then the case would have been very like it, because the covenant in *Collins* v. *Plumb* was not to sell to the injury of the plaintiff. but that they might sell water as long as they did not injure the plaintiff; and therefore on each occasion, as Lord Eldon said, it would have been necessary

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to try the question whether the sale was to the injury of the plaintiff or not. Nothing of that description would be necessary here; as I have already said, we must assume the 14th paragraph of the bill to be true, and therefore it must be admitted that there has been no breach of any kind on the part of the plaintiff in offering to make and making the requisite supply of that which it would be inferred he was bound to make from the contents of the indenture in question. Then, beyond that, it is said that this covenant is uncertain, which it clearly is not. I do not see how anything can be more certain than that a man is to have the exclusive right of supplying a particular public-house with ale, beer and porter. There undoubtedly is nothing uncertain about that. And again, it has been held in the case of *Holmes* v. *the Eastern Counties Railway Company* (3 Kay & J. 675) that a grant of an exclusive right of that description contained in a covenant is equivalent to a negative covenant. That being so, it brings the case in principle completely within the cases which have been decided on negative covenants; the cases of *Holmes* v. *the Eastern Counties Railway Company*, *Rolfe* v. *Rolfe* (15 Sim. 88), and *Lumley* v. *Wagner*. With respect to the case of *Hills* v. *Croll*, there is great similarity between that case and the present. Lord St. Leonards, in his judgment in *Lumley* v. *Wagner*, said that he decided that case under the particular circumstances of it. If the principle in *Hills* v. *Croll* lays down this proposition, that wherever there is an allegation which the Court cannot enforce, therefore it is to decline to act upon a negative covenant, all I can say is, that the principle laid down in *Hills* v. *Croll* is distinctly opposed to *Rolfe* v. *Rolfe*, and is distinctly opposed to *Lumley* v. *Wagner*.

Then with respect to its being a covenant in restraint of trade. That again is clearly not so; and in point of fact it does not go beyond the ordinary brewers' covenant, except in this particular, that in the ordinary brewers' covenant you generally have the lessor and lessee, or the mortgagor and mortgagee, whereas this is a sale of a piece of land under different circumstances. If authority were wanted, there is abundance of authority on the subject that a covenant of this description is not void according to the principles which are clearly laid down in this Court.

Upon all these grounds I am clearly of opinion that the demurrer was properly overruled in the Court below, that there is no ground for this appeal, and that it must be dismissed with costs.

LORDS JUSTICES, July 16, 1869

ALTON v. HARRISON. POYSER v. HARRISON.

38 L. J. Ch. 669; L. R. 4 Ch. 622; 21 L. T. 282; 17 W. R. 1034.

Referred to, *Allen* v. *Bonnett*, [1870] E. R. A.; L. R. 5 Ch. 577; 23 L. T. 437; 18 W. R. 874 (L.C. & L.J.). Applied, *Ex parte Games*, [1879] E. R. A.; 12 Ch. D. 314; 40 L. T. 789; 27 W. R. 744 (C. A.). Referred to, *Boldero* v. *London and Westminster Discount Co.*, [1880] E. R. A.; 5 Ex. D. 47; 42 L. T. 56; 28 W. R. 154 (Ex. D.). Distinguished, *In re Moroney*, 1887, 21 L. R. Ir. 27 (C. A.). Adopted, *Maskelyne* v. *Smith*, [1902] E. R. A.; 71 L. J. K.B. 476; [1902] 2 K.B. 158; 86 L. T. 832; 51 W. R. 392 (K.B.D. Div.): affirmed, [1903] E. R. A.; 72 L. J. K.B. 237; [1903] 1 K.B. 671; 88 L. T. 148; 51 W. R. 372 (C. A.). Applied, *Glegg* v. *Bromley*, [1912] E. R. A.; 81 L. J. K.B. 334; 105 L. T. 897 (K.B.D. Div.): reversed, [1912] E. R. A.; 81 L. J. K.B. 1081; [1912] 3 K.B. 474; 106 L. T. 825 (C. A.).

Deed—Conveyance fraudulent within 13 *Eliz. c.* 5.

FRAUDULENT CONVEYANCE.—*A person being indebted to five persons, as well as many others, and being aware that a writ of execution was about to be executed by one of the other creditors, executed a mortgage substantially com-*

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prising the whole of his property in favour of the five creditors. Under the mortgage-deed, the debtor was to remain in possession until default should be made in payment of the five debts at the expiration of six months, or until execution should be issued against his property:—Held, *that the deed was not void within the statute* 13 *Eliz. c.* 5.

It makes no difference as regards the act 13 *Eliz. c.* 5. *whether or not a deed executed in circumstances such as the above comprises all the property of the debtor.*

The question on this appeal from a decision of Stuart, V.C. related to the validity of a deed of trust executed for the benefit of five creditors of the grantor.

T. L. Harrison, a nail-maker at Belper, was, on the 8th of June, 1868, by an order made in these suits, directed to bring into Court on the 2nd of November, 1868, to the credit of the causes, the sum of 1,327*l.* 7*s.* 3*d.* which had been found by the chief clerk to be due from him as a trustee. The order was served upon him on the 1st of October. At that time Harrison was considerably indebted to various persons.

On the 24th of October, the indenture in question was executed, by which Harrison conveyed to two trustees certain freehold property, and also assigned to them certain personal effects, subject to a proviso that if he should, on the 29th of April, 1869, pay to five of his creditors who were parties thereto the several debts mentioned in the schedule, the property should be reconveyed and retransferred. The creditors covenanted in the meantime not to sue; and it was provided that Harrison should be permitted to remain in possession of the property for six months, but so as not to let in or permit any execution, extent, sequestration, or other process against the real or personal estate comprised in the deed, or against Harrison, his heirs, executors or administrators, in respect thereof; and in case any such should be attempted to be enforced, the permission thereby authorized was to cease. A power of sale was given to the trustees in case default should be made in payment of the debts.

The deed was duly registered as a bill of sale. It substantially comprised all Harrison's property.

Harrison having failed to pay the money into Court in accordance with the order, a writ of sequestration was issued, under which, on the 23rd of December, 1868, the sequestrators took possession of the freehold property and seized the personal effects mentioned in the deed. On the following day the trustees gave notice of the deed to the sequestrators, and required possession to be delivered to them as owners of the property. A motion was then made in the suit by the trustees of the deed that the sequestrators might be ordered to withdraw from possession, and for an inquiry as to damages. The sequestrators also moved for leave to sell the property. On these motions coming on, an inquiry was directed as to whether the trustees had any and what interest in the property. The chief clerk having certified that the trustees had no interest in the property, they moved to vary the certificate, when the Vice Chancellor held that the deed was valid, and varied the certificate accordingly, by finding that the trustees were entitled to the property. The sequestrators appealed.

Mr. Mackeson and *Mr. W. W. Cooper*, for the appellants.—This deed was fraudulent within the statute 13 Eliz. c. 5. These cases all depend upon the intent. A debtor may at any time pay any one of his creditors in preference to others; but it must be a real payment in cash. A mortgage of all his property does not fall within that doctrine, and there is no case where such a mortgage has been supported. From *Holbird* v. *Anderson* (5 Term Rep. 235) to *Wood* v. *Dixie* (7 Q.B. Rep. 892), all the cases go to payment only, and not to such a sweeping mortgage as this. The very completeness with which all the property is included proves the intent to defraud all creditors except those specially provided for by the deed. See *Evans* v. *Jones* (4 L. J. Ex. 25; 3 Hurls. & C. 68). The words of the act of Elizabeth may be compared with the almost identical words in the Bankrupt Act (12 & 13 Vict. c. 136. s. 67). It cannot

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and will not be contended that this deed would not have constituted an act of bankruptcy within the latter act. The like inference must be drawn that it comes within the earlier act—*Stewart* v. *Moody* (1 Cr. M. & R. 777; 4 L. J. Ex. 55); *Goodricke* v. *Taylor* (2 De Gex, J. & S. 135); *Ex parte Foxley* (L. R. 3 Ch. 515).

[GIFFARD, L.J.—The two acts have very different objects. I do not think that inferences can be drawn in the same way in both cases. We have nothing to do with acts of bankruptcy, and I cannot see any application of cases concerning bankruptcy. Have you not to satisfy me that the arrangement was one for the debtor's own benefit?]

We say that the circumstances apparent on the face of the deed and the facts which have been proved sufficiently demonstrate fraud. There is no case where a conveyance of this kind for the benefit of particular creditors has been supported—*Nunn* v. *Wilsmore* (8 Term Rep. 521).

Mr. Dickinson and *Mr. Solomon*, for the trustees of the deed, were not called upon.

GIFFARD, L.J.—There is no doubt that Harrison executed this deed at a time when he knew that a writ of execution would be issued against him for not obeying the order to pay in money. I think, however, that the law has been accurately laid down by the Vice Chancellor consistently with a large body of authority. His Honour says: "The question in this, as in all other cases, is, as to the *bona fides* of the transaction. If the deed of mortgage and bill of sale was executed by Harrison honestly for the purpose of giving a security to the five creditors, and was not a contrivance resorted to for his own personal benefit, it is not void, but must have effect." There is no doubt that under this deed these five creditors are to have the property, and are secured by means of it. Two arguments have been raised: first, from the proviso giving special powers to the trustees, under which the debtor obtains, it is said, a benefit; and, secondly, from the fact that the deed includes the whole of the property; and these, it is contended, prove the deed to be fraudulent. As to the proviso, I cannot infer from it that the deed is not intended to operate according to its tenor. It was a mortgage which was not to become absolute unless execution issued. If execution issued, then the mortgagees' powers were to become at once exercisable, and the trustees were to take possession. The evidence also shews that this deed was to have this effect. As to the second point, I may observe that we are not now dealing with the law of bankruptcy. I asked, during the argument, why proceedings in bankruptcy had not been taken. The answer was, that the appellants relied upon the invalidity of this deed. If this appeal succeeded, the only effect would be that the sequestrators would get paid in full whilst the other creditors would get nothing, a case exactly similar to that now complained of. I have no hesitation in saying that, if the deed is *bona fide*, it makes no difference, so far as regards the statute of Elizabeth, whether or not it includes the whole property. By *bona fide* I mean that the deed is intended to operate according to its tenor, and is not a mere cloak for providing something for the benefit of the person who makes it. In case of a bankruptcy it might be very different. The appeal must be dismissed with costs.

LORDS JUSTICES, Feb. 16, 17, 1869.

BARNARD *v.* FORD. CARRICK *v.* FORD.

38 L. J. Ch. 671; L. R. 4 Ch. 247; 20 L. T. 289; 17 W. R. 478.

Referred to, *In re Lush's Trusts*, [1869] E. R. A.; 38 L. J. Ch. 650; L. R. 4 Ch. 591; 21 L. T. 376; 17 W. R. 974 (L. JJ.).

Baron and Feme—Equity to a Settlement—Debts of Wife before Marriage.

HUSBAND AND WIFE.—*The creditors of a woman remaining unpaid after her marriage in respect of debts incurred before the marriage, have a right to be*

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satisfied out of her property, in priority to any equity to a settlement out of it which she may possess. Therefore the assignee of the bankrupt husband, against whose estate the wife's debts had been proved, has a right to set aside a post-nuptial settlement of the wife's property. And the wife's equity to a settlement can only arise when an amount equal to the amount of her debts has been provided out of her estate.

The plaintiff in the first of these suits, Augusta Barnard, was the wife of the defendant J. G. Barnard, and the object of that suit was to obtain the performance of the trusts of a post-nuptial settlement, dated the 17th of January, 1862, whereby an annuity of 300*l.* for Mrs. Barnard's life was settled to her separate use, subject to certain prior charges; the defendant Ford being the trustee. The annuity had been the property of Mrs. Barnard before her marriage.

At the time of the marriage (the 22nd of October, 1861) Mrs. Barnard was largely indebted to various persons, as also was Mr. Barnard.

On the 15th of November, 1862, Mr. Barnard was adjudicated a bankrupt.

Carrick, the plaintiff in the second suit, was the official assignee of the estate. He instituted the suit in his official capacity (no creditors' assignee having been appointed) for the purpose of setting aside the settlement, and obtaining possession of the annuity as part of the bankrupt's estate. It appeared that Mrs. Barnard's creditors, or a large number of them, were still unpaid as well as those of Mr. Barnard. Their debts were proved in the bankruptcy. The annuity, if recovered, would constitute the only assets belonging to the bankrupt's estate. Under these circumstances, the Master of the Rolls dismissed the bill in *Barnard* v. *Ford*, with costs, and in the second suit declared the settlement void as against the creditors of Mrs. Barnard before her marriage.

From these decrees Mrs. Barnard appealed.

Sir R. Baggallay and *Mr. H. Smith*, for the appellant.—This settlement is a marriage settlement, which, though post-nuptial, gives effect to the wife's equity to a settlement, and therefore cannot be set aside. At all events it cannot be wholly set aside, as her fair equity to a settlement must be provided for—*Spirett* v. *Willofs* (35 L. J. Ch. 755; L. R. 1 Ch. 520).

Mr. Southgate and *Mr. Bevir* contended that there could be no equity to a settlement as against the wife's creditors.

Mr. Jessel and *Mr. W. W. Karslake*, for Ford, the trustee.

Mr. H. Smith, in reply.

SELWYN, L.J.—There is no real difficulty in this case, and no dispute about facts. The only question which we have to deal with in a case like this is, whether the husband was at the date of the settlement so indebted that, according to the principles of this Court, the settlement ought to be set aside? This, in the present case, appears by Mr. and Mrs. Barnard's own evidence. It is clear that they both owed large sums at the date of the marriage, which are still unpaid, and it is admitted that he had not then, and has not now, any property of his own. It is clear that many of her debts are still unpaid notwithstanding some allegations to the contrary, for they are proved in the bankruptcy. The husband, then, in this state of circumstance, makes a settlement of property which would be his own during the coverture: can he do this as against his creditors? In my opinion certainly not. And I think that he was unable to do so, not only as against his wife's creditors, as the Master of the Rolls has thought, but as against his own creditors. I think the plaintiff Carrick is entitled to set the settlement aside entirely, and the decree must be slightly altered in form, so as to extend to the husband's creditors generally. The settlement being set aside, a question arises whether Mrs. Barnard is entitled to any equity to a settlement out of the property? That question, of course, can only have any substance if there be any property of the wife which can be settled.

It has been contended that if a lady at the time of her marriage owes more

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than the amount of all her property, she nevertheless has an equity to a settlement out of her property. To accede to this would be simply to convert this Court into an engine of fraud, and it cannot be entertained. The proper declaration should be, That Mrs. Barnard is entitled to no settlement until after provision is made from her property of an amount equal to the debts owing by her at the date of her marriage, which shall, previously to the chief clerk's certificate, be proved under her husband's bankruptcy. There will be an inquiry as to the amount of her property and that of her debts so proved; and a further inquiry whether Mrs. Barnard is entitled to any settlement, regard being had to the above declaration. The costs of all parties in the second suit may be paid out of the fund. The appeal in the first suit must be dismissed, with costs.

GIFFARD, L.J.—It was contended that this case was like *Spirett* v. *Willows*. It would have been so if the debts had all been originally those of the husband, but here we are asked to sustain a wife's equity against her own creditors. It would be contrary to good conscience to do so, and there can be no equity to a settlement till the wife's debts are provided for.

LORDS JUSTICES, May 28, 1869.

In re SMITH, KNIGHT & CO. (LIMITED); GIBSON'S CASE.

38 L. J. Ch. 673; L. R. 4 Ch. 662; 20 L. T. 835; 17 W. R. 833.

Debtor and Creditor—Acceptance of new Debtor in place of old—Change of Firms.

COMPANY. PARTNERSHIP.—*A. lent to B. & C. divers sums of money to be expended in executing certain works for which B. & C. were contractors. B. & C. during the period in which these advances were being made transferred all their contracts to a company, which undertook to indemnify them against all liabilities incurred by them in respect of the contracts. The money advanced by A. was actually expended by the company in the manner contemplated. A. refused to acknowledge the company as the borrowers of the money, and required the promissory notes which were given for repayment to be made by B. & C, which was accordingly done. About a year later A. accepted from the company interest upon the loan up to date. Beyond a few letters relative to the amount of interest no communication took place between A. and the company*:—Held, *that, upon the company being wound up, A. could not claim to be a creditor of the company for the amount of the notes, as he had not accepted the company as his debtors.*

This was an appeal from a decision of the Master of the Rolls, allowing a claim of G. S. Gibson to be a creditor of Smith, Knight & Co., Limited, for 5,791*l.* 19*s.*, in respect of six promissory notes, together amounting to 5,150*l.* and interest.

Messrs. Smith & Knight were in the year 1864 contractors for making the Saffron Walden Railway. In February of that year they obtained from Mr. Gibson, a banker at Saffron Walden, an agreement for an advance of money to enable them to carry on their works.

On the 8th of April, 1864, the above company was formed for the purpose of purchasing and carrying on the business of Smith & Knight, including the above-mentioned contract. The purchase was accordingly effected, and the company undertook to indemnify Messrs. Smith & Knight against all claims under their contracts as from the 1st of April, 1864.

Gibson was an original shareholder of the company, and Smith & Knight were among the first directors.

In accordance with his agreement Gibson made advances amounting altogether to 5,150*l.*, by giving credit to Messrs. Smith & Knight in their

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account at his bank. The advances were made at various dates ranging from the 2nd of April to the 29th of November, 1864. It was arranged that promissory notes should be given for the advances, to be payable in five years, with interest in the meantime at 5*l.* per cent.

On the 12th of August Mr. Gibson wrote to Mr. Smith as follows:—

"In reference to the notes for the advances made, I suppose they will be drawn jointly and severally in the names of Smith and Knight, not by the company, as our arrangement was with you as individuals, and we know nothing of the company in the transaction. They should be made payable five years after date, or on demand, with an indorsement stating that they are not to be called for before the expiration of the five years. The first should be dated the 1st of April, and the next the 1st of July. There is a third now required, as I see you have drawn for a further sum. They can be as well drawn in your office and sent down signed."

The notes in question were accordingly, after the date of the above letter, given by Smith & Knight, who drew upon Gibson's bank as occasion required for the amount advanced. The money was expended by the company in executing the works of the railway.

In November, 1865, an application was made by or on behalf of Gibson for interest then due; whether such application was made to the company or not did not appear, but it was proved that the secretary of the company wrote to Gibson, asking how the amount claimed, 305*l.* 11*s.* 8*d.*, was made up. To this a reply was sent to the company correcting a clerical error of the secretary, and stating how the interest was calculated.

On the 22nd of February, 1866, the secretary sent to Gibson's bank a cheque for the interest, and also a cheque upon Gibson's bank by Smith & Knight for 195*l.* 12*s.* 7*d.*, the balance then standing to their credit upon their drawing account; and asking that this amount might be placed to the credit of the company upon a new account then to be opened. This was accordingly done, and Smith & Knight's account was closed.

On the 30th of November, 1866, a resolution to wind up voluntarily was passed by the company, which was, on the 18th of December, followed by a supervision order.

The Master of the Rolls, holding that Gibson had adopted the company as his debtors, and that they were bound to pay the debt, admitted the claim.

From this decision the liquidators appealed.

Sir R. Baggallay and *Mr. Westlake*, for the appellants.—There was certainly no adoption by Gibson of the company as his debtors. The letter of the 12th of August, 1864, is distinctly opposed to such a view; and nothing afterwards done had any effect in altering the position of the parties. Smith & Knight were not released. What consideration, therefore, did the company, as between themselves and Gibson, get for the adoption of this debt? The payment of interest is no such adoption: this was done merely as agents of Smith & Knight, though, as they were bound to indemnify Smith & Knight, it was a convenient arrangement. It had no effect upon the position of the parties—*Liversidge* v. *Broadbelt* (4 Hurls. & N. 603; 28 L. J. Ex. 332); *In re the Commercial Bank Corporation of India and the East; Jones's case* (16 W. R. 958).

Mr. Jessel and *Mr. Chitty*, for Gibson.—Mr. Gibson's money came to the hands of the company, and was spent by them knowing that it was borrowed from him. How can it be said that there was no consideration for the debt? The substance of the agreement between the company and Smith & Knight was to assume all the assets and the liabilities of the old firm. They did so in fact. They paid the interest, and there was no suggestion that they paid as agents, but they paid it as a payment to which they were liable. Moreover, Gibson knew that they were liable, and he adopted them in receiving from them the interest.—*In re the Commercial Bank Corporation of India and the East, ubi supra*, supports this view. Very slight knowledge and acquiescence on the

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part of the creditor will in these cases of transfers of business constitute an assent to the transfer of the liability and acceptance of the new debtor, when as here, the engagement to pay the debt is already in existence. But we do not contend that Smith & Knight ceased to be liable, but only that the company became liable also.—*Rolfe* v. *Flower* (L. R. 1 P.C. 27); *Ex parte Williams* (Buck, 13); *Ex parte Jackson; In re Warwick* (2 Mont. D. & D. 146); *Ex parte Clowes* (2 Bro. C.C. 595); *Winter* v. *Innes* (4 Myl. & Cr. 101).

[GIFFARD, L.J.—That case merely decides that in every case these are questions for a jury.]—*Hart* v. *Alexander* (2 Mee. & W. 484; 6 L. J. Ex. 129); *Ex parte Peele* (6 Ves. 602); *Lindley on Partnership*, vol. 1, pp. 393, 440-454.

Mr. Westlake, in reply.—There was no act of acquiescence here, therefore, cases deciding that slight acts are sufficient do not apply. The letter of the 12th of August is the only fact of importance, and that is clear beyond doubt.

SELWYN, L.J.—In the case of *In re the Commercial Bank Corporation of India and the East*, I believe it was not the intention of the Lord Chancellor, and it certainly was not my intention, to lay down any rule in opposition to the authorities cited to the Court. On the contrary, the Lord Chancellor referred to the case in the Privy Council *(Rolfe* v. *Flower)* as a sound authority, and I also accepted that case, as affording a proper test to apply to these cases, and I referred to the observations of Vice Chancellor Wigram in the case of *Benson* v. *Hadfield* (4 Hare, 32; 12 L. J. Ch. 89), to the effect that lapse of time and other circumstances may be most material, which entirely concur with the observation of Lord Cottenham in *Winter* v. *Innes*. Assuming that slight circumstances are in ordinary cases sufficient to prove the acceptance of a new firm as debtors, still I must remark that where these circumstances are controlled by express declaration the rule has no application. In applying those observations to the present case, and taking the test which is supplied by *Rolfe* v. *Flower*, I will assume in favour of the respondent that the company took over all the assets and became subject to all the liabilities of the previous firm. It appears that Mr. Gibson was an original shareholder in that company, and the company appears from its memorandum to have been formed having for one of its objects to carry into effect an agreement for the transfer by Smith & Knight of their business, goodwill and plant, including the lease held by them of the premises in Great George Street, and to execute the contracts comprised in the agreement. It appears that among the directors appointed were Mr. Smith and Mr. Knight, and that Mr. Knight was by the articles of association to be the managing director. It is obvious that Gibson, being a shareholder in the company, must be taken to have had not only constructive but actual knowledge of the transaction which was the very foundation of the company, and the letter of the 12th of August, 1864, shews that at and before that date his attention had been pointedly called to the distinction between Smith and Knight as individuals and the new company which had been formed. He then, on the 12th of August, 1864, that is to say, four months after the company had been formed and after he had become a shareholder, wrote to Mr. Smith, one of the two persons who had transferred their business to the company, this letter.—[His Lordship here read the letter above set out, dated the 12th of August, 1864.]—This is a letter written some considerable time after the original agreement for the loan had been made, at a less, but still at a considerable, time after the formation of the company, and it plainly refers to the distinction existing between the former partnership of two and the company. It is written with a full knowledge that all the business of the two had been transferred to and was being carried on by the company. But, notwithstanding that, it contains the express declaration, "We know nothing of the company in the transaction," there is no denial of that by the other parties to the original contract. In pursuance of the original contract, as enforced and explained in this letter, the promissory notes are given not in the name of the company or with any reference to the company, but in the names of Smith & Knight, and those notes so

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given are retained from that time down to the present in the custody of Mr. Gibson. I admit that, notwithstanding all this, it still was competent to the parties to enter into a new agreement and arrangement. But I cannot admit that, after such a declaration as that, slight circumstances would be sufficient to prove an entirely different arrangement. If this letter had been written before the company was formed, if it had been written at an earlier period, different considerations might have arisen. But having regard to the circumstances which had occurred before the date of this letter, and having regard to the position in which the parties stood at the time when the letter was written, and so the manner in which it was acted upon by both parties, I think very strong circumstances would be required to prove that an arrangement so entirely the opposite of the original one was subsequently come to. It is stated that the case need not be carried as far as that, and perhaps in that respect the respondents may be considered to have some weight in their argument. They say, "We do not insist upon the release of the obligation on the part of two original parties to the contract, but we say there was an agreement by which the company became liable." The only circumstances, however, from which that can be inferred are: first, a demand which was made for interest; secondly, the payment of the interest; and thirdly, the transfer of the account which was made in the books of the bank, though but very slight reliance was placed upon the last fact. First, with respect to the demand for interest, it must be remembered that the promissory notes were not yet due. One instalment of interest did become due, and the original letter demanding payment of that instalment has not been produced. On the one side it may be said, that in the absence of any evidence it may be presumed that Mr. Gibson would continue of the same mind he was in on the 12th of August, when he said he would have nothing to do with the company, and that he made the application for interest to the company merely as the agents of the persons whom he treated as his debtors. On the other hand, it is justly said that the letter having been written by Mr. Gibson to Mr. Smith, it is rather for the company than for Mr. Gibson to produce that letter. No doubt it does appear that the letter was answered by the officers of the company, and the subsequent correspondence is with the company. Therefore there is weight in that observation. One of the subsequent letters may be considered as an expression of a hope on the part of Mr. Gibson that the interest would be paid; that is a letter which is addressed to the company, and in pursuance of that the company pay the interest. Without deciding that, under ordinary circumstances that demand (if it be a demand) and that payment of interest would be sufficient, I think we must look at that payment of interest and that letter with the light derived from the letter of the 12th of August, 1864. I think that Mr. Gibson, having told the company distinctly that he did not know them at all in the transaction, cannot be said to have assumed a different position as between himself and them merely because the letter written by him was answered by the officer of the company in a letter containing an allusion to, and a promise to pay, the interest, and because Gibson acquiesced in that and wrote a letter referring to that interest and received the interest from the company. I think this is very properly described as a slight circumstance, and in my judgment entirely insufficient to outweigh the other matters to which I have referred.

What took place afterwards with respect to the accounts is a circumstance upon which no great reliance can be placed. It appears that there was an account in the books of the bank with Smith and Knight. The interest did not enter into that account at all on one side or the other, and the explanation given is that it was considered a separate transaction of Mr. Gibson's. That account shewed a balance of 195*l*. 12*s*. 7*d*., for which a cheque was drawn, and a new account having been opened with Smith, Knight & Co. (Limited), the 195*l*. 12*s*. 7*d*. was carried to the credit of that account. That is a transaction even more slight, I think, than the other, and one which may be safely disregarded in the consideration of the present case. Therefore, the conclusion

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at which, with great respect to his Lordship the Master of the Rolls, I arrive is, that being bound, as we are, sitting in the position of a jury, to decide upon these facts, there being certain facts which appear to me to be clear and distinct, and on the other side certain matters which are in themselves equivocal, I cannot hesitate to say that in my judgment the plain and distinct declaration contained in the letter of the 12th of August, 1864, has not been qualified by any of the subsequent transactions. I think, therefore, that the order which has been made by the Master of the Rolls must be reversed; I think the official liquidator who has succeeded in this matter should have his costs here and in the Court below out of the estate, but Mr. Gibson will not have any costs or be called upon to pay any either here or in the Court below.

GIFFARD, L.J.—In cases of this description there is no difficulty whatever about the law. In each instance the matter is a matter of fact, and in this case the real question is, whether there was or was not a contract between Mr. Gibson and the limited company, that the limited company should pay Mr. Gibson this debt. Of course, to a contract there must be two parties, and both parties must assent. As regards the cases which have been cited, there is no doubt whatever that if you have an old firm, and either a new partner is taken into it or a new firm constituted, and the assets are taken over by that new firm, and the customer, knowing all those circumstances, afterwards goes on and deals with the new firm, you infer from slight circumstances an assent on his part to accept the new firm as his debtors. That is not a doctrine that I dispute, nor do I dispute anything said by the present Lord Chancellor in *Jones's case*. No doubt all his Lordship intended to say was, that the facts there did not come up to what was requisite in order to constitute Mr. Jones a creditor of the new firm; that two things at least were necessary, knowledge of the arangement between the old and new firms and assent on the part of Mr. Jones. Now, here it is admitted that there is nothing in the sense of novation proper. It could not, in fact, be argued that the right to go against Smith and Knight individually had been given up. Therefore we start with that. Then we have the company formed in April and May, and the transaction in question completed in the month of August. The transaction is an agreement for a loan, not to be called in for five years, a loan to Smith & Knight. The agreement was that promissory notes should be taken from Smith & Knight. Besides that, a letter was written by Mr. Gibson to Mr. Smith, in which he says, "In reference to the notes for the advances made, I suppose they will be drawn jointly and severally in the names of Smith and Knight, not by the company, as our arrangement was with you as individuals, and we know nothing of the company in the transaction." There can be nothing, I think, more explicit than that, and this being the origin of the transaction, the knowledge of the arrangement between Smith and Knight and the company does not appear to me to be material, unless you can make out that there was some intention to vary the original agreement. Then, what happens afterwards? The advances are made to Smith & Knight, and placed in the bank, in which Gibson was a partner, to the credit of Smith & Knight. One payment of interest is made, and that by the limited company. The application for the payment of that interest appears to have been made to the limited company. Nothing more than that happened up to the time of the winding-up, except the transfer of the balance, which I will mention presently. The Master of the Rolls says, that at the outset of the transaction it was not intended that the limited company should be liable. He seems to have based his judgment upon the fact of the 195*l*. 12*s*. 7*d*. being transferred from the account of Smith & Knight with the bank in which Mr. Gibson was a partner into the account of Smith, Knight & Co. (Limited). But when you come to investigate the transaction, it amounts to nothing more than this: Smith & Knight drew a cheque upon their banking account. That cheque is accompanied by a letter from the limited company, in which they ask that that sum should be transferred to the account of the limited company, and that the account of

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Smith & Knight should be closed. That is the whole of the transaction, and in argument it was admitted, very properly, that that could not alter the liability. There is, after every fact is known, a distinct arrangement in which the liability of the company is altogether repudiated. There is nothing but an application for interest, and interest paid by the limited company, carrying on the business of Smith & Knight, carrying on that business in the very offices of Smith & Knight, and being in point of fact the very persons to whom Smith & Knight would refer anyone for the payment of interest. I cannot infer, nor do I think any jury could, from the mere payment of interest infer, either an offer on the part of the company to give security to Mr. Gibson, and still less any agreement by Mr. Gibson to accept that further security. The whole matter comes to this, that as between Mr. Gibson and the limited company there was no contract, and there being no contract, there can be no proof by him against the company.

LORD ROMILLY, M.R., July 14, 15, 1869.

In re THE BLAKELEY ORDNANCE COMPANY; CREYKE'S CASE.

38 L. J. Ch. 677; 21 L. T. 165; 17 W. R. 981 (M.R.): affirmed, [1870] E. R. A.; 39 L. J. Ch. 124; L. R. 5 Ch. 63; 21 L. T. 572; 18 W. R. 103 (L.J.).

Companies' Act, 1862, *s.* 38. — *Past Member — Forfeiture of Shares — Liability for Past Debts.*

COMPANY.—*The holders of forfeited shares in a company limited by shares are liable to contribute in the winding-up as past members, although the articles of association do not expressly reserve the rights of the company against them.*

This was an application by the official liquidator to put the name of Mr. Creyke on the list of contributories as a past member of the company.

Mr. Creyke's shares had been forfeited (for non-payment of a call) within a year from the commencement of the winding-up.

In the 50th clause of the articles of association were these words: "The forfeiture of any share shall involve the extinction at the time of the forfeiture of all interest in, and all claims and demands against the company in respect of the share, and all other rights incident to the share; but any member whose shares have been forfeited shall, notwithstanding, be liable to pay to the company all calls owing on such shares at the time of such forfeiture.

Since the winding-up began Mr. Creyke had paid all calls owing on his shares at the time of the forfeiture.

Sir R. Baggallay and *Mr. Napier Higgins* appeared for the official liquidator.

Mr. Jessel and *Mr. Speed*, for Mr. Creyke, argued from clause 50. of the articles of association, that after the forfeiture of the shares and payment of the calls then due upon them, all the rights of the company against the shareholder were satisfied, and that the creditors had no further right, since they had given credit to the company, subject to the power of the directors to declare the shares forfeited, and thus deprive the company of its rights against the shareholder. This distinguished the present case from *The Accidental and Marine Insurance Corporation; Bridger and Neill's case* (38 L. J. Ch. 201; L. R. 4 Ch. Ap. 266), in which the rights of the company against the holder of forfeited shares were expressly reserved by the articles of association. Moreover, the Companies' Act, 1862, s. 38. cl. 4, enacted, that no contribution should be required from any member exceeding the amount (if any) unpaid on his shares; and here nothing was "unpaid" since nothing could become owing. They also quoted the language of Lord Cairns in *Stocken's case* (37 L. J. Ch. 230; L. R. 3 Ch. Ap. 415).

The MASTER OF THE ROLLS (*July* 15) held, that the question was settled by *Bridger and Neill's case*, which determined that the forfeiture of shares did not put an end to the shareholders' liability to contribute in respect of the liability of the company existing at the time of the forfeiture.

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LORD ROMILLY, M.R., April 19, 1869.

HORSLEY *v.* COX.

38 L. J. Ch. 678; L. R. 7 Eq. 464; 20 L. T. 473; 17 W. R. 603.

Costs—Number of Counsel.

COSTS.—*Costs of a brief to a second Queen's counsel on the hearing of the cause allowed, he having before he had been called within the bar been the defendant's junior counsel in the cause.*

This was a summons to review a taxation of costs. The bill had been dismissed with costs. The defendant had retained a Queen's counsel. Before the hearing of the cause the junior counsel, who had prepared the defendant's answer, and had also cross-examined the plaintiff on his affidavits, had been called within the bar. On the hearing briefs were delivered to the Queen's counsel originally retained, to a junior, and to the Queen's counsel who had at first been the defendant's junior. The Taxing Master disallowed the costs of the brief to the last-mentioned counsel, certifying that there was nothing in the nature of the cause to take it out of the ordinary rule of the Court as to the allowance of the costs of two counsel only.

Mr. Southgate and *Mr. Edmund James*, for the defendant, asked that the costs of the third brief might be allowed. They referred to *Betts* v. *Clifford* (1 Jo. & H. 74, 78).

Mr. Locock Webb, for the plaintiff.—In *Carter* v. *Barnard* (16 Sim. 157; 17 L. J. Ch. 278), where the costs of a second Queen's counsel were allowed, the facts were difficult and intricate. In *Green* v. *Briggs* (7 Hare, 279; 19 L. J. Ch. 294), the costs of a second Queen's counsel were not allowed either on the ground of the difficulty and intricacy of the case, or because he had whilst without the bar settled the pleadings. He also referred to *The Midland Railway Company* v. *Brown* (10 Hare, App. xliv.; 22 L. J. Ch. 1092).

THE MASTER OF THE ROLLS.—There are cases both for and against the decision of the Taxing Master. If a brief had not been given to the counsel who had been called within the bar, he might have been retained by the other side with all the knowledge obtained by him in the suit, to the disadvantage of his former client. I think the costs of the brief to the second Queen's counsel ought to be allowed.

LORDS JUSTICES, March 6, 1869.

WHITE *v.* HERRICK.

38 L. J. Ch. 679; L. R. 4 Ch. 345; 20 L. T. 386; 17 W. R. 522.

Practice—Ward of Court—Settlement upon Marriage after Majority—Payment out of Court.

HUSBAND AND WIFE. INFANT.—*Where a ward of Court married the day after attaining her majority*:—Held, *that a small fund in Court might be paid out to her upon her separate examination.*

The appellant, Mrs. Radclyffe, had been a ward of Court. She attained the age of twenty-one years on the 8th of August, 1866, and married the next day. During her minority the surplus income of some property to which she was entitled for life, for her separate use, had been paid into Court and invested, and at the date of her marriage consisted of 363*l.* 16*s.* 4*d.* consols, and 53*l.* 4*s.* 4*d.* cash.

In January, 1867, she presented a petition for transfer and payment out of Court to herself of these sums. The Master of the Rolls refused to do this,

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but directed inquiries whether the marriage was a valid one; whether any settlement had been made upon her, and if not, directing a settlement to be made of her fortune.

On the 13th of July, 1867, an order was made in chambers, which stated that the Judge was of opinion that he could not restrain the anticipation by her of the income of her fortune, and ordered the costs of the petition to be paid out of the 363*l.* 16*s.* 4*d.* consols, and directed the residue to be carried over to a settlement account, and ordered payment to her of the income upon her separate receipt, and also the sum of 53*l.* 4*s.* 4*d.*

When the costs were taxed and paid the amount of the consols was reduced to 95*l.* 17*s.* 3*d.*

Another order of the 24th of July, 1867, directed a certain sum of 85*l.* 4*s.* 1*d.*, which was payable by other parties to the cause to Mrs. Radclyffe, to be also settled. From these orders for settlement Mrs. Radclyffe now appealed.

Mr. Speed, for Mrs. Radclyffe, asked that these sums might be paid to her. They were her separate property, and the Court had exceeded its usual jurisdiction in directing a settlement to be made of them. The marriage having been after the majority was no contempt of Court, which is the ground of the jurisdiction usually exercised in these cases. He referred to—*Leeds* v. *Barnardiston* (4 Sim. 538); *Austen* v. *Halsey* (2 Sim. & S. 123); *Long* v. *Long* (2 Sim. & S. 119; 21 L. J. Ch. 844); *Money* v. *Money* (3 Drew. 269; 24 L. J. Ch. 684); *Biddles* v. *Jackson* (3 De Gex & J. 544; 28 L. J. Ch. 40, 290); *Longbottom* v. *Pearce* (3 De Gex & J. 545, n.); *Martin* v. *Foster* (7 De Gex, M. & G. 102; 24 L. J. Ch. 519). As to separate examination, since the fund is now under 200*l.* it is unnecessary.

Mr. Campbell, for the husband.

SELWYN, L.J.—In this case there is a very small fund in Court. It is hardly necessary to keep it in Court, which must be attended with expense. I think that we have sufficient authority in *Longbottom* v. *Pearce* for paying out the fund to the wife. The lady should however attend to be separately examined, although the fund is under 200*l.*

GIFFARD, L.J., concurred.

LORDS JUSTICES, May 26, 1869.

TAYLOR *v.* DOWLEN.

38 L. J. Ch. 680; L. R. 4 Ch. 697; 21 L. T. 70; 17 W. R. 779.

Followed, *In re Hoskin's Trusts*, [1877] E. R. A.; 46 L. J. Ch. 817; 6 Ch. D. 281; 25 W. R. 779 (C. A.); *In re Bradford*, [1883] E. R. A.; 52 L. J. Q.B. 759; 11 Q.B. D. 373; 48 L. T. 765; 31 W. R. 919 (Q.B.D. Div.): reversed, [1884] E. R. A.; 53 L. J. Q.B. 65; 15 Q.B. D. 635; 50 L. T. 170; 32 W. R. 238 (C. A.).

Practice—Appeal for Costs.

COSTS.—*The Court is not disposed to extend the exceptions to the general rule that there can be no appeal for costs alone.*

Trustees, having been ordered personally to pay the costs of the suit, were not allowed to appeal on the ground that the costs ought to have been ordered to be paid out of the trust fund.

This was an appeal by the defendants, who were trustees, from so much of a decree of Vice Chancellor Malins as ordered them to pay the costs of the suit.

A preliminary objection having been taken that the appeal was for costs only, and could not therefore be entertained,

Mr. M. Cookson, for the appellant, contended that the case of trustees

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formed an exception to the general rule that there could be no appeal for costs alone. *Angell* v. *Davis* (4 Myl. & Cr. 360; 9 L. J. Ch. 3) was a case in which the costs formed the sole subject-matter of the appeal, and Lord Cottenham, after reviewing the authorities, said, "These cases seem to me to establish several propositions, any one of which is sufficient to support my jurisdiction on the present appeal; the costs are part of the relief specifically prayed; they are not mere personal costs, but are given out of the fund; and the whole of the facts, moreover, distinctly appear upon the face of the proceedings themselves, so that it is not necessary in determining the question to enter into any investigation of the merits." If the first reason stated by his Lordship must be taken to be overruled by the subsequent case of *Lancashire* v. *Lancashire* (2 Phil. 657, 662; 10 Beav. 26; 16 L. J. Ch. 48), at all events, upon the second ground the appeal would lie, for, if the order had been for payment of the costs out of the trust fund, the *cestuis que trust* could have appealed, and there would be no mutuality if the trustees could not appeal in such a case as the present.

He cited also *Bagot* v. *Bagot* (Daniell's Ch. Pr. 1349 (4th edit.); 10 L. J. Ch. 116).

Mr. Glasse and *Mr. Graham Hastings*, who appeared for the respondents, were not called upon.

SELWYN, L.J., after referring to *Angell* v. *Davis* and *Lancashire* v. *Lancashire*, and to *Umpleby* v. *the Waveney Valley Railway Company* (1 Jo. & H. 254), in which Wood, V.C. preferred the opinion expressed by Lord Cottenham in *Lancashire* v. *Lancashire* to that in *Angell* v. *Davis*, said the first ground upon which the right to appeal was rested might be considered to be entirely disposed of by the authorities; and with regard to the second proposition stated by Lord Cottenham, it was enough to say that in this case the costs were not given out of the fund. The third ground upon which Lord Cottenham entertained the appeal in *Angell* v. *Davis* was, that the whole of the facts appeared upon the face of the proceedings themselves, so that it was not necessary to enter into any investigation of the merits. In that case costs had been given to a trustee who had been guilty of a breach of trust, and the error manifestly appeared on the face of the proceedings; but that was not the case here, for the Vice Chancellor had exercised his discretion as to costs upon the merits of the case, and this Court could not decide whether that discretion was or was not properly exercised without going into the merits. *Bagot* v. *Bagot* was really the only case that was cited in support of the proposition. But in that case there was a substantial question to be tried on the appeal, which was not limited to the question of the payment of the costs of the suit, and the trustees, as representing all the persons entitled to the fund, had an interest in the subject-matter of the suit. That case, therefore, had no application to the present. If in every case where a trustee or a creditor asserted that he was entitled to have his costs paid out of a particular fund, he were to be allowed to appeal upon the question of costs alone, the exceptions to the general rule, that there could be no appeal for costs only, would be very much increased in number. His Lordship adhered to the opinion which he had recently expressed in *Hope* v. *Carnegie* (L. R. 4 Ch. 264), that the general rule prohibiting appeals for costs only was not only well established but a very wholesome rule; the present case formed no exception to it, and the appeal must be dismissed, with costs.

GIFFARD, L.J. concurred.—He could not accede to the argument, that because if the costs had been ordered to be paid out of the fund, the persons interested in that fund might have appealed; therefore the trustees when ordered to pay them personally ought to have a similar right. If the present appeal were allowed, he did not see why there should not be an appeal for costs in every case. He was not disposed to extend the exceptions established by Lord Cottenham in *Angell* v. *Davis;* and *Bagot* v. *Bagot* was not a case of an appeal for costs alone. He agreed that the appeal must be dismissed, with costs.

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LORDS JUSTICES, June 22, 1869.

THE LONDON MARINE INSURANCE ASSOCIATION; SMITH'S CASE.

38 L. J. Ch. 681; L. R. 4 Ch. 611; 21 L. T. 97; 17 W. R. 941.

Distinguished, *In re Albert Average Insurance Association; Smith's case*, [1872] E. R. A.; L. R. 13 Eq. 529; 20 W. R. 504 (M.R.); *In re Teignmouth and General Mutual Shipping Association; Martin's claim*, [1872] E. R. A.; 41 L. J. Ch. 679; L. R. 14 Eq. 148; 26 L. T. 684 (V.C.). Referred to, *Marine Mutual Insurance* v. *Young*, 1880, 43 L. T. 441 (Ex. D.). Distinguished, *Barrow-in-Furness Ship Insurance Co.* v. *Ashburner*, 1885, 52 L. T. 898 (Q.B. D.): affirmed, [1885] E. R. A.; 54 L. J. Q.B. 377; 54 L. T. 58 (C. A.).

Mutual Insurance—Unstamped Policy, 35 *Geo.* 3. *c.* 63.

COMPANY. MARINE INSURANCE.—*S. made an application in writing to become a member of a mutual insurance association in respect of an insurance for* 300*l. upon his ship; the ship was accepted, and an unstamped copy of a policy returned to him. By the regulations of the association he would have to contribute to losses upon the ships of other members. No stamped policy was ever received by him. He contributed to losses upon some ships of various members. His own ship sustained an injury, but before the amount of the loss could be estimated, the association was ordered to be wound up*:—Held *(affirming the decision of one of the Vice Chancellors), that he was not a contributory, as the unstamped policy could not under* 35 *Geo.* 3. *c.* 63. *be received in evidence of his agreement to become a member.*

This was an appeal from an order of Vice Chancellor James, removing the name of J. W. Smith from the list of contributories to the association.

It appeared that the association was composed of shipowners, and under its provisions the members agreed together to mutually insure their ships in proportion to the amounts for which they should respectively take shares. On a shipowner becoming a member the custom was as follows: he signed a written proposal or statement of the particulars of his ship and the amount for which he proposed to insure; after the acceptance of the proposal he signed a power of attorney authorizing the secretary of the association to underwrite policies on ships approved by the committee, and a policy was given to him.

Smith, on the 6th of September, 1864, made an application in writing in the usual form addressed to the secretary authorizing him to insure his ship the "*Holyrood*" for 300*l.*, and agreeing to abide by the rules of the society.

The ship was accepted and a form of policy was sent to Smith, which was unstamped and bore the heading "copy." Smith never received any other policy, nor did he sign any power of attorney, but he paid the usual entrance fee and also a call which was made in February, 1865, in respect of losses upon ships belonging to members of the association. Smith received no policy beyond the unstamped copy. The "*Holyrood*" was injured at sea on the 1st of February, 1865, upon which Smith made a claim upon the society, which was admitted by the secretary, subject to the amount being afterwards settled. This amount had not been finally settled when, on the 1st of July, 1865, the association was ordered to be wound up.

On the 26th of April, 1869, the order now under appeal was made by his Honour upon the ground that as no stamped policy had ever been executed upon his ship, there was no contract, receivable in evidence on Smith's part, to become a member of the association.

Mr. Eddis and *Mr. Lindley*, for the appellant, the official liquidator.—We contend that though we cannot tender the form of policy as a policy (35 Geo. 3. c. 63. s. 14), yet there is a good agreement for mutual indemnity contained in Mr. Smith's application, fortified by his subsequent conduct. The contract is not destroyed by the non-existence of the policy. They referred to several

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subsequent acts—54 Geo. 3. c. 144; 7 Geo. 4. c. 49; 7 Vict. c. 21; which refer to mutual insurance. Now, it is true that the act 30 Vict. c. 23. s. 7. enacts, that no contract for marine insurance shall be valid unless contained in a policy; we say that that act does not refer to mutual insurance. There is no express authority, but the following cases bear upon the subject—*Taylor* v. *Dean* (22 Beav. 429); *Bromley* v. *Williams* (32 Beav. 177; 32 L. J. Ch. 716); *Harvey* v. *Beckwith* (2 Hem. & M. 429); *Mead* v. *Davison* (3 Ad. & E. 303; 4 L. J. K.B. 183). Smith, moreover, is estopped by his conduct from denying that he is a member—*Underwood's case* (5 De Gex, M. & G. 677; 23 L. J. Ch. 943).

Mr. Macnaghten, for Smith, was not called upon.

SELWYN, L.J.—We entertain no doubt that the Vice Chancellor was right in ordering the name of Mr. Smith not to be included in the list of contributories. The question depends entirely upon the construction of the act 35 Geo. 3. c. 63. The case of the appellant cannot be put more favourably to him than by saying that a contract in writing was entered into, and for some time acted upon by both parties to it. What, then, was the contract? In my judgment it was a contract for insurance. Then, how is that contract affected by the Stamp Acts? Assuming that before the act of 1867 a policy of insurance was not necessary, still the question remains whether this was not a contract for insurance within the meaning of the act 35 Geo. 3. c. 63. Now, section 1. of that act provides that from and after the 5th of July, 1795, there shall be raised, levied, collected and paid for every skin or piece of vellum or parchment, or sheet or piece of paper, upon which any insurance upon any ship or ships shall be engrossed, printed or written the stamp duties thereinafter mentioned. A stamp duty is, therefore, imposed upon everything effecting an insurance, and this casts upon the appellants the duty of shewing that these contracts of mutual insurance are exempt from the act. Then section 11. enacts, that "every contract or agreement which shall be made or entered into for any insurance, in respect whereof any duty is by this act made payable shall be engrossed, printed or written, and shall be deemed and called a policy of insurance." Then we come to section 14, which is most material, as it contains an express reference to agreements for insurance. That section enacts, that "no insurance made or entered into in Great Britain in respect whereof any duty is by this act made payable, nor any contract or agreement for such insurance as aforesaid, shall be pleaded or given in evidence in any Court, or admitted in any Court to be good, useful or available in law or equity, unless the vellum, parchment or paper on which such insurance shall be engrossed, printed or written shall be stamped with the lawful stamp to denote the rate or duty as by this act is directed, or to denote some higher rate or duty in this act contained; and it shall not be lawful for the said Commissioners of the said Stamp Duties, or any of their officers, to stamp any vellum, parchment or paper with any stamp directed to be provided or used by virtue of this act at any time after such insurance as aforesaid, or contract for such insurance, shall be engrossed, printed or written thereon under any pretence whatever." That section plainly applies not merely to policies for insurance, but to any agreement or contract for such insurance. It is perfectly unlimited in its language, and there is no ground for the contention that the contract in the present case was not a contract for a policy of insurance, and therefore not within the words of the act. I agree with the Vice Chancellor that it is not the duty of a Court of law or equity to be astute to find out ways in which the object of an act of the legislature may be defeated. Some reliance was placed in argument upon the 18th section of the act, which provides that nothing in the act contained shall extend to subject any of the members, officers or servants of the corporation of the London Assurance and the Royal Exchange Assurance to any of the penalties by the act imposed for or by reason of their making any agreement, insure by any label, slip or memorandum in writing upon unstamped vellum, parchment or paper. The proviso, however, at the end of the section, "provided that in every such case a policy of insurance according to the agreement

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expressed in such label, slip or memorandum shall be made out according to one of the forms in the schedule to this act annexed, and duly executed and stamped within three office days from the time of making such agreement as aforesaid," puts an end to the argument, and shews that this section cannot operate to take a contract for insurance out of the provisions of the act. In the present case, therefore, the contract entirely failed, for by the act we are precluded from taking notice of it as having any effect whatever at law or in equity. The name of Mr. Smith was, therefore, rightly omitted from the list of contributories. *Underwood's case*, which was cited, has really no application, and there has been no such laches, on the part of Mr. Smith, as can disentitle him from now saying that there is no contract binding him to become a member of this company. The decision of the Vice Chancellor was right, and the appeal motion must be refused, with costs.

GIFFARD, L.J.—Mr. Smith cannot be made a member of the company unless it can be proved that he entered into a binding mutual contract for the insurance of ships. The contract, if there was any, was unquestionably a contract in writing, and I agree with the Vice Chancellor that, having regard to the act 35 Geo. 3. c. 63, there is no document which can be read as evidence of that contract. It is clear under that act that every contract in writing for the insurance of ships must be stamped, and cannot be used in evidence if it is not, and there is no difference between a Court of law and a Court of equity with regard to the evidence which can be used in support of such a contract. Then it was said that Mr. Smith is estopped from denying that he entered into this contract. But there is a complete answer to that argument in the fact that Mr. Henzell was the agent of the association as well as the agent of Mr. Smith. Moreover, with regard to laches, I can find nothing to say that Mr. Smith was too late in making his application to be removed from the list of contributories. The appeal must, therefore, be refused, with costs.

JAMES, V.C., June 28, 29, 1869.

BARNES *v.* WOOD.

38 L. J. Ch. 683; L. R. 8 Eq. 424; 17 W. R. 1080.

Referred to, *Castle* v. *Wilkinson*, [1870] E. R. A.; 39 L. J. Ch. 843; L. R. 5 Ch. 534; 18 W. R. 586 (L.C. & L.J.). Observed upon, *Bailey* v. *Piper; Hooper* v. *Smart*, [1874] E. R. A.; 43 L. J. Ch. 704; L. R. 18 Eq. 683; 31 L. T. 86; 22 W. R. 943 (V.C.). Distinguished, *Rudd* v. *Lascelles*, [1900] E. R. A.; 69 L. J. Ch. 396; [1900] 1 Ch. 815; 82 L. T. 256; 48 W. R. 586 (Ch. D.).

Vendor and Purchaser—Specific Performance—Feme Covert, Husband entitled to Limited Interest—Remainder to Wife in fee—Contract by Husband for Sale of Whole Estate—Compensation.

FINES AND RECOVERIES. HUSBAND AND WIFE. VENDOR AND PURCHASER.—*A husband entitled to reality for an estate* pur autre vie, *with remainder to the use of himself and his wife in fee in her right, entered into an agreement in writing with the plaintiff, who was ignorant of the wife's interest in the property, for the sale of the estate to him in fee, and the plaintiff paid a deposit upon his purchase-money. Subsequently the husband and wife sold and by deed acknowledged conveyed the whole estate in fee to the defendant, who had notice of the contract with the plaintiff, for an amount very little exceeding that for which the husband had agreed to sell it to the plaintiff, and the husband returned to the plaintiff his deposit. In a suit against the purchaser, in which the plaintiff sought to fix him with the obligation of performing the contract for the sale of the premises to the plaintiff:*—Held, *that the plaintiff was entitled to have the*

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premises conveyed to him to the extent of the husband's interest therein, with compensation in respect of the wife's interest.

Thomas *v.* Dering (1 Keen, 729; 6 L. J. Ch. 267) *observed upon.*

This was a motion for a decree in a suit seeking the conveyance of certain premises from the defendant, under the following circumstances. In February, 1868, certain messuages and land at Stanningley, in Yorkshire, stood limited (subject to a mortgage in fee simple) to the use of John Stringer and his heirs, for the life of Harriet Whitehead, with remainder to the use of John Stringer and Betty his wife, in her right in fee. John Stringer had also a prospective interest in the premises as tenant by the curtesy in case the remainder in fee should vest in possession during the coverture. On the 7th of February, 1868, John Stringer and the plaintiff respectively entered into and signed an agreement in writing, by which Stringer agreed to sell and the plaintiff agreed to purchase, free from incumbrances, the premises, including the fixtures, for 710*l.* At the same time the plaintiff paid a deposit of 50*l.* upon his purchase-money. At this time the plaintiff was in ignorance of Betty Stringer having any rights in the property of which he believed John Stringer to be the absolute owner. On the 28th of March, 1868, the abstract of title to the premises was delivered, and by his solicitor's perusal of it the plaintiff for the first time became aware of Betty Stringer's interest in the property. On the 21st of April, 1868, the solicitors of Mr. and Mrs. Stringer approved, on their behalf, of the draft conveyance to the plaintiff submitted to them by the plaintiff's solicitor, and at the same time they notified their readiness to comply with a request made by a memorandum in the margin of the draft by the plaintiff's solicitors, to the effect that the deed must be duly acknowledged by Mrs. Stringer. Thereupon the plaintiff's solicitors proceeded to engross the draft-deed so approved.

On the 22nd of April, before the deed to the plaintiff had been executed, the defendant, who was an innkeeper at Stanningley, and a neighbour of the plaintiff and the Stringers, and who had notice that the said John Stringer had entered into some agreement with the plaintiff for the sale of the premises to him, entered into a written agreement with John Stringer and his wife for the purchase of the same premises for 710*l.*, the fixtures to be taken at a valuation, and on the 25th of April the said Stringer and his wife executed to the defendant a conveyance of the premises in accordance with such agreement, and Stringer returned to the plaintiff his 50*l.* deposit, by coming to the plaintiff's house in the evening when he was in bed and leaving the money upon the bed. The same day the defendant received the rents of the tenants. On the 27th of April the plaintiff's solicitors tendered the draft conveyance to Messrs. Barstow, the solicitors of Mr. and Mrs. Stringer, and an appointment was made for the completion of the purchase on the 1st of May. On the 30th of April Messrs. Barstow wrote to the plaintiff's solicitors informing them that Stringer and his wife had already sold the property to another purchaser. Both the agreement for sale to the plaintiff and the conveyance to the defendant were registered in the West Riding Registry on the 1st of May, the defendant's deed being first upon the register. The plaintiff filed this bill against Wood alone, not making the Stringers parties, to obtain a declaration that the premises were purchased by and conveyed to the defendant subject in equity to the contract between John Stringer and the plaintiff for the purchase thereof, and that the defendant held the property bound by such contract either to the extent of the fee simple, or if not to the extent of John Stringer's interest therein, and for consequential relief.

The defendant, by his answer, stated that he never knew of Betty Stringer's interest in the property till the 15th of April, 1868, when John Stringer informed him that the bargain between himself and the plaintiff was off, and he was in a position to sell the property, and that his wife had an interest in the property, and refused to convey to the plaintiff, and he further stated that Mrs. Stringer had informed him and his solicitor that she refused to recognize the contract with the plaintiff or to convey the premises to him.

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The defendant further insisted that J. Stringer was a necessary party to the suit.

Mr. Amphlett and *Mr. Bagshawe*, for the plaintiff.—The case of *MacCormick* v. *Grogan* (L. R. 4 E. & I. App. 82), proved that the defendant was a trustee for the plaintiff. The plaintiff was entitled to have a conveyance from the defendant of the whole estate—*Nelthorpe* v. *Holgate* (1 Coll. 203); *Wilson* v. *Williams* (3 Jur. N.S. 810).

Mr. Kay and *Mr. Williamson*, for the defendant.—The real question was, whether there was any binding contract with the plaintiff. The plaintiff claimed a right to take the husband's interest, but there was no contract which could have been enforced against him—*Wilkinson* v. *Castle* (37 L. J. Ch. 467); *Maw* v. *Topham* (19 Beav. 576); *Thomas* v. *Dering* (1 Keen, 729; 6 L. J. Ch. 267).

Mr. Amphlett, in reply.—We say there was a binding contract between the plaintiff and Stringer, and that the defendant had notice of it. If Stringer had obtained a conveyance from his wife he would have been a trustee of the whole estate for the plaintiff, and the defendant must stand in the same position. This case was not touched by the authority of *Wilkinson* v. *Castle*, *ubi supra*, for there the husband had nothing of his own in the estate. *Murrell* v. *Goodyear* (1 De Gex, F. & J. 432; 29 L. J. Ch. 425) shewed that a reasonable time must be given for the husband to obtain the consent of his wife. At all events, the plaintiff was entitled to a conveyance from the defendant of Stringer's estate *pur autre vie*, with compensation for the rest of the estate which he contracted to sell—*Nelthorpe* v. *Holgate*, *ubi supra*. *Thomas* v. *Dering*, *ubi supra*, had been disapproved of by Lord St. Leonards—*Sugd. Vend. & Pur.* (last edit.) 380. Stringer when he entered into the contract with the plaintiff was well aware that he had no title to the whole estate, and that made this a case of fraud.—He also referred to *Mortlock* v. *Buller* (10 Ves. 292).

JAMES, V.C.—In this case the plaintiff seeks specific performance of a contract entered into by Stringer. Stringer without question entered into a contract binding on himself. It turns out, however, that he was not owner in fee simple, his only estate being an estate *pur autre vie*, and the possiblity of an estate by the curtesy, the remainder being vested in his wife. The wife did not do any act by which she bound herself to ratify the contract. She had the power of assenting, but she did not adopt the means which the law gives her of so doing, and the husband is under no obligation which this Court can recognize to compel her to do so, for in the eyes of this Court the wife is a free agent, and can convey according to her own uncontrolled will. The question must, therefore, be decided just as if the vendor had been tenant for life, with remainder to any other person in the world with whom he had no connexion. In this state of things, Wood comes in, and with full notice of the contract between Stringer and the plaintiff, makes a new one, under which he becomes the purchaser of the interest both of the husband and wife. The plaintiff's first contention is, that the defendant is bound to give full effect to the first contract. I do not, however, think the purchaser of the wife's estate is bound to give effect to a contract which did not affect her estate, and since her estate was not bound by it, the purchaser from her has, as regards it, the same equity as if the first contract had not been made. But that is not the whole of the case, for the plaintiff says, "If I cannot get more from you than I would get from the husband, yet you took his estate, and I have the same equity against you as against him." I am of opinion that he has; and supposing that no purchase had intervened, and the same bill had been filed against the husband, the question is, whether the plaintiff would not have been entitled to a decree to the extent of the husband's interest, with compensation in respect of the interest of the wife. Upon that point two cases have been cited, one on either side, viz., *Thomas* v. *Dering*, where, for reasons which I confess I do not understand, specific performance with compensation was not decreed, and *Nelthorpe* v. *Holgate*, where relief was given under circumstances almost precisely the same as in the present case. The husband here represented himself to be the owner

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in fee. The plaintiff entered into a contract with him in ignorance of any defect in title. The husband therefore would be bound to convey whatever interest he had. The defendant is bound to the same extent; and it is for the Court to find out, in the best way it can, what compensation can be made. There must be a declaration that the plaintiff is entitled to a specific performance of his contract to the extent of Stringer's interest, with a reference to chambers to inquire what compensation should be made for the interest of Mrs. Stringer.

LORD ROMILLY, M.R., July 6, August 6, 1869.

THE ATTORNEY GENERAL *v.* THE WAXCHANDLERS' COMPANY.

38 L. J. Ch. 686; L. R. 8 Eq. 452; 22 L. T. 255; 18 W. R. 6: affirmed, [1870] E. R. A.; 39 L. J. Ch. 782; L. R. 5 Ch. 503; 23 L. T. 173; 19 W. R. 33 (L. C.): the latter decision reversed, [1873] E. R. A.; 42 L. J. Ch. 425; L. R. 6 H.L. 1; 28 L. T. 681; 21 W. R. 361 (H.L.).

Will—Construction—Charity—Trust or Condition.

CHARITY. TRUST AND TRUSTEE.—*Devise of houses to the W. Co. "for this intent and purpose and upon this condition," that they should make certain annual payments, the greater part of which were charitable. The surplus income was thus disposed of: "The rest of the profits of the said houses and tenements I will shall be bestowed upon the reparations of the said houses and tenements":*—Held, *having regard to the whole scope of the will, that the devise was for the intent and purpose of making the payments, and upon the condition of keeping the property in repair; and that the company was beneficially entitled to the surplus income after affecting these objects.*

This was an information seeking to establish that the defendants were trustees for charitable purposes of the whole income of certain property, after satisfying a specific annual payment of small amount.

The will of William Kendall, dated the 31st of January, 1558, contained the following devise:

"Also I give unto William Kendall, my son, all my houses and tenements in Old Change, in the parish of Mary Magdalen, in London, at Old Fish Street; and to have and to hold unto the said William and to the heirs of his body lawfully begotten, and for default of such issue I will that the Master and Wardens and Commonalty of the Mystery of the Waxchandlers, of the city of London, and their successors, shall have the said houses and tenements for this intent and purpose, and upon this condition, that they shall yearly distribute eight pounds of lawful money of England after this manner (that is to say), to the poor inhabitants of the parish of Mary Magdalen aforesaid, at Old Fish Street, four pounds lacking two shillings in gowns for men and women, and coals, at the discretion of the churchwardens of the said parish to be given and delivered unto the said poor inhabitants in the month of December yearly, and the said two shillings to the churchwardens of the said parish for their painstaking; and to distribute yearly to the poor inhabitants of the parish of Bexley, in the county of Kent, thirty and eight shillings of good and lawful money of England, to be given and delivered yearly about the third and fourth days of November yearly, by the discretion of the churchwardens and chief inhabitants of the said parish of Bexley then being, and two shillings to the churchwardens of the said parish of Bexley for their great pains; and thirty and five shillings to be distributed unto the poorest men and women of the Company and Mystery of the Waxchandlers of London, and the other five shillings to be distributed to the Master and Wardens of the Waxchandlers for the time being equally; and the rest of the profits of the said houses and tenements I will shall be bestowed upon the reparations of the said houses and tenements. And if the Master,

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Wardens and Commonalty of the Mystery of the Waxchandlers of London and their successors do leave any of these things undone above rehearsed, then I will that the next-of-kindred unto me, the said William, shall enter into the said tenements, and them have and hold unto him and unto his heirs for ever, upon condition that he and they, and every of them, do all these things above rehearsed, in all points as it is above rehearsed by me."

The testator's son, William Kendall, died without issue. From a period shortly after the testator's death the surplus rents of the property comprised in the devise, after deducting the 8*l.* charged upon them, had been more than sufficient for the repair of the houses, and at the date of the present suit they amounted to about 330*l.* a year.

There was no evidence as to the mode in which the surplus rents had been dealt with.

The information prayed a declaration that the defendants were not entitled for their own benefit to the whole income of the property, subject to an annual charge of 7*l.* 15*s.*; but that they were trustees of the property, and of the whole income thereof for charitable purposes, subject to the specific payment of 5*s.* annually given to the Master and Wardens, and to such increased allowance (if any) as might be proper in respect of that payment.

Mr. Jessell and *Mr. F. Vaughan Hawkins*, for the informant.—A gift for repairing a charity house is a charitable gift, and, if the exact purpose of a charitable gift fails, the Court applies the money to other charitable purposes. This gift is upon trust, not upon condition. Although the specific gifts do not exhaust the whole income, the general intention that the whole should be applied to charitable purposes must prevail—*The Attorney General* v. *the Coopers' Company* (3 Beav. 29). This is in accordance with the rule laid down in *The Corporation of Beverley* v. *the Attorney General* (6 H.L. C. 310; 27 L. J. Ch. 66), that if the whole rents are apportioned among charitable objects so as to exhaust them, any increase of rent must be devoted to the same charitable purposes.

Sir R. Baggallay and *Mr. C. Browne*, for the defendants.—The intention of the testator was to benefit the defendants. The fact that the specific gifts do not exhaust the income is evidence of this—*The Attorney General* v. *Trinity College* (24 Beav. 383); *The Attorney General* v. *the Dean and Canons of Windsor* (24 Beav. 679; on appeal, 8 H.L. C. 369; 27 L. J. Ch. 320: on appeal, 30 L. J. Ch. 529); *The Attorney General* v. *the Cordwainers' Company* (3 Myl. & K. 534); *The Attorney General* v. *Brazenose College* (2 Cl. & F. 295; 1 L. J. Ch. 66); *The Mayor, &c., of South Moulton* v. *the Attorney General* (5 H. L. C. 1; 23 L. J. Ch. 567).

Mr. Jessel, in reply.—In *The Attorney General* v. *Trinity College* the will shewed the testator's intention that the devisee should take beneficially, and there was no trust of the property devised. It differs from the present case in both these points. An early decision on the subject is *Eltham Parish* v. *Warreyn* (reported in *Duke on Charitable Uses*, 641).

The MASTER OF THE ROLLS (*Aug.* 6).—The construction of the will raises a point which, so far as I am acquainted with the cases on the subject, is new. It is this. A testator, possessed of real property producing more than 8*l.* per annum, gives it to the Waxchandlers' Company and their successors, "for this intent and purpose and upon this condition," that they pay divers sums for charitable purposes, amounting in the whole to 7*l.* 15*s.* He then gives 5*s.* to the Master and the Wardens of the Company and goes on thus: "And the rest of the profits of the said houses and tenements I will shall be bestowed upon the reparations of the said houses and tenements." Does this direction infer a benefit to the company? If they perform the obligation of keeping the property in repair, is the company entitled to take the rest? or to whom does it go?

This is clear, that if it had been given to the company or to any stranger limited merely with a condition of keeping the premises in repair, the whole would go to that person provided he performed the condition. It is clear also

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that more than is required for the purpose cannot be expended in repairs, though it may be wasted; and it is, therefore, to my mind, evident that I must read this trust, or this condition, whichever it may be, as if these words, "so far as may be necessary," had been introduced into the will with reference to it. It is clear also that, at the time of the death of the testator's son, when the income of the property was 16*l.* per annum, clear of all reprises, the surplus income was far more than was necessary for the repairs of the houses.

There are three sets of persons who may claim this surplus. The first claim is that of the charities; the second claim is that the surplus is undisposed of and belongs to the heir of William Kendall; and the third claim is that of the company itself.

I am of opinion that the charities cannot claim more than the specified annual payment given to them. I have searched in vain for a case of this description:—A devise in these words: "I give my farm of Whiteacre to A. and his heirs for ever, upon trust out of the rents to pay 100*l.* per annum to the St. George's Hospital, and to apply the rest of the rents in repair of the farmhouse"; the rents far exceed the sums required for these purposes; is there any disposition of the residue? A. clearly cannot take it, as the devise to him is in trust. Is the heir of the testator disinherited? If it had not been that the surplus is given in trust to repair the farmhouse, it is clear that the heir would take the estate subject to the payment of the rentcharge to the hospital. Can the charity say, we are entitled to the whole? Does the charity stand in any better position in this respect than a private individual? I apprehend not; but if it does, I am unable to discover on what principle; and if so, must the whole or the principal part be given to charity? For it is to be observed that, in the present case, the whole is not, properly speaking, given to charity. How does the gift of 3*l.* 18*s.* to the poor of St. Mary Magdalen and 1*l.* 18*s.* to the poor of the parish of Bexley differ from the 5*s.* given to the Master and Wardens of the company? It is true that the first two payments are charitable, and that the last is a personal gift to the persons who, from time to time, fill the offices of Master and Warden (for it is important to observe that the 5*s.* is not given to the company; the commonalty are nowhere mentioned as partaking in it; it is a personal legacy to be divided annually amongst the persons who fill those offices). If the whole income is now to be distributed *pro rata*, the Master and Wardens annually must take such a share of the increased income as 5*s.* at the date of the testator's death bore to the then existing income of the property. I think that it is impossible, when the testator says that the rest shall be bestowed upon the reparation of the houses, to hold that this is a gift to charity. It would be impossible, even if all the other part of the income were devoted to charity, which it is not. I am of opinion that I must read this residuary gift in one of two ways: either, first, as if the testator had said, "I give what may be required for the repairs of the property, and the rest to nobody"; or, secondly, as if he had said, "I require, as a condition inseparable from the devise I have made, that the devisees shall, out of the rents, keep the property in repair": and I am of opinion, for various reasons, that the proper mode of reading the will is to treat the words in question as expressing a condition appurtenant to the devise already made, and not as a separate and independent devise.

My principal reasons are to be found in the will itself. It is obvious to me from the whole scope of the will that the testator intended to benefit the company. In the beginning of the will he recites that he is himself a member of the company. In the next place, the devise to the company is complete: it is to the master, wardens and commonalty, and their successors. If it had gone on and simply said "upon this condition," no question would have arisen, and the company would have taken the whole; but the will says, "It is for this intent and purpose and upon this condition." I am as little entitled to convert the whole devise into a trust under the first two words as I am to reject the first two words, and treat it as an absolute devise solely on condition. I think that the fair way of reading it is either by examining the whole scope of the will to see

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which words were intended to predominate, or to read the words distributively, and to hold that the devise is for the intent and purpose of making the payments after stated, and upon the condition, after stated, that you keep the property in repair, and that on failure in the performance of the trusts and conditions you are to deliver it over to my kindred.

Another proof of the testator's wishing to benefit the company is that he gives 35*s*. to the poorest men and women of the company, and a third proof is the gift he makes to the Master and Wardens. Observing all this in the will, I observe also that in express words he gives no benefit at all to the Company *qua* company unless it is to be obtained by the surplus rents being included in the general devise. That the testator considered that the person who performed his wishes or carried his bequests into execution ought to receive some return is obvious from his gift of 2*s*. to the churchwardens of the parish of St. Mary Magdalen and of the parish of Bexley, yet he gives the Company in express words, as I have observed, nothing.

Another consideration also impresses me strongly. Unless some benefit were to be derived from doing all that the testator required, what inducement was there to the Company to undertake the trust, or what terror was there in the threat of forfeiture if the Company did not perform these duties? And, further, what motive could be found in his kindred to undertake a troublesome trust that would do them no good if they were to be in the same situation? The Company would lose nothing. The 35*s*. to the poor men and women of the Company would be paid by the kindred and the 5*s*. to the Master and Wardens exactly the same as before. But the circumstance which presses most strongly on me is this: I think that it is to be inferred from the will that the testator intended that if the Company failed to perform his wishes his kindred should stand in the place of the Company. Were the kindred to take the property on trust, or were the Company to take the property beneficially? The kindred, in my opinion, clearly take the property beneficially, not only because unless they did so they could not be induced to undertake gratuitously an onerous burthen, but also because the property is expressly given to them upon condition that they do the things above cited in all points. What possible reason can be assigned for the testator intending the charities to take the whole of the property if the Company administered the estate, but only the exact sum specified by him if his kindred administered it? What appearance is there that the testator preferred the unknown kindred to his own Company in the matter? The testator gave the property to the Company, subject to a trust and upon a condition. The condition is clearly expressed when the gift over to the kindred takes effect. My opinion is, that the kindred are merely substituted for the company, and that the Company and the kindred have both alike the same powers and interests. If the Company do not perform the matters entrusted to them, then the kindred, as the testator doubts not, will do so.

It is always to be remembered in these matters that it is a question of intention, to be gathered from the whole of the will; and the question on this will is, Did the testator intend the whole of the property, which, judging from the accounts of the rental, must have produced a surplus at the date of his will, after providing for the repairs, to be divided amongst his legatees, or did he intend that his Company should derive some advantage from his devise? I think the latter. I think the information fails, and that it must be dismissed.

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MALINS, V.C., March, 9, 10, 1869.

APPLETON v. ROWLEY.

38 L. J. Ch. 689; L. R. 8 Eq. 139; 20 L. T. 600.

Referred to, *Cooper* v. *Macdonald*, [1878] E. R. A.; 47 L. J. Ch. 373; 7 Ch. D. 288; 38 L. T. 191; 26 W. R. 377 (C. A.).

Curtesy, Tenancy by—Equitable Seisin of Wife—Separate Use—Legacy—Words of Limitation—" And " for " or "—Lapse.

HUSBAND AND WIFE.—*Freeholds were devised to trustees upon trust to hold the same unto and to the use of A, her heirs and assigns for ever, for her separate use. A. died, leaving a husband and child surviving, without having made any disposition of the property*:—Held, *that the husband became tenant by the curtesy.*

WILL.—*Testator directed real estate to be sold, the proceeds to go in equal moieties between A. and B, as tenants in common, and their respective heirs or representatives*:—Held, *that these words were words of limitation, and that the share of A, who predeceased the testator, lapsed.*

This was the further consideration of a suit for the administration of the trusts of the will of Samuel Duffield.

Testator, by his will, made in 1843, gave all his real and personal estate to trustees upon trust for his wife for life, and after her death (or during her life with her consent), as to a lot of sixteen freehold houses therein specified, to sell the same and invest the proceeds; and after charging the said sixteen houses with the payment of certain legacies, he gave the surplus proceeds in equal moieties between Sarah Gaywood and Alice Key, as tenants in common *and their respective heirs or representatives*. Then as to five other freehold houses, upon trust, after the death of his wife, to hold the same unto and to the use of Alice Key, her heirs and assigns, free from the control, intermeddling, debts or engagements of any husband with whom she might intermarry, her receipt alone to be sufficient discharge to the trustees for the time being for all purposes and upon all occasions, with a gift over in the event of her dying without having any child or children. And as to the residue, upon trust for his wife Alice Duffield, her heirs, executors, administrators and assigns absolutely. The testator added a proviso that every gift to or devolving on a female by that his will should be deemed to be for her sole separate use, and not subject to the debts or power of her husband, and should be settled upon her in such manner as if she were a *feme sole*, with power to her to give receipts.

There was a codicil to the will, but not affecting the questions now under consideration.

The testator died in 1858, in which year Alice Key intermarried with Robert Appleton, and by her the present suit was instituted after the death of the testator's widow, in 1864.

Since the institution of the suit, however, Alice Appleton had died intestate, leaving her husband and one of three children by him surviving.

The question which now came on for argument was, whether Robert Appleton, the husband, was entitled as tenant by the curtesy to the five freehold houses of which his wife had died equitably seised in fee, the same having been devised to her in fee to her separate use.

Mr. C. Hall, for Robert Appleton, argued in favour of the curtesy.—As at law the husband would hold by curtesy such estates as the wife was legally seised of at the time of her death, so in equity the curtesy must attach to those estates of which the wife died equitably seised. The separate use clause only operated during the coverture to exclude the husband as against the wife.—He referred to *Lewin on Trustees* (5th edit.), p. 524, and the cases there cited, pointing out the several conflicting decisions upon the point. He also cited

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Taylor v. *Meads* (34 L. J. Ch. 203); *Lechmere* v. *Brotheridge* (32 Beav. 353; 32 L. J. Ch. 577); *Harris* v. *Mott* (14 Beav. 169); *Moore* v. *Webster* (36 L. J. Ch. 429; L. R. 3 Eq. 267).

Mr. Bazalgette and *Mr. Horsey*, for the surviving child, contra, argued that as the expressed intention of the testator was to exclude entirely the husband's marital interest in the property, there could be no right to the curtesy; the essential principle of that tenure was, that the husband should have an inchoate right during the lifetime of the wife. Moreover, the decision of Lord Hardwicke in *Hearle* v. *Greenbank* (3 Atk. 716), overruling his previous dictum in *Roberts* v. *Dixwell* (1 Atk. 609), was distinct upon the point, and was regarded as the law by Vice Chancellor Stuart in *Moore* v. *Webster*, *ubi supra*.

MALINS, V.C. (without calling for a reply).—This question arises in respect of the husband of Alice Key, as to whether he is entitled to curtesy out of the five freehold houses which were devised by the testator to the trustees of his will to stand possessed thereof unto and to the use of Alice Key, her heirs and assigns, for ever, for her sole and separate use. The devise, therefore, is to her in fee simple with a direction that the property shall be for her separate use.

The effect of such a devise was to give her power to alienate the property without the concurrence of her husband. If she had conveyed it by deed or devised it by will the trustees would have been bound to convey the legal estate to any person taking under such deed or will. Now, why should not the husband have curtesy in this property as to which the wife at the time of her death had the whole equitable estate in fee?

The separate use clause is for the protection of the wife, and would have entitled her as against her husband to make an alienation. She has died without making any disposition of her property, and was seised of the equitable estate in possession. My opinion is that the estate is subject to curtesy. It would, I think, be contrary to every principle that a clause introduced solely for the benefit and protection of the wife should exclude the husband from his right to curtesy?

No doubt the authorities are conflicting. In *Roberts* v. *Dixwell*, where the testator directed trustees to convey a fourth part of his property to the use of his daughter for life for her separate use, so that her husband should not intermeddle therewith, and after her decease in trust for the heirs of her body, Lord Hardwicke thus expresses himself: "The next question will be, whether the devise to the wife for her separate use will bar the husband of his tenancy by the curtesy? I am of opinion it will not, because here is a sort of seisin in the wife." On the other hand, we have the contrary opinion expressed by Lord Hardwicke in *Hearle* v. *Greenbank*, where the rents of the estate were to be applied to the separate use of the wife, and the trustees who had the fee in all the real estate were to permit the wife to dispose of it. Lord Hardwicke decided that the husband could not hold by curtesy, because the whole legal estate of inheritance was in the trustees. But in the case of *Follett* v. *Tyrer* (14 Sim. 125) where property was conveyed to trustees in trust for the separate use of the wife for life with remainder as she should appoint, and in default of appointment to her right heirs for ever, and the wife had died without exercising the power, Sir L. Shadwell held that her husband was entitled to the curtesy. Then there is the recent case of *Moore* v. *Webster*, where the real estate was limited to the separate use of the wife, to be assigned and disposed of as she might think fit by deed or will. Vice Chancellor Stuart held, that the husband was not entitled to curtesy, on the ground that he was totally excluded from any marital interest. I am unable to concur in that decision, for there the whole equitable fee was given to the wife. The true criterion is, whether the wife was seised of an equitable estate of inheritance. From a review of the cases, and upon the sound principles of law, I think that wherever a wife at the time of her death is seised of an estate in fee simple or fee tail in possession, whether legal or equitable, the husband cannot be excluded from the curtesy; he will therefore, in this case, be entitled to this estate for life by the curtesy.

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A further question was then argued, whether the share of Sarah Gaywood (who had predeceased the testator) in the surplus proceeds arising from the sale of the sixteen houses had lapsed, or whether her children or their representatives took by way of substitution, the terms of the bequest being that the surplus should go " in equal moieties between Sarah Gaywood and Alice Key as tenants in common, and their respective heirs or representatives."

Mr. Whitehorne, for the children and grandchildren of Sarah Gaywood, argued that the gift must be regarded as substitutional. If necessary, the Court would read " *and* their respective heirs, &c." as if it were " *or*," in order to effectuate the testator's obvious intention.

He cited *In re Porter's Trust* (4 Kay & J. 188; 27 L. J. Ch. 196); *Salisbury* v. *Petty* (3 Hare, 86); *In re Newton's Trust* (L. R. 4 Eq. 171); *The King* v. *Cleaveland* (4 De Gex, & J. 477; 28 L. J. Ch. 835); *Gittings* v. *M'Dermott* (2 Myl. & K. 69; 4 L. J. Ch. 217); *Crawford* v. *Trotter* (4 Madd. 361); *Wilson* v. *Vansittart* (Amb. 562).

Mr. J. Humphrey, for persons in the same interest.

Mr. J. T. Pearson, *Mr. Langley* and *Mr. Grenside*, for parties interested in the event of the legacy having lapsed, were not called upon.

MALINS, V.C.—The general rule upon this point is, that where personal property is given in terms that would carry the fee simple in land, the gift is absolute, and in such gifts the use of the word " or " prevents a lapse. If in the present case the gift had been to Sarah Gaywood and Alice Key, *or* their heirs or representatives, I should have followed the cases which have been cited, and held that the children or representatives took by way of substitution; but here unfortunately it is " *and* their heirs or representatives." If Sarah Gaywood had survived the testator no doubt she would have taken an absolute interest. The testator seems to have had some doubt whether in using the word " heirs " he was employing the right word, therefore he adds " or representatives," so the bequest is to them and their heirs, or to them and their representatives,—the word " representatives " being used as a substitute for heirs, but not as a substitute for the original donees. I am of opinion therefore that these words are words of limitation, and Sarah Gaywood having died in the testator's lifetime there is a lapse as to her share, and there must be a declaration to that effect. *Crawford* v. *Trotter* is scarcely applicable to the present case: that was not a gift to a person and her heirs simply, but to her " and her heirs (say children)," that is, to her and her children. My doubt is whether she should not have taken jointly with her children.

JAMES, V.C., June 3, 4, 1869.

OGLE *v.* KNIPE.

38 L. J. Ch. 692; L. R. 8 Eq. 434; 20 L. T. 867; 17 W. R. 1090.

Followed, *Murphy* v. *Doyle*, 1892, 29 L. R. Ir. 333 (C. A.). Considered, *In re Rayner*, [1904] E. R. A.; 73 L. J. Ch. 111; [1904] 1 Ch. 176; 89 L. T. 681; 52 W. R. 273 (C. A.).

Will—Construction—" Money and Securities for Money "—Bank Stock—Canal Shares—Mortgage Debts.

WILL.—*T. O. by her will gave all her " money and securities for money of every description ":*—Held, *that these words did not carry Bank of England stock, shares in a canal company, or moneys invested on mortgage by and in the names of the trustees of the will of E. F., a prior testatrix, of whom T. O. was sole executrix, and to whose estate T. O. was entitled as residuary legatee subject to an outstanding unpaid legacy; but*, held, *that the same words carried, first, moneys which had been advanced on mortgage by E. F. herself, and*

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allowed by her trustees for sixteen years after her death to remain invested on the same mortgage; and, secondly, moneys which had been advanced by E. F. on mortgage, and on the mortgage having been paid off after her death had been received by one of her trustees as agent for T. O.

SPECIAL CASE. Elizabeth Furness, by her will, dated the 16th of March, 1841, bequeathed to John F. Ogle and J. Watson 3,000*l.*, upon trust for her sister Martha Ogle, for her life, with remainder for her five nieces and their children as therein mentioned; but if all her said nieces should die without leaving issue, then on trust for her niece Thomasin Ogle. And after bequeathing 4,000*l.* to her said trustees on trusts for the said Thomasin Ogle and her children, or her nephews and nieces as therein mentioned, and bequeathing other pecuniary legacies, the testatrix bequeathed all her residuary personal estate to Thomasin Ogle, and she devised all estates vested in her as mortgagee to her said trustees, and appointed Thomasin Ogle sole executrix of her will. The testatrix died on the 17th of November, 1843, and her will was proved by Thomasin Ogle. By her will, dated the 11th of May, 1857, Thomasin Ogle bequeathed to the defendants, William Ogle and William Lawton, "all my money and securities for money of every description," upon trust for her sisters Elizabeth Ogle, Harriett Ogle and Hannah Jane Ogle, for their lives, with remainder to her nephews therein mentioned absolutely, and she bequeathed her residuary personal estate to her said three sisters, whom, with her trustees, she appointed executrixes and executors of her will. Thomasin Ogle died on the 12th of March, 1859. At the death of Thomasin Ogle all the legacies and debts of Elizabeth Furness had been paid except the said legacy of 3,000*l.*, and the personal estate of Elizabeth Furness then consisted of the following particulars:

1. 3,025*l.* stock of the Bank of England, standing in the name of J. Watson, the surviving trustee of E. Furness's will.

2. Three shares in the Barnesley Canal Company, value about 230*l.*, standing in the name of E. Furness.

3. 670*l.* secured on mortgage advanced in 1845, by J. F. Ogle and John Watson, in their names, with Thomasin Ogle's approbation, out of moneys belonging to the estate of E. Furness.

4. A sum of 600*l.*, advanced by Elizabeth Furness on mortgage in her own name, and which remained on the same mortgage until after the death of Thomasin Ogle.

5. A sum of 1,200*l.*, formerly secured to Elizabeth Furness on a mortgage in her own name. This mortgage, in 1857, was paid off to Thomasin Ogle as the executrix of E. Furness, and with her approbation was received by John Watson, and at her death remained in his hands awaiting re-investment.

6. A sum of 130*l.* advanced by J. Watson on mortgage out of E. Furness's estate.

The estate of Elizabeth Furness had been managed with the approbation of Thomasin Ogle, first by John F. Ogle and J. Watson, and after the death of J. F. Ogle, which occurred in 1850, by J. Watson alone.

Thomasin Ogle's personal estate at her death comprised, amongst other things, the residuary estate of E. Furness, subject to the 3,000*l.* legacy, which had not been paid.

This special case was stated by Elizabeth Ogle and Harriett Ogle, who had survived Hannah Jane Ogle, to determine among other questions, which of the above moneys and securities passed under the bequest in Thomasin Ogle's will of all her money and securities for money.

Mr. Amphlett and *Mr. Chitty*, for the plaintiffs, contended that the Bank stock and canal shares did not pass under the words "money or securities for money." In *Bescody* v. *Pack* (1 Sim. & S. 500), the question as to Bank stock was raised, but not decided. They further contended that the outstanding residuary estate of Mrs. Furness did not pass under these words. As to what

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would pass under the words "money or securities for money," they referred to *Dicks* v. *Lambert* (4 Ves. 725); *Lowe* v. *Thomas* (Kay. 369; 23 L. J. Ch. 616: on appeal, 5 De Gex, M. & G. 315); *Slingsby* v. *Grainger* (1 De Gex, M. & G. 385; on appeal, 7 H.L. C. 273; 28 L. J. Ch. 616; 25 L. J. Ch. 573). *Hudleston* v. *Gouldsbury* (10 Beav. 547), which was a case of canal shares. They contended that where a specific gift was followed by a residuary gift, the specific gift should be construed strictly.

Mr. Everitt, for the defendant, contended that the Bank stock and canal shares, and all the outstanding personal estate of Elizabeth Furness to which Thomasin Ogle was entitled as above mentioned, passed under the words " money and securities for money."

He cited *Parker* v. *Marchant* (1 You. & C. C.C. 290; 1 Ph. 356; 11 L. J. Ch. 223); *Williams on Executors* (1072); *Vaisey* v. *Reynolds* (5 Rus. 12; 6 L. J. Ch. 172); *Manning* v. *Purcell* (2 Sm. & G. 248; 7 De Gex, M. & G. 55; 7 L. J. Dig. 418); *Mangin* v. *Mangin* (16 Beav. 300).

Mr. Babington and *Mr. Nalder*, for the other defendants.

Mr. Chitty replied.

JAMES, V.C. said: It appeared to be utterly impossible to hold that Bank stock, which was after all nothing but a share in the capital stock of a company incorporated by act of parliament for the purpose of carrying on a banking business, was any more a security for money than a share in any other partnership whatever. It was merely a share in an incorporated partnership, with certain privileges with regard to discounting and drawing bills, and so on. That could not alter the character of it. It was really as much a share in a company as any co-partner's share in a brewery was. Therefore, clearly the Bank stock did not pass as a security for money. Accordingly, he must hold that the first and second items in the list above stated, comprising the Bank stock and the canal shares, did not pass under the words money and securities for money in Thomasin Ogle's will. The 670*l.* mortgage, mentioned as the third item in the list, was a sum of money invested on mortgage by the trustees of Mrs. Furness's will in their own names, and they were bound to pay the legacy of 3,000*l.* bequeathed by the will of their testatrix. It was clear, therefore, that this item did not pass under the words in Thomasin Ogle's will. As regarded the fourth item, that also was a mortgage in the names of the trustees; but the equitable interest was in Thomasin Ogle. The trustees could not have interfered with the receipt of it by her, and they had abundant assets to meet the unpaid legacy under Mrs. Furness's will. They had allowed it to remain invested for sixteen years; but it was the property of Thomasin Ogle, and she had a right to deal with it as part of her estate. He was of opinion that it passed as one of her securites for money. The moneys comprised in the fifth item were moneys arising from the payment to Thomasin Ogle, as the executrix of Mrs. Furness, of a mortgage-debt owing to Mrs. Furness. These moneys had, with the assent of Thomasin Ogle, been received by J. Watson, as her agent, and had remained in his hands; but she had a right at any moment to call for them, and they accordingly passed under the specific gift in her will. Item No. 6. was subject to the same considerations as No. 3. Therefore, the Bank stock and the two mortgages which were in the hands of the trustees of Mrs. Furness's will as trustees for the persons entitled to the legacy, did not pass by Miss Ogle's will.

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MALINS, V.C., July 20, 21, 1869.

COUTTS *v.* ACWORTH.

38 L. J. Ch. 694; L. R. 8 Eq. 558; 21 L. T. 224; 17 W. R. 1121: further proceedings, [1870] E. R. A.; L. R. 9 Eq. 519; 18 W. R. 482 (V.C.).

Referred to, *Phillips* v. *Mullings*, [1872] E. R. A.; 41 L. J. Ch. 211; L. R. 7 Ch. 244; 20 W. R. 129 (L.C.); *Welman* v. *Welman*, [1880] E. R. A.; 49 L. J. Ch. 736; 15 Ch. D. 570; 43 L. T. 145 (V.C.).

Voluntary Settlement—Power of Revocation, Omission of—Solicitor and Client.

SETTLEMENT.—*It is the duty of a solicitor in preparing a voluntary deed of gift to protect his client by inserting a power of revocation; and in the absence of such a power will invalidate the deed, unless those who claim under it shew that the donor deliberately, and with full knowledge of the consequences, refused to have the power inserted.*

The object of this suit was to set aside a voluntary deed of settlement made in August, 1853, by Mercy, then Mrs. Harvey (afterwards the wife of James Russell Brenchley), whereby she appointed the capital of 3,000*l.*, of which she was tenant for life with a general power of appointment under her father's will, in favour of Joseph Acworth, her only sister's husband.

At the time of the execution of the deed Mercy Harvey was fifty-three years of age, and living apart from her husband; she was also on bad terms with her son-in-law, the surviving husband of her only child. In this state of circumstances, being desirous of making some appointment of the 3,000*l.*, so as to free herself from the importunities of her husband and son-in-law, it appears that she was introduced by Joseph Acworth, in whose house she was temporarily residing, to his cousin George Acworth, a solicitor practising at Rochester; and by him the deed in question was prepared containing (without any power of revocation) an irrevocable apointment by Mrs. Harvey of the fund to herself for life, with remainder to Joseph Acworth absolutely.

The evidence did not shew whether George Acworth received his instructions for this deed from Mrs. Harvey herself or from Joseph Acworth; but it was proved that the legal expenses were defrayed by Joseph Acworth, and the deed after its execution remained in his possession, nor was any copy of it shewn or delivered to Mrs. Harvey.

In 1861, her first husband being then dead, Mrs. Harvey married Brenchley, and she thereupon executed a second deed purporting to be a settlement of the 3,000*l.*, appointing the same in favour of Brenchley for life with remainder to her sister's children by Joseph Acworth. Upon this occasion she informed Mr. Ward, the solicitor acting on her behalf, that she had previously executed a *will* appointing the fund in favour of Joseph Acworth. Acworth, however, on being applied to for the document, declined to give it up, and remained silent as to the facts of its being not a will but a settlement, although he was served with formal notice of the second settlement; nor was any intimation of the existence of the first deed ever made by him till after Mrs. Brenchley's death, which took place in July, 1862.

In the meantime, shortly before her death, Mrs. Brenchley executed a will, whereby she revoked the appointment of the fund in favour of her nephews and nieces, and appointed 1,000*l.* to her husband and 2,000*l.* to the plaintiff Coutts, who was then acting as her spiritual adviser, and with whom she was on intimate terms. She also appointed Coutts her executor.

Probate to this will was taken out by Coutts, whereupon Joseph Acworth in October, 1862, for the first time brought forward the original deed of 1853, and threatened proceedings thereunder in respect of his claim to the fund.

After some delay caused by the bankruptcy of Coutts and the inability of

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Brenchley, who was a man of slender means, to prosecute any suit in this Court, the present bill was filed to set aside the deed of 1853 on the ground that it had been prepared, without any independent professional advice; that it contained no power of revocation; and that the settlor executed it in the belief that she was signing a will only, and not an irrevocable instrument.

There was some attempt to shew by the evidence of the only surviving witness to the deed, that at the time of its execution the attention of Mrs. Harvey was pointedly drawn to the words "irrevocably appoint," and that she deliberately told George Acworth the solicitor (who was now dead) that she meant the appointment to be irrevocable; it will be seen however that the Vice Chancellor came to the conclusion that she was allowed to remain in ignorance of its real effect, and that the future embarrassments which might arise by reason of the appointment being irrevocable were not sufficiently pointed out to her.

Joseph Acworth died pending the suit; some attempt had been made on the part of the plaintiff to compromise the matter; Acworth's children, however, the present defendants, absolutely declined the terms proposed by the plaintiff, and the cause now came on for hearing.

Mr. Glasse and *Mr. Bagshawe*, for the plaintiff, referred to—*Huguenin* v. *Baseley* (14 Ves. 273, 296); *Cooke* v. *Lamotte* (15 Beav. 234; 21 L. J. Ch. 371); *Toker* v. *Toker* (31 Beav. 629; 32 L. J. Ch. 322); *Dent* v. *Bennett* (4 Myl. & Cr. 269; 8 L. J. Ch. 125); *Philipson* v. *Kerry* (32 Beav. 628).

[The VICE CHANCELLOR also mentioned the case of *Nottidge* v. *Prince* (2 Giff. 216; 29 L. J. Ch. 857.]

Mr. Fooks and *Mr. Bevir*, for Brenchley, in the same interest.

Mr. Cole and *Mr. Dixon*, for the trustee of the deed.

Mr. Cotton and *Mr. A. E. Miller*, for the children of Joseph Acworth.—In this case there is no evidence of fraud, undue influence, intimidation, or coercion. The settlement is good, and must be supported in this Court. At the time of its execution Mrs. Harvey, as she then was, had separated from her husband and quarrelled with her son-in-law; the only relatives for whom she felt an interest were to be found in her own sister's household; and what more natural or reasonable than that she should appoint this fund after her own death in favour of that sister's husband, in whose house she was then residing, and whose wife and children she desired to benefit? She wished to put the money out of her own control. She could not at her time of life and in her then position anticipate a second marriage or the formation of any new relations in life. She was fully alive to all the circumstances of the case, and the effect of the deed was just that which she intended to bring about; nor was it an improvident step; she robbed herself of nothing. In all its aspects the case is distinguishable from any of those in which the Court has interfered; and it will not be held that the mere absence of a power of revocation is fatal to an appointment deliberately executed, and in other respects good as this was. They referred to—*Hunter* v. *Atkins* (3 Myl. & K. 113); *Anderson* v. *Elsworth* (30 L. J. Ch. 922; 3 Giff. 154); *Forshaw* v. *Welsby* (30 Beav. 243; 30 L. J. Ch. 331).

MALINS, V.C., without calling for a reply, stated the facts at length, and commented upon the position in which Mrs. Harvey was placed at the time she executed the deed; observing also that for the purposes of this suit Joseph Acworth must be regarded as an entire stranger to her in blood; for, although it had been argued that her intention was to benefit the appointee's wife and children, the Court could make no such assumption, seeing that under this appointment to the husband only, any such intention might have been frustrated, either by his bankruptcy or voluntary alienation of the property.—His Honour then proceeded: I think the circumstances here are so extraordinary as to bring it under that class of cases of which Lord Eldon says the person ought not to be permitted to execute such a deed. If a case like *Toker* v. *Toker* occurs—an aged woman desirous of providing for her nephew,—a deed prepared by her family solicitor, who says "Will you not reserve to yourself a power of

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revocation," and the woman deliberately says, " I will not have it; I have made up my mind to have this as the final mode of disposing of my property;" then the Court—seeing it was her deliberate intention carried into effect, not by the solicitor of the nephew, but by her own solicitor, and coming to the conclusion that it was her deliberate act after full advice,—decides that there is no ground why it should set aside that which she had so deliberately done. But how was this poor lady protected? Had she any solicitor? Can anyone doubt that Mr. George Acworth was the solicitor of the man who was to have the advantage of the appointment? What benefit did she derive from it? How was her condition better after the execution of the deed than before? If the solicitor had only applied the principles of this Court, and felt that it was his duty to protect the lady on whose behalf he ought to have considered himself as acting, he would have left the property under her own control to enable her to meet the demands which might arise in future life. If this had been done and the appointment made subject to a power of revocation, the only object which there could have been would have been just as effectually attained. That power it was not thought fit to insert; and I am bound to come to the conclusion that this solicitor and his cousin deliberately abstained from inserting it, because their object was finally and for ever to secure the possession of this 3,000*l.* to Joseph Acworth after the lady's death. It was a deed which she ought never to have been permitted to execute, and it was a most improvident arrangement. —His Honour then commented on the position in which Mrs. Brenchley found herself at the time of her second marriage, and her belief at that time that the instrument she had already executed, whether a will or not, was at all events a revocable instrument; whereas the conduct of Joseph Acworth in keeping back the document in his possession, and declining to produce it when called upon by the lady's solicitor, and more especially in concealing the fact of its being an irrevocable appointment in his own favour, could only be accounted for on the ground that he purposed to take an improper advantage of his position[1].—His Honour then continued: But now, on the law of the case, I apprehend all agree in the principle which is to be deduced from *Huguenin* v. *Baseley:* it is this, that wherever a voluntary settlement or gift of property is made it is incumbent on the defendant, and he has it thrown upon him, to prove that the transaction was fair and proper, and was understood by the person who was the donor.

In the first place, was this transaction fair, was it proper, was it understood by Mrs. Harvey? It was not fair; it was most unfair to deprive this lady of her property. Was it explained to her? Clearly not, for the deed would never have been executed in these terms if it had been. Has then the defendant discharged himself of the burden thrown on him? My opinion is, that he has failed in every respect to do so. It is scarcely necessary to refer to the authorities. I have stated the result of *Huguenin* v. *Baseley:* the same principle was distinctly laid down by the Master of the Rolls, not as anything new, but as following authority, in *Cooke* v. *Lamotte.* Then the cases of *Anderson* v. *Elsworth* and *Forshaw* v. *Welsby*, in my opinion, carry it much further, because they go to shew that where the circumstances are such that the donor or settlor ought to have been advised to retain a power of revocation, and a power of revocation is not inserted, it is a thing fatal to the deed. It is so treated by Lord Eldon in *Huguenin* v. *Baseley.* It is true that in that case there were many other circumstances which led to the conclusion that the deed was invalid, and it was not necessary to rest it on that ground; but it is, I think, impossible to address oneself to that case without seeing that Lord

(1) Amongst other evidence as to the motives and intention of Joseph Acworth in withholding all information as to the existence of the deed until after Mrs. Brenchley's death, the following items produced from the bill of costs furnished by Messrs. Acworth & Sons to Joseph Acworth in 1862, were here particularly referred to by the Vice Chancellor:

" Attending on you and conferring with you on the approaching decease of Mrs. Brenchley, and consulting as to what proceedings should be taken on the deed."

" Attending and conferring with you, when you informed us that Mrs. Brenchley had made a will and settlement, and advising you to keep quiet, which you promised to do."

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Eldon's strong opinion was that if in a voluntary deed of this kind a power of revocation is not inserted, the defendant is called upon to explain the reason. He says, referring to Lord Hardwicke's reasoning in an earlier case (14 Ves. 296), "There was in that deed a power of revocation, but it was a power to revoke in the presence of three persons, who perhaps never could be got together, which was therefore considered as if there had been no power of revocation; and the want of such power was considered strong evidence that the party did not understand the transaction, whence arose a strong influence of an undue purpose." He then goes on to speak of the case before him, in language every word of which is applicable to this case.—[His Honour continued to read from Lord Eldon's judgment.]—Was it not too much for this solicitor to allow this lady to be surprised or "himself to be surprised into" the execution of a deed which would deprive her in middle life—for she was not on the verge of the grave, when it might be hardly possible for her to form many future relations in life—of all control over her property? Every word of Lord Eldon in that case is applicable to this, and it has been carried much further in the cases of *Anderson* v. *Elsworth* and *Forshaw* v. *Welsby*. If I had the power, I should lay it down as a rule that wherever a voluntary gift of a material part of a person's property is made (unless, as in *Toker* v. *Toker*, it is prepared by an independent solicitor, and the donor distinctly repudiates and refuses to insert a power of revocation) it is the duty of the solicitor to insist that there shall be, and almost to go to the extent of refusing to execute such an instrument unless there be, a power of revoking and altering that which is done, so as to meet the various exigencies that may arise in future life. In my opinion, the fact of there being no such power of revocation is all but a conclusive reason for setting aside the deed; and I believe in saying so I am not going further than the cases have already gone; but if I am I have no hesitation in saying it, for no case can shew the extreme danger of omitting such a power more clearly than this, where the donor was putting the bulk of her property out of her own reach. Unless it is proved to demonstration that there was a distinct intention on the part of the donor to do so, it is the duty of the solicitor in preparing such an instrument to see that there is a full power of revocation or right of reservation inserted.

Therefore, upon these grounds, I am of opinion that this deed is open to almost every objection that can be brought against a deed of this kind, and was from the moment of its being signed, sealed and delivered a void deed. It must be set aside; it must be delivered up to be cancelled; and I see no ground on which I can relieve those who, instead of accepting the reasonable terms offered by the plaintiff, have persisted in their endeavour to uphold the deed, from paying the costs of this litigation.

LORDS JUSTICES, April 26, 27, 28, 1869.

In re THE MERCANTILE TRADING COMPANY; *Ex parte* THE OFFICIAL LIQUIDATOR.

38 L. J. Ch. 698; L. R. 4 Ch. 475; 20 L. T. 591; 17 W. R. 694 (otherwise *Stringer's case*): on appeal from 20 L. T. 553 (V.C.).

Company — Payment of Dividend — Profits — Jurisdiction under the Companies' Act, 1862, *to order Shareholder to refund Dividend.*

COMPANY.—*There is jurisdiction under the Companies' Act*, 1862, *s.* 101, *upon a summary application in a winding-up, to order a shareholder to refund a dividend improperly declared; and, a fortiori, under section* 165, *such an order may be made against a director.*

Circumstances considered under which a balance-sheet shewing profit is to be held delusive.

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Where a company was engaged in a highly hazardous course of trade (that of running a blockade), under which large profits had been realized, a balance-sheet in which the assets were honestly estimated, although so situated as to be in great danger of loss, was held to be a proper balance-sheet, and a dividend, declared upon the basis of the balance-sheet, upheld, although through the occurrence of subsequent events the assets were destroyed or became worthless. An application to make a director refund the dividend was therefore refused upon the merits.

This was an appeal from a decision of Vice Chancellor Malins, made in the course of winding up the company, by which his Honour refused to order Mr. Stringer, a shareholder and director of the company, to refund a dividend which he had received during the existence of the company.

The company was established, in the year 1863, for the purpose (according to the articles of association) of trading with America. The true object of the company was to establish a special trade with the Confederate States of America, then blockaded by the United States.

The articles of association provided, in the usual terms, that no dividend should be paid except out of profits, and they also provided that the directors should declare a dividend on the subscribed capital as often as the profits of the company in hand should suffice for the payment of a dividend of 5*l.* per cent., subject to the resolution of general meetings. The capital of the company was of the nominal amount of 150,000*l.*, of which upwards of 110,000*l.* was paid up. All the shares were fully paid up.

Shortly after the establishment of the company, they entered into an arrangement with the Confederate Government under which the latter were to become co-owners with the company of a number of ships, and were to join in the risk of running the blockade with cargoes of goods. Several adventures were thus made, of which some were successful and others unsuccessful; but the profit upon each successful trip made by a ship was very considerable.

In May, 1864, a balance-sheet of the affairs of the company brought down to the end of the preceding February shewed a profit of 42,718*l.* In this balance-sheet credit was taken for a large quantity of cotton, valued at 17,000*l.*, then in Charleston, which had been appropriated by the Confederate Government for the payment of the company for their share of the ships; also for a debt of 51,589*l.* as due from the Confederate Government, valued at its full nominal amount. Upon the balance-sheet so made out the directors proposed a dividend of 25 per cent. upon the shares, which proposition was adopted by a general meeting of the company held on the 17th of May. In order to pay the dividend an application was made to the Agra Bank, now represented by the Agra & Masterman's Bank, for a loan of 20,000*l.*, in addition to 4,000*l.* then overdrawn upon the company's account. The balance-sheet and a statement of the affairs of the company were submitted to the bank, who after the same had been examined by their accountant, made the required advance, and the dividend was accordingly paid, principally by cheques upon the bank. Mr. Stringer, who was managing director, received 3,560*l.* as his dividend.

When the civil war in America was terminated by the defeat of the Confederates, the cotton in Charleston was destroyed, and the debt from the Confederate Government became worthless. The company therefore was ruined, and was soon afterwards ordered to be wound up. The bank constituted, however, the only creditors to any substantial amount. Some further details as to the circumstances of the company will be found in the judgment of Lord Justice Selwyn.

The application made to the Vice Chancellor was refused by him upon the ground that he had no jurisdiction to make such an order in a winding-up. His Honour expressed his opinion, however, that the circumstances were such that upon a bill filed he would certainly make a decree against Mr. Stringer, as he

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held that the dividend had been improperly declared and was in fact a dividend out of capital.

From this decision the official liquidator appealed.

Mr. Cotton and *Mr. Higgins*, for the appellant.—The alleged profits upon which this dividend was declared were wholly delusive. The company was engaged in a most hazardous course of business, and it was therefore very probable, as in fact the event proved, that their engagements at the date of the balance-sheet would ruin them. The valuation of cotton whilst it was in America was clearly unjustifiable, and so was the valuation at its full nominal amount of the debt of the Confederated States. No dividend was to be declared out of any profits unless in hand. How could they be said to be in hand when the company had to borrow the money to pay the dividend? The dividend then ought to be refunded. They cited on this branch of their argument *Evans* v. *Coventry* (8 De Gex, M. & G. 835; 25 L. J. Ch. 489); *Turquand* v. *Marshall* (37 L. J. Ch. 582; L. R. 6 Eq. 112); *Kearns* v. *Leaf* (1 Hem. & M. 681); *Maclaren* v. *Stainton* (3 De Gex, F. & J. 202; 26 L. J. Ch. 332); *Macdougall* v. *the Jersey Imperial Hotel Company* (2 Hem. & M. 528; 34 L. J. Ch. 28); *Corry* v. *the Londonderry and Enniskillen Railway Company* (29 Beav. 263; 30 L. J. Ch. 290); *The Society for Illustration of Practical Knowledge* v. *Abbott* (2 Beav. 559). Next, as to jurisdiction under the Companies' Act, 1862. There is ample power under the act to make the order asked for; either section 101. or section 165. will be sufficient. Such orders are often made—*In re the Cardiff Coal Company* (11 W. R. 1007); *The Cardiff Preserved Coal Company* v. *Morton* (35 L. J. Ch. 646; 36 L. J. Ch. 451; L. R. 2 Ch. 405); *In re the Agra and Masterman's Bank; Shipman's case* (unreported, before Vice Chancellor Giffard, 7th December, 1868); *In re the London and Provincial Starch Company* (unreported, before Vice Chancellor James, 22nd April, 1869).

Mr. Glasse and *Mr. Jackson*, for Mr. Stringer.—The dividend was perfectly regular. The balance-sheet was made out in the usual way, and the assets were fairly estimated; there is no pretence for saying that any fraudulent statement or concealment was made. The directors of the bank, which is the only creditor, were themselves fully cognizant of every fact relating to the affairs of the company, and knew when they lent the money how it was to be applied. The bank, therefore, cannot complain; yet there is no one else for whom the official liquidator raises this contention. They also contended that there was no jurisdiction. The Winding-up Acts were not intended to meet cases of great difficulty, where special and difficult equities affect the parties—*In re the Royal Hotel of Great Yarmouth* (L. R. 4 Eq. 244); *In re the State Fire Insurance Company* (1 De Gex, J. & S. 634; 33 L. J. Ch. 123; 32 L. J. Ch. 300).

Mr. Cotton, in reply.

Lord Justice Selwyn.—This case has been conveniently divided by the learned Vice Chancellor into two separate and distinct points. He says, in his judgment, "Being on the first point entirely with the applicant, that this is a dividend most improperly made and a return of one-fourth of the capital, the next question is, have I power under the act of parliament in this summary manner to make an order upon the shareholders, and Mr. Stringer in particular, the managing director, to return it?" I think it is convenient to take the second of those two questions, that which the Vice Chancellor refers to, as the question whether he has this power under the act of parliament, in the first instance; for it is a question involving very important considerations with respect to the practice of the Court, and it is also one of very general application. It appears that different opinions have been entertained by different Judges upon it in this Court, and under those circumstances it appears to me to be the duty of this Appellate Court to form and express its own opinion as speedily, as clearly and as decisively as possible upon that question. This is a question which has been agitated more or less almost ever since the passing of the first Winding-up Act, in the year 1858; but the power which was given by the old Winding-up Acts is expressed in them in a very much less stringent and com-

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prehensive form than the clauses which appear in the present act of 1862; but even under the old Winding-up Act this summary jurisdiction was very frequently and usefully exercised. I believe that one of the earliest instances of its exercise was in the case of the Madrid and Valencia Railway Company, which was wound up before Master Blunt, and where very large sums of money had been misappropriated by the directors of the company. Without any bill being filed, and in the course of the winding-up of the company, proceedings were taken to enforce the restitution of that money by the directors, and, as appears by the report in 15 *Jurist*, some of those proceedings before the Master were brought before Lord Justice Knight Bruce when Vice Chancellor, and approved of by him. Another case, which came before another Judge of great eminence, is the case of *Carpenter's executors* (6 De Gex & Sm. 402; 21 L. J. Ch. 855), which came before Sir James Parker. In that case the directors had employed moneys belonging to a company in purchasing the shares of the company. There, without bill filed, proceedings were taken, and it came before the Master, who was then the Judge of first instance, for the purpose of recovering those moneys. There the Vice Chancellor says, at page 414, "If the act now complained of had been done by these gentlemen at their own instance I cannot entertain a doubt that the Master would have properly charged them under the act on the present proceedings." That is, upon summary proceedings which had been instituted without any bill. He however goes on to say, "The vice of the Master's order lies in this: that it assumes that the five individuals where there is no cheque forthcoming, or three of them where there are cheques, are the parties who as between the persons signing and the company are solely and ultimately chargeable with the moneys misapplied." Then he goes on to say he thinks there was that which, in substance, was an objection for want of parties. That case appears to me to be of importance in two respects: first, as shewing the clear opinion of so eminent a Judge as Sir James Parker, that in such a case the Master had jurisdiction without any bill being filed; and, secondly, that in those summary proceedings every objection is just as open to the person sought to be charged as it would have been if a bill had been filed.

I need not multiply instances of the exercise of the summary jurisdiction. Another of which is found in *Ex parte Johnson* (5 *Jurist*, 519). But it is perfectly true that, notwithstanding those proceedings and those opinions so expressed by several Judges, the doubt as to the propriety or the competency of the Court to exercise this jurisdiction was very frequently expressed by the late Lord Justice Turner. The matter very seldom came before him without his taking the opportunity of saying that, in his judgment, such proceedings were, if not unlawful, at all events inexpedient; and I believe it was in consequence of the doubt so frequently expressed by that eminent Judge, that the clauses were introduced into the subsequent act of parliament, and made so comprehensive and stringent as they now are. We find them expressed in the most wide and general terms. It is true they are permissive, but they are proceedings to be taken under the authority of the Court. They are to be taken by the official liquidator, who is the officer appointed by the Court, under the advice of solicitors appointed with the sanction of the Court; and, under those circumstances, I think it may be assumed that proceedings so instituted would be properly conducted, that is to say, that they would be so conducted as to afford to the persons sought to be charged a full knowledge of all the points of the case intended to be brought against them, and it would give to them the fullest opportunity of defending themselves in any legitimate way; and the able counsel who have argued this case on the part of Mr. Stringer have entirely failed (although requested by the Court to do so) to point out any substantial difference or disadvantage in the position in which the present respondent, Mr. Stringer, stands from that which he would have occupied if a bill had been filed containing the same statements as those found in the affidavit filed by the official liquidator, and concluding with a prayer in the precise words of the present notice of motion.

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The summary power which has been given by the recent act of parliament has been very frequently exercised; and in a case before the Master of the Rolls, of *The Cardiff Preserved Coal Company* v. *Norton*, there is a very strong expression of his Lordship's opinion as to the propriety of such proceedings; for he there says, at page 563, " It is said that the shares taken by them in exchange from the Crown Company belong to and form part of the assets of the Cardiff Company. If this be so, the proper mode of getting at the assets of the company in the hands of contributories is by a proceeding in the Court in which the company is being wound up,"—that was in the Court of Bankruptcy, which, under the peculiar circumstances of that case, was the Court having the conduct of the winding-up. Therefore that amounts to an expression of opinion by the Master of the Rolls that a bill was not the proper proceeding, but that a proceeding in the Court of Bankruptcy under the winding-up was the proper proceeding in such a case. It appears that this power has been very recently exercised, particularly in *Shipman's case*, which came before the Lord Justice when Vice Chancellor, and still more recently in a case mentioned at the bar, but which has not yet been reported, decided by Vice Chancellor James. Under these circumstances, it appears to me that we should be doing something which is entirely inconsistent with the provisions of the act of parliament, so general as they are, if we were to introduce any such qualification as that said to have been laid down by the Master of the Rolls in the case of *The Yarmouth Hotel Company* (L. R. 4 Eq. 248). His Lordship is there reported to have said, at page 248, " that where there is really a question to be tried then I do not think this 165th section enables you to dispose of it in this way "; and at page 249 he says, " The Court can only do so in plain and straightforward cases where there is no point of law to be determined." I am much disinclined to doubt whether those are not the words of the Master of the Rolls, but, having regard to what I have always understood to be his opinion upon this subject, and to his own decision in the case to which I have referred of the Cardiff Coal Company, I cannot help thinking that there must be some error in that report; if not, I feel bound to say that I do not think there is to be found, either in the words of the present act of parliament or in the conclusion which is justly to be drawn from the decisions upon this subject, any such qualification or limitation as that which is there expressed by his Lordship; and, if we were so to hold in all these cases, we should be inducing the person against whom the charge is made to endeavour to make out that there was some question to be tried, or that the matter was not so plain or straightforward as it was represented to be; and there are very few cases indeed in which some such attempt as that might not be made with some reasonable hope of success. The result would be to occasion the necessity for a double mode of proceeding and unnecessary expense and delay. Applying, then, these observations to the present case, and assuming with reference to this one part of the case that the Vice Chancellor was right when he said that " this was a wholly delusive and improper dividend, in effect a return of one-fourth of the capital, and a return of capital in violation of every rule of propriety,—a return of capital in violation of the general provisions of the act, that dividends are not to be declared out of capital, and, above all, an extraordinary violation of their own rule which prescribes that they are not to pay dividends except out of profits; " or, as it is more concisely put in another passage in the same judgment, that this is a dividend most improperly made, and a return of one-fourth of the capital; under those circumstances, has this Court jurisdiction, under the 101st and 165th sections of this act, to order the return of money so improperly paid without the necessity of having a bill filed? In my judgment, there is no doubt that the Court has that power under either of these sections, for, under the 101st section, " The Court may, at any time after making an order for winding-up the company, make an order on any contributory at the time being settled on the list of contributories, directing payment to be made in manner in the said act mentioned of any moneys due from him, or from the estate of the person whom he represents, to the

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company." Under the circumstances stated by the Vice Chancellor, can it be doubted that the amount of such a dividend so improperly paid, of capital so improperly returned, would be a sum of money owing from the contributory, who receives it, to the company? If so, there is in that act of parliament the clearest authority, under the Winding-up Act, without bill filed, to order a return of the money so received. The 165th section is, if possible, even clearer. That is, in particular, the section framed in this very comprehensive form in order to meet and obviate the doubts expressed by Lord Justice Turner. That section says, " Where, in the course of the winding-up of any company under this act, it appears that any past or present director, manager, official, or other liquidator, or any officer of such company, has misapplied or retained in his own hands or become liable or accountable for any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of any liquidator or of any creditor or contributory of the company, notwithstanding that the offence is one for which the offender is criminally responsible, examine into the conduct of such director, manager or other officer, and compel him to repay any moneys so misapplied or retained or for which he has become liable or accountable, together with interest after such rate as the Court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retaining, misfeasance or breach of trust, as the Court thinks just." There is no such limitation to be found in the words of either of these sections as is reported to have been considered to be included in them by the report of *The Royal Hotel Company of Great Yarmouth case*, but, on the contrary, the Court is empowered to examine into the conduct of the director, and that necessarily implies deciding the question whether he has been guilty of any misfeasance or breach of trust, which, of course, it would be open to him to deny, and therefore there would be a question to be tried in every such case. It is open to the Court to examine into his conduct, to compel him to repay any moneys so misapplied, or to contribute such sums by way of compensation as the Court shall think fit. It appears to me that if we had now to draw a clause in the widest and fullest manner, it would be very difficult to conceive anything more large or comprehensive than the words of the 165th section. Under these circumstances, it appears to me perfectly clear that if this was a wholly delusive dividend and an improper return of capital, this money so received by the managing director of the company in respect of that delusive and improper dividend, and in respect of that improper return of capital, would be most clearly a sum of money for which the managing director would be accountable, and which consequently the Court might under this jurisdiction order him to refund. I must therefore entirely differ, though most respectfully, from the conclusion at which the learned Vice-Chancellor has arrived upon this part of the case, and I consider that in so doing I am acting in accordance with a long series of authorities and many decisions which have taken place in this Court. There remains, however, the question upon the merits of the case, and that question may be shortly stated thus: whether the dividend in question (that is, the devidend of 25 per cent. which was declared and paid by the directors in this case) is to be considered, as the learned Vice Chancellor has considered it, so wholly delusive and improper, or in substance such a return of capital as to justify the Court in making Mr. Stringer pay the amount of 25 per cent. on the nominal value of the shares standing in his name. Now, I quite agree with the argument which has been addressed to us on behalf of the official liquidator to this extent, that the act which confers on these companies the privilege of limited liablity, imposes upon them at the same time certain conditions which they are bound to observe, and which may be considered as the price of that privilege, and if it is made to appear that, for the purpose of defrauding creditors or for any other improper motive, a company has declared and paid a wholly delusive and improper dividend, and has thereby in effect taken away from their creditors a portion of the capital which was answerable for the debts of those creditors, I

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entertain no doubt that the Court would have full jurisdiction, and would exercise it by ordering the repayment of the money so improperly paid. But, of course, in the present case, we have to consider whether this dividend was in truth a dividend declared under such circumstances. I think we may dismiss from our consideration some of the minor items, upon which considerable discussion has arisen, such, for instance, as the question relating to the cargo of the "*Love Bird*." For, in the first instance, it is apparent on the face of the balance-sheet in question that the whole sum there represented as being profit is 42,718*l*., and the dividend declared, amounting only to 28,000*l*., leaves a balance of 14,718*l*., which renders it unnecessary to enter into the consideration of any small or minute questions, because we have in any event that large balance remaining over and above the dividend actually declared. With respect to this question of the "*Love Bird*," it appears that a cargo of rifles was purchased and sent out, and the company have entered that cargo at the sum it actually cost, including and adding to it the amount of the insurance and the expenses connected with the shipment of the cargo. It appears that item was at all events justified to this extent, that it being set down at the value of 29,000*l*., there has been actually realized in respect of that cargo a sum of 28,000*l*.; though if you have regard to subsequent expenses, there may have been a total loss upon the entire transaction of a sum of about 4,000*l*. I think that and the other question about the "*Ida*" may be disregarded, having regard to the large amount of the admitted surplus. But the substantial question in the case depends upon the consideration of three items in this account. Those are, first, the ships which were actually lost; secondly, the debt due from the Confederate Government; and, thirdly, the cotton which was in the Confederate States at the time when the balance-sheet was made out. It is very material to observe in this case that no fraud on the shareholders can be or is attempted to be alleged in argument, because in this case a full and fair dividend was declared, and was paid or intended to be paid to all the shareholders equally, without any preference or priority. Neither was there any fraud upon the public intended or practised, nor even upon that part of the public who might be expected to become purchasers of the shares, because it is admitted that the shares of this company were not sold at all, but were held from the beginning to the end by the same persons. Neither is it, I think, possible to say with justice that any attempt has been made in this case to commit any fraud upon the creditors, for though it appears at the time when this balance-sheet was made out that a very large debt was owing from the company to the Agra & Masterman's Bank, and that a very large debt is still owing to that bank from the company now being wound up, it does not appear (with the exception of one claim recently made by a creditor at New York) that there are now any other debts existing at all against this company. The singularity of this case is, that this balance-sheet discloses on the very face of it all facts relating to profit and loss, for the very first thing we find with respect to the first of the three matters I have mentioned, namely, the ships lost—that the names of the four ships which had been lost are stated. So also with respect to the debt due from the Confederate Government. The experience which we have unfortunately had in this Court of this sort of statement put out by companies shews how very easy and how very common it is to dissemble in these balance-sheets and to put forth other statements instead of the real truth of the transactions with respect to the assets and debts and liabilities. We find commonly in a case of this kind, where there is an asset of a doubtful character, it is mixed up with others that are good in such a manner as to render the one undistinguishable from the others. Here the debt owing from the Confederate Government is plainly stated as being a debt owing from that Government. It stands by itself, and is not attempted to be dissembled or cloaked in any way. In like manner with respect to the third item, the cotton in the Confederate States. Nothing would have been easier than to mix up the cotton in the Confederate States with the larger amount of cotton which appears to have been either on the way or actually in England; but so far from that being

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the case, an amount of cotton to the extent of more than 17,000*l.* is plainly stated upon the face of this balance-sheet as being cotton in the Confederate States, as distinguished from cotton in England or on the way. Then, this balance-sheet, containing these plain and fair statements, is actually produced to the principal creditors of the company, who had had very large dealings with the company, who had several accounts with the company, who had advanced them money generally and upon special undertakings and securities, and who had the fullest knowledge of all the transactions of the company. It was produced to those creditors for the purpose of inducing them to advance a still larger sum, and what renders this matter still more singular is, in order to induce them to lend this sum for the express purpose of paying this dividend, so that this application, which is substantially an application made at the instance of the Agra & Masterman's Bank, is an application which asks the Court to treat as delusive and improper that dividend which was in fact made and paid with the money advanced by the Agra & Masterman's Bank, and advanced by them with full knowledge or with the means of knowledge of all the transactions of the company, and which was money advanced for the very purpose of paying this dividend, for it appears that a new account was opened with the bank, intituled "The Dividend Account." The question with respect to the dividend is mainly rested upon the provisions in Table A, with respect to the payment of dividends, and the fifth article of this company, which qualifies and adds to the rule laid down in Table A. The expression in Table A. is in the negative form: "That no dividends shall be payable except out of the profits arising from the business of the company." The first clause provides, "That all the articles of Table A. to the said act shall be deemed to be incorporated with and to apply to these articles and the said company as near as may be and circumstances will permit, except as hereinafter modified or altered." Then the fifth clause says, "That the directors shall declare a dividend on the subscribed capital of the company as soon and as often as the profits of the company in hand are sufficient for payment of a dividend of 5*l.* per cent. on such capital, subject to the resolutions of a general meeting." I agree, again, with the argument which was adduced by the official liquidator to this extent, that if it could be shewn that this dividend was declared in fraud, either of the negative provisions of Table A. (which is incorporated with the articles of this company), or in fraud or violation of the provisions of their own articles, so far as they relate to creditors, namely, the fifth article, it would be then a matter which this Court would be competent to set aside, and all moneys paid in respect of such dividend ought to be returned. But the first question we have to determine is, whether the conclusion at which the learned Vice Chancellor arrived with respect to this matter is correct, which, I think, is shortly summed up by him in his judgment in these words: "It was obvious to all the world that the consumption of life and property was such that it (that is, the war), must necessarily come to an end within a reasonable time, be it one, two or three years, and the company, according to my judgment, could only then for the first time ascertain whether its operations had been profitable or unprofitable." Now, if the learned Vice Chancellor is correct in that view of the case, of course it puts an end to any further consideration of the question with respect to future profits or profits in hand, because it is obvious that, according to that view of the case, there could be neither profits nor profits in hand until the termination of the war, and until all the operations had been concluded, because he says until that time it could not be ascertained whether the operations of the company had been profitable or unprofitable. I think, in order to test the soundness of that conclusion, we may take for instance the figures which appear in Mr. Stringer's affidavit; assume that by reason of the successful voyages of some of these ships the two sums mentioned of 32,000*l.* and 24,000*l.*, making in all 56,000*l.*, had been actually realized and received in respect of profit upon adventures and cargoes actually landed and sold; and suppose that no ship had been lost at all, still the whole of the ships belonging to this company would be subject to the very

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hazardous adventure in which they were engaged, they had cost more than 100,000*l.*, and they were liable to destruction at any time; and according to the Vice Chancellor's view until the war was determined, and the safety of those ships was ascertained, it could not be ascertained whether the transactions of the company had been profitable or unprofitable. Therefore, in that view of the case, even if the company had had this sum of 56,000*l.* in their hands in respect of realized profits inasmuch as they would be subject to the possible loss of 102,000*l.*, being the value of the ships they had, in the event of those ships being lost—and the great majority of them were lost—of course the whole of that profit would be swept away, and consequently no dividend could be paid by the company. I should say, having regard to the provisions of Table A, and clause 5. of the Articles, which contain no negative clause at all, in my judgment the company would have been perfectly justified at that time, in the case I have assumed, in declaring a dividend out of the profits so received, provided that they had put a fair, and no more than a fair, value upon the ships, and the assets which they actually had. Taking it one step further, and assuming the case that several of the ships had been lost, that the company were bound to put down, as they did put down, their proportion of that loss as being a loss upon this balance-sheet, the other two-thirds of the loss was to be covered by the responsibility and guarantee of the Confederate Government, and, according to the view of the learned Vice Chancellor, inasmuch as until the end of the war the value of that guarantee could not be ascertained, no dividend could be declared. I confess I am unable to agree with that view. I think, under those circumstances, the company was fully justified in putting a value on the Confederate debt, and if it be necessary to put some estimate of value on the ships and upon the Confederate debt, inasmuch as it is clear, so far as the ships are concerned, having regard to the extremely hazardous nature of the operations in which they were engaged, no insurance of the ships could be effected except at the most unreasonable rate,—in fact no insurance could be effected at all; therefore the valuation of the ships became a matter of mere valuation and estimate, and so also with respect to the value of this obligation on the part of the Confederate Government. Upon what principle are we to say that that was to be valued? It depended upon the views which different persons might take, and we know well what different views were taken by most eminent persons with respect to the probable conclusion of that great struggle. Under those circumstances, I think the company was justified in doing that which in truth is done in almost every business, namely, taking the facts as they actually stood and forming an estimate of their assets as they actually existed, and then drawing a balance and seeing what was the result in the shape of profit or of loss. Again, if it could be shewn that that estimate had been made in any fraudulent way with any intention or purpose of deceiving anyone, or that in point of fact anyone was deceived by it, very different considerations would arise. I have already shewn that no fraud was intended or attempted against either the shareholders, or the public, or the creditors of this company. If we were to lay down as a rule that there must be actually cash in hand or cash at the bankers of the company to the full amount of the dividend declared, we should be laying down a rule which, in my judgment, would be inconsistent with what I understand and believe to be the custom of all companies of this description, and also inconsistent with mercantile usage, and we should be laying down a rule which would open the door to and encourage a very great amount of litigation, because there are very few dividends indeed which would not be open to more or less question if such a rule as that were laid down; and I think that in the absence of any fraudulent intent as against the shareholders, or as against the creditors or the public, this Court ought not to be astute in searching out minute errors in calculations in an account honestly made out and openly declared, especially as in the present case, where the account was submitted to and the dividend consequent upon it was ratified by the general meeting so long ago as 1864, long before the winding up of this company, and more

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especially where, as here, that account is now attempted after that lapse of time to be impeached substantially at the instance of persons to whom all the items of the account were fully and fairly made known, who themselves were the principal actors in, and mainly assisted in, the payment of the very dividend they now seek to impeach. I think the item of the ships is fairly stated. I think that the debt due from the Confederate Government is also fairly stated, and that although some proper allowance should be made by way of deduction from that debt, still it is not such a deduction as would be sufficient to vitiate this balance-sheet and the dividend declared upon it; and with respect to the cotton in the Confederate States I think the allowance that was made by taking it at 5*d*. per lb. in value when it had been actually taken by the company at 6*d*., and when it is proved, and not disputed, that its real value if delivered here in England was from 2*s*. 1*d*. to 2*s*. 4*d*. per lb., is a valuation which, if it be not strictly accurate, is at least fair and *bona fide*, and cannot be made the foundation for impeaching the dividend, or asking that the dividend declared and received should be ordered to be paid back as having been improperly declared. I think, therefore, for these reasons that the claim originally made against Mr. Stringer fails upon the merits, and that the application which was made in the Court below ought to have been made there, and must now be refused, with costs; and I think, also, that the present appeal must be dismissed, with costs. Those, therefore, will be the terms of our order; but in accordance with our usual practice we shall leave to the decision of the Vice Chancellor any question which may arise as between the official liquidator, and those whom he represents, with reference to the costs so ordered to be paid by the official liquidator.

GIFFARD, L.J.—If I could have concurred in this case in the view which the Vice Chancellor has taken of the construction of the articles of association, and with the conclusion at which he has arrived, namely, that what has been done in this case amounts to a return of capital, I should not have hesitated to say that this Court had clear jurisdiction, not only under the 101st section against any contributory, but under the 165th section as against any director. I think that those clauses were introduced in order that by means of proceeding under the Winding-up Act, without any double process or double set of proceedings, complete justice might be done between the parties, and a complete winding-up effected; and I think the instances are very rare indeed where the jurisdiction ought not to be exercised. No doubt there are some cases, as, for instance, where you have parties concerned, some of whom are not amenable to the jurisdiction of winding-up, and it is not right and just to have a piecemeal litigation, then it is proper that a bill should be filed, and there may be some, but they are very rare instances indeed, where it may be necessary to have the facts stated upon the record: but wherever upon notice of motion and upon affidavits and due examination of witnesses, you can properly arrive at a conclusion, I can see no reason at all why a bill should be filed. It only adds to the expense, and upon notice of motion and affidavits and examination of witnesses complete justice can be done, the evidence can be taken under the winding-up just in as many ways as it can be taken upon bill filed; and what is more important, there are the same means of hearing in the Court below and the same means of appeal to this Court and to the House of Lords. Therefore I can see no reason why any narrow construction should be put upon those words, and I think it would be to the disadvantage of the public that a narrow construction should be put upon them. Now, with regard to this case, the first important matter that we have to consider is the effect of these articles of association, and I quite agree that if the effect of these articles was that you could have no division of dividends until all the transactions were wound up, that you could have no legal dividend except out of what is termed profits in hand, there might be a great deal to be said in this case; but if we look at the articles of association as compared with Table A., it is clearly manifest that the articles of association amount to nothing of the kind. First of all, the

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articles of association incorporate Table A. The first article is "That all the articles of Table A. to the said act shall be deemed to be incorporated with and apply to these articles, and the said company, as near as may be and circumstances will permit, except as hereinafter modified or altered." Then, when we come to dividend, the first part of Table A. as regards that is this: "The directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares." The next is, "No dividend shall be payable except out of the profits of the business of the company." The next is, "The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserve fund to meet contingencies." Then we have imported into that the 5th clause of these articles; and the 5th clause of these articles is this: "The directors shall declare a dividend on the subscribed capital of the company as soon and as often as the profits of the company in hand are sufficient for payment of a dividend of 5*l.* per cent. on such capital, subject to the resolutions of a general meeting of the company called with reference thereto." I have no hesitation in saying, especially if you compare the word "may" in Table A. and the word "shall" in this 5th clause, and consider that there are negative words in Table A., and that there are none in this clause, this clause was intended simply to have this effect, and no other, namely, that when the directors had in their hands profits they should not be able to set them aside for a contingency fund, and they should be compellable to make a dividend. It did not prevent their making a dividend, but I agree it must be out of profits—out of profits, although those profits were not profits in hand. I consider that when Table A. and this clause are put together there really can be no doubt upon this question. Then, we come to the facts themselves, and I will not again go through those facts, for they have been gone through at very considerable length, not only in argument, but by my learned Brother, but it certainly never was argued that there was a fraud committed upon anybody; it was not argued nor suggested, nor could be argued or suggested, that it was intended that this thing, though in terms a dividend, should cover what was not really a dividend transaction. The mode in which the matter was done was fair enough. The books were put into the hands of an accountant, calculations were made, and a certain conclusion was arrived at; and true it is, no doubt, that these proceedings are full of risk; but although, on the one hand, there may be a great loss, everyone knows that whenever there was any success, the profits were something very enormous, and upon the balance-sheet as taken from the books it did appear that there was a profit, I think, of 42,000*l.*, and it was proposed out of that to divide somewhere about 28,000*l.*, the profits I agree not being profits in hand. Then the fault that is found with that is this, that the estimate was an erroneous estimate, that too sanguine a view was taken of the prospects of success, and that there ought to have been a very much less sum put upon the face of this balance-sheet as assets than really was put there; but still I do not think that anyone can say it was not at this date possible for honest persons carrying on this trade entertaining the view which they did entertain as to their prospects—that it was not possible for them honestly to make out such a balance-sheet as this, and honestly to believe that those were profits fairly divisible between them. As I have said before, this was not done in any underhand proceeding whatever: the whole thing was patent; the whole thing was open; it was known, or capable of being known, by every shareholder; and all I can say is that if the Agra and Masterman's Bank did not know anything about it, they neglected their duty most shamefully, and behaved most shamefully to their own shareholders, whose money they lent; for the balance-sheet was put in their hands, and they had accounts of every description, and they must have known perfectly well that it was neither more nor less than a blockade-running company; the very nature of the accounts shewed it; and so far from there being any concealment, the very balance-sheet itself was put into the hands of the auditors in order

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that they might see what the balance-sheet was; and no person who knew what the business of the company was could look through that balance-sheet, which would not take a person five minutes to do, without seeing at once that the full value was put upon the Confederate Government debt, and without seeing at once that the four ships had been lost, and without knowing at once that if things turned out adversely that which was profit might from subsequent events become a great loss. But that is not the state of things which, when one considers that this dividend was declared in March, 1864, and was actually paid in June, 1864, and I cannot forget that it was actually paid by the Agra and Masterman's Bank, who advanced the money, not only knowing the affairs for that purpose, but who paid the dividends through the medium of cheques drawn upon them by the shareholders,—I say I think it would be a most monstrous proposition if, at this distance of time, when a dividend has been made and paid in this way so long ago as the year 1864, if these things turn out adversely afterwards and the company is wound up in 1867 at the instance of a creditor, such a dividend should be repaid. I quite agree that where there has been what can be termed fairly a misappropriation of assets, that is, as against a creditor, that the creditor has a right in the winding-up to have those assets recouped; but I cannot think that such a dividend as this was in any sense a misappropriation as against either the Agra and Masterman's Bank or any other creditor, or that it was in any sense delusive, or in any sense a fraudulent transaction, or that it was any other transaction than this, namely, that mercantile men were engaged in transactions which might result in very great loss,—total loss; and which might also result in very great profit, taking a sanguine view of what the value of the assets was, looking at what at that date was the actual profit made, acting upon that *bona fide*, and not intending to defraud in any way whatever. Therefore I am of opinion that this application should have been dismissed with costs in the Court below, and will be now; and the appeal will be dismissed with costs.

MALINS, V.C., April 17, 1869.

In re ROBERTS'S TRUSTS.

38 L. J. Ch. 708; 17 W. R. 639.

Trustee Relief Act (22 & 23 *Vict. s.* 35.)—*Unnecessary Payment into Court —Executor's Release—Legacy to Married Woman—Costs.*

EXECUTOR AND ADMINISTRATOR.—*An executor is not entitled to call for a release and indemnity from legatees, their receipt alone being sufficient discharge.*

TRUST AND TRUSTEE.—*Trustees are not justified, as a matter of course, in paying a married woman's legacy into Court; but it will be liable for costs if such payment appear vexatious and unnecessary.*

In re Swan (2 Hem. & M. 34) *questioned.*

Testator dying in 1851, bequeathed the sum of 1,200*l.* (then in the hands of and due to his estate from his son) to the trustees and executors of his will, upon trust, to pay the income to his widow for life, and after her decease to divide the capital equally between his two grandchildren, one of whom was now a married woman. The income was paid to the widow for seventeen years; on her death the grandchildren applied for payment of their legacies, but the trustees refused to pay over the fund to them without a release and indemnity, alleging that some claim had been made by other beneficiaries under the will. The legatees refused to execute any release, and the trustees thereupon paid the fund into Court, under the Trustee Relief Act, deducting 33*l.* on account of costs, and stating in their affidavit that two of the testator's general legatees

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had set up a claim to part of the fund on the ground that his general estate was insufficient to pay their legacies in full.

Mr. H. R. Woodhouse, for the grandchildren, now petitioned for payment out, and asked that the trustees might be ordered to pay all costs.

Mr. Owen, for the alleged claimants, repudiated any interest in the fund, and asked for costs.

Mr. E. C. Willis, for the trustees, submitted that under the circumstances of an adverse claim having been made, they were entitled to a release and indemnity; and were also justified in paying the fund into Court, by the fact of one of the legatees being a married woman, and therefore entitled to an opportunity of asserting her equity to a settlement—*In re Swan* (2 Hem. & M. 34).

MALINS, V.C.—It was the duty of these trustees to pay over the 1,200*l.* immediately after the widow's death, and they had no right to call for any deed of release or indemnity, the receipt of the legatees being quite sufficient discharge. It is quite a mistake, but not an uncommon one, for executors and trustees to require or consider themselves entitled in all cases to a formal deed of release. Such a requisition in the present instance was quite unreasonable. After paying the income to the widow for seventeen years, there could be no question as to the title of these specific legatees, nor was there, in fact, any substance in the alleged claims. The payment into Court, under the circumstances, was, in my opinion, unnecessary and vexatious. It is now sought to justify the conduct of the trustees upon the authority of the decision in *In re Swan*. But I cannot accede to the proposition that it is the duty of trustees, in all cases of legacies to married women, to incur the expense of paying the fund into Court, merely to obtain the lady's formal consent to the payment of the money to her husband. I wish to be understood as declining to follow that decision. In the present case it appears there has been no application whatever by the trustees to the lady on the subject, although she was ready at any time to give her consent. The attempted justification, therefore, is a mere afterthought, and cannot be sustained. There must be an order for payment of the fund to the petitioners, and the trustees must pay the costs of this petition, together with the 33*l.*, and all other costs occasioned by their payment of the fund into Court.

NOTE.—This petition was afterwards taken on appeal before the Lords Justices, but their Lordships declined to hear the appeal, on the ground that it was in substance only an appeal for costs.

LORD ROMILLY, M.R., May 1, 1869.

THOMAS *v.* BUXTON.

38 L. J. Ch. 709; L. R. 8 Eq. 120.

Vendor and Purchaser—Prematurely paid Purchase-Money—Lien.

VENDOR AND PURCHASER.—*A purchaser of an estate under a decree of the Court was improperly kept out of possession by the plaintiff for more than a year after he had paid his purchase-money into Court*:—Held, *that the purchaser was entitled to have paid to him out of the purchase-money sums in respect of the following particulars, viz., first, an occupation rent for the period during which he had been improperly kept out of possession; secondly, arrears of tithes which he had paid; thirdly, damage to the estate by improper management; and fourthly, the costs of obtaining possession.*

The testator in the cause by his will devised to a trustee an estate called Mellingye, upon trust to sell and invest the proceeds of such sale and to pay the income therefrom arising to the plaintiff for life. The estate was put up for

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sale under the decree of the Court, and was purchased by the applicant, John Jose, for the sum of 1,305*l.*

By an order dated the 29th of June, 1867, the purchaser was ordered, on or before the 6th of August, 1867, to pay into Court, to the credit of the cause, his purchase-money together with 7*l.* 13*s.* 8*d.* for interest thereon from the 24th of June, 1867, and upon such payment being made the purchaser was to be let into possession of the rents and profits from the 24th of June, 1867; and all proper parties were to join in executing a proper conveyance to the purchaser. The purchase-money was duly paid into Court. The plaintiff, who was in possession of the estate, refused to let the purchaser into possession. By an order, dated the 10th of June, 1868, the plaintiff was ordered within seven days after the service upon him thereof to give up possession of the property to the purchaser. The plaintiff, however, refused to obey this order, and on the 22nd of July, 1868, the purchaser was put into possession by the sheriff, acting under a writ of assistance. The plaintiff had since become bankrupt.

The purchaser now applied to have paid to him out of the purchase-money the following sums, viz., first, 34*l.* 7*s.* for occupation rent from the 24th of June, 1867, to the 22nd of July, 1868; secondly, 2*l.* 4*s.* 7*d.* for tithes which had become due before the 24th of June, 1767, and had been paid by the purchaser; thirdly, 40*l.*, the estimated amount of damage to the estate from improper management during the period aforesaid; and fourthly, the costs of the proceedings to obtain possession and of that application.

Mr. Cookson, in support of the application, contended that the purchaser having paid his purchase-money before he had got possession had a lien upon the money for the sums in question—He referred to *Wythes* v. *Lee* (3 Drew. 396; 25 L. J. Ch. 177).

Mr. Rowcliffe, for the trustee, did not oppose the application except so far as it related to the costs of obtaining possession, the orders as to which had been obtained *ex parte*. He asked for an inquiry as to the amount of the alleged damage. The sums to be now allowed ought to be a charge upon the plaintiff's life interest.

The MASTER OF THE ROLLS.—I think the purchaser is entitled to what he asks. If you cannot agree as to the damage there must be an inquiry.

LORDS JUSTICES, June 1, 1869.

In re THE HUMBER IRONWORKS AND SHIPBUILDING COMPANY; THE WARRANT FINANCE COMPANY'S CASE.

38 L. J. Ch. 712; L. R. 4 Ch. 643; 20 L. T. 859; 17 W. R. 780.

Distinguished, *In re Joint Stock Discount Co.; Warrant Finance Co.'s case*, [1869] E. R. A.; 38 L. J. Ch. 565; 21 L. T. 345; 17 W. R. 1001 (M.R.): reversed, [1870] E. R. A.; 39 L. J. Ch. 122; L. R. 5 Ch. 86; 21 L. T. 626; 18 W. R. 102 (L.J.). Considered, *In re Contract Corporation; Ebbw Vale Co.'s case*, [1870] E. R. A.; 39 L. J. Ch. 363; L. R. 5 Ch. 112; 18 W. R. 222 (L.C.). Followed, *In re Imperial Land Co. of Marseilles; Ex parte Colborne and Strawbridge*, [1871] E. R. A.; 40 L. J. Ch. 93; L. R. 11 Eq. 478; 24 L. T. 255; 19 W. R. 223 (V.C.). Considered, *In re International Contract Co.; Hughes' claim*, [1872] E. R. A.; 41 L. J. Ch. 373; L. R. 13 Eq. 623; 26 L. T. 500; 20 W. R. 522 (V.C.). Distinguished, *Ex parte Findlay*, [1881] E. R. A.; 50 L. J. Ch. 696; 17 Ch. D. 334; 45 L. T. 61; 29 W. R. 857 (C. A.). Referred to, *Whittingstall* v. *Grover*, [1887] E. R. A.; 55 L. T. 213; 35 W. R. 4 (Ch. D.).

Winding-up of Company—Interest on Debts—Dividends.

COMPANY.—*When a company has been ordered to be wound up, the interest upon debts which carry interest ceases to run from the commencement of the*

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winding-up, unless the estate is sufficient to pay all debts in full, in which case alone subsequent interest can be claimed.

In the case of a solvent estate, the accounts between the company and creditors must be ultimately adjusted as if no winding-up had taken place.

This was an appeal by the official liquidator of the above company from an order of the Master of the Rolls.

The company was ordered to be wound up compulsorily on the 13th of March, 1866, at which time the Warrant Finance Company was a creditor for a principal sum of 25,000*l.*, upon which, if it should not be paid at a certain date, interest at 20*l.* per cent. per annum was to be payable. The date in question occurred shortly after the winding-up.

The assets of the company had not been realized, but it was doubtful whether they would suffice to pay the principal of all the debts owing at the date of the winding-up. The question, therefore, arose whether any dividend should be now paid in respect of interest on the debt of the Warrant Finance Company. The Master of the Rolls held that the dividends should be declared both upon the principal and upon the interest that had accrued at the time of declaring the dividends respectively, and that these dividends should be separately applied in reduction of the principal and interest. It appeared that there was a difference of practice in the various branches of the Court, and as will be seen from the jugdment of Lord Justice Selwyn, the Judges had been unable to agree upon a general rule.

Mr. Southgate and *Mr. Wickens*, for the appeal.—The rule which is invariably adopted in bankruptcy, viz., that when there is a deficiency of assets dividends should only be made upon the principal and the interest that has accrued at the date of the bankruptcy, ought to be adopted in the analogous case of a winding-up. Where there is no deficiency of assets no necessity for a rule arises, for in that case all interest must, no doubt, be paid. The winding-up ought not to relieve the shareholders of their liabilities. There was, therefore, no contest between creditors whose debts bore interest and those whose debts did not, in the cases of *In re the State Fire Insurance Company* (2 Hem. & M. 722; 34 L. J. Ch. 58); *In re the Herefordshire Banking Company* (36 L. J. Ch. 806; L. R. 4 Eq. 250); and *In re the East of England Banking Company* (38 L. J. Ch. 121; L. R. 4 Ch. 14); because in those cases there were assets for the payment of debts.

Sir R. Baggallay and *Mr. Eddis*, for the Warrant Finance Company.—The rule in Chancery is the rule which ought to be followed here, and not the rule in bankruptcy. Dividends ought therefore to be calculated upon all interest as well as principal, and should be applied in reducing interest first and then in reducing principal. They referred to *The Companies' Act*, 1862, *s.* 170; *The Orders of the 11th of November*, 1862, *r.* 72; *Kellock's case* (L. R. 3 Ch. 769); and *In re the Xeres Wine Company* (L. R. 3 Ch. 769).

Mr. Westlake, for other creditors.

Mr. Southgate, in reply.

Lord Justice Selwyn.—We have several times considered this case, for a meeting of the Judges was held with a view if possible of laying down a general rule. But, as it appeared that there was no uniform practice, no final decision was arrived at, it being thought advisable to leave the matter to be decided in the ordinary course of judicial proceedings. It is matter of surprise that after the number of years during which winding-up proceedings have taken place the question has never arisen for judicial decision. It now comes before us upon the recommendation of the Master of the Rolls, that we may decide, so far as the authority of this Court can decide, what rule is to be applicable in these cases. It is some satisfaction to us that, in forming a rule upon the point, we are not fettered by any rule which obliges us to depart from what appears to be the justice of the case.

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The case is, I believe, unaffected by any previous decision, for the cases which were alluded to—*Kellock's case* and *In re the Xeres Wine Company*—relate to an entirely different point, and the effect of the decisions in those cases is only this, that the right of a creditor having a mortgage security to proceed upon all his remedies at once was not taken away from him by any of the provisions of the Companies Act.

In the present case, what we have to consider is the position of the several creditors of the company, some of whom have a right to receive interest, others having debts not bearing interest. In the first place, as it seems to me, we must consider the case under two aspects, according as there is or there is not a surplus. I apprehend that in whatever manner the dividends may have been made, whether originally in respect of capital or in respect of interest, still, inasmuch as they will all have been made in process of law, and not under any new contract or agreement between the parties, the account ultimately must, supposing there should prove to be a surplus, be taken as between the company and creditors in the ordinary way, that is, in the manner pointed out in *Bowen* v. *Morris* (Cr. & Ph. 351; 10 L. J. Ch. 356), by treating the dividends as ordinary payments on account, and applying them, in the first place, in payment of the interest due at the respective dates of declaring them, and next in reduction of principal. This disposes of all question where there is a surplus, and there is no doubt or difficulty about it.

The doubtful question is when the estate is insolvent. Now it has been admitted, very properly, that, as to interest due at the date of the winding-up, there can be no doubt. Suppose, at the date of the winding-up, a creditor has 1,000*l*. due to him for principal and 100*l*. for interest, he would prove for 1,100*l*., and if a dividend of 10*s*. in the pound were declared immediately, he would be entitled to 550*l*., because his interest due at the date of the winding-up is just as much a debt as the principal. Suppose, at the same time, a creditor has a debt of 1,000*l*. which, like that of the respondents in this case, has no interest due upon it, although it carried interest, and a dividend of 10*s*. in the pound were declared, he would, in my opinion, be only entitled to 500*l*. That would obviously be the case if the Court could do what it would wish to do, namely, to realize all the assets immediately and distribute them among the creditors. It is perhaps difficult to suppose that in any case the assets could be realized so immediately, but if they consisted merely of a sum of money in the banker's hands which could be paid the next day, that would be the course of proceeding. Justice, I think, requires that that course of proceeding should be followed, and that no person should be prejudiced by the accidental delay which, in consequence of the form and proceedings of the Court and other circumstances, actually occur in realizing the assets, but that all the money of an insolvent estate, being realized as speedily as possible, should be applied equally and rateably in payment of the debts as they existed at the date of the winding-up. I think, therefore, that nothing should be allowed for interest from that date. Consequently, in the present case, this debt of 25,000*l*., which had no interest due upon it at the date of the winding-up, should stand as a debt for that sum, and for no more. I have already guarded myself from being supposed to say that the Court takes upon itself to alter the right of the creditors to any further extent, or to deprive the respondents of their right to interest at the full rate of 20*l*. per cent, if and when there is a surplus to pay it. I think that as the tree falls, so it must lie. It must be ascertained what are the debts which existed at the date of the winding-up, and all dividends in the case of an insolvent estate must be declared in respect of the debts so ascertained. It will, of course, be understood that the rule we now lay down is applicable to all cases under the recent act where creditors' actions are stayed.

GIFFARD, L.J.—I think it quite clear that the 170th section of the Companies' Act has no reference to the matter before us. Nor can I consider that there is anything in *Kellock's case* which at all affects the present question.

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The only argument of any force which has been adduced in favour of computing interest subsequently to the winding-up is that it has been the rule which has been adopted as to dead men's estates. For some reason or other, dead men's estates have always been assumed to be solvent, and they have been wound up on that footing; but so unjust has that been found that it has been necessary to have a positive enactment to give interest from the date of the decree to simple contract creditors whose debts do not bear interest. I think therefore that the reason of the thing is rather against the rule which has been adopted as to dead men's estates than in favour of it. As to the rule which my learned Brother has laid down, it is the rule in bankruptcy. That rule was, it has been said, Judge-made law; but it was made after great consideration, and no doubt because it works with equality and fairness between the parties; and if we are to consider convenience, it is quite clear that where an estate is insolvent, convenience is all in favour of stopping the computation of interest at the date of the winding-up. For these reasons, I am of opinion that dividends ought to be paid on the debts as they stood at the time the winding-up commenced, for when the estate is insolvent, this rule has the effect of distributing the assets in the fairest way. When the estate is solvent, the rule works with equal fairness, because as soon as it is ascertained that there is a surplus, the creditor whose debt carries interest is remitted to his original right under his contract; and on the other hand a creditor who is not entitled by his contract to interest does not get any. Another reason may be added. I do not see with what justice interest can be computed in favour of creditors whose debts carry interest when other creditors are stayed from recovering judgment and so obtaining a right to carry interest.

LORDS JUSTICES, April 16, 17, 1869.

In re THE GENERAL ROLLING STOCK COMPANY; *Ex parte* THE ALLIANCE BANK.

38 L. J. Ch. 714; L. R. 4 Ch. 423; 20 L. T. 685; 17 W. R. 631: affirming, [1869] E. R. A. 159; 38 L. J. Ch. 151; 17 W. R. 248 (M.R.).

Referred to, *Bank of Ireland* v. *Perry*, [1872] E. R. A.; 41 L. J. Ex. 9; L. R. 7 Ex. 14; 25 L. T. 845; 20 W. R. 300 (Ex.).

Bill of Exchange—Collateral Securities—Appropriation.

BILLS OF EXCHANGE.—*Where securities are deposited for the purpose of securing bills, the parties may afterwards at any time, before both are insolvent and their estates are in a state of forced liquidation, deal with the securities as they please, notwithstanding that the bills have been in the meantime negotiated, if the bill-holders have no notice of the existence of the securities.*

Semble—*The principle of* Ex parte Waring (19 Ves. 345) *applies not only where there are two estates being wound up in bankruptcy, but also where the insolvent estates are those of a company in course of winding-up, and of a deceased person.*

The R. S. Co. advanced to M. a sum of money, in consideration of which M. accepted bills to the amount of 21,000*l.*, *and deposited shares with the company to secure payment of the bills. Shortly before these became due, it being intended to extend the period of the loan, the company wrote to M. requesting him to accept a new set of bills to replace the former set. M. accordingly accepted the new set, and gave them to the company. The former set remained outstanding and unpaid in the hands of third parties by whom they had been discounted without notice of the securities. The company was afterwards ordered to be wound up, and its estate was insolvent, as also was*

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that of the acceptor, who had died in the meantime:—Held, *that the holders of the former set had no claim upon the securities; though* (semble) *they would have had a claim if the second set had never been accepted.*

This was an appeal from the decision of the Master of the Rolls (reported 38 L. J. Ch. 151), whereby the Alliance Bank were held not entitled to have certain securities applied in payment of their claims upon bills accepted by the company.

The facts are stated in the former report, to which we may here add that the fifth set of bills for 21,000*l.* was accepted by L. Murray, in accordance with an application made to him by the secretary of the Rolling Stock Company by a letter, dated the 8th of September, 1864, as follows:

"I beg to inclose you drafts for your acceptance for 21,000*l.*, being in place of those falling due on Monday next, the 12th inst., and at the same time urge upon you the necessity to duly accept and return them per return of post. Hoping you will not fail to do so," &c.

L. Murray, in returning the bills accepted, stated that he did so in accordance with the above letter. At that time, it will be seen, the bank held the 16,000*l.* of bills of the fourth set, upon which they founded their present claim. It was stated, though not proved, that Murray's estate was substantially insolvent, and it was admitted that the Rolling Stock Company would pay but a very small dividend on their debts.

The Alliance Bank appealed.

There was no application before the Court by any other party than the Alliance Bank.

Sir R. Baggallay and *Mr. Eddis*, for the Alliance Bank, contended, as in the Court below, that the case of *Ex parte Waring* (19 Ves. 345) was decisive in their favour, so as to give them the right to have the proceeds of the securities applied in payment of the fourth set of bills; and that it was not necessary that both the estates of drawer and acceptor should be in bankruptcy —*Powles* v. *Hargreaves* (3 De Gex, M. & G. 430; 23 L. J. Ch. 1).

Mr. Jessel and *Mr. Winterbotham*, *Mr. Wickens*, *Mr. Davey*, and *Mr. Lawrance*, for various holders of the fifth set, opposed the claim of the Alliance Bank upon the ground that the transaction of the 8th of September, 1864, had the effect of transferring the security of the shares, &c. from the fourth set to the fifth set. They argued, equally with the appellants, that *Ex parte Waring* applied, but, as they contended, it was in their favour, and not in favour of the appellants. The doctrine of that case was first laid down by Lord Eldon to meet a dead lock which arose in deciding the equities between two bankrupt estates. That dead lock existed with exactly the same force in such cases as the present. They cited *Trimmingham* v. *Maud* (38 L. J. Ch. 207; L. R. 7 Eq. 201).

Mr. Roxburgh, for Murray's representatives, was indifferent whether the Alliance Bank or the holders of the fifth set of bills obtained the benefit of the securities, so long as one of them, and only one, had it; but in other respects supported the contention of the appellants.

Mr. Southgate (*Mr. Bagshawe* with him), for the official liquidator of the Rolling Stock Company, contended, that as there was not a double bankruptcy, *Ex parte Waring* (*ubi supra*) had no application. Rules in Bankruptcy had no application in winding-up cases. Neither the Alliance Bank nor the holders of the fifth set had any right to the securities. They supported the order of the Master of the Rolls; and relied on *Laycock* v. *Johnson* (6 Hare, 199; 16 L. J. Ch. 350); *In re the Joint-Stock Discount Company; Loder's case* (L. R. 6 Eq. 491; 37 L. J. Ch. 846); *Inman* v. *Clare* (John. 769); *In re Barned's Bank; Ex parte Stephens* (L. R. 3 Ch. 753).

Sir R. Baggallay, in reply.

SELWYN, L.J.—The Master of the Rolls did not in his judgment in this case question the authority of the case of *Ex parte Waring*. On the contrary,

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he referred to it as still governing all cases which fall within the scope of its authority. It certainly was not the intention of the Lord Chancellor and myself, in *Ex parte Stephens*, to question its authority in any way. The principle upon which *Ex parte Waring* proceeds appears very clearly from Lord Eldon's judgment, and particularly from two short passages to which I may refer. He says (p. 349), "If these bill-holders are to have payment in preference to other creditors, it must be by the effect of an equity between the two houses rather than by any demand directly in their own right upon any fund in the hands of Brickwood & Co." Again, he adds (p. 350), much in the same spirit, "Having regard to the demands of all the creditors and the bankrupts, in this circuitous way, I think the bill-holders must be paid, not as having a demand upon these funds in respect of the acceptances they hold, but as the estate of Brickwood & Co. must be cleared of the demand by these acceptances, and the surplus, after answering that demand, must be made good to Bracken & Co."

We see, then, that in these cases the claims of the bill-holders depend not upon any contract to which they are parties; for, in the case of *Ex parte Waring*, as in this case, the bill-holders had not, when they took the bills, even any notice of the existence of the securities the benefit of which they claimed; but their right depends upon the accidental concurrence of circumstances giving rise to such a complication as that which existed in *Ex parte Waring*, one which can only be solved by one particular application of the securities or their proceeds. To give rise to such a state of things there must be two insolvent estates, and there must be a forced administration of both estates. Until these circumstances concurrently exist the two persons, parties to the original contract, have a perfect right to deal with the securities, which one of them has deposited with the other, in any manner they think fit. That is what was intended to be decided, and, as I think, was decided by the Lord Chancellor in *Ex parte Stephens*, when he said, "The bill-holder might have raised an equity, but even then he could not raise it till he had given the person who gave the guarantee notice of his claim, and until that time they might deal with all the rights as between them and the acceptors in any way they thought fit."

Applying, then, these principles, which seem to me clearly established, to the facts of the present case, we find, in the first place, that there was here a contract between Mr. Murray and the Rolling Stock Company originally for a loan of 12,000*l.* and a bonus of 2,000*l.*, which by means of the sum of 3,000*l.* (which has been called a fine) and some subsequent bonuses of 1,500*l.* and 2,500*l.* became raised to the sum of 21,000*l.*, a sum which was secured by the fourth and fifth sets of bills.

Under the original contract of the 13th of March, 1863, for the 12,000*l.* and bonus of 2,000*l.*, Mr. Murray agreed to give his acceptances, and to deposit as a collateral security for their payment certain railway shares and other property. That is to say, the shares were a collateral security for the loan which was primarily secured by the acceptances. I need not go through the details of the subsequent transactions in respect of which the subsequent bonuses were agreed upon; but, applying the principle of *Ex parte Stephens*, it seems to me clear that Mr. Murray and the Rolling Stock Company, the parties to that contract, were at liberty at any time to deal with the securities, the subject-matter of the contract, as they thought fit, wholly irrespective of any claim by holders of the bills. The question which we have now to decide is, whether they have so dealt with the securities as to constitute at the date of the insolvencies a state of circumstances which can support a claim such as that which is raised upon the present occasion."

The whole question seems to me to depend upon the construction which ought to be put upon the letter of the 8th of September, 1864. That letter—[which his Lordship read]—contains a plain statement that the bills, the particulars of which are stated in the letter, were to be accepted by Mr. Murray

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in the place of those falling due on the 12th of September. The parties being at that time fully entitled to deal with the securities as they thought fit, and without regard to any interest existing in any bill-holder, entered into an arrangement the substance of which, I think, clearly was this: Mr. Murray was to accept (and he did accept) the fifth set of bills for 21,000*l.*, and they were to replace the fourth set of bills. The Rolling Stock Company after this could not possibly have a right to say that they could retain the securities as security for the fourth set of bills, for the very essence of this transaction was that they should put an end to Mr. Murray's liability on the fourth set, and they were bound in good faith and honour to do so. The agreement, if it had been put into a formal shape, would have been, that the fourth set of bills should be cancelled and should be delivered over in the cancelled state to Mr. Murray. In that case clearly it could not have been said that the security was a continuing security in respect of those bills, for they would cease to exist; and the fact that Mr. Murray subsequently failed to pay the fifth set cannot, in my opinion, revive any right in respect of the fourth set. The appellants are holders of some of the fourth set, the security in respect of which was entirely put an end to by the transaction between Mr. Murray and the company at a time when those parties were fully at liberty to deal with the security as they thought fit. Consequently, the state of things with regard to the securities, which alone could bring them within the principle of *Ex parte Waring*, never could arise so as to benefit the appellants.

I think, therefore, that the Master of the Rolls was quite right in refusing the claim of the appellants. That is the only point before us; and I think it would be dangerous to go further in this case, particularly when I consider the mode in which proceedings in these winding-up cases are necessarily conducted. I therefore only decide the case of the Alliance Bank and nothing more. This appeal must be refused, with costs.

GIFFARD, L.J.—The order of the Master of the Rolls must be affirmed, although I confess I do not accede to the reasons which seem to have led his Lordship to the conclusion at which he arrived. The simple ground upon which I found the affirmance of the order is this, that the Alliance Bank ought not to be paid out of the proceeds of the security, because as between the two estates there is no contract authorizing the application of the proceeds of these securities in payment of the bills which the Alliance Bank holds. Now, I certainly have no hesitation whatever in saying that *Ex parte Waring* and *Powles* v. *Hargreaves* apply to such insolvencies as exist in the present case, as between the insolvent estate which is being wound up and the insolvent estate of Mr. Murray, whose personal representative appears here admitting insolvency and submitting to be bound. I possibly should have thought that the decision of the Master of the Rolls could not stand if the matter rested entirely upon the state of things which existed when bills of the fourth set were drawn; but that state of circumstances does not exist. The letter of the 8th of September, 1864, in my opinion, created an entirely new contract. After that letter the state of facts was such that as between Mr. Murray and the Rolling Stock Company, the latter had no right to apply these securities otherwise than in payment of the bills, which were accepted on the footing of that letter. I consider that to be the only contract which affects the deposit of securities. It was made at a time when these parties were both in a position to enter into any contract they might think fit without regard to the bill-holders, and I am of opinion that it excludes the Alliance Bank.

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LORD ROMILLY, M.R., July 28, 1869.

BROWN v. OAKSHOTT.

38 L. J. Ch. 717.

Sale by Auction—Opening Biddings—30 & 31 Vict. c. 48. s. 7.

AUCTIONEERS AND VALUERS. VENDOR AND PURCHASER.—*Neglect on the part of an auctioneer to ascertain the reserved price before the commencement of a sale, is not such "improper conduct in the management of the sale" as will authorize the Court to open the biddings.*

Adjourned summons.

This was an application under the 7th section of the 30 & 31 Vict. c. 48, which forbids the Court to open biddings except on the ground of "fraud or improper conduct in the management of the sale."

On a sale by auction one of the lots was knocked down at 9,000*l.*, the exact amount of the reserved price. It afterwards came to the knowledge of the persons interested in the property sold that there were persons who would have offered a much higher sum if they had known that the reserved bidding had been reached. They now sought therefore to open the biddings on the ground of improper conduct and undue haste in the management of the sale.

It appeared that the auctioneer had received a note of the reserved bidding in a sealed envelope, which he was instructed not to open "until the time of sale." He knocked down the lot at 9,000*l.*, after going through the usual forms and allowing the usual time to pass before the fall of the hammer, and then proceeded to open the envelope and ascertain whether the reserved price had been reached.

Sir R. Baggallay and *Mr. Briggs*, in support of the summons, argued that the auctioneer ought to have ascertained the reserved price before the commencement of the sale, and then exercised his discretion whether to state when the reserved price was reached, for such an announcement was often an encouragement to bidders.

Sir Roundell Palmer and *Mr. Higgins*, for the purchaser; and

Mr. Southgate and *Mr. W. W. Karslake*, *Mr. Roxburgh* and *Mr. Lindley*, for various parties to the suit, were not called upon.

The MASTER OF THE ROLLS said, it was clear that the act meant only to provide for the case of grossly improper conduct. If, for example, persons intending to bid had been deceived as to the time when the sale was to commence, that would be a reason for opening the biddings. There was no ground for impeaching the management of the sale in the present case, and the summons must be dismissed.

LORDS JUSTICES, May 3, 1869.

HEARD v. PILLEY.

38 L. J. Ch. 718; L. R. 4 Ch. 548; 21 L. T. 68; 17 W. R. 750.

Considered, *Cave* v. *Mackenzie*, [1877] E. R. A.; 46 L. J. Ch. 564; 37 L. T. 218 (M.R.). Referred to, *Chattock* v. *Muller*, 1878, 8 Ch. D. 177 (V.C.). Considered, *James* v. *Smith*, [1891] E. R. A.; [1891] 1 Ch. 384; 63 L. T. 524; 39 W. R. 396 (Ch. D.): affirmed, 1891, 65 L. T. 544 (C. A.). Referred to, *Rochefoucauld* v. *Boustead*, [1897] E. R. A.; 66 L. J. Ch. 74; [1897] 1 Ch. 196; 75 L. T. 502; 45 W. R. 272 (C. A.).

Specific Performance—Statute of Frauds—Contract in Writing—Agreement by Agent, Allegation of—Demurrer.

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SPECIFIC PERFORMANCE. VENDOR AND PURCHASER.—*A bill for specific performance of a contract for a twenty-one years' lease alleged to be entered into by defendant P, as agent for the plaintiff, with the other defendant S, stated that P. had informed the plaintiff that S. had written him a letter constituting the contract, and further stated that P. had entered into "the said" contract as agent for and on behalf of the plaintiff*:—Held, *on demurrer, affirming the decision of* Malins, V.C., *that the bill contained a sufficient averment of a contract in writing to satisfy the Statute of Frauds, and that it was not necessary that the agency of P. should be constituted by writing.*

Bartlett *v.* Pickersgill (4 East, 557, n. b) *doubted.*

The bill was filed against William Pilley and Samuel Sugden, praying for a declaration that Pilley had entered into an agreement with Sugden for a lease of premises, No. 91, Fore Street, in the city of London, as the agent for and on behalf of the plaintiff, and for specific performance of the said agreement.

The bill stated that the plaintiff had from time to time purchased leasehold and other property for the purpose of selling or letting the same at a profit, and that Pilley had on one occasion assisted him in negotiating and effecting such purchases; that Pilley, in his character of property-tax collector for the wards of Cripplegate Within and Without, had become acquainted with the terms on which the lease of the premises in question was held; and on the 22nd of September, 1868, had called upon the plaintiff and stated to him that the unexpired lease, a year and a half, would be sold for a very trifling sum, and that he had ascertained from Sugden, the owner, that they would be let for 200*l.* per annum, and that they would underlet for an advanced rent, and he offered to obtain an agreement for a lease from Sugden, and to purchase the interest of the present lessee of the premises as agent for the plaintiff.

The fourth paragraph of the bill stated, amongst other things, that the plaintiff on the 8th of October authorized Pilley to offer 200*l.* per annum to Sugden for the premises for twenty-one years, and on the 20th of October Pilley informed the plaintiff that Sugden had written and sent to him a letter, dated the previous day, accepting the offer, and agreeing to let the premises to him for twenty-one years from the expiration of the existing term, at the rent of 200*l.* per annum.

The plaintiff also authorized Pilley to offer Robert Brown, the tenant, 100*l.* for the premises, and such offer was afterwards made to Brown and accepted by him, and an agreement in writing to that effect was entered into and signed by and between Brown and Pilley, dated the 21st of October, 1868.

The bill also contained the following paragraphs:

5. The said William Pilley entered into the said agreement with the said Samuel Sugden and Robert Brown respectively, as the agent for and on behalf of the plaintiff, and he afterwards paid the said sum of 100*l.* to the said Robert Brown, on the understanding that the same would be repaid to him by the plaintiff.

8. Before the said William Pilley entered into the said agreement with the said Samuel Sugden as such agent as aforesaid, the said James Rowe Heard (the plaintiff) asked him why he did not take a lease of the said premises himself, and the said William Pilley stated that he had not capital to speculate with, as the said J. R. Heard well knew, and that he had not disclosed the name of the said J. R. Heard as his principal, because he found he had some personal influence in the negotiations, and that he thought he should better succeed for the said J. R. Heard by using his own name, and that they could easily make arrangements to transfer the premises to him afterwards.

9. After the said W. Pilley had obtained a letter from the said S. Sugden, agreeing to let the said premises to him, as aforesaid, he had a conversation with Alfred Heard, a brother of the said J. R. Heard, upon the subject, and he then, after giving the said letter to the said Alfred Heard to read, said, "Tell your brother, as he will be glad to hear it." meaning thereby that the said agreement

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was entered into for the benefit of the said J. R. Heard, and not for the said W. Pilley.

The bill further stated, that Pilley now threatened, and intended to deal with the premises as his own, and that Sugden refused to recognize the plaintiff in the matter, and it therefore prayed in the terms already mentioned.

The defendants Pilley and Sugden demurred severally, and the demurrers came on for hearing before Vice Chancellor Malins, who, on the 22nd of February, 1869, overruled both demurrers. The defendants severally appealed from his Honour's decision.

Mr. Glasse and *Mr. Jolliffe*, for the defendant Pilley, and

Mr. Lawrence, for Sugden, supported the appeals.—They contended that there was in the bill no sufficient allegation of a contract in writing to satisfy the Statute of Frauds; and, further, that there was no allegation that the appointment of Pilley to act as the plaintiff's agent, was in writing. They cited—*Bartlett* v. *Pickersgill* (4 East, 577, note (*b*); 1 Cox, 15; 4 Burr. 2255; 1 Eden. 515); *Sug. Vend. & Pur.* 703 (14th ed.)).

Mr. Cotton and *Mr. Berkeley*, for the plaintiff, were not called upon on the first point.—On the second they contended that *Bartlett* v. *Pickersgill* had no application. In that case the defendant had bought the estate in his own name, and it had been conveyed to him, and after the conveyance was executed the plaintiff filed his bill to compel him to convey the estate. They referred also to—*Willis* v. *Willis* (2 Atk. 71); *Lees* v. *Nuttall* (3 L. J. Ch. 124; 2 M. & K. 284); *Taylor* v. *Salmon* (4 Myl. & Cr. 142).[1]

Mr. Jolliffe was heard in reply.

SELWYN, L.J.—In this case two questions have been raised: first, whether there is any sufficient allegation in the bill that an agreement was in fact entered into by the defendant Pilley in writing, so as to constitute it an agreement which could be enforced, having regard to the provisions of the Statute of Frauds; and, secondly, as between the plaintiff and the defendant Pilley, whether there is any such allegation of agency as is consistent with the provisions of that statute, and can be enforced. With regard to the first point, we did not think it necessary to hear the respondent's counsel; but it appears to me, that, although there has been in this bill an unfortunate departure from the common forms of pleading, still there is a statement in the fourth paragraph relating to a letter, though it is so stated as not to amount to a positive allegation. Then, in the fifth paragraph, it is stated, "The said William Pilley entered into the said agreement with the said Samuel Sugden and Robert Brown respectively as the agent for and on behalf of the said James Rowe Heard." And coupling that statement with what is afterwards stated in the eighth and ninth paragraphs, I think there is sufficient allegation of an agreement and an agreement constituted by the letter written and signed by the defendant Sugden, so as to render it impossible for him to set up a case that there is no contract in writing relating to this property. Then, with regard to the agency of Pilley. In the first place, the fact of the agency of Pilley is distinctly stated: "The said William Pilley entered into the said agreement with the said Samuel Sugden and Robert Brown, respectively, as the agents for and on behalf of the said James Rowe Heard, and afterwards paid the sum of 100*l.* to the said Robert Brown, on the understanding that the same would be repaid to him by the said James Rowe Heard." Now, although it may be true that he afterwards disputed or questioned that agency, the fact must be taken as clear and indisputable. Then this bill is brought into the category of those very common bills—a bill for specific performance alleging a contract entered into by the owner of the property, a contract by letter or agreement, but that the person with whom he entered into it was the agent of the plaintiff, and filed by the principal against the agent, and against the person with whom that agent has entered into the contract. That is a bill of a very ordinary description, and it is a startling

(1) See *Coles* v. *Trecothick* (9 Ves. 250).

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proposition to say that, unless the bill alleges that the agency was constituted by writing, such a bill cannot be sustained.

The only authority which has been cited in support of that proposition is *Bartlett* v. *Pickersgill*. It appears to me that that case does not govern the present one, because that is a case in which the conveyance was executed, and in which it appears, from the short statement of the case, in a note in 4 *East* that the bill was a bill by the plaintiff seeking for a conveyance to the plaintiff as against the defendant, to whom that conveyance had already been made. The statement is, "That the defendant bought an estate for the plaintiff, but there was no written agreement between them, nor was any part of the purchase-money paid by the plaintiff. The defendant articled for the estate in his own name, and refused to convey to the plaintiff, so this bill was brought to compel a conveyance." That is, after the conveyance had been executed, the bill was filed by the plaintiff, by one person on one side, and only one, and the defendant on the other, seeking for a conveyance of that estate from the defendant to whom the conveyance was made. That entirely distinguishes that case from the present, which is an ordinary suit by a principal, bringing before the Court an agent and the person with whom the contract had been entered into. Assuming the case of *Bartlett* v. *Pickersgill* to be good law, it cannot, I think, be considered as laying down any such general proposition as is contended for by the defendants. At all events, it would be subject to qualifications, especially to those which are mentioned by Lord St. Leonards, in page 118 of his book; and it is also subject to the qualification established by Lord Hardwicke in the case referred to of *Willis* v. *Willis*, where his Lordship says, "There is another way of taking a case out of the statute, and that is by admitting parol evidence, within the rules laid down in this Court, to shew the trust from the mean circumstances of the pretended owner of the real estate or inheritance, which make it impossible for him to be the purchaser." It is not altogether unworthy of remark, that the very passage Mr. Jolliffe referred to in his reply tends to shew something like that state of circumstances existing in the present case, for he says the bill shews in the eighth paragraph that Mr. Pilley said, "that he had not capital to speculate with, as the said J. R. Heard well knew." I think, therefore, in this case we must take it that there is a clear and express allegation of the agency of Pilley. I cannot at all accede to the argument urged in reply, that under those circumstances when the agent goes to the principal and says, "I will go and buy an estate for you," it is not a fraudulent act on his part afterwards to buy the estate for himself, and then deny the agency. I think that would be an attempt to make the Statute of Frauds an instrument of fraud; therefore I agree with the judgment of the Vice Chancellor, and I think that both of these demurrers were properly overruled, and both petitions of appeal must be dismissed with costs.

GIFFARD, L.J.—In this case, although the fourth paragraph of the bill would not amount to a sufficient allegation of agreement between the plaintiff and the defendant, I am satisfied that when you take in connexion with that the fifth, eighth, and ninth paragraphs, there is a clear allegation of an agreement in writing signed by Sugden. That being so, the only other question is that which is raised by the case of *Bartlett* v. *Pickersgill;* and certainly I must say, there having been no conveyance from Sugden to Pilley, the whole object in point of fact of the bill is to enforce specific performance between Heard, the plaintiff, and Sugden; and Pilley is brought here simply to be bound, and for nothing else, and no conveyance is sought from him. I cannot help saying, as regards the case of *Bartlett* v. *Pickersgill*, that it seems to be quite inconsistent with all the authorities of this Court, which proceed on the footing that it will not allow the Statute of Frauds to be made an instrument of fraud. Therefore, the appeal must be dismissed with costs.

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LORD ROMILLY, M.R., May 6, 25, 1869.

NORRIS v. THE CALEDONIAN INSURANCE COMPANY.

38 L. J. Ch. 721; L. R. 8 Eq. 127.

Referred to, *In re Leslie*, [1883] E. R. A.; 52 L. J. Ch. 762; 23 Ch. D. 552; 48 L. T. 564; 31 W. R. 561 (Ch. D.).

Mortgage—Policy of Assurance—Premiums—Priority.

INSURANCE. MORTGAGE.—*S. being entitled to a bond and judgment, mortgaged them to V. A policy of insurance was afterwards assigned to S. to secure the judgment debt and other moneys, and the premiums to be paid on the policy. S. paid the premiums on the policy till his death, after which his legal personal representative continued to pay them, under an order of Court made in an administration suit, till the policy fell in*:—Held, *that the premiums paid by the legal personal representative, together with interest (but not those paid by S. himself), must be repaid out of the policy money in priority to the debts secured.*

In February, 1846, Mr. Lalor, who owed Mr. Sadleir 900*l.*, gave him a bond to secure that sum and interest at 6*l.* per cent. per annum, together with the further security of a judgment; and in 1847 Mr. Sadleir, being indebted to Mr. Vincent Scully in 8,000*l.*, gave him an equitable assignment of the bond and judgment as security for that debt.

In April, 1850, the administratrix of Mr. Lalor (who had died intestate in 1846) assigned to Mr. Sadleir a policy of assurance granted by the Caledonian Insurance Company for the sum of 5,000*l.* less one shilling as security for satisfaction of the judgment debt, and for the repayment with interest of the balance of certain other accounts, and of the premiums to be paid by him to keep up the policy, and Mr. Sadleir covenanted to keep up the policy. The premiums were paid by Mr. Sadleir up to the time of his death, and after that by his legal personal representative.

Mr. Sadleir died in February, 1856, and the present plaintiff (Mr. Norris) became his legal personal representative, and instituted a suit in Ireland for the administration of his personal estate. In that suit the payment of the premiums was ordered to be continued, and Mr. Vincent Scully was declared to have a lien on the policy to the extent to which it was a security for satisfaction of the bond and judgment.

Mr. Norris continued to pay the premiums until the policy fell in. This took place in September, 1867; and in February, 1868, the money due upon it, amounting (after deduction of the expenses of the insurance company) to 4,716*l.* 5*s.* 9*d.*, was paid into Court.

This amount was insufficient for the payment of the various sums secured on the policy; and the question now argued was, whether all these sums should abate rateably, or whether the premiums should be fully repaid with interest, in priority to the other charges.

Mr. Benjamin Hardy and *Mr. Napier Higgins*, for the plaintiff, argued that money paid to prevent the policy from dropping was in the nature of salvage, and ought to be a first charge on it. They cited—*Clack* v. *Holland* (19 Beav. 262; 24 L. J. Ch. 13); *West* v. *Reid* (2 Hare, 249; 12 L. J. Ch. 245).

Mr. Smart appeared for the Caledonian Insurance Company.

Mr. Bird and *Mr. Ramadge*, appeared for other parties interested.

Mr. Mackeson and *Mr. Wellington Cooper*, for Mr. V. Scully, argued that what a mortgagor paid for the benefit of the mortgaged premises could not be charged on them in priority to the mortgage debt, and that the legal personal representative of the mortgagor could not be in a different position from the mortgagor himself. They cited—*Otter* v. *Lord Vaux* (2 Kay & J. 650; 26 L. J. Ch. 128). The cases of *Drydale* v. *Piggott* (8 De Gex, M. & G. 546;

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25 L. J. Ch. 878); *Frazer* v. *Jones* (5 Hare, 475; 17 L. J. Ch. 353); *Hill* v. *Trenery* (28 Beav. 16); and *Beresford* v. *Beresford* (28 Beav. 292), were also referred to.

The MASTER OF THE ROLLS (*May* 25), after stating the facts, said: On the part of Mr. V. Scully, it is argued that moneys paid by a mortgagor to keep up the mortgaged property cannot be claimed against the mortgagee; that a prior mortgage paid off enures for the benefit of the subsequent mortgagee; and that the payment of ground-rent, quit-rents and the like can never be claimed against the mortgagee; and I assent to those propositions. Although I do not think that this is exactly the same case, I am of opinion that the premiums paid during the life of Mr. Sadleir cannot now be charged on the policy money. But I think that in this case the legal personal representative does not stand in the same situation as Mr. Sadleir himself did; and I also think that the rights of the parties are in a great degree settled by the proceedings in Ireland. When the plaintiff became the legal personal representative of Mr. Sadleir, he was not compellable to keep up the policy of assurance and pay the premiums out of his own money, or even out of the estate of Mr. Sadleir. Indeed, he could not properly, without the sanction of the Court in which he had instituted proceedings, take the assets belonging to the general creditors for the purpose of keeping on foot a security which was specifically mortgaged to others. He was in the position of a trustee, and the trusts were, in the first place, to keep up the policy, and then to distribute the proceeds amongst the persons who had charges upon it according to their priorities. He might have borrowed money on the security of the policy for the purpose of paying the premiums; but the persons to whom or for whose benefit the policy was assigned could not require that the money so raised should be paid out of the general estate of Mr. Sadleir. The matter seems to me to have been thus settled by the ruling of the Master in the Irish suit, which bears date the 30th of May, 1860. That order contains a direction in these words: "Continue to pay the premiums until further order." Assuming that Mr. Norris might have given a preference to one class of creditors over another (which, after the suit was begun, appears to me to be very doubtful), it is certain that this is never done by the Court. Consequently, the order of the Master under which Mr. Norris paid the premiums till the policy fell in cannot be considered as altering the rights of the parties, or giving any advantage to Mr. V. Scully over the other creditors of Mr. Sadleir which he did not already possess.

I am of opinion, therefore, that the first charge on the policy moneys is the repayment of the premiums paid for its maintenance by the plaintiff, together with interest at 5*l.* per cent. per annum.

MALINS, V.C., June 11, 25, 1869.

In re WATMOUGH'S TRUSTS.

38 L. J. Ch. 723; L. R. 8 Eq. 272; 17 W. R. 959.

Referred to, *Hawkins* v. *Allen*, [1871] E. R. A.; 40 L. J. Ch. 23; L. R. 10 Eq. 246; 18 W. R. 748 (V.C.).

Will—Bequest to build for Charitable Purposes—Tendency to bring Land into Mortmain.

CHARITY.—*A bequest of money for the purpose of building involves the acquisition of land whereon to build, unless the contrary is expressly ordered in the will, and is therefore void.*

A testator bequeathed a fund to his executors "to be used towards the erection of a new chapel instead of the one now in use when such erection shall

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take place ":—Held, *that these words did not exclude the acquisition of land, and that the gift was void.*

Booth *v.* Carter (L. R. 3 Eq. 757) *not followed.*

The Rev. Abraham Watmough, of St. Helen's, Wesleyan minister, by his will gave all his personal property into the hands of his executors for the use of his wife for her life, " and the rest of my property I leave in the hands of my executors to be given, used or employed by them towards the erection of a new Wesleyan chapel, in the town of St. Helen's, instead of the one now in use when such an erection shall take place." Testator died in 1863, and his wife in 1868. The executors paid a sum of 534*l.* into Court. This was a petition by the trustees of the chapel for payment to them of the said sum. The evidence shewed that at the date of the will there was no actual scheme for the erection of a new Wesleyan chapel, though the necessity of building one had been discussed by the testator and others; that in 1867 a site had been purchased, and a new chapel had been since erected thereon. The petitioners submitted that they were entitled, as trustees of the new chapel, to the said sum of 534*l.*, " to be applied by them towards payment of the amount then still owing for building the said new chapel."

Mr. Glasse, for the petitioners.—This is a good bequest; the trusts of the will do not involve the necessity of acquiring land, and so bringing it into mortmain—*Booth* v. *Carter* (L. R. 3 Eq. 757); *Sewell* v. *Crewe-Read* (L. R. 3 Eq. 60; 36 L. J. Ch. 136); *Philpott* v. *St. George's Hospital* (6 H.L. C. 338; 28 L. J. Ch. 657; 27 Beav. 107); *Dixon* v. *Butler* (3 You. & C. Ex. 677). Where executors have the option between two courses, one of which invalidates their testator's bequest and the other confirms it, they must choose the latter—*The Attorney General* v. *the Bishop of Chester* (1 Bro. C.C. 444).

Mr. Rowcliffe with him.—How could money be applied to the purchase of land when it is directed to be used only " when the erection of a chapel shall take place "? Such a course would be inconsistent with the trusts of the will. —He cited—*Castle* v. *Green* (3 Kay & J. 591; 26 L. J. Ch. 845).

Mr. Wickens, for the Attorney General.—If this be a good gift, but the machinery for putting it into effect bad, I claim it on behalf of the Attorney General according to the doctrine of *cy-près*—*Martin* v. *Maugham* (14 Sim. 230; 13 L. J. Ch. 392). It is true that if the gift be void under the Mortmain Acts the property will go to the next-of-kin. But this gift can only be brought within those acts by the doctrine, that a bequest is void which has a tendency to bring land into mortmain. This " tendency " doctrine was exploded by *Philpott* v. *St. George's Hospital (ubi supra)*, in which the Court below held the gift void, in conformity with *Trye* v. *the Corporation of Gloucester* (14 Beav. 173; 21 L. J. Ch. 81). But the House of Lords laid down, on appeal, the new doctrine that a bequest of money for building purposes was good if accompanied by a direction that none of it should be laid out in the purchase of land.—*Trye* v. *the Corporation of Gloucester (ubi supra)* would have been appealed upon this expression of opinion, but that the estate in that suit had been already distributed. But a direction that all the money be laid out in building is equivalent to one that none be laid out in buying land, and equally satisfies the condition laid down by the House of Lords; and it is a fair and probable construction of the present words to read them as meaning " to be expended for building purposes, and not otherwise." But if there are two ways of construing the words, one of which makes the gift good and the other makes it bad, the Court will uphold the gift—*Sorresby* v. *Hollins* (9 Mod. 221); *The University of London* v. *Yarrow* (23 Beav. 159; 1 De Gex & J. 72; 26 L. J. Ch. 70, 430); *Edwards* v. *Hall* (11 Hare, 1; 22 L. J. Ch. 1078; 6 De Gex, M. & G. 74; 25 L. J. Ch. 82). There being already land on which the old chapel was built, the gift would be good for building a new chapel on that site; or, the trustees might sell the old site and buy a new one with the proceeds, and the gift would still be good for building on that—*Carter* v. *Green (ubi supra).*

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Mr. Cole and *Mr. L. Bird*, for the next-of-kin.—The gift is bad. It was not till long after the testator's death that it was decided to buy a new site. They cited—*Giblett* v. *Hobson* (3 Myl. & K. 517); *Mather* v. *Scott* (2 Keen, 172; 6 L. J. Ch. 300); *The Attorney General* v. *Hull* (9 Hare, 647).

Mr. Glasse, in reply, referred to *Tatham* v. *Drummond* (10 Jur. N.S. 557; 33 L. J. Ch. 438); *Hartshorn* v. *Nicholson* (26 Beav. 58; 27 L. J. Ch. 810).

Mr. Badnall, for the trustees of the will.

MALINS, V.C. said it was established that a mere naked bequest to build for charitable purposes necessarily carried with it a direction to purchase land, and was therefore void under the Statutes of Mortmain; and this had never, until recently, been called in question. Lord Eldon's words in *The Attorney General* v. *Davies* (9 Ves. 635), had been cited over and over again: "It is now clearly established that unless the testator distinctly points to some land already in mortmain the Court will understand him to mean that an interest in land is to be purchased, and the gift is not good." This was followed in *Pritchard* v. *Arbouin* (3 Russ. 456), and again in *Giblett* v. *Hobson*, which was a strong case. There the words were "5,000*l.* towards building almshouses for the said institution." The bequest was held void by Shadwell, V.C. (5 Sim. 651), and his decision was confirmed by Lord Brougham, who said (3 Myl. & K. 530), "The onus of shewing that the intention of the testator was restrained within lawful limits is upon the party seeking to take the bequest out of the statute; and in one way or another, but especially where it is to be by matter *dehors*, that is, by considering to what circumstances the instrument was applied, the intention must appear absolutely certain and clear to exclude the employment of the fund in purchasing land, and must not be a matter of speculation or conjecture." That was to say, if the will did not forbid the employment of the money in the purchase of land, the bequest was void. The doctrine was again so stated in *Mather* v. *Scott* (2 Keen, 172; 6 L. J. Ch. 300). He was surprised then to hear that the House of Lords had set aside all these decisions in their judgment in *Philpott* v. *St. George's Hospital*. In that case Lord Cranworth reviewed all the previous authorities, including *Pritchard* v. *Arbouin*, *Giblett* v. *Hodson* and *Mather* v. *Scott*, with approbation, and the doctrines therein laid down were confirmed. Lord Wensleydale's judgment was to the same effect. The same principles were asserted, by Lord Westbury, in *Tatham* v. *Drummond*, and by the present Lord Chancellor when Vice Chancellor, in *Dunn* v. *Barnas* (1 Kay & J. 596). The principle therefore was undoubted; and the only question in *Philpott* v. *St. George's Hospital* was whether Lord Beauchamp's bequest, although it expressly forbade the purchase of land, could be construed as having a tendency to bring land into mortmain. The Master of the Rolls held it could, and the House of Lords reversed the decision. If, in the present case, the testator had similarly forbidden the purchase of land, it would have fallen within that principle. But it was necessary that he should do so expressly, and that parties should be able to decide on the face of the will whether the bequest was good or not. As the testator had not done so, the bequest must be held to be void; and he should not have called on counsel to oppose it but for the case of *Booth* v. *Carter*. He could not distinguish that case from the present. There the words were "to be applied towards the erection of a new chapel," which were identical with those of this will. But with all respect to the Master of the Rolls, he could not follow him in his decision, which was opposed to all authority and principle, and calculated to introduce much embarrassment. His Lordship admitted that his judgment went beyond the cases cited, and seemed to have allowed his opinion to be influenced by circumstances outside the will. This was exactly what Sir L. Shadwell and Lord Cranworth had refused to do; and he (Vice Chancellor Malins) must follow their example. He should adhere to the rule that a bequest for the purpose of building involved the acquisition of land whereon to build, unless the contrary was expressly stated, and was therefore void. The fund must go to the next-of-kin, after providing for the costs of all parties to the petition.

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GIFFARD, L.J., July 9, 1869.

In re THE JOINT-STOCK DISCOUNT COMPANY; FYFE'S CASE.

38 L. J. Ch. 725; L. R. 4 Ch. 768; 17 W. R. 978: on appeal from, 17 W. R. 870 (M.R.).

Followed, *In re Hercules Insurance Co.; Lowe's case*, [1870] E. R. A.; 39 L. J. Ch. 458; L. R. 9 Eq. 589; 18 W. R. 370 (V.C.). Referred to, *In re National Bank of Wales; Taylor, Phillips & Rickards' case*, [1897] E. R. A.; 66 L. J. Ch. 222; [1897] 1 Ch. 298; 76 L. T. 1; 45 W. R. 401 (C. A.).

Company—Dissolution and Winding-up—Contributory.

COMPANY.—*Where a person's name has been improperly placed upon the list of contributories, his right to have it removed is not affected by the fact that there is no person in existence who ought to be put upon the list in his stead.*

The question on this appeal was, whether Dr. Fyfe's name ought not to be removed from the list of contributories upon which it had been placed by the official liquidator.

It appeared that Dr. Fyfe's name was upon the register of shareholders at the time the company was ordered to be wound up, and therefore his name was included in the list of contributories. He, however, established a case similar to *Nation's case* (36 L. J. Ch. 112) and *Shipman's case* (37 L. J. Ch. 193; L. R. 5 Eq. 219), by which, as his Lordship held, one Strawbridge ought long previously to have been registered as the holder of the shares in question. The facts of this contention do not call for a report. A difficulty, however, was suggested by the official liquidator arising from the fact that Strawbridge was dead, and had no legal personal representative, and therefore there was no person to substitute for Dr. Fyfe.

Mr. Jackson, for Dr. Fyfe.

Mr. Locock Webb, for the official liquidator, contended that, under the above circumstances, Dr. Fyfe's name must remain on the list. There had been no case where a name has been taken off without putting another on. He referred to *The Mexican and South American Company; Shewell's case* (37 L. J. Ch. 353; L. R. 2 Ch. 387); *Shipman's case* (37 L. J. Ch. 193; L. R. 5 Eq. 219).

GIFFARD, L.J., after dealing with the other part of the case, said—There was only one other point raised. It was said that Dr. Fyfe's name could not now be removed, because, as Strawbridge is dead, without any legal personal representative, there is no one whose name can be substituted for his. But, as I am of opinion that his name ought not to have been on the list, I must now remove it.

MALINS, V.C., July 23, 1869.

In re CHAWNER'S TRUSTS.

38 L. J. Ch. 726; L. R. 8 Eq. 569; 22 L. T. 262.

Referred to, *Cruickshank* v. *Duffin*, [1872] E. R. A.; 41 L. J. Ch. 317; L. R. 13 Eq. 555; 26 L. T. 121; 20 W. R. 354 (V.C.).

Will—Power of Mortgage—Power of Sale.

POWERS.—*A power of sale is incident to a mortgage; therefore, where trustees are directed to raise money by mortgage they are justified in inserting a power of sale. The Court will, however, see that the exercise of it is properly guarded.*

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Testator was, at the date of his will, seised of an estate called Manor Farm, and had also contracted to purchase a second, the Goodeve estate. In July, 1868, he made his will, directing that his personalty be exonerated from the payment of the purchase-money for the Goodeve estate, and that the same should be raised by mortgage of both the aforesaid estates; and, subject to such mortgage, he created a term of 1,000 years in his said real estate for the purposes therein declared, with ultimate devises for life and in fee. In the September following, testator being desirous of completing the purchase of the Goodeve estate, entered into an agreement to borrow 10,000*l.* for that purpose upon a mortgage of that estate and of the Manor Farm estate, and some steps were taken towards the completion of the mortgage; but eventually he borrowed the required sum from his bankers upon the security of a deposit of the title-deeds of the Manor Farm estate. The conveyance of the Goodeve estate was executed on the 20th of November, 1869, and on the 23rd the testator died. The trustees of his will, being advised that they were still bound to carry out the direction contained therein and to exonerate the testator's personalty from the payment of the purchase-money of the Goodeve estate, proceeded to carry out the original agreement for a mortgage which had been entered into and partially carried out by the testator; but the proposed mortgagees, requiring the insertion of a power of sale, raised the question whether by the direction to mortgage the trustees were authorized to give a power of sale.

This was a petition, by the trustees, under Lord St. Leonards' Act (22 & 23 Vict. c. 35. s. 30.) for the opinion of the Court on the above question.

Mr. Wingfield submitted the questions to the Court. He cited—*Cook* v. *Dawson* (29 Beav. 123; 30 L. J. Ch. 359; 3 De Gex, F. & J. 127); *Bridges* v. *Longman* (24 Beav. 27). The case of *Clarke* v. *the Royal Panopticon* (4 Drew. 26; 26 L. J. Ch. 830; 27 L. J. Ch. 207), in which Kindersley, V.C. held that express power must be given to enable trustees to insert a power of sale in a mortgage, was decided before Lord Cranworth's Act (23 & 24 Vict. c. 145).

Mr. W. W. Streeten, for the respondents.

MALINS, V.C. said he agreed entirely with the opinions expressed by the Master of the Rolls in the cases cited. Common sense required that a mortgage should contain a power of sale. Mortgagees would not advance their money without it; and he had never seen a mortgage in which it was omitted. The power of sale must, however, be properly guarded by a proviso that it should not operate until default had been made in the payment of principal or interest for six months after notice given.

LORDS JUSTICES, Nov. 6, 1868.

In re PICKERING.

38 L. J. Bk. 1; L. R. 4 Ch. 58; 19 L. T. 369; 17 W. R. 38.

Debtor and Creditor—Composition Deed—Schedule of Debts—Unpaid Shares in a Company—Bankruptcy Act, 1861, s. 192.

BANKRUPTCY.—*The schedule of debts in a trust deed executed by a debtor under the 192nd section of the Bankruptcy Act, 1861, must include not only the amount of unpaid calls already made, but also a fair estimate of future calls upon shares in a company held by the debtor, if the company is being wound up.*

Secus *if the company is not being wound up.*

This was an appeal from an order of Mr. Commissioner Winslow, allowing Mr. Laffitte, a creditor of Mr. Pickering, to issue execution upon a judgment recovered against him, notwithstanding the registration of a deed under the 192nd section of the Bankruptcy Act, 1861. The question argued was as to the validity of the deed, which had been impugned before his Honour upon the

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ground that the schedule of debts was inaccurate, and that if it had been properly made out there would not have been the requisite majority of assenting creditors.

The facts were as follows:

Mr. Pickering had been a director of the International Contract Company, which at the date of the deed was in liquidation. The number of shares for which he was placed upon the list of contributories was 6,645 shares, of 50*l.* each, upon which 10*l.* had been paid. At the date of the deed a call of 5*l.* had been made, leaving 35*l.* per share then uncalled. Mr. Pickering had entered in his deed as a debt the sum of 50,725*l.* in respect of the call of 5*l.* per share upon 10,145 shares, placing a memorandum against them that the debt was disputed.

No mention was made of the uncalled part of the capital. In his examination, when asked what were his grounds for disputing the debt, he replied that he did not think that he was liable upon so many shares, the fact being, as above mentioned, that he was only on the list of contributories for a less number.

Upon the motion being made before the Commissioner, Mr. Pickering put in some evidence that he had a right of set-off against the company in respect of some large claims against the company. The nature of these claims however did not appear. It appeared that the company would require all their capital to pay their debts; and, in fact, calls to the full amount of the shares had been made since the date of the deed. The liquidator was not an assenting creditor, and if the whole 40*l.* per share were to be considered a debt for the purpose of ascertaining the majority of assenting creditors there would not have been the requisite majority to support the deed. Under these circumstances the Commissioner held the deed to be bad. There were some other points raised in the case, which, however, in the view taken by the Court upon the principal question, became immaterial.

Mr. A. E. Miller (*Mr. Roxburgh* with him), for the appellant.—First, the debtor was not bound to insert in his deed as a debt anything in respect of the shares, except the call that had been made. For if it were otherwise, what a difficulty there would be in every case where a debtor possesses shares not fully paid up! He never would be able to register a deed if the company should not assent, for there would almost always be an overwhelming amount in respect of the uncalled capital. Until the call is made there is, in fact, no debt—*The Companies' Act*, 1862, *ss.* 38, 75. How can any debtor judge what calls are likely to be made? Suppose that no calls be made, is a company which is not and never will be a creditor to have an almost absolute power of controlling the rights of other creditors?

[Wood, L.J.—When the company is a going concern, not in course of winding-up, there is no debt provable in respect of unpaid capital, and the bankrupt is not discharged from his liability—*Martin's Patent Anchor Company* v. *Morton*.[1] But is not the case quite different when the company is being wound up?]

I submit not. Until the call is made nothing can be proved. Next, Mr. Pickering had a complete set-off against all calls. His claims against the company exceed not only the amount of the calls made since the date of the deed, but even the 5*l.* calls which he had inserted in the deed. Therefore the company could not really exercise any power of assenting to or dissenting from the deed; consequently the deed is good—*In re Duckworth* (36 L. J. Bk. 28; L. R. 2 Ch. 578).

Mr. De Gex and *Mr. Reed*, for the respondent, Mr. Lafitte, the judgment creditor.—Under a bankruptcy a liquidator can prove for an estimated amount of future calls—*Companies' Act*, 1862, *s.* 75; therefore an estimated amount of future calls ought to be included in the schedule of debts, which ought to contain every debt that would be provable in bankruptcy. Lord Kingdown's exposition of the law in *Williams* v. *Harding* (35 L. J. Bk. 25; L. R. 1 E. & I. Ap. 9), clearly shews that these calls constituted a debt before the date of the deed.

(1) 37 L. J. Q.B. 98; L. R. 3 Q.B. 306: see also *General Discount Company* v. *Stokes* (17 Com. B. Rep. N.S. 765; 34 L. J. C.P. 25); *Ex parte Hastie* (38 L. J. Ch. 43).

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Next, as to the alleged set-off, there is not the slightest evidence of its existence such as the Court can notice. It is clearly a mere claim, the validity of which is disputed and more than doubtful; therefore the debt upon the calls ought to taken into account for the purpose of calculating the number of assenting creditors without any reference to this set-off—*Ex parte Middleton* (33 L. J. Bk. 36). It is necessary to apply for leave to issue execution, even though we dispute the validity of the deed—*Lloyd* v. *Harrison* (35 L. J. Q.B. 153; L. R. 1 Q.B. 502); *Ames* v. *Colnaghi* (37 L. J. C.P. 159; L. R. 3 C.P. 359). They also referred to *Ex parte Morrison; In re Clun* (33 L. J. Bk. 47), in support of their contention.

Mr. Roxburgh, in reply, was stopped by the Court.

WOOD, L.J.—It appears to us that this debtor has not complied with the requisitions of the Bankruptcy Act, 1861. Under section 192. of that act he is bound to make out a list of creditors and a statement of his liabilities, and dissentient creditors are only bound if the statement is accurate. It is on oath, and is taken to be *prima facie* true. It ought to contain such debts as would be provable in bankruptcy. Now, if the matter were in bankruptcy, what would be the result in the circumstances of this case? We find that in the first part of the 75th section of the Companies' Act, 1862, there is, as Lord Kingsdown has remarked, a plain statutory declaration that a person executing a company's deed of settlement becomes a debtor liable to pay all calls afterwards made, although, of course, not payable until they are made. The section then in the second part provides for the estimation of future calls. Therefore we have a debt when the deed of settlement is executed, but so long as the company is a going concern it is not a debt that can be estimated; but when the company is being wound up the state of things in this respect entirely changes, because then, by positive enactment, it is necessary to estimate the liability; the debt must in fact be ascertained as best it can be. The debtor, then, when executing the deed under the Bankruptcy Act, 1861, knows that these calls constitute a debt capable of estimation, a mode of estimating which, in point of fact, is provided, for the liquidator can do it. He must then state his indebtedness in respect of all future calls, from which, it is to be observed, since they can be proved, he obtains a release. This settles the present case, for there does not appear to have been any doubt as to the amount of the calls, and the required estimate involved no difficulty whatever, because the whole amount unpaid was required. The only answer that he gives, which remains to be disposed of, is this alleged set-off. He says that in reality the company owes a larger amount than the calls. But this seems something very shadowy as opposed to the clear and undoubted debt for calls. In order to take advantage of such a claim he must make a full disclosure of its nature. There were some other points raised in the argument which I think it unnecessary to decide.

SELWYN, L.J.—Considering the effect which a trust deed has upon the right of dissentient creditors, it is incumbent upon the debtor to make a strictly accurate statement of all matters properly included. Here the debtor being a director must have had a considerable knowledge of the affairs of this company. He does not allege that there was any change after he ceased to be director, and it was morally certain that the whole nominal amount of the shares would be required for payment of debts. Therefore, according to law, and regard being particularly had to section 75. of the act, he is bound to include this amount among his debts. His answer is, that he has complied with all the requisitions of the Bankruptcy Act by making the statement before us without any reference to future calls. And he says, that even if the future calls ought to have been included, still the debt which he owes would not nearly amount to what he has inserted because of his counter-claims. But in view of the facts of the case, I think, this statement is altogether inaccurate. The insufficiency in respect of the future calls is by no means cured by his affidavit as to counter-claims, and I think, therefore, the order of the Commissioner was right, and this appeal must be dismissed, with costs.

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LORDS JUSTICES, Nov. 23, 1868.

In re DEACON.

38 L. J. Bk. 3; L. R. 4 Ch. 87; 19 L. T. 438; 17 W. R. 129.

Debtor and Creditor—Composition Deed—Assent of Majority of Creditors.

BANKRUPTCY.—*Where, under a deed of arrangement, it appears that the debtor retains for his own benefit part of his property, the Court will, on behalf of the dissenting minority, closely inquire into the bona fides of the bargain made with him by the majority of his creditors.*

An officer in the army, being indebted in an amount which would have been covered by the price of his commission, if sold, retired on half-pay, thereby receiving about half the value of his commission, and executed a composition deed to pay 10s. in the pound, which was assented to by the statutable majority of his creditors. No meeting of creditors took place:—Held, *that the deed was not binding upon the dissenting minority.*

This was an appeal from an order of Mr. Commissioner Holroyd, refusing to release the appellant from custody.

In July, 1867, the appellant, Major Deacon, was a major in the army on full pay. Being then indebted to his sister and another relative, Colonel Yonge, in considerable amounts, he executed a deed by which he assigned to them all moneys which should come to the hands of his army-agents, Messrs. Cox & Co., by virtue of any exchange or sale of his commission. A memorandum was indorsed on the deed, by which he agreed either to sell the commission, or retire on half-pay, and in the latter case the sum to be received on retirement was to be paid to his sister and Colonel Yonge, in satisfaction of their debt.

After the agreement was entered into nothing was done as to selling the commission for some time. Much correspondence between the parties took place, in which Major Deacon promised to give immediate information to Colonel Yonge of the sale of the commission. In September, 1868, he sent in his paper for retirement. He was then arrested at the suit of Colonel Yonge, who held a judgment for his debt.

On the 2nd of November, 1868, he executed a deed of arrangement, whereby he covenanted to pay his creditors 10*s.* in the pound. This was assented to by his sister and the requisite majority of his creditors, but not by Colonel Yonge. No meeting of creditors took place.

His debts amounted to rather less than 3,200*l.*, and the sum which he received on retirement was 1,650*l.* He had no other assets but his half-pay, which was 150*l.* a year. The commission, if sold, would, it appeared, have realized more than 3,200*l.* Under these circumstances, the Commissioner made the order now appealed from, when the debtor applied to be released from custody.

Sargood, Serjeant, and *Mr. Reed,* for the appellant.—The Commissioner thought that *In re Cowen* (36 L. J. Bk. 41; L. R. 2 Ch. 563) applied to this case; but we submit that it has no application, for there is no evidence whatever that the creditors acted from motives other than such as prudent people might approve of. The debtor could not be required to sell his commission. If he had been made bankrupt, the creditors at the utmost would have obtained a portion of his pay under section 134. of the Bankruptcy Act, 1861. Why, then, should not they with prudence and wisdom accept a reasonable composition payable immediately? As to the half-pay, that is not an asset which can belong to the creditors. It is pay for services which the retired officer may be called upon to render at any moment.

Mr. Glasse and *Mr. W. R. Cole* appeared for Colonel Yonge, but were not called upon.

WOOD, L.J.—If we examine the case of *In re Cowen* we find this, that where

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a man has placed himself in such a position that one creditor may, under a judgment, carry off all his assets, and he then takes steps to secure an equal distribution among all his creditors by deed of arrangement, the Court will not be hasty to say that he is guilty of fraud, whatever may be the mode in which he does this, because by this means he acts fairly by all his creditors instead of allowing one creditor to sweep away all. But he must make a distribution of all his property, and that rateably, amongst his creditors; and if the Court finds that he is not parting with all, but is reserving a fund for his own use, then the question whether the assent which may appear to have been given to his scheme of arrangement was an assent within the meaning of the act, is a question into which the Court will inquire closely. The Court will, in order to protect the minority, inquire whether the majority, whose opinion is to bind the minority, have arrived at their opinion by a consideration of their own pecuniary interests, or whether the assent has been given from some other motive, such as a desire to protect the debtor. In *In re Cowen* the Court found that the creditors had taken no steps to ascertain what was the amount of the property, or what the debtor was giving up. No meeting had been held by them, and in fact the debtor was retaining a portion of his property. In such a state of circumstances the Court concluded that the assent could not have been given *bona fide*. In the present case this gentleman, having a commission in the army, in July, 1867, arranged with some relatives who were creditors that he would raise by sale or exchange of his commission a sum of money to pay his debts, and that all moneys so to arise should pass through Messrs. Cox & Co.'s hands. A memorandum indorsed upon the deed making this arrangement states that it was contemplated that he should retire upon half-pay, although that was not mentioned in the deed, and that the sum to be paid on his so retiring should be paid over under the deed. He retired accordingly, and if the sum paid on his retirement had been the whole of his property there would have been nothing to throw suspicion on the arrangement afterwards made, that this sum should be given up to the general creditors. *In re Cowen* would have had no application. But, in fact, he has at the time of making the arrangement, and retains at the present moment, that which constitutes half his property. He retains in the form of half-pay that which, if it had been realized by selling the commission instead of retiring, would have enabled him to pay his creditors in full. He does not sacrifice all his property so as to pay in full. Instead of that, he adopts a course which the Court cannot sanction; and looking at the conduct of his assenting creditors, seeing that they have taken no pains to secure the unappropriated fund, there is nothing to shew that they considered whether the composition which they agreed to accept was reasonable or not. The necessary inference seems to be that they were influenced by other considerations than their own interest in being content to accept a composition not extending to the whole property.

I agree, therefore, with the Commissioner in this case, and the appeal must be dismissed, with costs.

SELWYN, L.J., concurred.

LORDS JUSTICES, Jan. 22, 1869.

Ex parte NORRIS; *In re* BIDDULPH.

38 L. J. Bk. 5; L. R. 4 Ch. 280; 19 L. T. 755; 17 W. R. 452.

Proof of Debt—Breach of Trust.

BANKRUPTCY.—*By a will and seven codicils the three executors were made residuary legatees subject to a life interest, and although no valid trust had been created, they had always treated themselves as not being beneficially interested. By an eighth codicil the residuary gift was converted into a trust for certain other persons, subject to the life estate. The eighth codicil was not proved or*

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discovered for many years after the testatrix's death. In the meanwhile, and during the lifetime of the tenant for life, the executors invested part of the funds upon a security which would be an improper one for investment by trustees, and which afterwards proved deficient. The security was appropriated to the purposes of the trusts of the eighth codicil. It did not appear whether the tenant for life consented to the investment, but she received the interest during her life, and did not in fact suffer from the insufficiency of the security:—Held, *that a proof against the estate of one of the trustees who had become bankrupt for the deficiency was good.*

This was an appeal from an order of Mr. Commissioner Holroyd, refusing a proof for a debt of 1,819*l.* 15*s.*, claimed against the separate estate of A. W. Biddulph, as the balance of a sum of 3,000*l.* after realizing a security for the same.

The circumstances were as follows:

By her will and the first seven codicils thereto, made in the year 1824, the Countess de Front gave the residue of her estate to her executors, W. V. Fry, A. Wright Biddulph and J. Wright, upon trust for her sister S. Neve for life, and subject thereto for themselves absolutely.

It appeared that the testatrix was an ardent Roman Catholic, and that it was privately understood by the executors that they were to devote the residue bequeathed to them to Roman Catholic purposes. But no trust was ever formally constituted for that purpose.

By an eighth codicil to the will, dated the 20th of April, 1824, the testatrix declared that she had bequeathed the residue of her personal estate to her executors in trust only, and directed them, after payment thereout of certain sums therein referred to, to pay one moiety to the Catholic bishop for the time being of the London district, the vicar-general of the same district, the president of St. Edmund's College, and to John Gage, and the other moiety to the Catholic bishop of the midland district, the vicar-general of the same district, the president of St. Mary's College, Oscot, and John Gage.

The testatrix died on the 7th of January, 1830.

The will and the first seven codicils were proved by the executors in the following month. The existence of the eighth codicil was not communicated to the executors, and was only brought to light in the year 1841, having been in the possession of Mr. Gage.

The two executors, Mr. Biddulph and Mr. Wright, were partners in a banking business, carried on by them with a Mr. Jerningham, under the firm of Wright, Biddulph & Co. With this firm the executors had a banking account, bearing their title as executors and trustees of the Countess de Front's will.

The banking firm, in the year 1834, made large advances to Sir G. Duckett, to the extent of 15,000*l.*, upon the security of a third mortgage of a canal, dated the 8th of May, 1834, made in favour of Wright and Jerningham. Part of the money so advanced was considered to belong to the countess's estate; and by a deed-poll, dated the 31st of May, 1836, executed by Wright and Jerningham, after reciting that the moneys advanced upon the mortgage were not the moneys of Wright and Jerningham, but belonged to the persons and in the proportions therein mentioned, it was declared that they (Wright and Jerningham) held the said mortgage in trust, as to 3,000*l.*, part of the money thereby secured, upon trust for A. W. Biddulph, J. Wright and Dr. Fryer, as trustees of the will of the Countess de Front, and in priority over the residue of the 15,000*l.* as therein mentioned.

The firm of Wright, Biddulph & Co. became bankrupt on the 17th of December, 1840.

Dr. Fryer proved against the estate for the money standing to the trustees' account beyond the 3,000*l.*, but did not then prove for that sum.

The eighth codicil was proved on the 1st of October, 1841. The exact period when it first became known to the executors did not appear, Mr. Biddulph

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in his affidavit only declaring that it had come to his knowledge since the will had been proved.

The tenant for life, S. Neve, died on the 22nd of September, 1842.

When the security was realized there was a deficiency of the sum now sought to be proved.

In the year 1858 a proof was tendered for this amount against the separate estate of Jerningham, but it was rejected on the ground that he was not a trustee and had not such knowledge of the trust as could render him liable for a breach of trust, the investment having been made with the sanction of those who had legal control over the money, and were moreover, according to the then known state of the trust, absolute owners of the money, subject only to the life interest of S. Neve.

The claim was now made by the present legal personal representative of the countess against the separate estate of A. W. Biddulph; but the Commissioner, thinking it was governed by the former case against Jerningham's estate, refused the proof.

The case alluded to is reported *sub nom. Ex parte Barnewell; In re Biddulph* (6 De Gex, M. & G. 801).

Mr. De Gex and *Mr. Ramadge*, for the appellants.—This case is in no way governed by Jerningham's case, for Jerningham was not a trustee, and never committed any breach of trust. Here Mr. Biddulph was clearly a trustee. There is no evidence that the tenant for life consented to the investment. It is true that the trustees seemed to be absolute owners (subject to the life interest), but it is certain that they did not consider that in honour they could appropriate the money, and, in fact, they were mere trustees. They had never done anything to appropriate the fund or divide it. It is admitted that the investment was such that it constituted a breach of trust if the executors were to be considered as trustees. It cannot be disputed that when distribution has taken place under a mistake, you may follow the assets into the hands of those who have received them and require them to refund. This alone, in every event, would enable us to support this proof as to one-third—*Anon.* (1 P. Wms. 495); *Edwards* v. *Freeman* (2 P. Wms. 435). A distinction is taken: when the distribution is made under decree of Court the claim against individual beneficiaries for refunding is only *pro rata;* but when it is made out of Court you may require any legatee to refund the whole of his legacy; but the right to refund is clear—*Todd* v. *Studholme* (3 Kay & J. 324; 26 L. J. Ch. 271). We had a perfect right to appropriate the security, realize it, and then prove for the difference; and since this was a breach of trust, although made under peculiar circumstances, in consequence of the executors' ignorance of the nature of their trust, we are entitled to take this course—*Mant* v. *Leith* (5 Beav. 524; 21 L. J. Ch. 719). Whichever way, therefore, you look at the case, whether the proof be grounded on breach of trust, or upon the right of requiring legatees to refund, it is well founded.

Mr. Amphlett and *Mr. Elderton*, for the assignees.—We say there was no breach of trust, for at the date of the investment the executors were absolute owners, according to all appearances. The question as to the consent of the tenant for life is immaterial, because she was not damnified; she received the interest and made no complaint. There is no evidence that she did not consent. The security was taken, and that is all that the claimant could properly ask for. As, in fact, the executors derived no benefit from the property, why should their estates be liable? They considered they had a perfect right to lend the money as they did, and although it may be that in honour they considered themselves bound to apply the interest for Catholic purposes, that is quite beside any question which this Court will consider. Next, we say this is an improper way of proceeding; there ought to have been a bill filed against the representatives of all three executors. Dr. Fryer is dead, but he died solvent, and his representatives ought to be made parties, so as to contribute.

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The COURT did not require a reply.

SELWYN, L.J., after stating the nature of the question and facts, observed, that it was admitted that the investment was not authorized by the trusts of the particular will, or by the general rules of this Court, and under ordinary circumstances would constitute a breach of trust. He proceeded as follows: The first question, therefore, that appears to be material is in what manner, in point of fact, the executors dealt with this trust fund. No doubt, if it could be shewn that they, with the consent of all the persons interested, had in fact divided the trust fund under some mistaken notion of their rights, if it had been separated and dealt with otherwise than as a trust fund, and divided amongst different individuals, then different considerations entirely would arise. But, in the present case, it appears that throughout the whole of these transactions down to the time of the bankruptcy there had always been joint possession of this fund, and it always had been dealt with as a trust fund, as in point of fact it was. Now, the money having been advanced, as I have stated, on that security on the 8th of May, 1834, it appears that a deed-poll was executed on the 31st of May, 1836, declaring the ownership of the different sums of money which were included in the mortgage made in 1834; and the recital in that deed-poll, as far as is material for the present purpose, states: "That whereas the said sum of 15,000*l.*, which in and by the said recited indenture is stated to be due to the said John Wright and Edmund William Jerningham, was not, in fact, their own proper moneys, but the same was the proper moneys of and belonged to the following persons, in the proportions, and was advanced by them according to the priorities hereinafter mentioned, that is to say, the sum of 3,000*l.*, part thereof, belonged to and was the proper money of Anthony George Wright Biddulph, the said John Wright and the Rev. Dr. Fryer, as trustees under the will of the late Countess de Front, deceased; the sum of 5,000*l.*, other part of the said sum of 15,000*l.*, was the proper money of and belonged to Peter Campbell," and so forth. Therefore, there is there an express declaration by way of recital that the sum of 3,000*l.* belonged to and was the proper money of these gentlemen as trustees under the will of the late Countess de Front, and in the operative part of the same instrument there is a declaration of trust exactly in accordance with the recital, in these words: "And as to, for and concerning the sum of 3,000*l.*, part of the said sum of 15,000*l.*, and the interest thereof, in trust for the said Anthony George Wright Biddulph, John Wright and the Rev. Dr. Fryer, as trustees under the said will of the said Countess de Front." It appears, therefore, that so late as the month of May, 1836, these persons were dealing with this fund as being a trust fund, declaring by this instrument which was executed by them that it was a trust fund, and held by them upon the trusts of the said Countess de Front's will. I think therefore that as it appears nothing was done from that time down to the bankruptcy with the trust fund, it becomes immaterial to consider precisely whether they or any of them had or had not notice at that time of the eighth codicil, because, it being a trust fund, and it being admitted by them to be such, and it being dealt with by them as such, the burden is cast on them of shewing—when they committed what they are obliged now to admit was in substance and effect a breach of trust under ordinary circumstances—I say the burden is cast upon them of shewing that they had the consent of all persons whose consent was necessary to legalize that which without such consent would have been a breach of trust. It is their misfortune that they had not obtained that consent, because it now appears that the persons who were entitled to stand in the position of *cestuis que trust*, either primarily or ultimately in respect of that trust fund, were the persons interested in the remainder of the estate of the Countess de Front, after the termination of the life of the tenant for life. It appears that the tenant for life lived until 1842, that is, until after the bankruptcy, and therefore the trust was obviously subsisting down to that time. Under those circumstances, the present appellants come here asking for leave to prove in respect of this trust fund, saying that the

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investment was an improper one, but that under ordinary circumstances they are entitled to follow the trust money into the investments if they can trace it, and having received as much as can be realized from the proceeds of the sale of that improper investment to prove against the estate of the trustee for the difference. I think that is what they are entitled to at the present time. I think the respondents have failed to prove that which was necessary to establish their contention, namely, that that which would under ordinary circumstances have been a breach of trust was sanctioned and authorized by persons capable of giving such sanction and authority. It follows therefore that the proof ought to have been allowed. It is then said that even if a *prima facie* case had been established, considering the lapse of time and the great complication of circumstances, a bill ought to have been ordered to have been filed, and that this proof ought not to have been allowed in the meantime; but inasmuch as these facts were within the cognizance of Mr. Biddulph, and inasmuch as there has been no difficulty in ascertaining or proving any part of the facts of this case, inasmuch as there has been a full opportunity given to the parties to bring forward any evidence they might think fit, I think it would be incurring unnecessary expense if we were now to say that this proof should be postponed until after a bill is filed. I think a case has been established for allowing the proof, and that consequently the order of the Commissioner must be reversed. The proof will be allowed, but there will be no costs of the appeal. The deposit will be returned.

GIFFARD, L.J.—I am of opinion that the proof should be allowed against Mr. Biddulph's separate estate. The original transaction was simply a loan, and there was security taken for it which was worthless, or nearly worthless. Of course such a transaction as that by trustees would be in an ordinary case a breach of trust, and would in an ordinary case create a joint and several liability. I do not think it a less breach of trust because it has happened that the persons entitled under the trusts were not known. It may be that under certain circumstances the ignorance of those facts may excuse that which in itself is a breach of trust, as for instance, if there had been on the face of this seventh codicil some third party entitled and the money paid over to the third party in ignorance of the existence of the eighth codicil. But in this case these parties had done nothing of the sort; and not only that, but it cannot be said that they ever acted at any time in the belief that this money was their own or proceeded upon that footing. That being so, first of all there was a breach of trust, and secondly there was no excuse for it. Under these circumstances therefore I think there is a clear case for proof against the separate estate, and I see no reason why it should stand over for a bill to be filed.

GIFFARD, L.J., July 2, 1869.

In re RICHARDS; *Ex parte* LLOYDS BANKING COMPANY; AND *Ex parte* ASTBURY AND OTHERS.

38 L. J. Bk. 9; L. R. 4 Ch. 630; 20 L. T. 997; 17 W. R. 997.

Mortgage—What passes to a Mortgagee as Fixtures—Duplicate Rollers—Weighing Machine—Straightening Plates—Equitable Mortgage by Deposit of Lease.

FIXTURES.—*Where a rolling-machine (which itself was admittedly a fixture) was fitted with a number of different sets of loose rollers, one of which only could be actually attached to the machine and used at one time, but the duplicates were kept for the purpose of effecting different kinds of work,*—Held, *in a contest between mortgagees and the assignees in bankruptcy of the mortgagor, that all the rollers that had been fitted to the machine thereby became part of it, and passed to the mortgagees by virtue of an equitable*

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mortgage by deposit of the lease of the mill:—Held, *also, that other rollers which had been purchased with the view of using them in the machine, but had not been fitted to the machine, were not part of the machine, and did not pass to the mortgagees.*

Weighing-machines which rest in brick cavities constructed in the ground for the purpose, but which are not attached to the brickwork, and can be lifted out of the cavity at pleasure, are not fixtures.

Straightening-plates, formed of flat plates of iron and let into the iron flooring of a room so as to be on a level with the surrounding floor and united to it, are fixtures.

Fixtures belonging to a lessee and removable by him at pleasure (as between himself and the lessor) form part of the security under an equitable mortgage by deposit of the lease.

These were appeals from an order of Mr. Registrar Tudor, acting for the Commissioner of the Birmingham Court of Bankruptcy, made on a special case.

In June, 1867, Messrs. J. Richards & Co. (of which firm the bankrupts were partners) made an equitable mortgage of their mills to Lloyds Banking Company by deposit of their lease (accompanied by a memorandum in writing), for the purpose of securing any advances which the bank might make to them.

The memorandum was as follows:

"Memorandum.—We, the undersigned Job Richards, L. Jenkins, Richard Hill and Thomas Jenkins, trading together as ironmasters at Smethwick, in the county of Stafford, under the style and firm of Job Richards & Co., have this day deposited with Lloyds Banking Company (Limited), the deed mentioned in the schedule hereunder written, to be retained by the company by way of a continuing security to them for payment on demand of all moneys and liabilities already paid or incurred, or which the company may at any time advance, pay, or incur to or for the said firm of Job Richards & Co., whether on current account or by the discount of, or otherwise in respect of bills of exchange, promissory notes, or other negotiable securities drawn, accepted, or indorsed by the said firm, together with interest, commission, banking charges, law and other costs, charges and expenses; and for a more effectual security we undertake, at our own expense, when required by the company, that we and all other necessary parties will execute to the said company, or as they shall direct, a mortgage of all our estate and interest in the said deed, which mortgage shall contain a power of sale and all usual clauses."

The bankrupts afterwards, in 1867, succeeded to all the assets and liabilities of the firm of J. Richards & Co., the Messrs. Jenkins then retiring.

In January, 1868, the bankrupts executed a legal mortgage of the mills to the bank; and in this mortgage was included a number of articles belonging to the mill and machinery described as rollers of various kinds, also four weighing-machines and four straightening-plates. These rollers, &c., were part of the plant necessary for the bankrupts' business.

At that time the account with the bank had been overdrawn to the extent of nearly 11,000*l*. On the 18th of January the bank took possession of the mortgaged premises, and soon afterwards the petition was presented upon which an adjudication in bankruptcy was made against Messrs. Richards. M. Astbury and two other gentlemen were appointed creditors' assignees.

It was admitted that the mortgage, having been made on the eve of bankruptcy, could not be supported as against the assignees, except so far as it gave effect to the previous equitable mortgage by deposit of the lease.

The question was whether the mortgagees had any claim to the rollers and other chattels. They contended that everything forming part of the machinery or in any way belonging to it passed to them by virtue of their equitable mortgage as being fixtures.

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The facts as to the nature of the chattels were proved to be as follows:

The rollers were loose iron rollers fitting into the rolling-machine. When the machines were made they were usually fitted with one set of rollers, and others were ordered and supplied as occasion required, the rollers being required to be of different sizes according to the character of the iron being manufactured. After the rollers had been made by the manufacturer they required to be fitted to the machine by filing their ends; and they were, when so fitted to their bearings, grooved in a manner varying according to the work each set was intended to perform. At the date of the equitable mortgage there were several of these duplicate rollers which had been either in use or fitted to the machine ready for use, besides others which had not been so fitted.

The weighing-machines in question were placed in square holes dug in the ground and faced with brickwork. The machines rested upon the brickwork in the holes, their upper surfaces being on the level of the ground. They were not fastened to the brickwork, and could be removed without injury to it, and it was said that similar machines were often placed upon wheels.

The straightening-plates in question were broad plates of iron used for straightening bars of iron whilst red hot. They were laid upon brickwork and embedded in the earth; their upper surfaces being even with the surrounding floor, which was also composed of iron.

The Registrar held that all the rollers passed to the mortgagees as part of the mill, but that neither the straightening-plates nor the weighing-machines passed.

Both parties appealed. The assignees admitted however that one set of rollers passed with the machine.

The appeals were argued separately.

Mr. Jessel, *Mr. Little* and *Mr. A. Smith*, for the assignees, the appellants in the first appeal.—The duplicate rollers were mere personal chattels, unconnected with the freehold, and could not therefore pass as fixtures. It might easily be that a hundred sets were in stock ready for use as occasion might require; can all these pass as fixtures? In calico-printing establishments the copper rollers on which the designs are engraved are the most valuable part of the plant; can it be pretended that they would pass as fixtures in any case? The case as to the rollers which have never been used or fitted to the machine, is, at all events, clearly in our favour. These can in no sense at all be considered as belonging to the machine, or forming part of it.

Mr. Fry and *Mr. Finlay Knight*, for the mortgagees.—These rollers are ordinary trade fixtures. They are parts of the rolling-machines, which are admittedly so. You cannot distinguish between one set of rollers and another. They are like a mill-stone, which is often removed, yet certainly constitutes part of the mill—*Wystow's case* (cited in 4 Man. & R. 277, 280 n); *Johnston* v. *Dobie* (Mor. 5543); *Fisher* v. *Dixon* (12 Cl. & F. 312); *Mather* v. *Fraser* (4 Kay & J. 536; 25 L. J. Ch. 361).

Mr. Jessel, in reply.—*Johnston* v. *Dobie* (*ubi supra*) was decided according to Scotch law: it must have been decided the other way by English law. In *Wystow's case* (*ubi supra*), the distinction is taken between one millstone and duplicates; therefore, it is in our favour.

GIFFARD, L.J.—The questions in cases of this description are generally more of fact than law, for, as I think, the law has been well settled, but the facts must differ in particular cases. As to the law it is clear, and is admitted, that where there is a mortgage of a manufactory and part of the machinery used in it is a fixture, that part passes to the mortgagee. We have, therefore, to determine what according to law are fixtures. Two dicta will be sufficient to guide us in the present case. In *Mather* v. *Fraser* it was said, and so decided, that the article in question must be an essential part of the machine. I think that was all it was necessary to decide in that case. Lord Cottenham, in *Fisher* v. *Dixon*, said that all "belonging to the machine" would pass: and

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I should say in this case the proper test to lay down will be that the chattel must be something which "belongs to the machine."

Now, these machines were rolling-machines, and there appear to be connected with the machine some parts which clearly cannot be described as fixed. It is in evidence that when a machine is ordered from the manufacturer, it is sent with one set of rollers, and it is quite manifest that without rollers the machine would not do any part of the work it is intended to do. One set of rollers therefore must pass. But we have here duplicate rollers, and with reference to them—I am not now speaking of rollers which can be in any sense considered as unfinished, but of duplicate rollers which have been actually fitted to the machine—I cannot see why if one set of rollers passes, the duplicate should not also. It comes in fact to this, that the machine with one set of rollers is a complete machine, but a machine with a duplicate set is a still more perfect machine. I think, therefore, that each set of rollers necessarily belongs to the machine as part of it. I do not think that the dictum of Fitzherbert in *Wystow's case* affects what I have decided; but if it did, I should observe that this subject has been considered much more of late years than it was in olden times, and that the matter decided there was in regard of distress. The matter may be reduced to an absurdity by supposing a case of duplicate latch-keys to a door. Could it be held, that one only should pass and not the other? The fact is that, whether there is one set of rollers or more they are each part and parcel of the machine and come within the term "belonging to the machine as part of it." Then comes the case as to the different size of the rollers. But if the duplicates of the same size pass, it follows that the rollers of different sizes pass if they render the machine still more perfect than if all the rollers were of the same size. We come next to a different class of rollers; and here I confess I differ from the Registrar who has decided this case. I allude to those rollers which had been made for the purpose of being used in the machine, and had been purchased for that purpose, but had never been fitted to the machine, and required something more to be done to them before they were ready for use. I think if a man mortgages a machine when perfect and fitted with rollers and everything else connected with it, and afterwards purchases other rollers which cannot be used until they are fitted to the machine, it would be going a long way to say that the mortgagor should be compelled to fit those rollers to the machine, and should be precluded from saying that they form no part of it.

I am of opinion, therefore, that the duplicate rollers and the rollers of different sizes, in fact all the rollers that have been fitted to the machine belong to the machine; they are essential parts of it. But I cannot hold that the rollers which have never been fitted to the machine, and have never been used, and which in fact require something to be done to them before they can be used, belong to the machine or that they are essential parts of it. The order must be varied in this respect.

On the second appeal by the mortgagees,

Mr. Fry and *Mr. Finlay Knight*, for the appellants, contended that the weighing-machines were so far attached to the soil that they could not be removed without structural injury to the building; and that the straightening-plates constituted part of the structure, being in fact only a special kind of flooring.

Mr. Jessel, *Mr. Little* and *Mr. A. Smith*, for the assignees, contended that as the weighing-machines were merely laid upon brickwork, and could be removed by merely lifting them, it could not be held that they were in any way part of the building, nor would their removal injure the building. They were, therefore, not fixtures—*D'Eyncourt* v. *Gregory* (36 L. J. Ch. 107; L. R. 3 Eq. 382); *The Duke of Beaufort* v. *Bates* (3 De Gex, F. & J. 381; 31 L. J. Ch. 481); *Hellawell* v. *Eastwood* (6 Ex. 294; 20 L. J. Ch. 154). Similar reasons applied to the straightening-plates, as to which they referred to *The Metropolitan Counties Society* v. *Brown* (26 Beav. 454; 28 L. J. Ch. 581). But,

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in fact, these cases were not wanted, because the mortgagor is only a leaseholder, and fixtures constitute no part of his leasehold interest, which alone is mortgaged.

Mr. Fry, in reply.

GIFFARD, L.J.—Two points remain to be disposed of in this case, one as to the straightening-plates, and the other as to the weighing-machines.

I cannot agree with the suggestion of Mr. Jessel, that because the mortgagor was a leaseholder and not a freeholder, the articles which were fixtures did not pass to the mortgagee of his leasehold interest. Whether he is a freeholder or leaseholder the same rule clearly applies; and the only question is, whether these articles are fixtures or not.

As to the straightening-plates, two cases were cited in argument, *The Metropolitan Counties Society* v. *Brown* and *The Duke of Beaufort* v. *Bates*. The latter case has, I think, no application, for it was a case in which, there being chattels which, as between lessor and lessee, the lessee might remove, an execution creditor of the lessee was held entitled to take them. As regards the former case, the point decided differed entirely from the present question. There the straightening-plates were not fixed in the mode in which these straightening-plates appear, by the evidence, to be fixed. We need only read a few portions of the evidence to see that these plates are clearly fixtures, just as much, indeed, as an ordinary part of the flooring or any pavement would be; and it would certainly be astonishing if an ordinary pavement were regarded as a thing which could be removed by a mortgagor as against his mortgagee. I must assume upon the evidence (which his Lordship referred to) that the iron plates round the straightening-plates are part of the floor of the place, and that the straightening-plates also constitute part of the floor just as much as the surrounding plates. I look upon these straightening-plates as in the same position as a flagstone laid down and let in, and certainly, if anything can be a fixture, I should say a flagstone laid down and let in would be one. I think the Registrar has fallen into this mistake by laying rather too much stress upon what was said in *Mather* v. *Fraser*, as to nothing being a fixture which will stand by its own weight. No doubt a flat plate will rest by its own weight, but when you find it let in, embedded, and overlaid with part of the permanent floor, and the permanent floor cannot be removed without injury to the freehold, as is clearly the case here, I cannot entertain a doubt that the straightening-plates are fixtures.

Next, with regard to the weighing-machines. I think we have wholly different circumstances here. The evidence shews that machines of this description are frequently placed upon wheels, and so used; and it appears that when these weighing-machines are placed inside the building the floor is prepared for them, and when they are placed outside the building the soil is prepared for them; both in the same way, by making a square receptacle of brickwork, and in this the weighing-machine is placed; and it may be as easily taken out again, for no fastenings of screws or nails are used. One of the witnesses shews that there was a space all round the machine of from five-eighths to three-quarters of an inch.

Mr. Fry's argument that a brickwork was the same thing as a frame to the machine, and constitutes part and parcel of the machine, I cannot assent to. Suppose in this case a number of bricked places had been made as convenient receptacles for weights, it cannot be thought that the weights would be fixtures. So, if there had been a foundation of granite for a cannon or large telescope, neither the cannon nor telescope would be fixtures. The preparation of the soil does not make the machine a fixture, nor does the fact of its being put into a receptacle so prepared for it, make it a fixture.

As regards the straightening-plates, the decision below must be reversed; and, as regards the weighing-machine, it will be affirmed. There will be no costs of the appeal, and the deposit will be returned.

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LORDS JUSTICES, Nov. 7, 1868.

In re GOULDWELL; *Ex parte* SQUIRE.

38 L. J. Bk. 13; L. R. 4 Ch. 47; 19 L. T. 272; 17 W. R. 40.

Bankruptcy—Act of Bankruptcy—Unstamped Trust Deed—Stay of Proceedings.

BANKRUPTCY.—*A deed of assignment for the benefit of creditors, not registered through want of the necessary assents, may be used, even though unstamped, as evidence of an act of bankruptcy.*

Where an adjudication was obtained upon the bankrupt's own petition, and on the same day, but at a later hour, another adjudication in another Court was obtained by a creditor upon an earlier act of bankruptcy, the Court stayed proceedings under the former adjudication.

On the 20th of July the bankrupt executed an ordinary deed of assignment of all his property to trustees, upon trust to pay his debts. He was unable to obtain the necessary assents of his creditors, and the deed could not, therefore, be registered under the Bankruptcy Act, 1861, and it remained unstamped. On the 8th of August the bankrupt obtained an adjudication of bankruptcy against him upon his own petition in the County Court of Hull.

On the same day, but at a later hour, an adjudication was made against him by the Court of Bankruptcy, at Leeds, upon the petition of a creditor. The act of bankruptcy relied on was the assignment of property by the deed above mentioned.

The petitioning creditor then applied to the County Court at Hull for an order to stay proceedings under the adjudication there obtained. This was refused, upon the ground that the deed not having been stamped could not be used for any purpose in Court. From this refusal the petitioning creditor now appealed.

Mr. De Gex, for the appellant.—There is no objection to our using the deed, though unstamped, for the purpose for which we seek to use it—*Ponsford* v. *Walton* (37 L. J. C.P. 113; L. R. 3 C.P. 167), where the Judges adopted Lord Westbury's decision in *Ex parte Wensley* (32 L. J. Bk. 23; 1 De Gex, J. & S. 273), overruling His Lordship's later decision to the contrary in *Ex parte Potter; In re Barrow* (34 L. J. Bk. 46).

Mr. Jemmett, for the official assignee in the Hull bankruptcy, contended that Lord Westbury's later decision was right. The adjudication at Leeds was open to doubt, whereas the other was free from all doubt, and was moreover prior in date. There was no good reason for disturbing it.

WOOD, L.J.—The decision of the Judges in *Ponsford* v. *Walton* seems to me to decide the point relative to the use of the deed, though unstamped, as an act of bankruptcy. I agree with the conclusion arrived at by them, and think the reasoning upon which it is founded is correct. It is clear that the deed, though unstamped, passes the estate; it is not void. Only under the act 5 Will. & M. c. 21. s. 11. and the subsequent similar enactments it may not be pleaded or admitted in any Court to be good or available. But the object of the present proceeding is to make it bad, as being an act of bankruptcy; there seems then no good reason why it should not be so used.

Next, as to the discretion to be exercised in staying proceedings, the Court always inclines to favour an adjudication obtained on the part of a creditor in preference to one made at the instance of the bankrupt himself. I think, in the present instance, the proceedings in Leeds would be more advantageous for the creditors generally than those in Hull, and therefore the latter must be stayed.

SELWYN, L.J.—The question as to staying proceedings is one of convenience. Lord Eldon, in the case of *Ex parte Layton and Ex parte Hardwicke* (6 Ves. 433: see p. 439), said, that "If there are two commissions, and the

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Court see that by superseding one the other may be made good, and will answer the purpose of convenience to the creditors and the bankrupt himself, the Court will supersede the one if the objections to the other would be thereby removed." In the present case it seems altogether more convenient that the second adjudication should be supported rather than the first, for it relates back to an earlier date, and the creditors seem to wish that the administration of the estate should take place under it, for none of them supports the other adjudication. The order appealed from must be discharged, and the proceedings in the Hull Court stayed.

PROBATE. Nov. 3, 1868.

In the goods of MARY REID.

38 L. J. P. 1; 19 L. T. 265.

Followed, *Durham* v. *Northern*, [1895] P. 66; 69 L. T. 691 (P.D. & A.).
Approved, *In the goods of Smart*, [1902] E. R. A.; 71 L. J. P. 123; [1902] P. 238; 87 L. T. 142 (P.D. & A.).

Probate—Unexecuted Papers—Reference to, in Will and Codicil—Incorporation.

WILL.—*Where the will, if read as speaking at the date of the execution of the codicil, contains language which would operate as an incorporation of a document to which it refers, such document, although not in existence until after the execution of the will, is entitled to probate by force of the codicil. But where the reference in the will was to a future document, and the language of the codicil, in which the reference was repeated, was ambiguous and might be read as pointing either to an existing or future document, the Court refused to incorporate unexecuted papers written by the testatrix between the date of the will and codicil.*

Mary Reid, late of Oxford Parade, Cheltenham, in the county of Gloucester, widow, died on or about the 19th of October, 1867, leaving a duly executed will and codicil. The will bore date the 24th of May, 1864; the codicil was not dated, but it appeared from the affidavit of the attesting witnesses that it was executed in the latter part of April or the beginning of May, 1866. By her will she gave all her ready money to her executors, "to pay her funeral expenses, &c., as also some small sums as remembrances to friends, to be named in a letter addressed to my two nieces, Margaret G. Thain and Lilias Thain," whom she appointed residuary legatees. In disposing of certain sheep in Australia, she divided the flock into four parts. Three of these she specifically bequeathed, and then continued, "the other portion to be given to my residuary legatees, to be appropriated by them as specified in my letter."

The codicil ran thus: "In consequence of some deaths in our family, it is necessary that I add a short codicil to my will, &c. In the first place, my set of pearl ornaments, which I then left to Mary Eweretta Thain, in consequence of her early and melancholy death, so much lamented by us all, I must now destine to some one else, and as Mrs. Thain has no female in her family that either she or I would wish to possess those family jewels, *I now leave them as intimated in the letter addressed* to my residuary legatees."

The will and codicil were found in an envelope in a sealed parcel. In the same parcel, but in a separate envelope, two unexecuted testamentary papers were also found. Paper No. 1. bore date the 1st of March, 1866, and commenced thus: "To my dear nieces, Margaret G. Thain and Lilias Thain, named in my last will and testament as my residuary legatees, and to whom I there stated it was my intention to address to them a letter which I wish to be equally binding and legal as if its contents had been expressed in the will itself. This my intimated intention I now shall endeavour to perform." The paper

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gave trifling legacies to certain friends and acquaintances, and also referred to her pearls,—this reference and some other portions of the document being in pencil.

Paper No. 2. simply expressed a wish that the fourth part of the sheep in Australia might go towards forming a fund to pay off a debt on a cottage, and had at the foot of it "Cheltenham, 1865." Both papers were in the handwriting of the deceased.

Dr. Swabey moved for probate of the will and codicil, together with the two unexecuted testamentary papers as incorporated by reference.—Although the will does not refer to an existing paper, the unexecuted documents were written before the codicil, and in it the reference "I now leave them as intimated in the letter addressed to my residuary legatees" is a reference to an existing document.

SIR J. P. WILDE.—I think that those papers cannot be admitted to probate as part of the will. Dealing with the case as it appears on the face of the will, the unquestionable rule of law is that the will must refer to a paper as existing at the time, and then that the reference must be in such terms that the paper referred to can be fairly recognized. Now this will does not refer to an existing paper at all. It is said very truly that the language of the will is future, and points to a future document; and, further, the document which is asked to be incorporated refers to the fact that the testatrix intended to write such a paper, and it then goes on to say that this is the document which she so intended. It is quite plain therefore that the document referred to in the will was of a future character. But then comes the codicil. *In the goods of Lady Truro* (35 L. J. Pr. & M. 89; 1 L. R. P. & D. 201) it was decided that the effect of a codicil was to make the will speak as if executed on the date of the codicil, but that is all. It was there said, "Where the will, if treated as executed on the date of the codicil and read as speaking at that date, contains language which, within the rule of *Allen* v. *Maddock* (11 Moo. P.C. 427), would operate as an incorporation of the document to which it refers, testamentary effect may be given to such document. But when this is not the case, the mere fact of unexecuted papers having been written or signed between the date of the will and that of the codicil, will not suffice to add such papers to the will by force of republication, or to make that testamentary which would not have been so, if the will had been originally executed at the later date." But the language of this instrument, read it as you will, is language of a future character, and therefore it seems to me that it cannot fall within the rule laid down in the case to which I have referred. It is quite true that the effect of the codicil is to bring down the will to that date, and that the codicil speaks of leaving certain jewels "as intimated in the letter addressed to my residuary legatees"; but then the language is ambiguous. It might point to an existing paper, but it might also point to a future paper, and the testatrix herself, when she was obviously speaking of a future paper in the will, used similar language—"the other portion to be given to my residuary legatees, to be appropriated by them as specified in my letter." The Court cannot see on the face of the will or codicil any distinct reference to an existing document, and still less that these documents existed at the time of their execution. Under these circumstances, the Court can only grant probate of the will and codicil.

PROBATE. Nov. 10, 1868.

In the goods of WILLIAM PASCALL.

38 L. J. P. 3; L. R. 1 P. & D. 606; 19 L. T. 366.

Probate—Verbal Instructions—Memorandum made in Presence of Testator—Incorporation.

WILL.—*A. being ill in bed, sent for an attorney's clerk, to whom he gave verbal instructions for the preparation of his will. The clerk made a*

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memorandum of part of them in his presence, and trusted to memory for the remainder. Before the will could be prepared A. became suddenly worse, and he then executed a paper in which he desired that the "instructions given to the clerk" should be carried out:—Held *(on motion), that the mere fact of the clerk writing in the presence of A. did not make the "memorandum" a written document of which A. had cognizance, and that it was not incorporated by the reference to the "instructions" in the paper.*

The deceased, William Pascall, late of Bowdon, in the county of Chester, died on the 25th of September, 1868. On the evening of the same day, being then ill in bed, he gave verbal instructions for the preparation of his will to an attorney's clerk, who attended him for the purpose. Part of the instructions so given, viz., the names of the executors, the names of the children, a legacy of 50*l.* to his sister, and the enumeration of the property, the clerk reduced to writing in the presence of the deceased, and trusted to memory for the remainder. It did not appear that the memorandum was read over to the deceased. After the clerk left the deceased grew suddenly worse, and he then, at the instance of his medical attendant, executed the following paper:

"The instructions given, this Tuesday, August (a mistake for September) 25th, 1868, to Messrs. Whitworth's clerk, I desire to be carried out."

He died a few hours afterwards, and before the will could be prepared.

Pritchard moved for the probate of the paper and the memorandum of instructions made by the clerk as together constituting the will of the deceased. The memorandum was clearly incorporated by reference.

[Sir J. P. Wilde.—How do you shew from the affidavit of the clerk that the deceased knew anything of the existence of the document beyond the fact that the clerk sat and wrote at the table?]

The document was written in his presence, and these were the only instructions given by the deceased that day. That the document is incomplete is no objection. So far as it goes it expresses the intention of the deceased.

Sir J. P. Wilde.—I fear I cannot grant this probate, upon motion at any rate. You are, however, at liberty to propound the papers, and take the considered opinion of the Court upon them. It seems to me that before the Court makes a grant of this kind it ought to be satisfied that the testator, at the time he signed this paper, was refering distinctly to some written document of which he had cognizance, and that the reference should be so definite as to enable the Court to identify the document. That is the plain rule upon which the Court acts in all cases.—[Having referred to the facts of the case as above detailed, his Lordship continued]—Now, the question is, whether the paper executed by the deceased does refer in distinct terms to any written document which he wished to incorporate. It seems to me that it does not. When he says, "the instructions given this Tuesday," &c., he meant, I think, the instructions which he verbally gave the clerk, and though the clerk did make a very meagre note, which, according to his own account, does not contain a tithe of the will, still he made no such paper as confessedly was the substance of his instructions, and still less is there any evidence to shew that the testator knew that there was any such paper in existence. The application for probate must be refused, but the parties may propound the papers if they please.

PROBATE. Nov. 5, 17, 1868.

SPRIGGE *v.* SPRIGGE.

38 L. J. P. 4; L. R. 1 P. & D. 608; 19 L. T. 462; 17 W. R. 80.

Will—Revocation—Insanity—Onus Probandi.

Will.—*S. duly executed his will. Five years afterwards he became insane, and died in a lunatic asylum. The will was seen in his custody two months*

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after its execution, but it could not be found at his death*:—Held, *that there being satisfactory evidence of the due execution of the will, the onus of shewing that it was destroyed by S. when of sound mind lay upon the party alleging its revocation.

The testator, Mr. Oliver Sprigge, late of Peterborough, surgeon, died, on the 3rd of December, 1867. He had declined to make a settlement on his wife, but on the 15th of September, 1858, the day after his marriage, he executed a will in her favour and the children that might be born to them, and appointed her one of his executors. In 1863 his mind became affected. He continued to grow worse, and in November, 1865, he was removed to Lincoln Lunatic Asylum, where he died. Search was made for the will after his death, but it could not be found. The plaintiff, the widow, propounded as executrix a copy of it. The defendants (the children and only next-of-kin, who appeared by their guardian) pleaded that it was destroyed by the testator with the intention of revoking it, and that when he so destroyed it he was of sound mind, memory and understanding.

The case was heard on the 5th of November.

Dr. Deane (with him *Dr. Tristram*), was for the plaintiff.

Pritchard, for the defendants.

It was proved that the will was in the custody of the testator; that it was seen in his desk by the solicitor who prepared it about two months after its execution; and that for a considerable time—two or three years—prior to his removal to the asylum, he was in the habit of tearing up papers, regardless of their value or character. No evidence was offered on behalf of the defendants, who gave notice with their pleas that they only required the will to be proved in solemn form.

Cur. adv. vult.

Sir J. P. Wilde (*Nov.* 17).—This was a question of revocation. There was no doubt of the execution of the will, and the question was, whether, in the circumstances that happened, the Court ought or ought not to presume that the will had been revoked, the fact being that the will remained in the custody of the testator from the time it was made, and that upon his death it was not to be found. Under ordinary circumstances in such a state of things, the presumption of law is that the testator destroyed it *animo cancellandi*, but in this case it appeared that the testator, during a considerable portion of the time that elapsed between the making of the will and his death, was of unsound mind. The question that arose was the general one, whether the Court ought to apply the ordinary presumption in such a case.

Now, a case was cited in argument, *Harris* v. *Berrall* (1 Sw. & Tr. 153), and on looking to that case I am of opinion that it is an authority directly in point, and that it concludes the general question. In that case the will had not been destroyed, but had been cancelled, and the question was whether it had been cancelled *animo revocandi*. Sir C. Cresswell said, "If there had been no evidence to fix one time or another for its mutilation, I still think that it would have been entitled to probate. By 1 Vict. c. 26. every will is required to be executed as therein prescribed. If it is once proved that a will has been duly executed I hold that it is entitled to probate, unless it is also shewn that it has been revoked by one of the several modes pointed out by that statute; and I am of opinion that the burden of shewing that it has been so revoked lies upon the party who sets up the revocation. One of the modes of revocation pointed out by the statute is tearing with an intention to revoke; but an insane person cannot be said to have any intention. The will in this case was in the custody of the deceased at the time she was of unsound as well as of sound mind. Shortly before her death it was discovered to have been torn by her. The burden of shewing that it was not done after she became insane but at a time when she was of sound mind is cast upon the plaintiff who sets up the revocation of the instrument." I am entirely of the same opinion, and I think the rule applies

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equally to cases in which the will has been destroyed. The short proposition is, that the burden of shewing that the destruction of the instrument was not done by the testator after he became insane but that it was done when he was of sound mind, is cast upon those who set up the revocation. Here there was no evidence to shew when it was done, and thus the party setting up the revocation failed to make out the case upon which the presumption would rest. In these circumstances I think the paper is entitled to probate.

Upon the application of counsel, the costs of all parties were allowed out of the estate.

PROBATE. Dec. 1, 1868.

DUPREZ v. VERET.

38 L. J. P. 5; L. R. 1 P. & D. 583; 19 L. T. 525; 17 W. R. 157.

Staying Proceedings—Lis alibi pendens—Amendment of Pleadings to raise Question of Domicil.

WILL.—*A, a native of France, died after many years' residence in London, leaving a will, executed according to the English law, in which he appointed B. sole executrix. B. propounded the will in a declaration. C, the brother, who, with other of the next-of-kin, had entered a caveat, filed pleas and treated the will as that of a domiciled Englishman. Some months afterwards, the cause having in the mean time been ordered to be tried by a special jury, C. and the other next-of-kin commenced proceedings in France to set aside the will, on the ground that the testator was a domiciled Frenchman, and that the will was not executed according to the law of France:—*

The Court refused to stay the proceedings in the suit pending the proceedings before the French tribunal, or to allow the pleadings to be amended so as to raise the question of domicil; the facts as to the domicil having been within the knowledge of C. from the first, and the case standing for trial.

The testator, Louis Nicolas Stanislas Veret, otherwise Bonté, died at Gainsforth Street, Horselydown, in the county of Surrey, on or about the 27th of February, 1868, possessed of personal property in England and France, and leaving a will, dated the 6th of February, 1868, in which he appointed the plaintiff sole executrix. He was a native of France, but had lived and carried on the business of a corn-merchant in London since 1850, when he came to England to avoid a criminal prosecution which was instituted against him in his own country. On being notified of his death and the execution of the will, the defendant (his brother) and the other next-of-kin entered a caveat, and further filed, on the 17th of March, a bill in Chancery to restrain the executrix from intermeddling with the property, and for the appointment of a receiver. In this bill the testator was described as a "native of France, but a domiciled Englishman." The declaration was filed on the 1st of April. The defendant pleaded that the will was not duly executed according to the statute 1 Vict. c. 26; that the testator was not of sound mind, memory and understanding, and that the will was procured by undue influence. These pleas were filed on the 5th of May. Issue having been joined, the Court, on the 3rd of June, ordered the cause to be tried before itself by a special jury; and it stood in the list of causes set down for trial in the Michaelmas Sittings.

On the 26th of August, 1868, proceedings were commenced by the defendant and the other next-of-kin in the Civil Tribunal of Montdidier (Somme), France, to set aside the will, on the ground that the testator being a domiciled Frenchman and all the parties to the suit French subjects, the tribunal in question was alone competent to determine its validity; that the will was not executed according to the requirements of French law; and that it was procured by fraud

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and undue influence. And it was stated in the affidavits that the case would be heard on or about the 15th of December, 1868.

Dr. Tristram, for the defendant, now moved the Court to order a stay of proceedings in the suit pending the proceedings instituted in France.—The deceased being domiciled in France at the time he made the will and died, the French forum is the proper tribunal to determine its validity. Besides, the issues in dispute in both suits are the same. But if the Court should not grant the motion, it may allow the defendant to amend his pleas by adding a plea that the testator was a domiciled Frenchman, and that the very questions in dispute in the case pending in this Court are raised in the case depending in the Court in France.

Dr. Spinks (with him *Pritchard*), for the plaintiff, contra.—At this stage of the proceedings, the case standing for trial by a special jury, it is too late to amend the pleadings. As to a stay of proceedings, the Court has seisin of the case, and before it can dispossess itself, it must decide that there was a French domicil. But not only has that question not been raised, but the defendant himself has alleged in the bill filed in Chancery that the testator was domiciled in England, and in his affidavit in opposition to an application in Chancery for security for costs, that he himself has come to London with the intention of permanently residing here. The application is an attempt to oust the Court of its jurisdiction.

Dr. Tristram, in reply.

Sir J. P. Wilde.—In this case the testator died in February last. Thereupon the executrix propounded the will which he left behind him, treating it as the will of a domiciled Englishman, and alleging that it was well made according to English law. Upon that being done, it was open to the defendant to take one of two courses. He might allege, as he has alleged to-day, that although the deceased was resident in England, yet that he came to England under peculiar circumstances to avoid the effects of a criminal prosecution, and that he always intended to return to his native land; that there was the *animus revertendi*, and that consequently he remained a domiciled Frenchman, he not having lost his original domicil in France. It was open to the defendant to contend that, and to go on and say, that the will was not well executed according to the law of the domicil. That was one course he might have taken. The other course was to treat it as the plaintiff treated it, as the will of a domiciled Englishman, and to traverse the plaintiff's allegation that, according to the law of England, the will was a good one. He took the latter course, and he took it with his eyes open, because all the facts now relied upon to shew that the deceased was a domiciled Frenchman were facts, as it appears from his own affidavit, within his knowledge at the time. It seems from the 5th paragraph of his affidavit that he perfectly well knew all along that the deceased was a domiciled Frenchman, and yet, notwithstanding that, he takes issue upon the question whether the will was good according to the law of England, treating it as purely a question to be decided by the law of England. The suit goes on, issue is joined, and directions are given for the mode of trial; and then, in August this year, the defendant goes to the French Court and commences a suit there. He now comes to this Court and asks to have all proceedings stayed in it. It is obvious that such an application is quite untenable, because the question to be determined in the French Court is a different one altogether from that to be determined in the English Court. In the French tribunal it will have to be decided, first of all, whether the testator was a domiciled Englishman or not; in the English Court that fact is admitted, and the question will be whether according to the law of England, the will is a good one. The French Court will not entertain the suit, except upon the assumption that the deceased was a domiciled Frenchman, or if otherwise, according to the law of nations, they would decide it according to English law.

This Court on its side is proceeding on the assumption that he was a domiciled Englishman; and, therefore, the proceedings in the two Courts will

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be proceedings of a totally different character. It is, therefore, quite clear to my mind that the one suit is quite independent of the other, and that it would be monstrous to stay proceedings in the one which was first commenced in order that the proceedings in the other might be first determined. Dr. Tristram then applies to be allowed to retrace his steps, and to say at the eleventh hour that the deceased was not a domiciled Englishman, but a domiciled Frenchman. That is a matter within the discretion of the Court. It is, however, five months since the suit was commenced, and under such circumstances the Court would never allow a party to retrace his steps, unless it was satisfied that he was under some mistake as to the facts, and discovered at the last moment that the testator was a domiciled Frenchman. But he knew this all along, and it would be monstrous to allow him, after all this expense has been incurred, to withdraw his pleas and file fresh pleas founded on circumstances which were within his knowledge from the first. The application must be rejected, and with costs.

Dr. Tristram asked for leave to appeal.

SIR J. P. WILDE.—The question as to the amendment of the pleadings is not properly a ground of appeal. I give leave to appeal on the motion as originally made, on condition of payment of costs, and that there be no stay of proceedings.

MATRIMONIAL. Nov. 12, 13, 14, 1868.

KEECH *v.* KEECH.

38 L. J. P. 7; L. R. 1 P. & D. 641; 19 L. T. 462.

Desertion—Wife's Petition—Judicial Separation.

DIVORCE AND MATRIMONIAL CAUSES.—*Immediately after their marriage in* 1845, *A. and B. proceeded to Jamaica, where A. (the husband) had an appointment. B. (the wife) came to England at the end of the year in consequence of ill health, and corresponded with and received an allowance from A. until* 1851. *In* 1851 *A. wrote requesting her to return to Jamaica, stating at the same time that if she did not she would hear no more of him. B. replied that she was still too unwell to return to the island and remained in England. From* 1851 *to* 1856 *she neither heard nor received any allowance from A. In* 1856 *she communicated with him through a friend, the result being an arrangement for the continuance of the allowance, but she at no time expressed any desire to return to him. In* 1860 *A. wrote to say that he could no longer pay the allowance, and all communication ceased between them*:—Held, *that after the definite offer made by A. in* 1851, *B. should have been able to shew that she subsequently sought a renewal of the cohabitation, and that the circumstances under which she and A. continued to live separate did not constitute desertion on his part.*

This was a petition by the wife for dissolution of marriage on the ground of adultery, cruelty and desertion. The respondent did not appear. At the hearing, which took place before the Judge Ordinary on the 12th and 13th of November, the charge of adultery was established; the petitioner failed to prove cruelty, and judgment was reserved on the question of desertion.

The respondent was a medical practitioner. He married the petitioner in April, 1845, and all correspondence ceased between them in 1860. The other facts are set out in the judgment.

Dr. Swabey, for the petitioner.

The JUDGE ORDINARY (*Nov.* 14).—In this case the wife prays for a dissolution of marriage on the ground of adultery, cruelty and desertion. The Court has already intimated that it considers the adultery to be proved, and that it considers the cruelty has not been proved. The remaining question was, whether desertion was established. Immediately after her marriage Mrs. Keech

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went with her husband to Jamaica, where he had an appointment which gave him an income only of 100*l.* a year. She had in consequence to put up with some hardship. Her health suffered, and she returned to England at the end of 1845 or beginning of 1846, and she has been in England since that date. Mr. Keech, so far as we know, has been abroad ever since, the greater part of the time in Jamaica, where he succeeded in obtaining another appointment of a more lucrative character; and the contention on the part of the petitioner is, that the circumstances under which they have lived separate amount to desertion on his part. When she left Jamaica he put her on board the vessel himself, and otherwise then acted kindly. She further states that there was no arrangement for a separation, but that he said he would allow her 30*l.* a year. His income being only 100*l.* a year, that would seem to be a fair provision. She then says that she went to live with her mother until 1851, and that she and the respondent corresponded on kindly terms. Now, here you have a wife returning to England on account of her health, taking up her abode with her mother, her husband making her an allowance and corresponding with her, and no one can say that there was then desertion. In 1851, she says, he wrote to me. When asked for the letter she says she tore it up. What did he say in the letter? He said, "Come out here (Jamaica) directly, and the money for your passage will be at my agent's;" and then he went on to say, "If you don't come I shall disappear, and then you won't hear any more of me." Now it is very likely that he intimated on some former occasion his desire to see her out in Jamaica. The petitioner says that it was not so, and the Court has no means of knowing; but from the tone of the letter it would rather look as if he had also on a former occasion expressed a like desire to see her in the island. What was the answer? "I answered that I was still in bad health, and couldn't go (I was still weak and suffering from neuralgia), but I asked for the money which was intended for my passage to apply it to other uses." He refused, or at any rate did not assent, and she did not go out. Here the correspondence seems to have ended, and she heard no more of the respondent until 1856. In 1856 she succeeded through the medium of some persons living in Jamaica, in ascertaining, which she had been desirous of doing, where he was, and she found that he was in the island and was leading a loose life. She then got a relation, an attorney, to write to him for an allowance, and he thereupon made an allowance of 50*l.* to herself, and a further allowance of 25*l.* which was to be paid to her mother by way of remuneration for the past support of his wife in England; and this allowance he continued to pay up to October, 1860. He then wrote and said that his circumstances were altered, that he had lost his appointment, and that he was no longer able to pay the allowance. It is under these circumstances that the Court is asked to hold that he deserted his wife. But what is meant by desertion? It means that he wilfully separated himself from his wife against her consent; but the Court cannot come to that conclusion. Here there was a definite offer by the husband to come and join him in Jamaica in 1851, and funds provided for her passage; and if the wife's health was not then sufficiently re-established to admit of her going to Jamaica, still she ought to have been able to shew in the witness-box that, knowing her husband's desire to have her come back to him, she subsequently offered to join him. It seems to me that he was willing to have her back, and that she was not willing to go; and I find in one of his letters, dated in 1860, a passage to this effect: "I have declined repeated offers of private practice, one recently, Mrs. Keech having refused to return to the island." Taking that and the evidence given in the case, I cannot see my way to the conclusion that the respondent wilfully deserted his wife. That Mr. Keech is willing enough for a divorce I am disposed to think, but that he ever brought himself within the provisions of the act of parliament by deserting his wife, I am not disposed to think. He has, however, been guilty of adultery, and if the wife desire it she can have a decree of judicial separation.

Judicial separation decreed.

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MATRIMONIAL. Nov. 12, 17, 1868.

CURTIS v. CURTIS.

38 L. J. P. 9; 19 L. T. 610.

Dissolution of Marriage—Non-Appearance of Petitioner at Hearing—Dismissal of Petition—Practice—Costs.

DIVORCE AND MATRIMONIAL CAUSES.—*Where the wife, the petitioner, did not appear on the day of hearing, the Court, before dismissing the petition, required that a rule to shew cause should be first served upon her, and intimated that in all such cases that practice should be followed.*

If in a matrimonial suit the wife be unable to go to trial in consequence of the non-payment of her costs by the husband, she should either apply at chambers to have the case stand over, or appear in Court on the day of hearing and state her inability to proceed.

This was the wife's petition for dissolution of marriage. It appeared in the general list of causes for Michaelmas Term, and stood for hearing, before the Judge Ordinary, on Thursday the 12th of November. The petitioner did not appear.

Bayford, for the respondent, asked that the petition might be dismissed.

The JUDGE ORDINARY.—With a view to establishing a practice in these cases, let a rule be served on the other side to the effect that, unless on next motion day cause be shewn to the contrary, the petition will be dismissed.

Searle (*Nov.* 17) shewed cause.—The petitioner has got an order for costs and alimony, and an attachment against the respondent to enforce their payment. They however still remain unpaid, and the petitioner is in consequence not in a position to proceed to hearing. She is entitled to have the rule discharged, with costs.

Bayford admitted that he could not support it, but submitted that under the circumstances the petitioner was not entitled to costs.

The JUDGE ORDINARY.—The petitioner ought to have done one of two things. She ought either to have come to chambers and asked that the case might stand over, or she should have come to the Court on the day of hearing and stated her inability to proceed in consequence of the non-payment of her costs. The husband was brought here by seeing the case in the paper, and the cause of this rule was the petitioner's absence. She cannot therefore have the costs of the argument.

Rule discharged; costs of argument not to be taxed against respondent.

MATRIMONIAL. Nov. 18, 19, 1868.

BARNES v. BARNES AND BEAUMONT.*

38 L. J. P. 9; 19 L. T. 526; 17 W. R. 75.

Matrimonial Suit—Respondent and Co-Respondent—New Trial—Severance of Issues.

DIVORCE AND MATRIMONIAL CAUSES.—*Where there was reason to suppose that, on the trial of the husband's petition, evidence applicable to the respondent alone affected the minds of the jury against the co-respondent, the Court, in making absolute the rule for a new trial, ordered that the issues should be severed, so that the charges against the co-respondent might be tried separately from those against the respondent.*

* Before the Full Court: The Judge Ordinary, Willes, J. and Cleasby, B.

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This was the husband's petition for dissolution of marriage on the ground of the wife's adultery with the co-respondent. The respondent and co-respondent denied the charge, and the respondent further pleaded a counter-charge of adultery against the petitioner.

The cause was tried, before the Judge Ordinary, by a special jury, in the Sittings after Trinity Term. Alleged confessions by the respondent were much relied on by counsel for the petitioner, and the jury, after long deliberation, found that the respondent and co-respondent had committed adultery, and they assessed the damages at 1,000*l*. They also found that the petitioner had been guilty of adultery, but did not state with whom or where, though the charges in the answer were specific. The petitioner took no steps to impeach the verdict of the jury so far as it affected him; but, on the 3rd of November, *Dr. Spinks*, for the co-respondent, obtained a rule *nisi* for a new trial on the ground that the verdict was against the weight of evidence. In granting the rule the Judge Ordinary directed that it should be argued before the Full Court.

Cause was shewn against the rule by *Ballantine*, *Serjeant* and *Willis*, for the petitioner; and it was supported by *Dr. Spinks* and *F. H. Lewis*, for the co-respondent.

The JUDGE ORDINARY.—There were three questions of fact submitted to the jury. One of them was, whether the petitioner had committed adultery; another of them was, whether, upon the evidence applicable to the respondent, it was proved that she had committed adultery with the co-respondent; and the third was, whether the co-respondent, upon the evidence legally applicable to him, was proved to have committed adultery with the respondent. We are all of opinion that the inquiry with respect to the co-respondent has not been a satisfactory one. The effect of some of the evidence applicable to the respondent alone was such as probably to affect the minds of the jury strongly against him, and we are therefore prepared to grant a new trial of the issue found against him. The petitioner, however, has also been found guilty of adultery. He has not applied to have that finding set aside, but we nevertheless think that, if he desire it, he ought to have the opportunity of reopening the question. The form in which the verdict was delivered was such as to lead the Court to believe that possibly justice has not been done to him, and he may, if he wish it, have a new trial; but if he determine upon having a new trial, it must be a new trial as to the whole matter, including the issue found against the respondent. With a view also that justice may be done to all parties, the charges against the co-respondent must be tried separately from those against the respondent, and the issues therefore severed.

Rule absolute for new trial of the issue found against the co-respondent.

MATRIMONIAL. Dec. 15, 1868.

BARNES *v.* BARNES AND BEAUMONT.

38 L. J. P. 10; L. R. 1 P. & D. 572; 19 L. T. 526.

Dissolution of Marriage — Specific Counter-charges of Adultery by Respondent—General Verdict of Adultery found against Petitioner—New Trial offered and declined—Refusal of Decree—20 & 21 Vict. c. 85. s. 31.—Costs.

DIVORCE AND MATRIMONIAL CAUSES.—*The cases are few in which the Court would be justified in visiting with the penalty of adultery a guilty wife whose husband has also been found guilty of adultery.*

Where a general verdict of adultery was found against the husband (the petitioner), the issues raised by the counter-charges of adultery in the wife's answer being specific, and the petitioner declined the offer of a new trial, the

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Court, accepting the verdict of the jury as conclusive of his adultery, refused to exercise its discretionary power under section 31. of the 20 & 21 Vict. c. 85, and condemned him in the wife's full costs.

In this suit, which was the husband's petition for dissolution of marriage, and which was tried before the Judge Ordinary, by a special jury, in the sittings after Trinity Term, the jury found that the respondent and co-respondent had committed adultery together, and they assessed the damages at 1,000*l*. They also found that the petitioner had likewise been guilty of adultery; but they declined to say with whom or where, or whether it was committed with the knowledge and consent of the respondent. The petitioner took no steps to impeach the verdict, but the Full Court, in making absolute a rule *nisi* for a new trial of the issues found against the co-respondent, intimated that the petitioner might also have a new trial of the issue found against him, the question of the respondent's guilt to be, in such event, also re-opened.

Willis, on behalf of the petitioner, now moved the Court to exercise its discretionary power under section 31. of the 20 & 21 Vict. c. 85, and to grant a decree *nisi* notwithstanding the verdict. The jury having only found a general verdict of adultery, the Court might assume that the petitioner had not been guilty of the specific adultery charged against him in the respondent's answer, and might properly exercise the discretionary power vested in it by section 31. of 20 & 21 Vict. c. 85.—He cited *Narracott* v. *Narracott and Hesketh* (3 Sw. & Tr. 408; 33 L. J. Pr. M. & A. 132).

[The JUDGE ORDINARY.—But in that case no verdict was found against the petitioner. As to the offer of a new trial, the petitioner was not in a position to accept it.]

Dr. Deane (with him *Dr. Swabey*), for the respondent, *contra*.—The petitioner could not avail himself of the finding of the jury against his wife and repudiate it as against himself. As to the discretionary power given by section 31. of the first Divorce Act, the Court was not to say whether the petitioner had committed adultery (here the jury found that he had); but whether the adultery partook of that venial character which, notwithstanding its commission, would justify the Court in granting him the relief he sought. The respondent was entitled to her full costs—*Ellaytt* v. *Ellaytt, Taylor and Halse* (3 Sw. & Tr. 504; 33 L. J. Pr. M. & A. 137).

The JUDGE ORDINARY.—I assume that the petitioner declines to avail himself of the liberty granted by the Full Court to submit the whole matter to a fresh jury. That being so, the verdict stands. It is now said that it was not a verdict against the petitioner on the issues, but merely a general verdict of adultery. There were certainly some expressions of the jury, when the verdict was given, which were not satisfactory; but, on the whole, there is no doubt that the jury did find the petitioner guilty of adultery. The Court is now asked to take one of two courses,—either to pass over the finding of the jury and to act on its own opinion as to the guilt of the petitioner; or, accepting the finding of the jury and treating the fact of adultery as proved, to exercise its discretion under the 31st section of the Divorce Act, and, notwithstanding the adultery of the petitioner, to grant him a divorce. I am of opinion that the Court cannot properly do one or the other of these things. Now, whatever may be the effect of the verdict of a jury in some cases,—to whatever extent it may be possible for the Court to exercise its discretion upon it, and to refuse to withhold a divorce, —yet in this case I am clear that the verdict ought to be allowed to have its ordinary effect. I do not propose now to attempt a definition of the cases in which the Court would pass by the verdict of a jury; but in this case the petitioner has refused the opportunity of having the verdict reviewed before a fresh jury; and the Court therefore is not inclined to pass it by. The remaining question is, whether the petitioner ought to have his divorce. The language of the section is: "Provided always, that the Court shall not be bound to pronounce such decree if it shall find that the petitioner has, during the

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marriage, been guilty of adultery, or if the petitioner shall, in the opinion of the Court, have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty, &c." That looks as if the legislature meant that the cases in which the Court did not grant a divorce should be the exceptions. But, in construing that section, my learned predecessor always considered what was the practice before the Divorce Act passed, and what the House of Lords used to do. He considered that, although the language of the section gave a discretion, he would be acting in conformity with former practice by withholding a divorce under such circumstances, or making the grant of it quite exceptional. I do not propose to depart from that principle. The cases are few in which the Court would be justified in visiting with the penalty of adultery a guilty wife whose husband has also been found guilty of adultery. As to the question of costs, that must be governed by the cases of *Ellaytt* v. *Ellaytt, Taylor and Halse* (3 Sw. & Tr. 504; 33 L. J. Pr. M. & A. 137) and *Sedden* v. *Sedden* (2 Sw. & Tr. 640; 31 L. J. Pr. M. & A. 101). The wife has her costs in these cases because she succeeds in the suit. It is true the husband succeeds in proving her guilty of adultery; but then she, on her side, has established the proposition that he had no ground for coming into Court. The wife must therefore have her full costs.

The COURT refused to dismiss the petition against her until the issue with the co-respondent had been disposed of.

MATRIMONIAL. Dec. 15, 22, 1868.

SYKES *v.* SYKES AND SMITH.

38 L. J. P. 12; 19 L. T. 611; 17 W. R. 265.

Confrontation—Petitioner and Co-respondent ordered to attend at Trial—Damages—Claim withdrawn—Reinstatement of—Practice.

DIVORCE AND MATRIMONIAL CAUSES.—*The co-respondent, who pleaded a counter-charge of adultery against the petitioner, and whose case depended upon the petitioner's identification, applied that he might be ordered to attend at the trial. The petitioner asked that, as a condition of the order, the co-respondent might also be ordered to attend. The Court ordered that both petitioner and co-respondent should attend at the trial.*

A claim for damages having been formally withdrawn, the Court refused to allow it to be reinstated in the petition, the petitioner having failed to shew that it was withdrawn in error, or that an altered state of circumstances had arisen which would justify its reinsertion.

This was the husband's petition for dissolution of marriage, on the ground of the wife's adultery with the co-respondent. It also contained a claim for damages, but this was struck out of the petitioner's motion on the 3rd of November; and on the 10th of November the co-respondent obtained leave to amend his answer, by adding a counter-charge of adultery against the petitioner.

Dr. Swabey, for the co-respondent, moved the Court (*Dec.* 15) to order the petitioner to attend at the trial. The petitioner was abroad, and the co-respondent's case depended on his identification. In *Hooke* v. *Hooke* (28 L. J. Prob. & M. 29) it was held, that the Court had not power in a suit for dissolution to compel the respondent to attend, but in *Pollack* v. *Pollack, Deane and Macnamara* (2 Sw. & Tr. 648; 32 L. J. Pr. M. & A. 28), on intervention by the Queen's Proctor after decree *nisi*, the proceedings were ordered to be stayed till the petitioner should attend.

Searle, for the petitioner, submitted, that the Court could only order his attendance for the purpose of being examined under section 43. of the

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20 & 21 Vict. c. 85. If, however, the Court made the order, the co-respondent should also be required to attend.

The JUDGE ORDINARY ordered that both petitioner and co-respondent should attend at the trial.

Dr. Tristram, for the petitioner, moved (*Dec.* 22) to be allowed to reinstate in the petition the claim for damages.

Dr. Swabey, for the co-respondent, *contra*.—The claim had been voluntarily withdrawn, and it would not have been revived if it had not been for the counter-charge of adultery against the petitioner.

The JUDGE ORDINARY.—I think the application must be refused. It may be that on good grounds shewn (here no grounds have been shewn) the Court would allow a petitioner to change his mind in such a matter, but, as the Court must proceed on some principle, he cannot be allowed to shift backwards and forwards as often as he pleases. The claim has been formally withdrawn, and there ought to be an end of it, unless it can be shewn that it was withdrawn in error, or that some altered state of circumstances has arisen which would justify its reinsertion. The application must be refused, with costs.

MATRIMONIAL. Nov. 24, Dec. 1, 8, 1868.

CAVENDISH *v.* CAVENDISH AND ROCHEFOUCAULD.

38 L. J. P. 13; 19 L. T. 497; 17 W. R. 263.

Settlements—Order under 20 *&* 21 *Vict. c.* 85. *s.* 45. *and* 22 *&* 23 *Vict. c* 61. *s.* 5.—*Omission in Order per Incuriam—Order acted on and appealed against—Rectification of—Practice.*

DIVORCE AND MATRIMONIAL CAUSES.—*In making an order under* 20 *&* 21 *Vict. c.* 85. *s.* 45. *and* 22 *&* 23 *Vict. c.* 61. *s.* 5, *the Court failed per incuriam to give the husband (the petitioner) the interest in the wife's property which it intended. Before the error was discovered the order was acted on by the petitioner and repealed against by the respondent. The Court held that it had power to amend the order so as to carry out its original intention, and intimated that it would follow the practice of the Court of Chancery, which varies its orders, but not without re-hearing when the order has passed and been entered as a decree. The matter was accordingly re-heard, and fresh circumstances having been brought to the knowledge of the Court the parties were directed to attend at chambers that the order might be drawn anew.*

The husband, the petitioner in the suit, having obtained a decree for dissolution of the marriage on the ground of the wife's adultery, subsequently petitioned the Court, under section 5. of the 22 & 23 Vict. c. 61. and section 45. of the 20 & 21 Vict. c. 85, to vary the marriage settlements, and to order also that provision should be made for his benefit and that of the children of the marriage out of the wife's property.

Owing to the character of the settlements and the circumstances attending the property affected (it consisted principally of coffee plantations in Ceylon, which were heavily mortgaged) the matter was very complicated, and the Court in consequence invited both parties to submit proposals for the basis of an arrangement.

This was done, and on the 31st of July, 1868, the Judge Ordinary made an order which, *per incuriam*, omitted to give the petitioner, as intended, one-third of the interest in a sum of 20,000*l.* during the life of the respondent.

The order was appealed against by the respondent, and was acted on by the petitioner before the discovery of the omission.

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Hodgson, for the petitioner, now moved the Court to amend the order so as to carry out its original intention.

Manisty (with him *Cohen*), for the respondent, contra.—At common law an order once acted upon cannot be altered or amended. Here, not only has the order been acted upon, but it is also under appeal. It can only be altered by a higher Court; and even if it can be amended in this Court, this is not the mode in which it should be done. It should be by petition.

Hodgson, in reply.—The Court has power to correct its mistakes. The appeal will not be affected by the correction.

The JUDGE ORDINARY.—As to the justice of the matter I have no doubt. What took place was this: each party sent in a proposal, the matter being very complicated and difficult to deal with. It was spoken to on a subsequent occasion, and the Court having ascertained what it was that the petitioner desired, and that it was reasonable, an order was thereupon drawn up; but before it was drawn up notice was given to the parties to attend at chambers and see it. They accordingly did attend at chambers, and no objection was taken as to the mode of dealing with the 20,000*l.*, now the subject of discussion. At the same time, if the matter had been then called to my attention I should have made the alteration now desired. I am clear that the order is not in accordance with the intention of the Court; but the question is whether I can now correct the mistake. The practice of the Court is not sufficiently formed in these matters to indicate the course which I should take. There is no analogy between orders of Courts of common law and orders of this kind, but the Court of Chancery furnishes a variety of instances which I should have thought would have been available and been cited in argument, though I know not how far it may go in dealing with cases of this kind, where the blunder is passed over by the party interested in correcting it, and where, with full notice, no objection is at the time taken. I will be guided by the practice of the Court of Chancery, and if I make the amendment I shall take care that the party appealing has the right of appeal on that as on all other points.

Cur. adv. vult.

The JUDGE ORDINARY (*Dec.* 1).—In this case the Court took time to consider whether it was within the proper exercise of its functions to alter or amend an order already made, and I intimated that, there being no established practice in this Court, I should like to ascertain what the practice was in the Court of Chancery. I find that the practice in the Court of Chancery is well established. It is this: so long as an order remains on the minutes the Court can alter it from time to time. When the order has once passed and been entered as a decree, the Court never does alter it without a re-hearing; but when any suggestion is made that the order does not carry out the intentions of the Court, then it is the daily practice to re-open and re-hear the matter with the view of doing what justice may require. I think that is the course that ought to be pursued in this case. My impression is that the parties do not desire to have the matter re-opened, and that they will be content to consider what took place last Tuesday as a re-hearing; but if they wish it, the Court will appoint next Tuesday for a further hearing; if not, the order will be amended as prayed.

The matter was re-opened and re-argued by the same counsel on the following Tuesday, the 8th of December, and fresh circumstances were brought to the notice of the Court, which led it to think that, in addition to the correction suggested by the petitioner, the order should also be amended in other respects in the interest of the respondent.

The JUDGE ORDINARY in consequence intimated that the order should be drawn anew, and directed the parties to attend at chambers for the purpose.

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MATRIMONIAL. Nov. 27, Dec. 22, 1868.

FITZGERALD *v.* FITZGERALD.

38 L. J. P. 14; L. R. 1 P. & D. 694; 19 L. T. 575; 17 W. R. 264.

Considered, *Garcia* v. *Garcia*, [1888] E. R. A.; 57 L. J. P. 101; 13 P. D. 216; 59 L. T. 524 (P.D. & A.). Followed, *R.* v. *Leresche*, [1891] E. R. A.; 60 L. J. M.C. 153; [1891] 2 Q.B. 418; 65 L. T. 602; 40 W. R. 2 (C. A.). Explained, *Mahoney* v. *McCarthy*, [1892] E. R. A.; 61 L. J. P. 41; [1892] P. 21 (P.D. & A.). Distinguished, *Bradshaw* v. *Bradshaw*, [1897] E. R. A.; 66 L. J. P. 31; [1897] P. 24; 75 L. T. 391; 45 W. R. 142 (P.D. & A.); *De Laubenque* v. *De Laubenque*, [1899] E. R. A.; 68 L. J. P. 20; [1899] P. 42; 79 L. T. 708 (P.D. & A.). Approved, *Synge* v. *Synge*, [1901] E. R. A.; 70 L. J. P. 97; [1901] P. 317; 85 L. T. 83 (C. A.). Explained, *Kay* v. *Kay*, [1904] E. R. A.; 73 L. J. P. 108; [1904] P. 382; 91 L. T. 360 (P.D. & A.). See, *Harriman* v. *Harriman*, [1909] E. R. A.; 78 L. J. P. 62; [1909] P. 123; 100 L. T. 557 (C. A.).

Desertion—Refusal of Wife to resume Cohabitation until Husband's Innocence was proved—Verdict in Favour of Husband—Cohabitation never resumed—Fresh Petition.

DIVORCE AND MATRIMONIAL CAUSES.—*No one can desert who does not actively and wilfully bring to an end an existing state of cohabitation. Cohabitation may be put an end to by other acts besides that of actually quitting the common home; and when once cohabitation has ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, desertion becomes from that moment impossible to either, at least until their common life and home have been resumed.*

A, the wife, while temporarily absent from the common home, received information which led her to believe that B, the husband, had been guilty of adultery, and she in consequence refused to resume cohabitation until his innocence was established. On the trial of her petition for divorce, on the ground of adultery and cruelty, the verdict was in favour of the husband, but both parties continued to live apart, and nothing was done by either towards reconciliation or resumption of the cohabitation. Subsequently B, the husband, committed adultery, and A. filed a fresh petition for dissolution of marriage, on the ground of adultery, coupled with desertion:—Held, *that under the circumstances B. had not been guilty of desertion.*

This was the wife's petition for dissolution of marriage on the ground of adultery, coupled with desertion without reasonable cause, for two years and upwards. It was heard, before the Judge Ordinary, on the 27th of November. The adultery was proved, and judgment was reserved on the question of desertion.

Coleridge (with him *H. Giffard* and *Dr. Swabey*), for the petitioner.

Dr. Spinks (with him *Searle*), for the respondent.

The facts are fully set out in the judgment.

The JUDGE ORDINARY (*Dec.* 22).—The petitioner in this suit instituted a former suit against her husband a few years since, charging him with adultery and cruelty. She failed to establish those charges. The parties have never lived together since. Her present suit is founded upon charges of adultery and desertion. Adultery since the conclusion of the former suit has been proved. The question which the Court has reserved for consideration is, whether the desertion is established. The facts are not doubtful. In the autumn of 1861 Mrs. Fitzgerald received information which led her to believe that her husband had been guilty of adultery. At that time their home was at Braydon Hall, but at the moment when these suspicions were aroused they were both temporarily

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absent from it—he for a month at Cowes, she for a few days in London. Some attempt was made to establish the proposition that Major Fitzgerald, on leaving for his visit to Cowes, had, in fact, determined not to return to his wife. But his conduct immediately afterwards, and the contents of the correspondence which then passed between them, sufficiently disprove any such resolve. Upon discovery of what Mrs. Fitzgerald deemed proof of her husband's guilt, she wrote to him a letter charging him with it, and distinctly refused to return home, at least for the present. She says: "I have received a communication of such a nature it is impossible for me to return to Braydon for the present. In fact, I am so entirely upset by it that it must be some days before I can recover myself sufficiently to think what to do." After writing this letter Mrs. Fitzgerald went with her mother to Dover. Thither Major Fitzgerald followed her. It is needless to pass in review the passionate letters which Major Fitzgerald then wrote, entreating forgiveness for the past (whatever that was), and that his wife would receive him and live with him again. She refused to see him, and the burthen of her letters was uniform—prove yourself innocent, and I will accede to your wishes; until then I have determined to live separate and apart from you. The act of separation was therefore that of the wife. She withdrew herself from the common home and cohabitation; and though strenuously pressed to resume it, she persistently refused. Whether she had good cause and reasonable excuse for her conduct is another matter. True, she failed to establish her husband's guilt to the satisfaction of the jury and the Court. But it is not inconsistent with that to allege that she had such reasonable grounds for suspecting her husband as to warrant her in withdrawing from cohabitation until her suspicions were confirmed or dispelled. Believing that she could establish her husband's guilt she instituted the suit to which I have above referred. The case was brought to trial at Christmas, 1863, and an appeal to the Full Court finally established the verdict against her early in the following year. Meanwhile, both parties had kept aloof from each other, as might be expected. After the first few months which immediately succeeded the withdrawal of his wife from Braydon Hall in 1861, Major Fitzgerald, so far as the Court is aware, desisted from all attempts to induce her to return to him. The termination of the legal proceedings appears to have worked no alteration in the relation of the parties. On her part, Mrs. Fitzgerald made no overtures to her husband to return to him. She says she wrote one letter to him to a wrong address, which was returned through the Dead Letter Office. She says further, indeed, that she was willing to have returned if he had asked her, and that she was bound to accept the verdict of the jury. But, on being questioned, she could not, and did not, assert that his innocence was really established to her own satisfaction and belief, and the Court may well hesitate to accept the conclusion that the trial had really removed her scruples or changed her determination, for she has repeated the same charges against him on the face of her present petition. She also alleges that for some time she did not know her husband's address; but she admitted that she first entertained the idea of reconciliation when she came to town in 1864, and that within a day or two afterwards she found her husband was leading an immoral life, and abandoned the idea again almost as soon as she had conceived it. So that in the result it is quite plain that Mrs. Fitzgerald never demanded to be taken back again by her husband, and I think it is tolerably plain that she never desired it. On Major Fitzgerald's part nothing seems to have been done since the first suit towards reconciliation. He has never sought his wife or asked her society, but, like her, has been well content that the breach made in 1861 should remain open, and cohabitation not be resumed. But does all this amount to "desertion" on his part? That is the question. Now, putting the facts in the most favourable light for Mrs. Fitzgerald, it would, I presume, be argued thus: After the first suit was at an end, Major Fitzgerald might at any time have demanded cohabitation of his wife; she was not unwilling to return to him; and if she had been, the law would have compelled her. But he made no such demand, therefore, he wilfully kept apart from her. Therefore

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he deserted her. If, indeed, keeping apart from a wife who has voluntarily quitted her husband against his will and withdrawn from cohabitation is the same thing as "deserting" her, the argument must prevail. But I cannot think that it is. It is one thing to make a breach, it is another to refrain from attempts to heal it. Desertion means abandonment, and implies an active withdrawal from a cohabitation that exists. The word carries with it an idea of forsaking or leaving, and is hardly satisfied by the negative position of standing still. No doubt there are cases, such as that of *Williams* v. *Williams* (3 Sw. & Tr. 547; 33 L. J. Pr. & M. 173), in which actual cohabitation does not exist at all, because the circumstances of the parties do not permit of it. I am not now dealing with such cases. No doubt, again, there are cases in which the parties may have innocently ceased for a time to be living together, separated by the calls of every-day life or the exigencies of public duty, and the husband or wife, taking advantage of the separation, may have purposely rejected all subsequent opportunities of coming together again; and this may constitute desertion. For, in truth, in such cases the state of cohabitation was not, in the first instance, wholly relinquished, but only suspended till a fitting occasion for its resumption, and purposely to reject all such occasions is, practically, to abandon it. Such were the cases of *Gatehouse* v. *Gatehouse* (36 L. J. Pr. & M. 121) and *Lawrence* v. *Lawrence* (2 Sw. & Tr. 575). But they have no analogy with a case in which a wife, who complains of desertion, has herself voluntarily ceased to live with her husband, and an actual separation has already occurred, not in obedience to any external necessity, but for the express purpose of avoiding continued intercourse. In this latter case the cohabitation is not merely suspended, but determined by the wife herself, with or without good cause, as the case may be, and with or without a conditional intention on her part of possibly resuming it at some indefinite future day; but still broken up and put an end to. In such a case desertion, if it exist at all, is rather the act of the wife herself than that of the husband. I come, then, to the following conclusions as applicable to cases of this kind: No one can desert who does not actively and wilfully bring to an end an existing state of cohabitation. Cohabitation may be put an end to by other acts besides that of actually quitting the common home. Advantage may be taken of temporary absence or separation to hold aloof from a renewal of intercourse. This done wilfully, against the wish of the other party, and in execution of a design to cease cohabitation, would constitute desertion. But if the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, desertion, in my judgment, becomes from that moment impossible to either, at least, until their common life and home have been resumed. In the meantime either party may have the right to call upon the other to resume their conjugal relations and, if refused, to enforce their resumption, but such refusal cannot constitute the offence intended by the statute under the name of "desertion without cause." It results from these considerations that the petitioner's claim to a dissolution of her marriage must be respected. She is entitled to a decree of judicial separation.

PROBATE. Jan. 13, Feb. 9, 1869.

SHARPE AND SHARPE *v.* CRISPIN.

38 L. J. P. 17; L. R. 1 P. & D. 611; 20 L. T. 41; 17 W. R. 368.

Domicil—Consul—Domicil of Lunatic Son of Full Age—Change of Domicil —Evidence.

INTERNATIONAL LAW.—*Residence in a foreign country as a public officer gives rise to no inference of a domicil in that country; but if already there*

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domiciled and resident, the acceptance of an office in the public service of another country does nothing to destroy the domicil.

The domicil of a child during its minority follows that of the father; and if from lunacy or mental imbecility it is incapable, after it has attained the age of majority, to choose a domicil for itself, in such case its domicil will still continue to be determined by that of the father.

An intention to abandon the domicil of origin and acquire another must be indicated by some words or acts of a marked character from which a definite resolve may safely be collected; but the mode in which a man may evidence such a intention must vary indefinitely with the age, the character, the circumstances and the general conduct of the individual. Where, accordingly, a minor of age of nineteen or twenty, who was of weak intellect and incapable of being employed in any business or occupation, was taken back to Oporto on the close of his education in England by his father, an Englishman domiciled in Portugal, but returned to England shortly after he attained his majority, the Court held, that his intention to abandon his domicil of origin and to acquire an English one was sufficiently shewn by the reluctance with which he accompanied his father back to Portugal, by expressions of dislike to residence in Portugal, and by his prompt return to England when circumstances allowed it.

This was a cause of interest, the question being whether George Crispin was at the time of his death, which took place in a lunatic asylum at Stoke Newington, Middlesex, on the 1st of September, 1862, domiciled in England or Portugal.

It was heard before Sir J. P. Wilde, on Wednesday, the 13th of January. The facts were these:

George Crispin was born (presumably at Lisbon) on or about the 11th of January, 1804. His parents were English, but were at the time of his birth domiciled in Portugal. Whilst yet a child he was sent to school to England, and remained in this country until 1823 or 1824, when he returned to Portugal with his father, who was then British consul at Oporto. He came back to England, but under what circumstances was not in evidence, in 1826 or 1827, and took up his residence with his aunt at Richmond. He was always of weak intellect (the degree was a matter of controversy). In 1829 or 1830 he was placed under medical supervision and control, and in 1858 he was found lunatic under a commission.

John Crispin, the father, was the son of William Crispin, who had settled at Faro, in Portugal, about the year 1765. He was born in 1769, was educated in England, married in Lisbon in 1801, where he carried on business as a merchant, and in 1811 (he having previously been employed in the British consul general's office at Lisbon) was appointed British consul at Oporto. He was removed from Oporto to Corunna, in Spain, in 1832. In 1843 he retired on a pension, and came to England, and he died at Richmond in 1846.

Dr. Spinks (with him *Dr. Tristram*), for the plaintiffs, whom the deceased appointed his executors in a will made in 1858, urged that his domicil at the time of his death was English. The presumption was that John Crispin, the father, looking at the date at which he left his home, the fact that he never took any part in his father's business, and the early period at which he was employed in the consular service, had revived his English domicil, and he did not abandon it by his subsequent residence abroad as British consul. But even if the father's domicil were Portuguese, George Crispin, the son, when he came of age, was entitled to choose his own, and he did so by returning to England, where he remained until his death.

H. Giffard (with him *Inderwick*), for the defendant,—an illegitimate cousin of the deceased, but who by the law of Portugal would be entitled as one of the next-of-kin in the event of an intestacy,—contended that the domicil of the father was Portuguese; that he did not lose it by entering the British consular

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service; that George Crispin was incapable from his mental condition of choosing a domicil for himself, and that therefore he retained throughout his life his original domicil, which was that of Portugal.

Phillimore's International Law, vol. 2, part 7; *Phillimore on Domicil; Halleck's International Law*, c. 10; *Heath* v. *Samson* (14 Beav. 441); *Maltass* v. *Maltass* (1 Rob. 67); *Moorhouse* v. *Lord* (32 L. J. Ch. 295); and *Crookenden* v. *Fuller* (1 Sw. & Tr. 454); were referred to in the course of the argument.

Cur. adv. vult.

SIR J. P. WILDE (*Feb.* 9).—George Crispin died in this country on the 1st of September, 1862, and the question now before the Court is, whether at the time of his death he had a Portuguese domicil. His family was English or Irish by extraction. He was born in 1804, and lived all his life in England, with the exception of two or three years, during which he was in Portugal with his father, who was the British consul at Oporto. But residence is no absolute test of domicil, and the very peculiar facts of this case render it one in which it is not easy to apply with confidence the recognized principles of the law.

It must be admitted at the outset that on the 11th of January, 1804, when George Crispin was born, the domicil of his father, whose name was John, was Portuguese. For John was the son of William, who had settled at Faro, in Portugal, in the middle of the last century, had established a valuable mercantile business there, and had there lived till his death, under circumstances which shewed that he had abandoned his original domicil for that of Portugal. The domicil of origin of John, his son, was therefore Portugal. The date of his birth was the 7th of January, 1769, and there is evidence that soon after his baptism he was sent to England. His subsequent movements in the earlier part of his life were not in evidence; but he was shewn to be in Lisbon in 1792, when he was about twenty-three years old. He was shewn again to be in Lisbon in 1799; on the 5th of April, 1801, he married in Lisbon, and in 1811, when he received his first appointment as British consul at Oporto, he is represented as a merchant carrying on business in Lisbon. On these facts, which were all that the evidence revealed, it is impossible, I think, for the Court to read an intention up to this time (1811) to abandon his Portuguese domicil of origin for that of England or any other country. John was therefore a domiciled Portuguese in 1804, and George, who was then born to him, had a Portuguese domicil as his domicil of origin.

Starting from this point, it was ably and forcibly argued that George said nothing and did nothing in the course of his life from which the Court could infer a deliberate resolve on his part to surrender his Portuguese domicil and replace it by an English one. That such an inference could alone in the eye of the law destroy his domicil of origin is apparent from the numerous authorities which exist on this subject, confirmed as they are by the decision of the House of Lords in the case of *Moorhouse* v. *Lord* (32 L. J. Ch. 235). The great difficulty which besets this part of the case lies in the fact that George Crispin, always of somewhat weak mind, was certainly as early as 1829 or 1830, probably even earlier, unfit from mental incapacity to manage his own affairs, or be employed in any business or occupation, and that from that time till his death he was more or less under medical supervision and control as a person of unsound mind, having in the year 1858 been actually found lunatic under a commission. It was argued on the one isde that he was *non compos mentis* from the time his father took him, still a minor, from this country to Portugal, in 1823 or 1824. It was argued on the other that his mental incapacity did not shew itself until the later period of 1829 or 1830. It would be no easy task to ascertain upon the very meagre evidence which the great lapse of time has left at command, what was the precise period at which his mental faculties so far failed him as to make him incapable of a choice of domicil. Nor is it necessary, for, in my judgment, both alternatives led to the same result. I propose to deal with them separately.

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Assuming, then, the first to be true, namely, that from a time before his minority expired—that is, 1824—continually down to the period of his death, he was of unsound mind, the question arises whether anything, and, if so, what, happened which could destroy his domicil of origin. Now his father, John Crispin, as I have already pointed out, was in 1811 a domiciled Portuguese. In that year he became British consul at Oporto, where he remained till the year 1832, when he was removed, as British consul, to Corunna, in Spain. Some stress was laid in argument on the fact of his having thus devoted himself to the British service as consul, but in my judgment it had no bearing on the question of his domicil. Residence in a foreign country as a public officer gives rise to no inference of a domicil in that country. But if already there domiciled and resident, the acceptance of an office in the public service of another country does nothing to destroy the domicil. In the year 1843, being of advanced age, John Crispin determined to retire from the consular service, and came over to this country apparently for the purpose of doing so. On the 10th of June, 1843, he wrote a letter to the Foreign Office, in which he said, "I have served my country since the year 1792," and that he wished to retire with a pension. The pension was allotted to him, and he took up his residence at Richmond, in Surrey, where he lived from that time down to 1846, when he died. It should be stated that his wife, who had died just forty years before, was an Englishwoman, of the name of Hare, and that her mother and sister had, from the beginning of the century, lived at Richmond. It should be further stated that, from his earliest years, John Crispin had apparently no connexion with the business at Faro, nor was he shewn to have been resident there. On the contrary he was, soon after his coming of age, shewn to have been in Lisbon, assisting in the consular office; and it must be further borne in mind that whatever mercantile pursuits engaged his attention in Lisbon during the years which preceded his consular appointment in 1811, from that date he wholly ceased, in obedience to the rules of the consular service, to take any part in mercantile affairs. In this state of things there existed, in 1843, few ties with Portugal to be broken. He was bound to that country neither by ties of family, residence or business association; and the fair presumption from his conduct in 1843, when he claimed his pension, retired from active life, and took up his residence in this country, is, in my judgment, that he meant from that time to make England his home. In 1843 John Crispin became, I think, a domiciled Englishman. The question then arises, what effect had this change of domicil upon the domicil of his lunatic son? It seems to have been considered as tolerably free from doubt that the domicil of a minor follows that of his father, and the better opinion seems to be that, after the father's death, even the mother may, by changing her domicil, affect the domicil of her minor children. I can find no authority which defines the effect of a change of domicil in the father upon a lunatic son. It would probably depend upon circumstances. If a man had grown up, married and established himself in business in the country of his original domicil, and had afterwards become lunatic, and in that state had been taken charge of by his father, the emigration of his father to a foreign country, with the view of becoming domiciled there, taking his son with him, might fail to work a change in the domicil of that son. It is not difficult to conceive cases in which great injustice might be done to the interests of others if the general proposition were admitted, that the custody of a lunatic necessarily carried with it the power of changing his domicil at will. But the hypothesis under which I am now considering the circumstances of the present case is free from the necessity of asserting any such general proposition. For I am assuming that George Crispin was of unsound mind throughout his majority: in other words, that there never was a period during which he could think and act for himself in the matter of domicil otherwise than as a minor could. And if this be so, it would seem to me that the same reasoning which attaches the domicil of the son to that of his father while a minor, would continue to bring about the same result after the son had attained his majority, if he was continually of unsound mind. The son in this case continued under the control

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of his father, was presumably supported by him, and, if he had not already been in England when his father returned hither in 1843, would, it may reasonably be presumed, have been brought with him. At no period could he, according to that hypothesis, have acted for himself in choosing a domicil, and if his next-of-kin and those who had the control of his movements and life were not capable of changing his domicil, that domicil would, from the moment of his majority, become indelible. The better opinion, in my judgment, is, that the incapacity of minority never having in this case been followed by adult capacity, it continued to confer upon the father the right of choice in the matter of domicil for the son, and that in 1843, if not before, that right was exercised by the adoption of an English domicil for himself, which drew with it a similar domicil for his son.

I now proceed to examine the other alternative, namely, that there was a period of longer or shorter duration after George Crispin came of age, on the 11th of January, 1825, during which he was capable of selecting a domicil for himself. Did he do so? And, for that is the question, did he voluntarily adopt England as his home and domicil, with the intention of renouncing and abandoning the Portuguese domicil which his origin had conferred upon him? I was much struck with the argument that such a resolve ought to be indicated by some acts or words of a marked character, from which definite intentions of a permanent nature might be safely collected. But, while admitting this as a general proposition, it is, I think, sufficiently obvious that the mode in which a man may be expected to evidence his intentions on such a subject must vary indefinitely with the age, character, circumstances and general conduct of the individual. In canvassing the words and actions of a youth just emerging from minority, and still wholly dependent on his father, one would not expect the intention, if it existed, of making England his home to be evidenced by such acts as would be likely to attend the resolve of a matured man of business. Nor would it be reasonable to look for conduct such as might be evinced by a healthy, energetic youth in the full use of his faculties, in one who was neither healthy nor energetic, and whose mental faculties were weak, if not yet unsound. I am far from saying that this last condition dispenses with the proof of the intention in question, or that the existence of the intention in all its fullness and completeness must not be arrived at by the Court before a change of domicil can be declared. But I am speaking of the *media* of proof, and I hold it to be unreasonable to require any further proof to this end than the individual, such as he really was, might fairly be expected to have furnished in the circumstances in which he was placed—if he had, in fact, really and truly entertained the intention of which we are in quest. What, then, was George Crispin, what his previous life, and what his conduct after he came of age and before he became imbecile? The date when he was sent to England is not in evidence. But in 1814, when he was ten years old, he is spoken of as living at a school at Twickenham and spoken of as having been there some time. Here George Crispin remained until 1820 or 1821, spending his holidays with his mother's sister, Miss Hare, who lived at Richmond. With this aunt he continued to reside until 1823 or 1824, when his father took him over from England to Oporto, with the view, apparently, of bringing him up in the consular office. The day of his majority found him still residing with his father, where he remained till 1826 or 1827, when he returned to his aunt in England. It is to be gathered from the evidence that he was not able to render his father the assistance he expected. There is no proof of the exact circumstances which attended his return. But there is strong evidence in the testimony of Mr. Mark Comburgh, the French master of the school where he had been educated, of his feelings and desires while resident in Portugal, and of the light in which he contemplated his return to this country. His letters to this gentleman during his stay in Portugal were "desponding," expressed a "dislike to be there"; he thought "the climate did not agree with him"; he said "he was always subject to head-ache"; and, in his last letter he said, "I hope I shall return to England very shortly." He further said, that what kept him in Portugal was his father's wishes, and that

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he disliked his stay in Portugal very much. Upon his return to England this same gentleman had several conversations with him, in which he expressed a similar dislike to the country, the people and their habits. Another witness, Mr. Chapman, says he came to London with George Crispin and his father when they were about to start for Portugal. He describes him as "very loth indeed to go."—"I think he felt he must go as a matter of duty to his father." This same gentleman saw him on his return, when he said that he did not like Portugal; "that the habits of the people were so different from what he had been accustomed to in England; that it was so very distasteful to him." It is reasonable, I think, to infer from these statements that this young man, who had been entirely brought up in England with his aunt, was attached to this country; and that, as soon as his father permitted it, he put an end to his enforced residence in Portugal, returning to England as his home. True, he took no steps to establish himself in business in this country. It is true also that he did no act, beyond that of his eager return hither, to sever the ties which bound him to Portugal as his original domicil. But those ties were of the slightest. Except in the eye of the law, they had no existence. His language, his nurture, his habits, the family of his mother, and, by extraction, the family of his father, were all English. His actual relations with Portugal were those of an enforced and temporary residence, distasteful in the outset, repellant throughout, and escaped from with alacrity. The evidence that a man desires to resign his domicil of origin ought to be cogent in proportion to the probability of such a desire. And the converse is true, that if the probability is great, far less evidence may suffice. On the whole, I do not hesitate to conclude that, had this young man been asked, on his return to England, whether he desired to make England in future his home and surrender all connexion with Portugal, he would have answered in the affirmative. And if that was his true state of mind, did he not evidence his intention in the only way in which he could be expected to do it? As for setting up in business or establishing an independent home for himself in this country, he had not the capacity or the means for either. He did the only thing which, in his condition and circumstances, he could do,—continued to reside with his aunt and be maintained, it is presumed, by his father. And if the means of determining his true state of mind by marked and definite acts were less ample than might have been desired, the conclusion to be drawn from all that he really said and did is not, in my judgment, the less certain. Assuming, then, that George Crispin was of sufficient capacity after he came of age to select a domicil for himself, I am of opinion that he did so, and that the domicil he selected was English, which he retained till he died. The issue taken upon the Portuguese domicil must therefore he found in favour of the plaintiffs, and I think with costs.

PROBATE. Jan. 26, 1869.

In the goods of D. F. DE ANGULO Y URRUELA.

38 L. J. P. 21; L. R. 1 P. & D. 598; 19 L. T. 704.

*Probate—Foreign Will—Executor Abroad—Property sworn below its value—Affidavit of Agent—*55 *Geo.* 3. *c.* 184. *ss.* 38, 41.—*Practice.*

DEATH DUTIES.—*In granting probate or letters of administration the Court is not restricted to the oath of the applicant as to the value of the property, but may receive the oath of any competent person to that fact.*

Where, therefore, the property was sworn below its value by the executor who was abroad, the Court allowed a fresh affidavit, in which the true value of the property was stated, and the mistake in the executor's oath explained, to be sworn and filed by his agent in this country, and probate to go accordingly.

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Damasco Francisco de Angulo y Urruela died domiciled at and resident in Guatemala, Central America, on the 13th of June, 1866, leaving a will and codicil, in which he appointed Rafael Jose Angulo y Urruela executor. As he left considerable property in this country, an official copy of the will and codicil, duly certified, was forwarded to England, together with the usual affidavits, which were prepared here, and sworn by the executor in Guatemala. In these affidavits the property belonging to the deceased in this country was stated to be under the value of 32,000*l.*; but it was subsequently discovered that this was a mistake, and that the amount ought to be taken at 40,000*l.* The agent of the executor offered to make an affidavit as to the full value of the estate, and to pay the proper duty and fees, but the registrar refused to allow the grant to be made on a stamp larger than sufficient to cover the amount under which the effects had been sworn by the executor.

C. A. Middleton now moved the Court to allow the grant to be stamped on the affidavit of the agent as to the true amount, so as to cover the whole value of the property, and referred to sections 38. and 41. of 55 Geo. 3. c. 184.

Sir J. P. Wilde.—The mistake that has happened is easily explained. The affidavit as to the amount of the estate is made at the other side of the globe, and when the matter comes to be investigated here, it turns out that the property is larger than expected. It appears natural that the mistake should be corrected, and unless there is anything in the act of parliament to prevent it, the Court would be desirous to allow the correction to be made. Is there anything in the act of parliament to prevent it? I think not. The act (55 Geo. 3. c. 184. s. 38.) says, "No Ecclesiastical Court or person shall grant probate of the will or letters of administration of the estate and effects of any person deceased, without first requiring and receiving from the person or persons applying for the probate or letters of administration, or from some other competent person or persons, an affidavit, or solemn affirmation in the case of Quakers, that the estate and effects of the deceased for or in respect of which the probate or letters of administration is or are to be granted, &c., are under the value of a certain sum to be therein specified, to the best of the deponent's or affirmant's knowledge, information, and belief; in order that the proper and full stamp-duty may be paid on such letters of administration; which affidavit or affirmation shall be made before the surrogate, or other person who shall administer the usual oath for the due administration of the estate and effects of the deceased." It is plain from that section that the Court is not restricted to the affidavit of the person applying for the grant, the executor or his attorney, but that it may take the affidavit of any "other competent person." It seems to me, therefore, that the estate being larger than was expected, upon a proper affidavit being filed of that fact, and explaining how the mistake in the executor's oath has arisen, this application should be granted. It might have been surmised that the proper mode of rectifying such an error was to apply to the stamp office under the subsequent section (41), but on looking to the terms of that section I think it will appear that that would not be the proper course. The section says, "Where any person, on applying for the probate of a will or letters of administration, shall have estimated the estate and effects of the deceased to be of less value than the same shall afterwards be proved to be, and shall in consequence have paid too little stamp-duty thereon, it shall be lawful for the said Commissioners of Stamps, on delivery to them of an affidavit or solemn affirmation of the value of the estate and effects of the deceased, to cause the probate or letters of administration to be duly stamped, on payment of the full duty which ought to have been originally paid thereon in respect of such value," &c. It is plain from the language of that section that the stamp office is only intended to interfere where the mistake has been discovered after the grant has been made, and where the person applying for it has estimated the property below its value and paid too little stamp-duty. Here the mistake was discovered before the grant was made, and I think the course proposed is the right one.

Motion allowed.

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MATRIMONIAL, Nov. 19, 1868; Jan. 20, 1869.

MORPHETT v. MORPHETT.*

38 L. J. P. 23; L. R. 1 P. & D. 702; 19 L. T. 801; 17 W. R. 471.

Disapproved, *Browning* v. *Browning*, [1911] E. R. A.; 80 L. J. P. 74; [1911] P. 161; 104 L. T. 750 (P.D.).

Restitution of Conjugal Rights—Cruelty charged by Wife—Wilful Communication of Disease—Onus Probandi—Absence of Actual Proof—Medical Testimony—New Trial—Costs.

DIVORCE AND MATRIMONIAL CAUSES.—*To the husband's petition for restitution of conjugal rights the wife pleaded cruelty, viz., the wilful communication of an infectious disease. The husband denied the charge, and on examination by medical men no trace of disease could be found upon him*:—Held, *by the full Court* (Willes, J. *dissentiente*), *first, that it devolved upon the respondent to establish affirmatively that the petitioner, having the disease himself, knew, either from medical advice or from the obvious character of the symptoms, that he had a disease, that it was an infectious disease, and that it existed in such a stage and form that connexion with his wife was at least distinctly dangerous; secondly, that in the absence of actual proof of the existence of disease in the petitioner, it was incumbent on the respondent, in the medical evidence adduced in support of her charge, to lay the foundation for a scientific conclusion which should take the place of such proof, and from which the jury could argue with reason, first, to the charge of knowledge, and through that to the charge of wilfulness; and thirdly, that the verdict of the jury having, in absence of such actual or scientific proof, been for the respondent, the petitioner was entitled to a new trial, the respondent's costs in the previous trial being first paid by him.*

This was the husband's petition for restitution of conjugal rights.

The wife in her answer pleaded adultery and cruelty; the proof relied upon of both charges being the communication of an infectious disease. The petitioner denied the charges.

The facts were these:

The parties, who were both young, were married on the 9th of June, 1866, and the cohabitation ceased in the following September. In January, 1867, the husband filed his petition for restitution.

In February, 1867, the wife was found to be affected with secondary syphilis, and in March she was prematurely delivered of a child, which was also marked with the disease. Upon this she filed her answer, charging adultery and cruelty, and immediately afterwards the husband submitted himself to examination by medical men.

On the trial, which took place in the Sittings after Trinity Term, before the Judge Ordinary, by a special jury, the petitioner swore that he never had been diseased. The medical men by whom he was examined swore that they could find no trace of disease on him; and further gave their opinion that if he had been diseased in the previous autumn there must have been some trace left.

On the other hand, the respondent, the wife, swore that the first intimation she ever had of being infected was in February. She further swore that she had not been unchaste before marriage or unfaithful after it; and in the course of the inquiry counsel for the petitioner stated that no such imputation was made against her. Several medical men were also examined on her behalf, but their evidence left it uncertain as to the form in which the person who infected her must himself have been suffering at the time.

The jury found for the petitioner on the issue of adultery, and for the respondent on the issue of cruelty.

* Before the full Court, the Judge Ordinary, Willes, J. (whose judgment was read by Brett, J.) and Cleasby, B.

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A rule *nisi* for a new trial was subsequently obtained by the petitioner, and the rule was argued, before the full Court, on the 19th of November, by the same counsel who appeared at the trial—

Parry, Serjeant (with him *Dr. Tristram* and *Lush*), for the petitioner; and *Coleridge* (with him *Dr. Spinks* and *A. S. Hill*), for the respondent.

Cur. adv. vult.

The JUDGE ORDINARY (*Jan.* 20).—The parties in this case were married on the 9th of June, 1866. They lived together only a few months. At the end of that time the respondent refused to live with her husband any longer. The ground of her refusal was his unkind and cruel conduct. This was investigated at the trial, but nothing like legal cruelty was proved. In the month of January, 1867, the husband filed a petition in this case for a restitution of conjugal rights. In the month of February, 1867, the respondent was examined by a surgeon of eminence, who found her to be affected with certain tubercles and other symptoms, which indicated to him that she was suffering from secondary syphilis, which, in his opinion, she had suffered from on some previous occasion. This, the respondent said, was the first intimation she ever had of being thus affected. In the next month a child was born similarly affected, and the existence of this disease was beyond question. Upon this she filed her answer to her husband's petition, and charged him with having wilfully infected her. He denied it, and submitted himself immediately to examination by medical men, who swore that there was no trace of such a disease, and further gave their opinion that, if he had been diseased in the previous autumn, there must have been some such trace left. On the other hand, the respondent swore that she had not been unchaste before marriage or unfaithful after it. No proof was given, beyond this denial, on the part of the wife to establish the fact of the husband having been the cause of the infection. It was, indeed, sworn by her, though denied by him, that during the cohabitation, when she consulted him about a discharge from which she suffered, he advised her not to mention it to her mother. But the medical man who attended her within a month of her marriage proved that the discharge she suffered from was probably of an innocent character, at any rate it had no connexion with syphilis, and her own admissions made it probable that it was due to nothing but an innocent complaint from which she had suffered before marriage. In this state of things the jury, with nothing to guide them but the oaths and demeanour of the parties themselves, decided, as might be expected, in favour of the wife, and arrived at the conclusion that the disease proceeded from the husband. But the mere fact that the husband has communicated disease to his wife, whatever may be thought of it in other points of view, is not sufficient to constitute legal cruelty. It is abundantly clear that, for this purpose, the act must be a wilful one; and, according to the judgment of Dr. Lushington in *Collett* v. *Collett* (1 Curt. 679), the proof of it "requires very strong and conclusive evidence." The very important question, therefore, arises, whether in the mere fact that the wife was diseased, any evidence is to be found to sustain the proposition, not only that the husband infected her, but that he did so knowingly and wilfully. It devolved upon the respondent to establish affirmatively that the petitioner, having the disease himself, knew, either from medical advice of from the obvious character of the symptoms, that he had a disease, that it was an infectious disease, and that it existed in such a stage and form that connexion with his wife was at least distinctly dangerous. The great difficulty attending the establishment of these propositions in this case was this, that no proof appears to have existed of the actual fact of disease in the petitioner at all; and consequently, none of the form in which it presented itself. On the other hand, the presumption that the petitioner had the disease, which was drawn from the respondent's oath that she had not been herself unchaste, did not carry with it any further presumption as to the form in which the petitioner had it, or the symptoms by which it was attended at the time when he is supposed to have

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communicated the infection. Now, it is obvious that in such an inquiry as the present, it is all-important to know what the signs of the disease were at that time. Were they such as to give warning, or at any rate arouse suspicion and excite vigilance and inquiry? Were they such that any man might be expected to notice them and suspect their true nature? If knowledge is charged and the proof of it is to be drawn from the fact that the disease existed, it is material to know whether the disease existed in such a form as to carry with it a knowledge of its existence and an appreciation of its nature and incidents. In many, if not most cases of venereal disease, the general nature of the malady is hardly doubtful. I allude to those cases in which the organs of generation are palpably affected. But when the disease exhibits itself in other parts of the body only, as was proved to be the case with secondary syphilis, and the symptoms are those of eruptions, sore-throat and the like,—easily disregarded with innocence, or as easily referred with innocence to other causes,—the case becomes widely different. Now it is just here that the evidence of fact wholly fails. There is an absolute dearth of proof that the petitioner was diseased at all, and consequently of all circumstances tending to shew its character or appearances. The next question is, whether the scientific evidence supplies this defect. I am quite unable to perceive that it does. Proof of this character ought, I conceive, to be tolerably uniform and cogent to the end it is designed to meet. It is far from it. There is no affirmative medical testimony from which it can be inferred whether the symptoms of the petitioner at the time of the supposed infection must have been those of primary, or might have been those of secondary syphilis; or, indeed, whether at that time he must have had any outward symptoms at all. If primary, it is probable on the evidence that the symptoms would be such as to challenge attention and reveal their true character. But if secondary, it was made clear by the evidence beyond question that they might escape observation altogether, or if noticed might be innocently referred to other causes than venereal disease. In a word, no definite conclusion was capable of being drawn from the evidence given at the trial through the medium of medical experience as to the form in which the person who infected the respondent must himself have been suffering at the time. When I say "must," I mean must within the limits of all reasonable probability, as inferred from past experience. It was, I think, absolutely incumbent upon the respondent, in the absence of actual proof on this head, to lay the foundation for a scientific conclusion which should take its place, and from which the jury could argue with reason, first, to the charge of knowledge, and through that to the charge of wilfulness. It was part, and the most essential part, of the burden of proof which her charge of cruelty cast upon her, and the defect in her proof leaves her case, in my judgment, unsupported by sufficient evidence to sustain the finding of the jury. The rule for a new trial ought therefore, in my opinion, to be made absolute. But before the petitioner brings the case to trial again, I think he ought to pay his wife's costs of the first trial. The principle acted upon in this court is that the husband shall provide the wife with the means of defending herself, and as the finding of the jury exonerated the respondent from all misconduct, the petitioner ought not to enter upon further litigation until provision has been made for her costs of the past.

WILLES, J.—If the question in this case had retained the form in which it was dealt with at the trial, in the rule, and, as I understood, upon the argument, as one of fact depending only upon the weight of evidence, I might have restricted myself to expressing a strong reluctance against condemning the respondent, who is upon her defence, to the ordeal of a new trial in such a case, once fully investigated, laid before a jury and deliberately decided by them. Inasmuch, however, as the true question has, in the event, turned out to be one of law, viz., whether there was any sufficient evidence to go to the jury, and the majority of the Court are of opinion that there was not, their judgment, in which I do not concur, involves not merely a new inquiry, but practically a

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decision of the cause, and a conclusion, only to be deferred by the changes and chances of litigation—that the respondent must return to cohabit with the petitioner,—and it is therefore right that I should shortly state my reason for dissenting. Having carefully studied the shorthand-writer's notes of the trial, I find evidence of the following facts: The marriage took place in June. Soon after the wife suffered, amongst other things, from a discharge which, according to her evidence, was distinctly unlike any that she had experienced before. It was remarkable enough to induce her to complain of it to her husband, and he requested her not to tell her mother, as people would think that something was the matter with one or other of them. The husband left his wife in the beginning of September, and they did not again cohabit. During the cohabitation she had caught a foul disease, the precise nature of which was not suspected by her medical attendant before November, and was not discovered until her examination by a more experienced medical man, early in the following year. In the following March she was prematurely delivered of a child poisoned thereby. How did she contract the disease? Not by any misconduct of her own. No suggestion of that was made against her at the trial. The evidence was such that my Lord, in summing up, told the jury they would have "scouted" the notion if suggested. Had any such imputation been made, she might have ransacked her life for evidence to rebut it; and to be influenced by the hint of its possibility thrown out in argument, would be grave injustice. Could the disease then have been congenital? Of this there was no evidence, either as to the husband or wife; and, on the contrary, strong improbability, such as a jury were warranted in acting upon. It remains, as the jury concluded, that she caught it from her husband, and that he had at some time contracted the disease. But, in order to entitle her to object to a renewal of cohabitation, it was still to be shewn that he must have known of, or at least suspected his state, and disregarded the probable consequences to his wife. As to the proof of this, I conceive that, in the present state of the law, allowing the examination of the parties, explanation from the husband was properly called for at the trial; and, in the absence of any satisfactory explanation, the jury were justified in acting upon the evidence given by and for the wife. The case or cases in the Spiritual Courts which shew, or tend to shew, that a husband might disease his wife over and over and yet compel her to return, unless she could establish affirmatively that he not only was diseased and diseased her, but knew of his state when he did so, could only be tolerable under a system which exlcuded the evidence of the husband. Now that he can be heard, if he thinks proper, in explanation, those cases are only valuable as warnings. What, then, was the answer or explanation given by the husband? It consisted, in the main, of proof: first, that he was examined by medical men, who found no traces of disease at a period consistent with the fact of his having suffered from it during the cohabitation and recovered; and, secondly, of his own evidence contradicting that of the wife in several particulars, and positively denying that he ever had the disease. In this state of things I do not intend to pronounce an opinion upon the question of fact, which is not within my province; but I am satisfied that it was competent for the jury to believe, as they did, the statements of the wife, to conclude that the husband was the cause of the suffering; and that his denial of having ever suffered himself was untrue, and therefore unsatisfactory. A man who commits an act *prima facie* injurious to another, which may or may not be morally wrong, according to the mind with which it was committed, and who, having the opportunity of explanation, offers none beyond a flat contradiction, exposes himself, when the fact is established by competent proof, to the inference that his lying denial was the result of conscious wrong. Whether that inference be a just one under the circumstances is a question for a jury. I do not understand how it can be held otherwise than relevant and important without also holding that there was nothing in the wife's evidence which the husband ought to have been called upon to answer. In the result, I think there was evidence upon which the jury might properly conclude: first, that the

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disease was communicated to the wife by the husband, under circumstances calling upon him for an explanation; and secondly, that the explanation attempted was untrue and ought to be rejected; except, indeed, so far as the assertion of a falsehood gives rise to the inference of guilty motives for keeping back the truth. Upon these grounds I am of opinion that the rule for a new trial ought to be discharged.

CLEASBY, B., concurred in the judgment of the Judge Ordinary.

Rule absolute for a new trial; respondent's costs of previous trial to be first paid by petitioner.

MATRIMONIAL. Jan. 19, 1869.

PATCH *v.* PATCH.

38 L. J. P. 27; 19 L. T. 662; 17 W. R. 265.

Alimony Pendente Lite—Wife charged with leading an Abandoned Life—Conflicting Affidavits—Refusal to rescind Order.

DIVORCE AND MATRIMONIAL CAUSES.—*The Court refused to rescind an order for alimony pendente lite on an allegation, supported by affidavits, that the wife was maintaining herself by prostitution; the wife in her affidavit denying the truth of the allegation, and the charge of prostitution being the main question in the suit.*

Alimony *pendente lite* was allotted to the wife, the respondent in the suit, on the 8th of December, 1868, but the order was suspended until the next motion-day, to enable the petitioner to file affidavits in proof of an allegation that she was supporting herself by prostitution. No affidavits having been filed, the order was drawn in the usual manner.

Littler, for the petitioner, now moved the Court to rescind the order, on the ground that the respondent was supporting herself by prostitution. He relied on three affidavits: two by policemen, who deposed that the house in which the respondent lived was a noted brothel, and the third by a confessed prostitute, who stated that she was a lodger in the house, and that the respondent was the mistress of it.

Inderwick, for the respondent, contra.—The adultery charged in the petition is prostitution, and the Court will not decide the main question in the suit on the motion now before it. Further, the respondent, while admitting that she keeps lodgers, denies in her affidavit that her house is a brothel or that she is leading an abandoned life.

The JUDGE ORDINARY.—I cannot interfere with the order that has been made for the payment of the alimony. To do so would be to decide incidentally and upon affidavits the main question in the suit, which will ultimately have to be tried in a very different way, and it may be with a different result. If the Court saw its way clearly to the conclusion that the wife was leading the life she is represented, it would be disposed to relieve the husband from the obligation of paying alimony. But here it is a matter of contest and oath against oath. The wife pledges her oath that there is no truth in the allegation that she is leading a life of prostitution, and she is open to a prosecution for perjury if she has sworn falsely. I cannot act upon the affidavits.

Motion refused.

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PROBATE. Jan. 26, 1869.

In the goods of JOHN HUTLEY.

38 L. J. P. 27; L. R. 1 P. & D. 596; 19 L. T. 704.

Citation to bring in Probate—Affidavit to Lead—Applicant (Next-of-Kin) Abroad—Estate in course of Administration in Chancery—Agent—Practice.

WILL.—*The Court allowed a citation to executors to bring in the probate to issue on the affidavit of the agent of the party citant (the next-of-kin), who was in Australia; the property being distributed by the Court of Chancery in due course of administration, which could not be stayed until proceedings were instituted in the Court of Probate for revocation of the probate, and the agent of the party citant being in a position to make the necessary averments to lead the citation.*

John Hutley, late of Maida Vale and Blooomsbury, in the county of Middlesex, provision-merchant, died in August, 1866, possessed of large personal and real estate, and leaving a will, dated the 9th of December, 1865, in which he appointed Susan Grimston, his sister (who pre-deceased him), Frances Maria Hutley, Percival Turner and Michael Gunston, executors. Probate in common form was granted to the executors in September, 1866. In January, 1867, the probate was called in on the citation of Stephen Hutley, the natural and lawful brother and heir-at-law of the deceased. The executors propounded the will in a declaration, to which the defendant pleaded; and the suit proceeded.

At the trial, which took place, before Sir J. P. Wilde, by a special jury, on the 27th of July, 1867, a compromise was arranged between the parties; and the Court pronounced for the validity of the will.

The compromise entered into in the Court of Probate was confirmed by the Court of Chancery, in which a suit had been previously instituted for the administration of the estate pursuant to the trusts and provisions of the will, and large sums were subsequently paid out of the personal estate, which was sworn under 90,000*l.*, by orders of the Court, in due course of administration.

The deceased left surviving him John Grimston and Henry Grimston, his lawful nephews, and who, with Stephen Hutley, were the only next-of-kin and the only persons entitled in distribution in the event of his having died intestate. John Grimston died in August, 1868. Henry Grimston was in Australia at the time of the death of the deceased, and still resides there. He was not cited or made party to the suit by the executors, though described in the pleadings in the administration suit, in the Court of Chancery, as "then resident in Hobart Town, in the colony of Australia," and as "one of the persons entitled in distribution," and he had no knowledge of his uncle's death, or the suit in the Court of Probate in respect of his will, until October or November, 1868, when he received a communication from Mr. Edwin John Nunn, of Colchester. He at once forwarded a power of attorney authorizing Mr. Nunn to take all such steps as might be necessary for the protection of his interests; but before the administration of the estate could be stayed in the Court of Chancery, it was requisite that proceedings should be instituted in the Court of Probate to have the probate of the will called in and declared null and void.

Dr. Spinks (*E. C. Clarkson* with him) moved the Court, under these circumstances, to allow the citation to the executors to issue on the affidavit of Mr. Nunn, as agent for the applicant. As the property was in course of distribution, the delay of waiting for an affidavit from Tasmania would be very injurious, and Mr. Nunn was in a position to make all the necessary averments.

SIR J. P. WILDE said, that the affidavit of Mr. Nunn would answer all the purposes.

Motion allowed.

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PROBATE. Feb. 2, 16, 1869.

CRISPIN *v.* CUMANO, *executor of* DOGLIONI.

38 L. J. P. 28; L. R. 1 P. & D. 622; 20 L. T. 150; 17 W. R. 535.

Followed, *Clarke* v. *Clarke*, [1873] E. R. A.; 42 L. J. P. 72; L. R. 3 P. & D. 57; 28 L. T. 911; 21 W. R. 776 (P. & D.). Considered, *Craig* v. *Craig*, [1896] E. R. A.; 65 L. J. P. 99; [1896] P. 171; 75 L. T. 280; 45 W. R. 64 (P.D. & A.).

Testamentary Suit—Costs against Defendant as Executor and as Party—Defendant out of the Jurisdiction—Sequestration—Money in the Funds—Dividends—20 & 21 Vict. c. 77. s. 25—1 & 2 Vict. c. 110.

WILL.—*The Court of Probate has, under the 25th section of the 20 & 21 Vict. c. 77, the like powers, jurisdiction and authority for enforcing its orders, decrees and judgments as are by law vested in the Court of Chancery, but the limit of this authority must be found in the powers exercised by the Court of Chancery prior to the passing of the 1 & 2 Vict. c. 110. The Court of Probate does not possess the additional powers and authority indirectly conferred upon Courts of equity for the enforcing of their orders by that statute.*

Where, therefore, large sums of stock stood in the books of the Bank of England in the name of an unsuccessful defendant in a testamentary suit, who admitted that he held the stock as executor and trustee for the original defendant, and who was condemned in the costs of the suit as executor and party, the Court refused to give effect to a writ of sequestration for payment of the costs by granting an order on the Bank of England to pay into Court the dividends on the stock in question, an adverse order never having hitherto been made by a Court of equity on a third party to pay over to a creditor money which he owes to the debtor.

This was originally a cause of interest, in which a decree had been given (June 2, 1863) against Maria Doglioni, the original defendant, with costs.

An appeal was prosecuted to the House of Lords by Madame Doglioni, and on her death by the defendant as her executor, but the appeal was dismissed (July 31, 1866) with costs, and the cause remitted back to the Court of Probate.

Orders for payment of the taxed costs in the suit and balance of the taxed costs on the appeal (3,605*l.* 19*s.* 2*d.* and 744*l.* 6*s.* 6*d.*) were made by the Court on the defendant as executor of Madame Doglioni.

The defendant was out of the jurisdiction, and on the 22nd of December, 1868, a writ of sequestration issued against the estate.

The defendant was not possessed of any real estate in this country, but two large sums of money (99,424*l.* and 75,442*l.*) were standing in his name in the books of the Bank of England.

In August, 1859, an injunction issued from the Court of Chancery to restrain the transfer of these funds, but it did not restrain the payment of the dividends, which continued to be received by the defendant. The injunction was still in force. Moreover, the Bank received notice through his solicitor, on the 8th of January, 1869, that he held the stock in question as executor and trustee for Maria Doglioni. He also commenced an action for payment of the last half-yearly dividend on the sum of 75,442*l.*, and further gave notice of his intention to claim a writ of injunction to restrain the Bank from paying the dividends to any one else.

The defendant was one of the residuary legatees named in Madame Doglioni's will as well as her executor.

Dr. Deane (with him *Mander*), for the sequestrators, moved the Court (*Feb.* 2) for an order on the Governor and Company of the Bank of England to pay into Court to the credit of the cause the sum of 1,103*l.*, being the amount of one half-year's dividend now in their hands, due in respect of the sum of

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75,442*l.*, and also until further order all future dividends accruing in respect of both sums standing in the name of Cumano.—It is immaterial whether Cumano receives the dividends in his own right or as executor, and there is no dispute as to his liability or the amount of the debt. Under section 25. of the Probate Act the Court has the like "power, jurisdiction and authority" as the Court of Chancery for enforcing its orders, decrees and judgments. In *Dent* v. *Dent* (36 L. J. Pr. & M. 61; L. R. 1 Pr. & D. 366) the Court enforced its order by writ of sequestration. Choses in action, which dividends on Bank stock are, are liable to sequestration, and the Court of Chancery will order a chose in action in the hands of a third person to be paid into Court when the person in whose hands it is is willing to abide by the order of the Court, or admits it belongs to the party against whom the sequestration has issued. The only case in which a third party can refuse is where he *bona fide* denies the debt.

Dr. Spinks (with him *Cecil Russell*), for the defendant.—No such application as that now made to the Court would be entertained by the Court of Chancery on motion. It should be for permission to bring an action, and not to proceed by summary process, from which there can be no appeal. Further, supposing the Court to have the jurisdiction of the Court of Chancery, there is no case to support the proposition that the Court of Chancery would attach a chose in action in the hands of a third person; and, moreover, the Court has no power to restrain the defendant from prosecuting the action which he has brought against the Bank for payment of the dividends.

Watkin Williams (with him *Kekewich*), for the Bank of England.—The Bank is neutral in the matter, it neither assents nor objects to the order; but it is legally liable to Cumano, and if it should turn out that the Court has not jurisdiction the order would be no defence to an action by him.

The following cases were cited in argument:—*Dent* v. *Dent* (36 L. J. Pr. & M. 61; L. R. 1 Pr. & D. 366); *Pratt* v. *Bull* (4 Giff. 117; 32 L. J. Ch. 21); *Wilson* v. *Metcalfe* (1 Beav. 269); *Knight* v. *Knight* (4 W. R. 771); *M'Carthy* v. *Gould* (1 B. & B. 387); *Johnson* v. *Chippendall* (2 Sim. 55); *Dundas* v. *Dutens* (1 Ves. jun. 196); *Barrett* v. *M'Cullagh* (5 W. R. 38); *Daniel's Chanc. Prac.* 948

Cur. adv. vult.

SIR J. P. WILDE (*Feb.* 16).—The statute 20 & 21 Vict. c. 77, by which the Court of Probate was created, provides, in section 25, "That the Court shall have the like powers, jurisdiction and authority for enforcing all orders, decrees and judgments made and given by the Court as are by law vested in the High Court of Chancery." On the 2nd of June, 1863, this Court made a decree condemning Madame Doglioni, the unsuccessful defendant in a testamentary suit, in the costs of the plaintiff. For the enforcement of this decree the Court, on the 29th of January, 1867, made an order upon Justine Cumano, who was the executor of Madame Doglioni and who had become a party to the suit in her place, for the payment of the amount of costs as taxed. The defendant Cumano is out of the jurisdiction, and the order cannot be enforced by attachment. There is, however, a very large sum of stock standing in his name in the books of the Bank of England, upon which the last accruing dividends are now in the hands of the Bank. It appears on affidavit that this stock is in fact held by Cumano as executor of Madame Doglioni, the original defendant in the suit. It seems therefore extremely just and reasonable that the dividends above mentioned should be made available in satisfaction of the costs of that suit. Now, if the order in question had been made by a Court of equity instead of the Court of Probate, the provisions of the 1 & 2 Vict. c. 110. would immediately have been applicable to it. The order would have had the force of a judgment at common law, and the funds in question would have been available in satisfaction of the decree; and this, not by reason of the original authority of the Courts of equity, but of the additional powers and authority indirectly conferred upon these Courts for the enforcing of their orders by the statute of Victoria. No doubt this statute did not prescribe any additional or

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new action on the part of the Courts of equity themselves. All that they had to do was what they had done before. But it can hardly be denied that by attaching to these orders when made new legal incidents and effects of a much larger character than they had previously enjoyed, the power and authority of the Courts for the enforcement of their orders was greatly and beneficially widened and extended. It is immaterial to this end whether a Court is empowered to make orders of a more extensive character and incidence than heretofore, or whether a more extensive character and operation is, by the act of the law, given to the orders already in use. The wider and more searching the legal effect and practical scope of any order made to enforce a decree upon the person or property of him against whom it is issued, the greater the power and authority for the enforcement of that decree possessed by the Court that issues it. I should therefore have thought that when the legislature declared its intention that the Court of Probate should have the like powers and authority as the Courts of equity for the enforcing of its decrees and orders, it designed to include therein the power of making orders which should be of the like efficacy, attended with the same incidents, and followed by the same legal results as those of the Courts whose powers and authority formed the standard to which it was to be assimilated; and this design, I should have thought, might have been well conveyed in the very general language employed in section 25. of the statute, notwithstanding that by a very close adherence to the precise terms employed it was quite possible to infer a distinction between the power of the Court in making an order and the legal consequences of that order when made. These views, however, must now be taken as incorrect, for the matter has now received judicial consideration and decision in the Court of Chancery. The case of *Pratt* v. *Bull* (4 Giff. 117; 32 L. J. Ch. 21) is a direct authority, as it seems to me, upon the point; and the decision of the very eminent Judge by whom that case was determined must be held decisive.

There is, therefore, no other way in which the order here in question can be enforced except by a writ of *fieri facias* or a writ of sequestration. A writ of *fieri facias* inapplicable, and a writ of sequestration has issued. The sequestrators now apply by motion for an order upon the Bank of England to pay into Court the dividend in their hands. This order is opposed by Cumano. The Bank of England appeared by their counsel, on the hearing of the motion, and neither assented nor objected to such an order being made. In these circumstances, the question is whether the Court has power to make the order. It will not be right, even in the furtherance of justice, to assume a power which the Court does not possess; and the limits of the powers which it does possess must be found in the powers hitherto exercised by the Courts of equity in this direction. The only semblance of a direct authority produced in favour of the proposed order is the case of *Wilson* v. *Metcalfe* (1 Beav. 269). But in that case, the third person upon whom the order was asked to be made was a consenting party to it. The question therefore arises whether an adverse order has ever hitherto been made by a Court of equity on a third person to pay over to a creditor money which he owes to the debtor. I cannot find that it has, and I must, therefore, with much reluctance, refuse to make such an order. It is hardly within the province of this Court to suggest the remedy, if any, which the party applicant has for the inefficiency of this Court to work out his rights. It may be that the Courts of equity may be able to assist him in the suit now depending in reference to the stock in question; or it may be that the Bank of England, by bill of interpleader, may be able and willing to give some jurisdiction to the Court of equity under which justice may be done. It is enough for this Court to say that, as the case now stands, on the decided cases, it can give the parties no further help towards obtaining the money to which they are justly entitled.

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PROBATE. Feb. 23, 1869.

In the goods of ANDREW RUSSELL.

38 L. J. P. 31; L. R. 1 P. & D. 634; 20 L. T. 231; 17 W. R. 471.

Will—Executor renounced—Attorney for other Executors—Practice—Rules and Orders, 1862—Rule 50.—20 & 21 *Vict. c.* 77. *s.* 79.

WILL.—*An executor, having renounced in Australia, was appointed by the executors, who proved the will in the colony, their agent to obtain letters of administration with will annexed in this country:—The Court* held *that rule* 50. *of Rules and Orders,* 1862, *did not apply to such a case, and made the grant to him as attorney, but required that he should file a fresh and definite renunciation, which beyond all question should strip him of the character of executor and bring him within the operation of the 79th section of the Probate Act.*

Andrew Russell died domiciled in Australia, leaving a will and two codicils, in which he appointed Peter Inglis, William Taylor, Archibald Fiskin, Donald Larnach, and David Moore his executors.

On the renunciation of Inglis, Moore and Larnach, probate of the will and codicils was granted to Taylor and Fiskin by the Supreme Court of the Colony of Victoria. Exemplified copies of the instruments were forwarded by them to Larnach, who was resident in London, with a power of attorney authorizing him to take out administration in this country on their behalf.

C. A. Middleton moved the Court accordingly for letters of administration (with the will and codicils annexed) to Larnach as attorney for the executors.—By rule 50. (Rules and Orders, Principal Registry, 1862) "No one, who renounces probate of a will or letters of administration of the personal estate and effects of a deceased person in one character, is to be allowed to take a representation to the same deceased in another character." But the character there referred to is a character derivable from the deceased either by relationship or interest. Here the right of the applicant is derived not through the deceased, but the executors. Further, by section 79. of the Probate Act, 1857, in case of renunciation by an executor the rights of such person in respect of the executorship shall wholly cease, and the grant of probate or administration shall go as if such person had not been appointed executor. If the renunciation abroad be not sufficient, a fresh renunciation will be filed by the applicant.

SIR J. P. WILDE.—I think the application ought to be granted. I can conceive no reasonable object to be attained in forbidding a man appointed executor by a testator from saying, "I will have nothing to do with the estate as executor. I do not wish to be burdened with the responsibility, and I withdraw from the position in which the testator has offered to place me," and not allowing such a man to act when requested as attorney for somebody else who is entitled to the probate or administration. The good sense and obvious reason of the thing is therefore in favour of the application; whether it conflicts with rule 50. is another matter. I think it does not. I think the meaning of the rule is what is suggested, that is, where a man under a will, or in case of an intestacy, occupies with reference to the testator or deceased two different characters, in either of which he might ask for administration, he is not to be at liberty to select the character in which he will take the grant, but that he must take it in that character (always the largest one) in which, according to the ordinary practice of the Court, he would be entitled to the administration. I think that is the sense and meaning of the rule, and, if so, it in no way interferes with the decision at which the Court has arrived. There must, however, be a fresh and definite renunciation which beyond all question should strip Larnach of the character of executor, and bring him within the operation of the 79th section.

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PROBATE. Feb. 23, 1869.

In the goods of JOHN HOWARD.

38 L. J. P. 32; L. R. 1 P. & D. 636; 20 L. T. 230.

Will—Codicil—Revocation—Probate of Will and Codicil.

WILL.—*J. H. by his will, appointed A. and B. trustees, executors and guardians of his three minor children. He subsequently executed two codicils. By the first he revoked all the dispositions in favour of his son, and in all other respects confirmed his will. By the second he absolutely revoked and made void all bequests and dispositions in his will, and bequeathed all his property to C, his housekeeper, whom, with D. and E, he also appointed executors:—*

The Court granted probate of the three papers to C. and E, power being reserved to A. and B, the executors named in the will, to come in if entitled and prove.

John Howard, late of Staley, in the county of Chester, cotton-spinner, died, leaving a will and two codicils, all duly executed. By his will be gave and devised all his real and the residue of his personal estate to Samuel Cocker and William Sunderland, in trust for his three children, whom he named, and he also appointed them his executors and guardians of his three minor children. By the first codicil, dated the 23rd of July, 1863, he revoked and made void all the devises, bequests and dispositions in his will in favour of his son, Harry Edward Howard, and directed that his trustees should stand seised and possessed of the share intended for his said son in trust for his other two children, and in all other respects confirmed his said will.

The second codicil, which was executed on the 23rd of July, 1868, was as follows:

"This is a second codicil to the last will and testament of me, &c. I absolutely revoke and make void all bequests and dispositions in my said will, and I bequeath all my property to my housekeeper, Margaret Wright, and appoint Mr. Henry Heap one of my executors, Robert Heap another of my executors, and Margaret Wright aforesaid my executrix."

Bayford moved for probate of the three papers to Robert Heap and Margaret Wright.

SIR J. P. WILDE.—So long as anything in the will is left the codicil does not revoke it absolutely. It is clear to my mind that the probate ought to be of the three papers as prayed, power being reserved to the executors named in the will, if entitled, to come in and prove.

MATRIMONIAL. Dec. 15, 1868.

HOLT *v.* HOLT AND DAVIS.

38 L. J. P. 33; L. R. 1 P. & D. 610; 19 L. T. 662.

Alimony pendente Lite—Respondent cohabiting with and supported by Co-Respondent.

DIVORCE AND MATRIMONIAL CAUSES.—*The respondent in a matrimonial suit cohabited with and was supported by the co-respondent for some time after the filing of the petition and the service of the citation. In allotting alimony pendente lite, the Court ordered that the alimony should run from the date at which the respondent ceased to cohabit with the co-respondent, instead of from the service of the citation.*

The wife, the respondent in the suit, having filed a petition for alimony *pendente lite*, the husband in his answer, after setting out his faculties, alleged

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that at the time of the filing of the petition and the service of the citation (February, 1868), and from that time up to the 21st of August, 1868, the respondent lived with the co-respondent as his wife, and was supported by him. Affidavits were filed in support of this allegation.

Searle, for the petitioner, submitted that the alimony ought to run from the 21st of August, 1868, instead of from the service of the citation, as up to that date the respondent required no alimony.

[The JUDGE ORDINARY intimated that a *prima facie* case having been made out the respondent might have time to answer the affidavits if she applied for it.]

Dr. Swabey (with him *Thomas*), for the respondent, did not apply for time to answer.

The JUDGE ORDINARY.—It is proved that the respondent was living as the wife of the co-respondent up to the 21st of August, 1868, and the Court assumes that she was supported by him during their cohabitation. I think the husband ought not to be called on to pay alimony for the time during which the wife had other means of support. It is immaterial, so far as this question is concerned, that the wife was living in adultery. The ground upon which the Court proceeds is, that she was living in such a manner that she had means of support independent of her husband. Taking the income at 500*l*., I allot alimony *pendente lite*, at the rate of 100*l*. per annum, to commence from the 21st of August, 1868.

MATRIMONIAL. Feb. 16, 1869.

ROSS *v.* ROSS.

38 L. J. P. 33; L. R. 1 P. & D. 629; 20 L. T. 232; 17 W. R. 577.

Judicial Separation—Wife Petitioner—Adultery—Order to attend at the Hearing—20 & 21 Vict. c. 85. s. 43.—Practice.

DIVORCE AND MATRIMONIAL CAUSES.—*The Court ordered the petitioner in a suit for judicial separation on the ground of adultery to attend at the hearing of the petition, and intimated that section 43. of the 20 & 21 Vict. c. 85. was applicable to any petition.*

This was the wife's suit for judicial separation by reason of the husband's adultery. The respondent pleaded connivance; and the Court had ordered that the petition should be heard before itself without a jury.

Dr. Deane, for the respondent, moved the Court to order the petitioner to attend at the hearing to be examined.

Pritchard, for the petitioner, contra.—The suit is for judicial separation by reason of adultery, and the parties are therefore inadmissible as witnesses. Moreover, section 43. of the 20 & 21 Vict. c. 85, under which the Court makes such orders, only refers to suits for dissolution of marriage.

The JUDGE ORDINARY.—The section is applicable to any petition, and in almost all cases the Court requires the petitioner to be here. It will not make an order that the petitioner attend for the purpose of examination, but that she shall be here when the petition comes on for hearing.

Order accordingly.

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MATRIMONIAL. Feb. 16, 1869.

SHELTON *v.* SHELTON AND CAMPBELL.

38 L. J. P. 34; 20 L. T. 232; 17 W. R. 401.

Dissolution of Marriage—Decree absolute—Time—29 & 30 Vict. c. 32. s. 3.

DIVORCE AND MATRIMONIAL CAUSES.—*The Court refused, in the absence of special circumstances, to exercise the discretionary power vested in it, and to fix a shorter period than that within which, according to the statute and the rules of the Court, the decree nisi in a suit for dissolution of marriage is to be made absolute.*

This was the husband's petition for dissolution of marriage on the ground of the wife's adultery with the co-respondent. Neither the respondent nor co-respondent appeared; the petition was heard before the Court itself, on Saturday, the 6th of February, and the Court granted a decree *nisi*. The adultery charged in the petition came to the knowledge of the petitioner, an officer in the Indian army, in 1865 or 1866, but it was alleged that ill-health and the exigencies of foreign service prevented him from sooner prosecuting his suit. He had also been separated for a number of years from the respondent because of a previous act of adultery of which she had been guilty.

Inderwick, for the petitioner, now moved the Court to exercise the discretionary power vested in it, and to fix a less period than six months within which the decree *nisi* might be made absolute. There was no right of appeal on the part of the respondent or co-respondent, they not having appeared and defended the suit; and if the period were not shortened, the decree could not be made absolute until after the long vacation—practically nine instead of six months from the decree *nisi*.

[The JUDGE ORDINARY.—Are there any special circumstances in the case?]

The petitioner is in a bad state of health; he suffers from the excitement of this litigation, and he is anxious that it should be brought to a close.

The JUDGE ORDINARY.—He may set his mind at rest at once upon that point, but I fear I cannot grant this application. The period within which the decree is to be made absolute has been fixed by the statute and the rules of the Court; if I departed from it at all I should have to fix some other period applicable to all such cases, and I cannot see my way to that.

Application refused.

MATRIMONIAL. Feb. 23, 1869.

GEORGE *v.* GEORGE.

38 L. J. P. 34; 20 L. T. 232.

Dissolution of Marriage—Wife's Petition—Rights of Husband in Wife's Real Estate after Divorce—Annuity to Wife secured on her Property—20 & 21 Vict. c. 85. s. 32.—Practice.

DIVORCE AND MATRIMONIAL CAUSES. HUSBAND AND WIFE.—*The wife during the coverture became entitled to a small estate of inheritance. On the dissolution of the marriage on her petition, by reason of the husband's adultery and cruelty, the Court ordered that he should pay to the wife an annuity to the amount of two-thirds of the rents, and secure such annuity on the property.*

Quære—*Does the husband's interest in the wife's freehold estates continue after the termination of the coverture by a dissolution of the marriage?*

The wife, the petitioner in the suit, obtained a decree *nisi* for dissolution of the marriage on the ground of cruelty and adultery. During the coverture she

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became entitled to a small estate of inheritance, the rents of which, amounting of 45*l.* a year, the husband continued to receive.

Inderwick, in moving to make the decree absolute, asked the Court also to declare that the respondent's interest in the petitioner's property had ceased. In case of judicial separation, the wife's right in respect of property were defined by the Divorce Acts. In the case of divorce they were silent, the 31st section of the 20 & 21 Vict. c. 85. empowering the Court simply to declare the marriage dissolved; but, as in the case of judicial separation, it was enacted that the husband should have no right in the after-acquired property of the wife, it could not be supposed that the legislature intended that where the marriage was dissolved the husband should continue to enjoy the property which, while the marriage subsisted, he alone had *jure mariti*.

[The JUDGE ORDINARY.—The decision of this Court cannot bind the property in any way. If I were to pronounce one it would be a mere *obiter dictum*.]

Inderwick then asked for an order, under section 32. of the 20 & 21 Vict. c. 85, settling the amount of the rents on the petitioner and securing it on the property.

Pritchard, for the respondent, objected to the order being drawn in such form, on the ground of the difficulty which it would throw in the way of his dealing with the property, supposing he continued still entitled to it.

The JUDGE ORDINARY.—If the property is the wife's, the Court ought not by its order to deprive her of it, or to prevent her in any way from asserting her right to it. The order I shall make will be upon the contrary assumption; namely, that the property, so far as the life interest is concerned, belongs to the husband; and that being so, I shall order that he pay to the wife 30*l.* annually, to be secured on the property, and to cease if at any time she should recover the property from him. The order will express that the wife's rights to the property, whatever they are, are reserved, and that in the event of her becoming possessed of them as a *feme sole*, the order shall cease.

MATRIMONIAL. March 2, 1869.

B—— *v.* L—— *(falsely called* B——*)*.

38 L. J. P. 35; L. R. 1 P. & D. 639; 20 L. T. 280.

Nullity of Marriage—Order for Inspection of Person—Refusal—Attachment —Practice.

DIVORCE AND MATRIMONIAL CAUSES.—*In a suit for nullity of marriage by reason of malformation the respondent refused to comply with the order for inspection. The Court declined to issue an attachment against her until after the hearing, but intimated that the attachment would issue forthwith if she attempted to remove out of the jurisdiction.*

This was a suit for nullity of marriage by reason of the malformation of the respondent.

On the 16th of June, 1868, the Judge Ordinary made the usual order for the appointment of inspectors to examine the person of the respondent and to report whether she had any impediment to prevent the consummation of the marriage. This order was personally served upon her on the 11th of September, 1868, but while admitting the allegations in the petition to be true, she, through her attorney, formally declined to submit to any examination. A fresh copy of the order was served upon her on the 1st of February, 1869, and she was informed that if she did not obey it, application would be made for an attachment against her, but she again absolutely refused to comply.

Dr. Spinks (with him *Bayford*) now moved the Court that an attachment might issue against the respondent for non-compliance with its order. It

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might be that the evidence which would be adduced would satisfy the Court and render inspection unnecessary, and the attachment might therefore be allowed to lie in the registry until after the hearing: to be enforced, however, if the respondent attempted to leave the jurisdiction.

The JUDGE ORDINARY.—The course suggested is a desirable one, but I think it ought to be modified. I think the Court ought not to issue an attachment now and let it lie in the registry as suggested; but if, after the hearing, the Court should determine that the respondent ought to be examined, it will then make a fresh order, appointing time and place for the purpose. The best way will be to let the motion for the attachment stand over until after the hearing, it being clearly understood that if the respondent attempts to leave the jurisdiction, the Court will at once grant the attachment.

MATRIMONIAL. March 2, 1869.

TOPPER *v.* TOPPER.

38 L. J. P. 36; 20 L. T. 279.

Dissolution of Marriage—Adultery and Cruelty—Condonation—Evidence—Practice.

DIVORCE AND MATRIMONIAL CAUSES.—*After the cause had been heard, and the Court taken time to consider its decision, the petitioner (the wife) applied to be allowed to give evidence of further acts of cruelty, which she alleged took place at a date later than that to which she deposed at the trial. The Court refused the application, the petitioner having repeatedly stated, in the course of her examination, that the last act of cruelty took place at Easter, 1863, and that also being the latest date given in the petition.*

This was a petition instituted by the wife for dissolution of marriage by reason of adultery, coupled with cruelty. The respondent traversed both charges. The case was heard, before the Court itself, on Saturday, the 20th of February. Judgment was reserved; and on the following motion-day the petitioner applied to be allowed to give evidence of further acts of cruelty, which she alleged took place at a date later than that to which she deposed at the trial. The facts are set out in the judgment.

Dr. Tristram, for the petitioner.

Pritchard, for the respondent.

The JUDGE ORDINARY.—I think the evidence in this case fails. The parties lived together nearly ten years. During that time the petitioner speaks of two or three occasions upon which the respondent used some violence to her. On no occasion is it established, in my judgment, that he did her any serious hurt. Her own evidence was not given in a manner to induce the Court to place implicit reliance on her statement; and the occasions of violence, few and comparatively slight as they were on her own shewing, appear to the Court to have been exaggerated. The blow said to have been given with the muzzle of a gun is an instance of this. The struggle which went on at the time between the respondent and another man renders it very probable that the injury the petitioner received was the result of accident rather than design. These isolated acts, not accompanied with any general ill-treatment and of no very serious nature, do not establish a case of legal cruelty. But, further, the last act of cruelty imputed took place at Easter, 1863, and the petitioner continued to cohabit with the respondent until February, 1864, when she left him because she was jealous of a servant in the house. The cruelty, if any, was therefore condoned, and cannot now be relied upon unless revived by the subsequent adultery which has been charged. But here, too, I think the evidence fails.

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The respondent is living in a house in which there is only one other person—a maid-servant. He has been once seen to kiss this woman. Beyond that there is no evidence of adultery, except that the man who lives in the next house has heard voices apparently talking in the same room at night. On the other hand, a girl who was once there on a visit deposes to the fact that the servant slept in her own room, and that she never saw the respondent in that room, or the servant in the respondent's. It was proposed, after the case was closed and the Court had taken time to consider its decision, that the petitioner should be allowed to be called again, to give evidence of further acts of cruelty calculated to take off the effect of the condonation. But on the trial she had been several times asked if the occurrence which took place at Easter, 1863, was the last act of which she had to complain, to which she had uniformly answered in the affirmative. Moreover, on turning to the statement of cruelty in her petition, it will be seen that Easter, 1863, is the latest date she gives. I think the proposed further evidence ought not to be received. And as the evidence on neither of the two charges is, in my opinion, sufficient to sustain them, the petition must be dismissed.

MATRIMONIAL. March 16, 1869.

HAIGH *v.* HAIGH.

38 L. J. P. 37; L. R. 1 P. & D. 709; 20 L. T. 281.

Considered, *Cobb* v. *Cobb*, [1900] E. R. A.; 69 L. J. P. 125; [1900] P. 294; 83 L. T. 716 (P.D. & A.).

Permanent Alimony—Settled Property—Large Proportion brought in by Wife—Rate of Allowance—20 & 21 Vict. c. 85. s. 22.—Practice.

DIVORCE AND MATRIMONIAL CAUSES.—*In allotting permanent alimony in suits for judicial separation, the Court is bound by the practice of the Ecclesiastical Courts, and cannot allot a larger proportion than one moiety of the joint income, although the greater part of the fortune may have come from the wife.*

The wife had obtained a decree of judicial separation on the ground of cruelty, and the case now came before the Court on the question of permanent alimony.

The income of the respondent was derived from property comprised in the marriage settlement, part of which was brought into settlement by the wife and part by the husband. It amounted to 341*l.* per annum. Of this sum 210*l.* per annum was derived from property which belonged to the petitioner; and by the settlement the income of the whole of the property was receivable by the respondent during their joint lives.

Dr. Deane (*Searle* with him), for the petitioner, moved that the income of the whole of the wife's property might be allotted to her as permanent alimony. The Court is not bound by the rules of the Ecclesiastical Courts, but is at liberty to make such an order as it might deem just.

Dr. Tristram, for the respondent, *contra*.—One moiety of the joint income is the utmost that the Court can allot. The usual rate is one-third, and there is no reason why the Court should depart from it in this instance.—He referred to 20 & 21 Vict c. 85. s. 22; *Cooke* v. *Cooke* (2 Phil. 40); *Otway* v. *Otway* (2 Phil. 109).

The JUDGE ORDINARY.—The question is, on what principle the Court is to act in allotting permanent alimony in suits for judicial separation. The Court is invited to adopt by analogy the principle on which it acts in suits for dissolution of marriage; but the powers given to the Court in suits for dissolution are defined by certain sections of the statute, and the legislature has advisedly

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not extended the powers contained in those sections to suits for judicial separation. Section 22. of the Divorce Act defines the principles and rules by which the Court is to be guided in suits for judicial separation—namely, the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief. Let us see what the principle of the Ecclesiastical Courts was. It would be equitable to say that where a wife has brought a sum of money, whether large or small, to her husband, and the cohabitation contemplated at the time of the marriage has become impossible by reason of the husband's misconduct, the wife should receive back the money which she had brought to the common fund, whatever it may be. I think that would not be an unreasonable principle. But the Ecclesiastical Courts never did proceed on that principle. There is no trace of it in the reports. The rule laid down by those Courts was, to take all the circumstances of the case into consideration, and having regard to those circumstances to allot a certain proportion of the joint income. In ordinary cases the principle was to give one-third. The highest proportion ever allotted in any case was one-half, and that I shall allot in this instance. Taking the joint income at 340*l*. I allot 170*l*. payable quarterly.

MATRIMONIAL. March 9, 1869.

C—— *v.* C——.

38 L. J. P. 37; L. R. 1 P. & D. 640; 20 L. T. 280.

Commented on, *A.* v. *A.*, [1875] E. R. A.; 44 L. J. P. 15; L. R. 3 P. & D. 230; 31 L. T. 801; 23 W. R. 386 (P.D.). See, *Druce* v. *Druce*, [1903] E. R. A.; 72 L. J. P. 51; [1903] P. 144; 88 L. T. 573 (P.D. & A.); *Scott* v. *Scott*, [1913] E. R. A.; 82 L. J. P. 75; [1913] A.C. 417; 109 L. T. 1 (H.L.).

Petition for Dissolution of Marriage—Power of Court to order Cause to be heard in Camera.

DIVORCE AND MATRIMONIAL CAUSES.—*The Court is not bound by the practice of the Ecclesiastical Courts in suits for dissolution of marriage, and in such suits it has no power, even with the consent of all parties, to order the cause to be heard in camera.*

This was a suit instituted by the wife for dissolution of marriage, on the ground of sodomy. The respondent traversed the charge.

Searle, for the petitioner, moved that the cause might be heard before the Court itself, and *in camera*.

The JUDGE ORDINARY.—Has the Court power to make an order that the cause be heard *in camera?*

Dr. Tristram, for the respondent, intimated that he was prepared to consent to the order.

The JUDGE ORDINARY.—The authority under which the Court has acted in hearing causes *in camera* is the section in the Divorce Act which says that the Court shall follow as nearly as may be the practice of the Ecclesiastical Courts, and that section applies to all cases except cases of dissolution of marriage; but in cases of dissolution we are under the act of parliament, and I am not sure whether the Court has power to make such an order. I must pause and see whether I can do it.

The learned JUDGE subsequently intimated to counsel that he had no power to order the cause to be heard *in camera*. Under section 22. of the 20 & 21 Vict. c. 85. the Court is governed in all suits and proceedings, other than proceedings to dissolve any marriage, by the practice of the Ecclesiastical Courts, but even under that practice suits for nullity were alone heard *in camera*. Here the suit was for dissolution of marriage, and the section did not apply.

The usual order that the cause be heard before the Court itself was granted.

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PROBATE. Feb. 16, 1869.

In the goods of J. S. SWINFORD.

38 L. J. P. 38; L. R. 1 P. & D. 630; 20 L. T. 87; 17 W. R. 536.

Codicil—Execution—Signature not Made or Acknowledged in Presence of Witnesses—Presumption.

WILL.—*A testator wrote with his own hand on the back of his will, which was duly executed, a codicil, headed "Memorandum, dated the 25th of April, 1863." It purported to have been executed on the 31st of August, 1863, and the attestation clause was perfect save that it did not state that the testator had signed his name or acknowledged his signature in the presence of the witnesses. The witnesses could not say whether he did either one or the other in their presence; they did not see his signature when they signed nor the will on the other side, and nothing was said as to the character of the paper. The Court refused probate of the codicil on motion, but allowed the parties interested, if they thought fit, to propound it.*

J. S. Swinford, late of Nash Court, Margate, in the county of Kent, died on the 3rd of October, 1868, leaving a duly executed will, on the back of which he wrote with his own hand a codicil, headed "Memorandum, dated the 25th of April, 1863." The attestation clause ran, "Witness the signature of the said J. S. Swinford, in the presence of us, who, at his request, in his presence and in the presence of each other, have hereunto subscribed our names this 31st of August, 1863. William Mascall, Jane Kennett."

Mascall deposed that the testator asked him to sign his name to a paper; that the testator then called up his servant, and that deponent signed the paper in her presence; that he was unable to say whether the testator wrote anything in his presence, or whether the testator's signature was on the paper when it was signed by deponent; and that nothing was said about the character of the paper.

Jane Kennett said that she put her name to the paper at the testator's request, and then directly left the room; that she did not see Mascall sign; that she did not see the testator's signature; that he did not acknowledge or in any way refer to his signature, and that he did not tell her what the paper was.

Both witnesses further deposed that they did not see the will on the other side of the paper, and that they could not say whether the paper was so folded as to prevent them from seeing the testator's signature to the codicil.

Dr. Tristram moved the Court, the executors having renounced, to grant letters of administration, with the will and codicil annexed, to John Swinford, the father and only next-of-kin of the deceased. He submitted that the codicil being in the handwriting of the testator, and the attestation clause sufficiently full for the purpose, the presumption *omnia rite esse acta* should prevail.—He referred to *Gwillim* v. *Gwillim* (3 Sw. & Tr. 200) and *Vinnicombe* v. *Butler* (3 Sw. & Tr. 580).

SIR J. P. WILDE.—I am not disposed to grant probate of the codicil. I do not think that the circumstances come up to the decided cases. It is desirable that the Court should draw the line somewhere, otherwise the provisions of the statute would be entirely defeated. The parties interested may, if they think fit, propound the paper.

Administration, with will annexed, granted.

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PROBATE. March 16, 1869.

In the goods of CHARLES STEWART.

38 L. J. P. 39; L. R. 1 P. & D. 727; 20 L. T. 279.

Administration—Insolvent Estate—Property liable to Depreciation—Grant ad Colligenda Bona *to Creditor—Practice.*

WILL.—*The widow and next-of-kin in this country renounced administration, and the estate, which was insolvent, was liable to depreciation if the property (timber) were not at once sold. The Court, under the circumstances, made a grant* ad colligenda bona *to a creditor, the money realized by the sale of the timber (after deduction for wages and charges) and collection of debts, to be paid into the registry, and the next-of-kin abroad to be at once cited with a view to the applicant taking a creditor's grant.*

Charles Stewart, late of Kingston-upon-Hull, timber-merchant, died intestate on the 18th of January, 1869, leaving his wife and several children, some of whom lived abroad, him surviving. The estate, which consisted principally of deals and a number of small trade debts, was valued at 2,000*l.*, but the deceased was indebted to his banker and other creditors to the amount of 7,000*l.* The widow and the next-of-kin in this country renounced administration.

Dr. Tristram moved for letters *ad colligenda bona* to Mr. A. B. Pease, a creditor. It was proposed to sell the timber.

[SIR J. P. WILDE.—But timber is not a perishable article.]

It is subject to charges, and the affidavits also state that it will deteriorate in value if not at once sold. The trade debts, moreover, are small and numerous, and may be altogether lost to the estate if some one be not forthwith appointed to collect them. He referred to *In the goods of Clarkington* (2 Sw. & Tr. 381).

SIR J. P. WILDE.—I think the grant ought to go. So far as one can judge, the estate is probably insolvent, but no one can positively say that in respect of any estate. The widow and next-of-kin in this country, however, appear to take that view of the property. They have also renounced; and as the estate is subject to charges and the timber will depreciate in value if not at once sold, you may take a grant *ad colligenda bona*, but you must pay the money into the registry after deducting for wages and charges on the property, and you must also at once cite the next-of-kin abroad with the view of taking a creditor's administration.

PROBATE. March 16, 23, 1869.

In the goods of JOHN RISDON.

38 L. J. P. 40; L. R. 1 P. & D. 637; 20 L. T. 330; 17 W. R. 576.

Administration — Wife Administratrix — Husband surviving — Chose in Action — Grant de Bonis non *— Practice.*

WILL.—*A creditor's administration of the personal estate and effects of B. was granted to C, a* feme sole. *C. subsequently intermarried with D, and died six weeks afterwards, leaving part of the estate of B. unadministered, and the debt in respect of which she had obtained the grant still owing. The Court held that D. (the husband) had not reduced his wife's chose in action in the debt into possession by merely taking possession of that part of B.'s estate*

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which he found in her hands, and refused to make to him a grant de bonis non *of the goods of B. until he had first taken out administration to his wife.*

John Risdon, late of St. John's Wood, London, coachbuilder, died in March, 1865, a widower, without child or parent or any known relation, and intestate. In May, 1866, letters of administration of his personal effects were granted to Mary Ann Sarah Hooper, a creditor to the amount of 300*l*. She got in a part of the estate, which consisted, among other property, of two leasehold houses mortgaged to the Perpetual Building Society, and paid some of the debts. In July, 1868, she intermarried with Edward Hibberd, who thereupon entered into possession of the leasehold houses, and paid the ground-rents and taxes and the monthly instalments on the mortgages as they became due. In September, 1868, M. A. S. Hibberd died, leaving part of the estate unadministered, and the debt in respect of which she obtained the administration still due and unpaid.

Bayford (*March* 16) moved for a grant *de bonis non* of the personal estate and effects of Risdon to Edward Hibberd, the husband.

[Sir J. P. Wilde.—What has the applicant done to reduce the wife's chose in action in the debt into possession?]

He has adopted the administration granted to the wife in her character of creditor, and that is an assertion of the claim.

[Sir J. P. Wilde.—If that argument be right your proposition would be this, that the mere fact of claiming administration as a creditor would reduce the debt into possession.]

It is a step towards it. The issuing of a writ would be sufficient, and this is an analogous proceeding.—He admitted that he could cite no authority in support of the proposition.

Cur. adv. vult.

Judgment was given, on March 23, as follows:—

Sir J. P. Wilde (*March* 23).—This is an application for a grant of administration *de bonis non* to the personal estate and effects of John Risdon, deceased. After the death of the intestate, letters of administration were granted to Mary Ann Sarah Hooper, as a creditor, and under the grant she got in a considerable part of the estate, and paid some of the debts. She then married the present applicant. Within a month or six weeks after the marriage she died, and the present applicant applies for the grant of administration as a creditor on the estate of the original deceased. Now, it is obvious there was no debt due to him. But he says that the debt was due to his wife and to him *jure mariti*, and that he has reduced it into possession. I think that is a contention that cannot be maintained. What he really did was this—to take possession of that part of the estate which was in his wife's hands under the letters of administration at the time he married her, and to retain possession of it. But that is not reducing into possession the debt; because, before a debt can be said to be reduced into possession as a chose in action, something must have been done to satisfy it, and no part of the estate has here been set aside or appropriated for the payment of the debt. Indeed, the present position of the applicant is an inconsistent one; because he comes here to ask for a grant as a creditor, which implies that the debt is still owing, and at the same time he alleges that the debt has been reduced into possession—that is to say, that a sum of money has been set apart in discharge of it. I therefore think that he cannot take the grant in the way in which he asks for it. He must first take administration to his wife, and then he will be entitled to a grant of course.

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MATRIMONIAL. March 4, 16, May 5, 1869.

MORGAN v. MORGAN AND PORTER.

38 L. J. P. 41; L. R. 1 P. & D. 644; 20 L. T. 588; 17 W. R. 688.

Applied, *Noble* v. *Noble*, [1869] E. R. A. 810; 38 L. J. P. 52; L. R. 1 P. & D. 691; 20 L. T. 1016 (Prob.); *McCord* v. *McCord*, [1875] E. R. A.; 44 L. J. P. 38; L. R. 3 P. & D. 237; 33 L. T. 264; 23 W. R. 684 (P.D. & A.). Followed, *Grosvenor* v. *Grosvenor*, [1886] E. R. A.; 34 W. R. 140 (P.D. & A.). See, *Whitworth* v. *Whitworth*, [1893] E. R. A.; 62 L. J. P. 71; [1893] P. 85; 68 L. T. 467; 41 W. R. 592 (P.D. & A.); *Gooch* v. *Gooch*, [1893] E. R. A.; 62 L. J. P. 73; [1893] P. 99; 68 L. T. 462; 41 W. R. 655 (P.D. & A.); *Symons* v. *Symons*, [1897] E. R. A.; 66 L. J. P. 81; [1897] P. 167; 77 L. T. 142 (P.D. & A.). Commented on, *Waudby* v. *Waudby*, [1902] E. R. A.; 71 L. J. P. 43; [1902] P. 85; 86 L. T. 123; 50 W. R. 176 (P.D. & A. Discussed, *Constantinidi* v. *Constantinidi*, [1903] E. R. A.; 72 L. J. P. 82; [1903] P. 246; 89 L. T. 340 (P.D. & A.): reversed, [1905] E. R. A.; 74 L. J. P. 122; [1905] P. 253; 93 L. T. 651; 54 W. R. 121 (C. A.). See, *Wyke* v. *Wyke*, [1904] E. R. A.; 73 L. J. P. 38; [1904] P. 149; 90 L. T. 172 (P.D. & A.). Approved, *Evans* v. *Evans*, [1906] E. R. A.; 75 L. J. P. 27; [1906] P. 125; 94 L. T. 616 (P.D. & A.).

Dissolution of Marriage—Husband's Petition—Petitioner Guilty of Adultery—Adultery long antecedent to Wife's Misconduct—Exercise of Discretion vested in Court—20 & 21 Vict. c. 85. s. 31.—Costs.

DIVORCE AND MATRIMONIAL CAUSES.—*On the trial of the husband's petition for dissolution of marriage by reason of the wife's adultery, the jury found that the petitioner had also been guilty of adultery. The adultery was long antecedent to the wife's misconduct, and it did not appear that it was known to her until after the filing of the petition. The Court held, that mere lapse of time would not justify the exercise of the discretion (which must be a regulated discretion, and not a free option subordinated to no rules) vested in it under section 31. of the statute, and refused a decree.*

There are cases in which the discretion may be fitly exercised in favour of a petitioner. But in cases where the adultery has no special circumstances attending it, and no special features placing it in some category capable of distinct statement and recognition, the Court ought not to assume to itself a right to grant or withhold a divorce upon the mere footing of the petitioner's adultery being, under the whole circumstances of each case, more or less pardonable or capable of excuse.

The wife, the respondent in the suit, recriminated adultery, which she charged as having taken place with A. and B. At the trial no evidence was offered in support of the charge with B. The Court ordered that the costs incurred by the petitioner in respect of the charge of adultery with B. should be deducted from the sum paid into Court to meet the respondent's costs of trial.

This was a petition by the husband for dissolution of marriage on the ground of adultery.

The respondent and co-respondent traversed the charge, and the respondent further pleaded counter-charges of adultery and wilful neglect and misconduct conducing to adultery.

The cause was tried, before the Judge Ordinary, by a common jury, on the 4th of March, and the jury found, first, that the respondent had committed adultery with the co-respondent; secondly, that the petitioner had not condoned such adultery; thirdly, that he had not been guilty of wilful neglect and misconduct conducing to adultery, but that he had committed adultery with a woman of the name of Bentley.

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The marriage took place in 1855. The adultery with Bentley was committed a year or two afterwards, and it did not appear that it was known to the wife until after the filing of the petition.

The respondent also alleged adultery with a woman of the name of Rhodes, but no evidence was adduced in support of this charge, which the petitioner had come prepared to meet.

Dr. Deane (with him *Inderwick*) (*March* 16), for the petitioner, moved the Court to grant a decree *nisi* notwithstanding that he had been found guilty of adultery. The case is different from *Lautour* v. *Lautour* (10 H.L. C. 685; 33 L. J. Pr. M. & A. 89). There the decree was refused on the ground of the adultery of the husband, but the adultery was continuous for upwards of twenty years.

[The JUDGE ORDINARY.—But it was after the wife's adultery, and after sentence in the Ecclesiastical Court.]

If the adultery of the husband committed many years previously to the adultery of the wife is of itself to be a bar to the suit of the husband, it will amount to leave and licence to the wife to commit adultery. If the husband's adultery were close upon that of the wife (either antecedent or subsequent) it might well constitute a bar, but when the adultery has taken place ten or a dozen years ago, and, for aught that appears to the contrary, the husband and wife continued to live on friendly terms afterwards, and the husband's adultery in no way conduced to the wife's misconduct, it would be a monstrous hardship that in such a case the adultery of the husband should be an absolute bar.

[The JUDGE ORDINARY.—Upon what ground do you ask the Court to exercise the discretion vested in it by the 31st section? Is it that the adultery was venial?]

On the ground that it did not conduce to the wife's misconduct, and the length of time since which it took place.

[The JUDGE ORDINARY.—In the next case the adultery may have taken place ten instead of twelve years ago. How is the Court to distinguish them?]

Anichini v. *Anichini* (2 Curt. 21); *Clarke* v. *Clarke* (34 L. J. Pr. M. & A. 94); *Joseph* v. *Joseph* (34 L. J. Pr. M. & A. 96); *Campbell* v. *Campbell* (Macq. H.L. Pr. 590); and *Coleman* v. *Coleman* (35 L. J. Pr. & M. 37; L. R. Prob. & Div. 1, 91) were referred to.

Dr. Spinks (with him *Searle*), for the respondent, contra.—All the cases shew that the discretion to be exercised under the 31st section must be a legal not an arbitrary discretion; and nothing has appeared in the case which should induce the Court to depart from the general current of decisions. There has been no condonation because there was no knowledge. The argument that the petitioner's adultery did not conduce to the respondent's misconduct is of no force. *Lautour* v. *H. M. P.* (10 H.L. C. 685; 33 L. J. Pr. M. & A. 89) the husband's adultery was subsequent to that of the wife, and a decree was refused. In *Barnes* v. *Barnes* (33 L. J. Pr. M. & A. 89) the husband's adultery did not conduce to the wife's misconduct; and there also the decree was refused. The hardship in the case is that the petitioner has been found out. The petition ought to be dismissed, and with the wife's full costs.

Pritchard, for the co-respondent.

Dr. Deane, in reply.—In *Barnes* v. *Barnes* (33 L. J. Pr. M. & A. 89) the adultery of the petitioner took place shortly after the marriage, and shortly before the filing of his petition. With respect to the respondent's costs, the costs incurred by the petitioner in regard to the adultery charged with the woman Rhodes ought to be deducted. The charges were very specific, time and place having been given, and the petitioner had come prepared with witnesses to meet them.

Dr. Spinks.—If that argument is to prevail the attorney for the wife must lose his costs unless he is successful. When the charges were distinctly made he was justified in putting them on the record.

Cur. adv. vult.

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LORD PENZANCE (on *May* 5) delivered the following judgment:—The general question involved in this case is a serious one. It is practically this: To what extent ought this Court to exercise a discretion in granting or withholding a divorce to a petitioner who has himself been found guilty of adultery? There is no doubt, I think, that the legislature has invested the Court with a discretion on this subject; and there is equally no doubt that there are cases in which the adultery of a petitioner has been committed under such circumstances that it ought not in justice to stand in the way of a decree. In one case the respondent who was living in adultery had contrived to induce the petitioner to believe that she was dead. Upon receiving this information the petitioner married again. When he found out his mistake he sued the respondent for her adultery, and she retorted the adultery of which he had been guilty with his second wife. The Court thought that ignorance was innocence, and granted him his decree. In another case the wife was the complainant. She proved a case for divorce against her husband, and he in turn accused her of adultery, which was established. But it was further proved that he had, by threats and violence, forced her to lead an immoral life, from which he derived a pecuniary benefit. It was held that adultery so caused ought to be no bar to the wife's relief. It may also well be that an act of adultery committed by a petitioner to the knowledge of the respondent, and by him or her long since pardoned and condoned, ought not to preclude the petitioner from all remedy for the subsequent adultery of the respondent. This was much discussed in the Ecclesiastical Court, in the case of *Anichini* v. *Anichini* (2 Curt. 210), and it was pointed out that, upon a contrary view, a sort of licence to commit adultery without punishment would be set up on the one side by guilt on the other, however distant in point of time, or however completely forgiven and condoned. There appears to me to be great force in the observations of the learned Judge in that case, and on a proper occasion it will be very fit to consider whether his views ought not to be adopted in applying the discretion vested in this Court by section 31. Here, then, are three clases of cases, and there may be, and probably are, others in which this discretion may be fitly exercised in favour of a petitioner. But in cases where the adultery complained of has no special circumstances attending it, and no special features placing it in some category capable of distinct statement and recognition, there would, I think, be great mischief in this Court assuming to itself a right to grant or withhold a divorce upon the mere footing of the petitioner's adultery being, under the whole circumstances of each case, more or less pardonable or capable of excuse. A loose and unfettered discretion of this sort upon matters of such grave import is a dangerous weapon to entrust to any Court—still more so to a single Judge. Its exercise is likely to be the refuge of vagueness in decision and the harbour of half-formed thought. Under cover of discretion, a conclusion is apt to be formed upon a general impression of facts too numerous and minute to be perfectly brought together and weighed, and sometimes not perfectly proved; while the result is apt to be coloured with the general prejudices, favourable or otherwise to the person whose conduct is under review, which the course of the evidence has evoked. Upon such materials, so used, two minds will hardly ever form a judgment alike, and the same mind will often appear to others to form contradictory judgments on what seem to be similar facts. This invites public criticism and shakes public confidence in the justice of the tribunal. I hold, therefore, that the discretion to be exercised under section 31. of the statute should be a regulated discretion, and not a free option subordinated to no rules. It was probably reposed in the Court because the legislature found it impossible to foresee and specify the classes of cases fit for its application which might arise under the new law. The duty of reducing its exercise to method devolves upon the Court. Past experience has already pointed out some classes of cases to which it is fitly applied, and the future may probably furnish more. But the facts of this case present no definite features beyond mere lapse of time to justify its exercise, and the Court must refuse to decree.

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In reference to the question of costs, I think that such costs as were incurred by the petitioner in respect of the charge of adultery with the woman Rhodes should be deducted from the sum paid into Court to meet the respondent's costs of trial.

MATRIMONIAL. March 16, May 11, 1869.

WORSLEY v. WORSLEY AND WIGNALL.

38 L. J. P. 43; L. R. 1 P. & D. 648; 20 L. T. 546; 17 W. R. 743.

Distinguished, *Charlesworth* v. *Holt*, [1874] E. R. A.; 43 L. J. Ex. 25; L. R. 9 Ex. 38; 29 L. T. 647; 22 W. R. 94 (Ex.). See, *Dormer* v. *Ward*, [1900] E. R. A.; 69 L. J. P. 65; [1900] P. 130; 82 L. T. 469; 48 W. R. 524 (P.D. & A.): reversed, [1900] E. R. A.; 69 L. J. P. 144; [1901] P. 20; 83 L. T. 556; 49 W. R. 149 (C. A.).

Dissolution of Marriage—Revision of Settlements—Deed of Separation—Post-Nuptial Settlement—22 & 23 Vict. c. 61. s. 5.

DIVORCE AND MATRIMONIAL CAUSES. SETTLEMENT.—*Husband and wife having agreed to live separate and apart, executed a deed of separation, by which the husband covenanted to pay to the wife an annuity of 200l. a year during their joint lives, the annuity to be reduced to 150l. a year on the decease of the husband, and to 50l. a year if the wife re-married:*—Held, *that it was a post-nuptial settlement within the terms of section 5. of the 22 & 23 Vict. c. 61, and an order was made for its revision after a decree for dissolution of the marriage by reason of the wife's adultery.*

In this case the decree for dissolution of the marriage on the ground of the wife's adultery was made in November, 1868, and the matter now came before the Court on the application of the petitioner, to vary a deed of separation entered into between him and the respondent on the 4th of December, 1865. The question was, whether such a deed could be treated as a post-nuptial settlement under the terms of the 5th section of the 22 & 23 Vict. c. 61.

After reciting that differences had arisen between them, and that they had in consequence agreed to live separate and apart, the deed provided that the petitioner should pay to the trustee named therein an annuity of 200*l.* a year during their joint lives for the maintenance and support of the respondent. It further provided for the reduction of the annuity to 150*l.* a year on the decease of the petitioner, and to 50*l.* in the event of the respondent re-marrying, but it contained no provision as to her remaining chaste. Finally it provided for the maintenance of the children of the marriage by the petitioner, and that the covenants should cease and determine on the revocation of the deed at the will of the parties.

Dr. Tristram, for the petitioner, submitted that the deed came within the terms of a post-nuptial settlement, and referred to *Callwell* v. *Callwell* (3 Swa. & Tr. 259) and *Stone* v. *Stone* (3 Swa. & Tr. 372).

Dr. Deane (*Searle* with him), for the respondent and trustees, contra.—This case differs from *Stone* v. *Stone and Brownrigg* (3 Swa. & Tr. 372).

[The JUDGE ORDINARY.—I think that case comes to nothing. It is not an affirmative decision of any kind.]

A deed of separation and a settlement are totally different things. A settlement, be it ante-nuptial or post-nuptial, has in view the cohabitation of the parties. A deed of separation has expressly the opposite purpose.

[The JUDGE ORDINARY.—Although they agreed to separate, they were still man and wife, and now an event has happened which has broken the arrangement. That is a matter which was not contemplated by the deed.]

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In settlements provision is also made for the children of the marriage. Here the settlement is exclusively on the wife. The deed does not provide for anything usually found in a settlement, but for everything that is not in a settlement. There is also this distinction in it, that there is a power of revocation. Further, the 5th section of the 22 & 23 Vict. c. 61. has been strictly construed. Separation deeds were well known, and if it were intended to give the Court power to deal with them, they would have been mentioned.

Cur. adv. vult.

LORD PENZANCE gave judgment, on *May* 11, as follows:—In this case the respondent has been found guilty of adultery. The Court has made a decree for dissolution of the marriage, and the question that now remains for determination is, whether the Court should interfere, under the 5th section of the 22 & 23 Vict. c. 61, by its order, with the effect of a certain deed which had been entered into between the petitioner and the respondent, and which is said to have been of the character of a post-nuptial settlement. The first question is, whether the deed is of a kind that falls within the intentions of the legislature when it used the words "post-nuptial settlement." Now, the deed is in all its provisions, I think, pretty well an ordinary deed of separation.—[Having recited the provisions of the deed, his Lordship continued:]—The question is, whether it is a post-nuptial settlement. The language of the statute is very general. It says, "The Court, after a final decree of nullity of marriage, or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents, as to the Court shall seem fit." I should not be justified in narrowing the fair meaning and scope of those words. The deed is one by which money is secured to the wife. It is then a settlement, so far as I understand the meaning of the word settlement, and it is post-nuptial. So much upon the mere meaning of the words. But if one looks at the substance of the matter, one will see that the legislature intended by this section to arm the Court with the power of making fresh arrangements, in case of the woman committing adultery, in respect to the pecuniary settlements that at any time were made upon her in the character of wife. I think the substantial feature of this deed which brings it within the clause is this—that it provides by covenant that a sum or sums of money shall be paid to the respondent in her character of wife, and that it was made upon the footing and assumption that she would continue the wife. It seems to me, therefore, that the Court would be acting within the spirit of the clause and the intention of the legislature in considering it as a post-nuptial settlement. The respondent has committed adultery; there is a decree for a dissolution of the marriage, and she is no longer a wife. The petitioner has in consequence proposed to reduce the annuity of 200*l.* a year by one-third, to reduce the annuity of 150*l.* a year payable on his death by one-half, and to deal in like manner with the annuity of 50*l.* a year if she marry again. It seems to me that that is a very reasonable proposition. I shall be prepared to make an order embodying that proposal, and in this, as in all other cases of marriage settlements, the order will be drawn up in the presence of the parties, and if they have any objection to make to the terms of the order, or the manner in which it carries out the decision of the Court, I shall be prepared to hear them either at chambers or in Court.

Dr. Tristram asked that the future payments of the annuity to the respondent should only be *dum casta vixerit*, and that a provision to that effect should be introduced into the order.

Dr. Deane submitted that inasmuch as it was not in the deed, the Court had no power to include such a provision in the order.

LORD PENZANCE.—When the order is drawn you can attend me at chambers and argue the point.

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PROBATE. Dec. 8, 1868.

MORDAUNT *v.* CLARKE AND CLARKE.

38 L. J. P. 45; L. R. 1 P. & D. 592; 19 L. T. 610.

Will—Executors Intermeddling—Citation to take Probate—Failure to do so—Attachment—Practice.

WILL.—*The executors of a will intermeddled in the estate and effects of their testator, without taking probate of the instrument. A citation having been served upon them, to enter an appearance and take probate, they entered an appearance, but took no further steps in the matter. The Court refused to grant an attachment against them for contempt in not obeying the citation, but directed a peremptory order to be served upon them to take probate within ten days from the date of the order.*

The testator Joseph Bell Clarke, formerly of Cheltenham, Gloucestershire, cotton-manufacturer, died on the 5th of September, 1863, leaving a will in which he appointed the defendants his executors. The deceased at the time of his death was indebted to Mrs. Grant in the sum of 5,000*l.* Mrs. Grant died in 1867, and her executors instituted a suit in the Court of Chancery to administer the estate of Joseph Bell Clarke. The defendants, in their answer to the bill in Chancery, admitted that they had possessed themselves of personal estate and effects of Joseph Bell Clarke of considerable value, and that they had caused to be sold a portion thereof, which realized the sum of 205*l.* 18*s.* 9*d.*, and had thereby intermeddled in the estate and effects of their testator, although they had not taken probate of his will. On the 20th of November, 1868, a citation was taken out against them, calling upon them to enter an appearance within eight days, and to take probate of the will. This citation was personally served upon the defendants, who entered an appearance, but took no further steps in the matter.

Searle, for the plaintiff, moved that an attachment might issue against them for contempt in not obeying the citation.

SIR J. P. WILDE said, he knew of no case in which an attachment had issued in the first instance for not obeying a citation. He accordingly declined to grant an attachment, but ordered a peremptory order to be served upon the defendants to take probate within ten days from the date of the order, and condemned them in costs.

PROBATE. May 5, 1869.

BARNES *v.* DURHAM.

38 L. J. P. 46; L. R. 1 P. & D. 728; 20 L. T. 545.

Practice—Revocation of Grant of Administration with Will annexed—Proctor's Lien on Letters of Administration.

WILL.—*An order was made for the revocation of a grant of administration with the will annexed. The letters of administration were in the hands of the proctors who had obtained them, and who claimed a lien upon them for costs. The Court declined to order the proctors to deliver up the letters for the purpose of cancellation, but directed that a copy of its order, revoking the grant and requiring the executor to bring the letters into the registry if they ever came into his possession, should be served upon them.*

John Durham, late of Witham, in the county of Essex, grocer, died on the 28th of August, 1856, leaving a duly executed will in which he appointed his wife, Elizabeth Durham, sole executrix and residuary legatee.

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Elizabeth Durham died without having proved the will, and letters of administration of her personal estate and effects were granted to John Dykes Durham, the defendant, her natural and lawful son and next-of-kin, on the suggestion that she had died intestate. Subsequently letters of administration, with the will annexed, of John Durham (the father), were granted to him as administrator of Elizabeth Durham.

The suggestion that Elizabeth Durham had died intestate was untrue. She left a duly executed will, of which she appointed John Barnes, the plaintiff, executor. The defendant, at the time he obtained administration, was aware of the fact.

In January, 1868, probate of the will of Elizabeth Durham was granted to the plaintiff as exectuor, the administration previously granted to the defendant having been revoked, and in the following February a citation was issued at the instance of the plaintiff, and served by advertisement on the defendant, to bring in the letters of administration with the will annexed of John Durham, deceased, and to shew cause why they should not be revoked; and a copy of this citation was served upon Messrs. Moore & Currey, the defendant's proctors, who obtained them. They admitted that the letters of administration were in their possession, but refused to give them up, on the ground that they had a lien upon them for their costs of obtaining them.

Dr. Tristram, for the plaintiff, now moved the Court to revoke the grant made to the defendant, and to make such order as to the Court should seem fit respecting the bringing into the registry the letters of administration in the hands of Messrs. Moore & Currey, with a view to their being cancelled. He also asked that the defendant might be condemned in the plaintiff's costs, as he was aware of the existence of the will when he obtained the grant.

Lord Penzance.—As Messrs. Moore & Currey claimed a lien on the letters of administration, I do not see my way to making an order on them to deliver them up; and the Court must therefore proceed in the matter as best it can under the circumstances. I will make this order: that the grant of administration with the will of John Durham annexed be revoked; that the plaintiff bring the letters of administration into the registry should they ever hereafter come into his possession, and that a copy of this order be served on Messrs. Moore & Currey. I also condemn the defendant in the plaintiff's costs.

PROBATE. April 20, May 5, 1869.

In the goods of T. B. SHARMAN.

38 L. J. P. 47; L. R. 1 P. & D. 661; 20 L. T. 683; 17 W. R. 687.

Applied, *Griffiths* v. *Griffiths*, [1872] E. R. A.; 41 L. J. P. 14; L. R. 2 P. & D. 300; 25 L. T. 574; 20 W. R. 192 (Prob.). Followed, *In the goods of Pursglove*, 1872, 26 L. T. 405 (Prob.). Approved, *In the goods of Murphy*, 1874, Ir. R. 8 Eq. 300 (Prob.). See, *In the goods of Smith*, [1890] E. R. A.; 59 L. J. P. 5; 15 P.D. 2; 62 L. T. 183; 38 W. R. 384 (P.D. & A.).

Will—Residue—Signature of Legatee written under Attestation Clause—Omission of Name in Probate—Practice.

Will.—*A residuary legatee who was present at the execution of the will, in which no executor was appointed, wrote her name, after the instrument had been signed by the testator and attesting witnesses, underneath the attestation clause, at the request of one of the witnesses*:—Held, *that, the Court having to determine to whom the grant of administration with the will annexed should go, it was the duty of the Court to inquire in what character the legatee had signed the paper; and the Court being satisfied from the evidence that she had not signed the will as a witness, her signature was omitted from the grant.*

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The residuary legatee signed the will after it was executed at the request of one of the attesting witnesses. The Court required, before making an order for the omission of her signature from the probate, that a notice to shew cause should first be served upon the next-of-kin.

The testator gave and bequeathed to his sister absolutely all his "houses and land and book-debts, household furniture, plate, linen, books, china, glass, books of art, drugs, hay, straw, potatoes, and everything on the said premises," horse, gig, &c., "and all other chattels":—Held, *that the residue passed, "all other chattels" being meant to supply any omission in the previous enumeration.*

Thomas Brightman Sharman, late of Leake, in the county of Lincoln, veterinary surgeon, deceased, died, leaving a duly executed will in the words and figures following:

"I give and bequeath unto my sister Adelaide Sharman absolutely all my houses and land and book-debts, household furniture, plate, linen, books, china, glass, books of art, drugs, hay, straw, potatoes, and everything on the said premises," horse, gig, &c., "and all other chattels. September 28, 1868."

Opposite the attestation clause there appeared the names of two witnesses, and beneath the attestation clause the signature of the legatee, Adelaide Sharman.

From the affidavits it appeared that Miss Sharman signed her name after the will had been executed at the request of one of the witnesses who had drawn the will, and who thought it was proper she should, as the legatee named therein, so sign her name.

The Court was moved (*April* 20) to allow administration, with the will annexed, to go to Adelaide Sharman as residuary legatee, and to omit her name from the grant; but the learned Judge required that a notice to shew cause should first be served upon the father of the deceased as the sole next-of-kin. The requisite notice having been served.

Inderwick renewed the motion on the 5th of May. There were two questions involved: first, as to the character in which Miss Sharman signed the will; and next, as to the meaning of the residuary clause. As to the first, the affidavits shewed that she signed at the request, not of the testator, but of one of the attesting witnesses, and as legatee. *Randfield* v. *Randfield* (30 L. J. Ch. 177) was conclusive, that, under such circumstances she did not forfeit her interest. As to the second point, the whole object of the paper was to benefit one person, and that distinguished it from all other cases. The words "and all other chattels" clearly meant anything not included in the previous enumeration. He referred to *Jarman on Wills*, 721; *Mitchell* v. *Mitchell* (5 Madd. 69); *Campbell* v. *Prescott* (15 Ves. 500); *Kendall* v. *Kendall* (4 Russ. 360).

Lord Penzance.—Two questions arise in this case. The first is, whether the grant ought to go to the applicant of probate of this will with or without her name as a witness. As to that, there is the case decided by Sir Cresswell Cresswell—*In the goods of Jane Forest* (2 Swa. & Tr. 334), which was cited when this matter was last before the Court, and which was to this effect, that in ordinary cases it is not the duty of this Court to ascertain whether, when there are two attesting witnesses to a will, the name of a third person which also appears on the face of the instrument, was put there as an attesting witness or not. For, said Sir Cresswell Cresswell: "If I were to omit the name in the probate, the next-of-kin would be precluded from raising the question in a Court of construction." But in this case it is said, and I think rightly, that the duty of deciding that question is forced upon the Court, because the Court has to say, not only what was the will, but to whom the grant should go; and the question to whom the grant should go depends upon the previous question, whether the applicant has any interest under the will. If an attesting witness, she has no interest, as she forfeited it; if not an attesting witness, then she has an interest. I am satisfied from the evidence that she did not sign the will

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as an attesting witness. To whom then should the grant go? Is the applicant the residuary legatee? Upon the whole matter, I think she is. There is something in the suggestion that the will was a short one, and that its whole object and purpose was to give everything to his sister. I think the fair meaning of the language is, that he meant to give her everything; and then, after the enumeration, lest he should omit anything, he puts in the words "all other chattels." The grant ought to go to her as residuary legatee; and when it does go, it ought not to include her name as a witness.

PROBATE. May 11, 1869.

In the goods of GUTTIEREZ.

38 L. J. P. 48; 20 L. T. 758; 17 W. R. 742.

Foreign Will—Will made after Death of Testator by Third Party on his behalf—Probate.

WILL.—*The testator, a Spaniard, died at Bilboa, in Spain. On the day of his death he caused a document to be prepared by a notary, purporting to give authority to his wife to make a will on his behalf. In pursuance of this authority she made a will on his behalf after his decease, and appointed herself executrix. The Court being satisfied from the affidavit of a Spanish advocate that such a will was valid according to the law of Spain, decreed probate.*

Don Eulojio Celis y Guttierez died at Bilboa, in Spain, on the 27th of January, 1869. On the day of his death he caused a document to be prepared by a notary, purporting to give authority to his wife, Doña Josepha, to make a will on his behalf. This document recited that Don Eulojio, being too unwell to execute it, had requested a third person to execute it on his behalf, and that it was in fact so executed and attested by witnesses.

On the 13th of March, 1869, Doña Josepha, acting in pursuance of this power, made a will on behalf of her deceased husband, and appointed herself executrix. It appeared from the affidavit of a Spanish advocate that a will so made is valid according to the law of Spain. It was also stated that the will had been admitted to probate by the Spanish Court, but there was no affidavit as to the fact.

C. A. Middleton, in moving for probate to the executrix, cited an unreported case, *In the goods of Don Garcia*, wherein a will similarly made was admitted to probate in the Prerogative Court of Canterbury in the year 1836.

LORD PENZANCE.—If the will has received the sanction of the Spanish Court, you are entitled to a grant of course. But I think you are also entitled to a grant as the case stands. The notion of a will made after a man's death is entirely opposed to our ideas of a will. We have, however, no right to impose our ideas on other people, and the only thing which the Court has to determine is whether this paper is or is not a valid will in Spain. We have an affidavit of a person versed in the law of Spain to the fact that it is, and I think I ought to grant probate.

MATRIMONIAL. April 24, 1869.

ROSS *v.* ROSS.

38 L. J. P. 49; L. R. 1 P. & D. 734; 20 L. T. 853.

Judicial Separation—Connivance—Agreement to Live Separate—Agreement silent as to Future Life of Husband—Unwilling Consent.

DIVORCE AND MATRIMONIAL CAUSES.—*Husband and wife agreed to live separate and apart. The agreement was silent as to the future life of the*

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husband, but it was alleged that when it was entered into the wife was aware that he was living with another woman, and that the understanding was that the intimacy was to be continued:—The Court investigated the circumstances under which the agreement was made, and being satisfied that the wife had not connived at the husband's adultery, decreed judicial separation on her petition.

To constitute connivance on the part of the wife it is not necessary that there should be a willing consent to the adultery of the husband. She may be unwilling to consent to his living with another woman; but if under pressure of circumstances, short of force in the nature of duress, she should withdraw her scruples, that would amount to connivance.

This was a petition by the wife for judicial separation, by reason of the husband's adultery. The respondent did not deny the charge, but pleaded that the petitioner had connived at his adultery. The case was heard before the Judge Ordinary, on the 24th of April.

In support of the plea of connivance, there was put in evidence an agreement to live separate, which was entered into between the petitioner and respondent on the 26th of October, 1866. It recited that, " Whereas unhappy differences had arisen " between them, they had agreed to live separate and apart from each other, and provided that the respondent should pay to the petitioner the sum of 88*l*. a year for her maintenance and support. It contained no provision as to the mode of life of the respondent in the future, but it was alleged that at the time the agreement was signed it was well understood by both parties that the respondent should continue his intimacy with the woman, Maria Smith, with whom the petitioner charged the adultery to have been committed. Maria Smith had been a servant in the house.

In proof of this allegation Mr. Gill, the attorney who prepared the agreement, was called. He stated that he was first consulted by Mrs. Ross, in 1865, and that in the course of their interviews the fact of the respondent's living with Maria Smith was frequently referred to. He also saw the respondent, who proposed to continue his intimacy with Maria Smith. He mentioned it to the petitioner, and although she appeared shocked she did not forbid it. She never said that she would agree to the respondent living with Maria Smith, and on the day the agreement was signed the petitioner and respondent settled the terms themselves in a private room in his office at Wakefield; but his impression was that it was quite understood that the respondent was to continue to live with Maria Smith. He admitted that Mrs. Ross was at this time becoming very destitute, the respondent having deserted her for a considerable period, and added that if the respondent had refused to come to terms he should have brought the matter into Court. On behalf of the petitioner, Miss Ross was called. She stated that Maria Smith had been a servant in the house, and that from December, 1864, until September, 1865, the date of the desertion, there were frequent quarrels between her father and mother about her, and that on all those occasions the respondent denied the intimacy. On the day the agreement was signed her mother said that she would never consent to his living with Maria Smith. The respondent declared that he was not living with her, and never intended to do so, and on their way to the railway station, after the agreement was signed, he repeated the assurance.

Dr. Deane (with him *Bayford*), for the respondent, submitted that, on the whole case, the plea of connivance was established. It was true the agreement was silent as to the future life of the respondent, but the circumstances under which it was entered into implied leave and licence. It did not matter that the consent of the petitioner might have been an unwilling consent. —(He referred to *Thomas* v. *Thomas* (2 Sw. & Tr. 113).

Dr. Spinks (with him *Pritchard*), for the petitioner, in reply.—To

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constitute connivance there must be a willing consent.—*Morris* v. *Morris* (2 Sw. & Tr. 530; 31 L. J. Pr. & M. 69).

The JUDGE ORDINARY.—The principle on which the Court has to decide this case is this: The husband's adultery is proved, and the wife is entitled by law to a decree of judicial separation by reason of that adultery, unless he shews that she connived at it. Now connivance means consent. *Volenti non fit injuria* is the principle upon which the Court acts. It is said in this case that the wife has consented, and that the consent of the wife is shewn by her having executed a certain written agreement. The agreement, in substance, is an agreement on his part that she shall be allowed to live separate from him; that she may live where she likes and in what manner she likes; that he will not take any proceedings against her to bring her back to live with him; that she shall enjoy any property that may devolve upon her, and that he, the husband, will pay and allow her the sum of 88*l.* a year; and, upon her part, she promises not to contract any debts which the respondent may be called upon to pay; and that their young child, William Scarth Ross, shall be supported by her until he is five years old, when he is to be sent to school at the cost of the respondent. That is the substance of the agreement. It is to be observed that there is no agreement at all as to what the husband is to do. There is no statement to be found in the agreement as to the contemplated future life of the husband; and it is said, upon the authority of *Thomas* v. *Thomas* (2 Sw. & Tr. 113), that that is connivance. In *Thomas* v. *Thomas* (2 Sw. & Tr. 113), no doubt, the Court held that a deed of separation which recited the fact that the husband was then living with another woman, and that proceedings were actually pending in the Matrimonial Court on account of that adultery; and having recited these matters, the deed provided that the proceedings should be put an end to, and a certain sum of money should be settled on the wife, the Court held, that that was a sort of bargain between the parties that the husband was to continue to live in a state of adultery with the same person with whom he was then living. But it is obvious that there is a great distinction between the two cases. There is here no bargain at all; no recital about the woman Smith; and nothing is said about what the husband is to do. In *Thomas* v. *Thomas* (2 Sw. & Tr. 113), also, I find that the learned Judge relied very much upon a case in the Ecclesiastical Court, *Barker* v. *Barker* (Add. Ec. Rep. 285), and, on turning to it, I find it to be a very strong authority indeed, so far as the effect of a deed of separation is concerned. In that case it was said that the wife was living with another man, and that the deed constituted a licence or consent on the part of the husband that she should continue to do so; and I think it was so held in the first instance. But there was an appeal or some other proceeding, and upon that appeal Sir John Nicholl came to the conclusion that, notwithstanding the formal words in the deed that the wife might live separate and apart in such manner, in such place and with such person as she thought fit, as if she were sole and unmarried, the husband never did consent that his wife should live in adultery with another man. He said, "The presumption which it (the deed) would raise against the husband would, it is true, be the same in both Courts. But, whereas that presumption in the Court below was not, as I have said, rebutted by any evidence, it is in this appellate Court, I think, amply so rebutted. For the husband, in this Court, as he was fully entitled to do, has brought in a further allegation, pleading the circumstances under which the original separation was had, and the correspondence by letter which took place between him and his wife subsequent to the separation, as also the letter from the mother, in which she communicated to her son-in-law the information that he received of his wife's elopement. From the evidence taken upon this allegation and from the face of these exhibits, I collect both that the husband was not to blame in the matter of separation, and that the deed of separation was understood neither by husband nor wife as dispensing to either with the obligation of fulfilling the marriage vow in the article of fidelity so far as the consent of the other

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party was concerned, however the contrary might seem upon the mere wording of the deed." The learned Judge took what appears to me an extremely just and proper course. He forebore to rely wholly and solely upon the deed. He investigated the circumstances under which it was entered into, and he entertained the broad question whether, in point of fact, the deed and the circumstances that surrounded it were such as should satisfy the tribunal that the husband had connived at his wife's adultery. In these cases, it is in the interest of justice that the Court should take that view. In dealing with them nothing would lead to more injustice than what is called technical decisions. What a man writes is, no doubt, of greater force than what he says. What he does by deed has still greater stability or force in law than what he does by parol or simple writing, and the deed should be closely scanned to ascertain what it was that the parties were agreeing to. But, allowing all that, it is still proper to let in as much light as can be obtained by evidence; and then, when the whole matter is before the Court, it ought not to determine that the husband or wife consented to the adultery of the other, unless it is clearly proved that that was their intention when they entered into the agreement to separate. When we turn to the facts of this case, I am of opinion that there is no satisfactory evidence of connivance at all. There is not much difference in the case as made on the one side or the other; but it is remarkable that there is no proof before the Court that the respondent was carrying on an adulterous intercourse with the woman Smith at the time this agreement was made. When we come to the day on which it was signed, there is a discrepancy. Mr. Gill alleges that nothing was said. Miss Ross, on the other hand, swears that her mother declared she would never consent to the respondent living with Maria Smith, and that he assured her he had no intention of doing so; and it is to be remembered that Mr. Gill stated that they arranged the terms of the agreement themselves in a private room. On such evidence it is impossible to come to the conclusion that this woman ever did willingly, or in any terms, give her consent to a continuance of the intercourse with the girl Smith. I therefore think that the plea of connivance fails. In reference to what has been said on the subject of willing consent, if it were established that the wife had consented, as the consideration of obtaining the allowance, to the husband continuing this intercourse, it would, in my opinion, have amounted to connivance; even though the consent was extorted from her by pressure of the circumstances in which she was placed, unless the pressure amounted to that degree of force which would vitiate any agreement. She might be unwilling to consent; but if she withdrew her scruples in order to get the allowance, then I think she would have been guilty of connivance.

Judicial separation decreed.

MATRIMONIAL. June 4, 1869.

DITCHFIELD *v.* DITCHFIELD.

38 L. J. P. 51; L. R. 1 P. & D. 729; 20 L. T. 1016.

See, *Jones* v. *Jones*, [1872] E. R. A.; 41 L. J. P. 53; L. R. 2 P. & D. 333; 26 L. T. 106; 20 W. R. 449 (Mat.)

Costs—Wife's Petition for Dissolution of Marriage on the Ground of Adultery—Previous Suit for Nullity dismissed.

DIVORCE AND MATRIMONIAL CAUSES.—*A suit for a decree of nullity promoted by the wife on the ground of impotency was dismissed. Subsequently she filed a petition for dissolution of marriage on the ground of adultery, coupled with cruelty and desertion, and obtained a decree nisi*:—Held, *that the respondent ought not to be condemned in the costs of both suits; and in allowing the*

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petitioner the full costs of the suit in which she was successful, it was ordered that the respondent should have credit for the sum paid by him on account of her costs in the suit for nullity.

This was a petition by the wife for a dissolution of marriage, on the ground of adultery, cruelty and desertion. The respondent entered an appearance, but filed no answer.

The parties were married in 1854, and they cohabited at Dunkinfield, in the county of Chester, where the respondent carried on the business of an innkeeper. In February, 1863, he turned the petitioner out of the house, and they never afterwards lived together. In February, 1864, she instituted a suit for a decree of nullity, on the ground of the impotency of the respondent. The respondent answered and submitted to medical inspection, but did not appear at the hearing of the suit, which was dismissed—vide *Tavernor, falsely called Ditchfield* v. *Ditchfield* (35 L. J. Pr. & M. 51; L. R. 1 P. & D. 127).

The charges of adultery (which took place subsequently to 1863) and cruelty were proved, and the Court granted a decree *nisi*.

On the question of costs,

Searle submitted that the respondent ought not to be required to pay the costs of both suits. In the suit for nullity he had paid costs, on behalf of the petitioner, to the amount of 64*l*.

[The JUDGE ORDINARY.—In this suit he has failed; consequently it follows that he should pay the costs. But then comes the question whether he ought not to have credit for any costs he paid in the suit for nullity, which failed, and in my judgment properly failed.]

Dr. Spinks (with him *Inderwick*), for the petitioner.—It is hardly competent for the Court, so far as costs are concerned, to set off what occurred in a former suit as against this suit. Besides, in the suit for nullity the petitioner's case may have been perfectly true although she failed. The respondent's impotency might have been *quoad hanc*.

The JUDGE ORDINARY.—I think that the respondent ought, in the costs he is condemned to pay in this suit, to have credit for the sum he paid in the former suit. I do not think it is competent for the Court in this suit to make any order as to the payment of costs in the other suit; but in ordering what is to be paid in this suit, it is competent for the Court to say that the whole or only a part of the costs shall be paid, and consequently it is competent for the Court to say that the whole of the wife's costs shall be paid after deducting the amount paid for her costs in the former suit. The respondent rendered himself liable by his misconduct in this suit, but he did not lay himself open to two suits. The wife, erroneously or improperly, took her first remedy against him and failed; and I therefore think that he ought not to be called upon to pay the costs of both suits.

Order accordingly.

MATRIMONIAL. June 8, 1869.

NOBLE v. NOBLE AND GODMAN.

38 L. J. P. 52; L. R. 1 P. & D. 691; 20 L. T. 1016.

See, *Moore* v. *Moore*, [1893] E. R. A.; 62 L. J. P. 10; [1892] P. 382; 67 L. T. 530 (P.D. & A.). Applied, *Whitworth* v. *Whitworth*, [1893] E. R. A.; 62 L. J. P. 71; [1893] P. 85; 68 L. T. 467; 41 W. R. 592 (P.D. & A.).

Dissolution of Marriage — Husband's Petition — Marriage of Petitioner immediately after Decree Nisi—Decree made absolute—Discretion—20 & 21 Vict. c. 85. s. 31.

DIVORCE AND MATRIMONIAL CAUSES.—*The husband obtained a decree nisi*

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for dissolution of the marriage, and a fortnight afterwards re-married. The Court being satisfied that in contracting the second marriage he honestly believed that the first had been dissolved by the decree nisi, and that he had no intention of committing adultery, exercised the discretion vested in it under the 31st section of the Divorce Act, and made the decree absolute.

This was the husband's petition for a dissolution of marriage by reason of the wife's adultery with the co-respondent. Neither the respondent nor the co-respondent appeared.

At the hearing, the petitioner (a tailor) conducted his own case, and the Court granted a decree *nisi* on the 28th of November, 1868. About a fortnight afterwards, on the 11th of December, 1868, the petitioner went through the ceremony of marriage with another woman, and cohabited with her. The matter having come to the knowledge of the Queen's Proctor, he entered an appearance on the 29th of April last, and filed affidavits with a view of shewing cause against the decree *nisi* being made absolute, on the ground that the petitioner had been guilty of bigamous adultery. The petitioner filed an affidavit in reply, in which he admitted the charge, but alleged that he had entered into the second marriage in ignorance of the law, believing that his first marriage was dissolved when the decree *nisi* was granted.

The Attorney General, Sir R. Collier (*C. A. Middleton* with him), for the Queen's Proctor, now shewed cause against the decree *nisi* being made absolute. —It might be true that the petitioner married in ignorance of the law; but in a criminal Court ignorance of the law would not be held as an excuse.

Inderwick, for the petitioner, submitted that the case was one for the exercise of the discretion of the Court under the 31st section of the Divorce Act. All the circumstances attending the second marriage of the petitioner proved that he was acting in the *bona fide* belief that his first marriage was dissolved. There was no concealment; the petitioner published the marriage in two of the papers at Ipswich, where he lived, and his adultery ought not therefore to be a bar to his relief.

The JUDGE ORDINARY.—In any view of the case, the Queen's Proctor has done good service in bringing this matter to the attention of the Court. The ground on which the petition is said to have acted is want of knowledge of the effect of a decree *nisi*, and the greater publicity given to proceedings of this character the less likely is it that an occurrence of the same kind will come again before the Court. But the Court has now to consider whether it will exercise the discretion vested in it under the 31st section of the 20 & 21 Vict. c. 85. The first question is, whether the Court is satisfied as to the *bona fides* of the petitioner; and looking to the manner in which the second marriage was contracted, and all the steps taken in regard to the event, I am prepared to give credence to what the petitioner says. I believe he did think he was released by law from the obligation of the first marriage, and that it was that which induced him to contract the second marriage, and to enter into a cohabitation which was, in truth, adulterous. It is said that ignorance of the law does not excuse a person in the criminal Court. That is quite true; and neither would it be an excuse in this Court if the Court had not a discretion vested in it by law. The Court is obliged to find upon these affidavits that the petitioner has committed adultery; but, says the 31st section, "the Court shall not be bound to grant a decree if it shall find that the petitioner has during the marriage been guilty of adultery." The Court, therefore, may or may not grant a decree according to the circumstances of the case. In a late case which came before the Court, and in which the Court was asked to exercise its discretion, upon the ground that the petitioner's adultery was more or less pardonable, the Court refused to do so, but pointed out that there were cases in which the discretion vested in it would be most fittingly and properly exercised. A reference was then had to a case which occurred in this Court where a man had been induced by his wife to believe that she was dead, and

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under these circumstances he re-married, and then when she came to life again, and he proceeded against her for the adultery of which she had been guilty, she answered, recriminating the adultery involved in his second marriage. The Court thought that the man was innocent of all intention to commit adultery, and granted him his decree. I think the same considerations prevail in this case. The Court is satisfied that in entering into this second marriage the petitioner acted *bona fide*, and that he did not imagine he was committing adultery. Under these circumstances, I think the adultery ought not to stand in the way of the decree to which otherwise he would be entitled.

Decree absolute.

PROBATE. Feb. 16, 1869.

In the goods of E. K. WESTON.

38 L. J. P. 53; L. R. 1 P. & D. 633; 20 L. T. 330.

See, *Cossey* v. *Cossey*, [1900] E. R. A.; 69 L. J. P. 17; 82 L. T. 203 (P.D. & A.).

Revocation—Will destroyed with an Intention to revive a Will of earlier Date—Declarations of Testatrix after Act—Intestacy.

WILL.—*The testatrix executed a will which revoked an earlier will. Two years subsequently, while alone in her bed-room, she destroyed the later will, and immediately afterwards told her daughter that she had done so with the intention that the earlier will might take effect*:—Held, *that the destruction of the instrument under the circumstances amounted to an absolute revocation.*

The deceased duly executed a will in August, 1863, by which she gave her property to trustees for the use of her only child (a daughter) absolutely, and appointed executors.

In March, 1866, she executed another will, by which she left the whole of her property absolutely and directly to her daughter, and made her and another person executors. In the month of February, 1868, the daughter on entering the deceased's room on one occasion found her mother alone, and the will of March, 1866, lying torn in pieces in the fire-place. The deceased then told her daughter that she had torn up and destroyed the will with the intention that the former will of August, 1863, might take effect.

Dr. Middleton now moved for probate of the draft of the will of March, 1866. In *Powell* v. *Powell* (35 L. J. Pr. & M. 100) the testator executed a will which contained a clause revoking all former wills. He subsequently destroyed such will, with an intention expressed at the time that the earlier will should operate as his last will; and it was held that the destruction of the second will was only a conditional revocatory act, and that the condition failing the revocation was not effectual. Here also, the destruction of the second will was only a conditional revocatory act, and failing to revive the earlier will the revocation was not effectual.

SIR J. P. WILDE.—The case differs from *Powell* v. *Powell* (35 L. J. Pr. & M. 100). The declarations of the deceased did not accompany the act; I must reject the motion.

PROBATE. April 27, 1869.

In the goods of GEORGE CASMORE.

38 L. J. P. 54; L. R. 1 P. & D. 653; 20 L. T. 497; 17 W. R. 627.

See, *Burke* v. *Moore*, 1875, Ir. R. 9 Eq. 609 (Prob.); *In the goods of Peverett*, [1902] E. R. A.; 71 L. J. P. 114; [1902] P. 205; 87 L. T. 143 (P.D. & A.).

Will—Execution—Signature in Attestation Clause—Subsequent Signature beneath Names of Witnesses.

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WILL.—*A. made his will on a printed form. After he had written his name in the attestation clause, he asked the witnesses to subscribe and attest the will, which they did in his presence. He then wrote his name underneath their signatures, and remarked that they were witnesses to his will. The Court being satisfied on the evidence that he intended by signing his name in the attestation clause to execute the will, ordered probate to issue without the signature of the deceased written under the names of the witnesses.*

George Casmore, late of Yardley Street, Clerkenwell, Middlesex, stationer, made his will on a printed form, on the 16th of April, 1864. After he had written his name in the testimonium clause, he asked the witnesses to subscribe and attest the instrument, which they did in his presence, and he then wrote his name beneath their signatures, remarking that they were witnesses to his will.

The witnesses in their affidavits stated that they were in the house of the deceased on the 16th of April, 1864, and that he told them he wished to make his will, and to secure his property to his wife; that he had a printed form of a will which would suit, and that he asked them to witness it. He then produced a printed form of a will, which he filled up in their presence, and having written his name in the attestation clause, he asked them to subscribe and attest the will, which they did in his presence. He then signed his name underneath their signatures, remarking that they were witnesses to his will. They further stated that he sold printed forms of wills in his shop, and that they believed he was aware of the legal requirements necessary to make the execution of a valid will.

Dr. Spinks moved for probate of the will to the wife as executrix. The presumption was that the deceased intended his signature in the attestation clause as the signature to his will, and that the second signature was for greater security. He referred to *In the goods of John Walker* (2 Sw. & Tr. 354; 31 L. J. Pr. M. & A. 62).

LORD PENZANCE.—The case cited is very much in point. It appears to be substantially the same as this. I am satisfied from the account of the witnesses that the testator intended to sign the will when he put his name in the attestation clause. Probate will issue, the signature of the testator under the names of the witnesses being omitted.

PROBATE. April 27, 1869.

GRANT AND GRANT *v.* GRANT.

38 L. J. P. 55; L. R. 1 P. & D. 654; 20 L. T. 684.

Will—Appointment of Executor—Receiver of Real Estate—20 & 21 Vict. c. 77. s. 71.—Practice.

WILL.—*The Court of Probate has no power to appoint a receiver unless the validity of the will by which the real estate is affected is in dispute. It therefore refused to appoint a receiver when the only question was as to the person who was appointed executor in the will.*

John Grant died on the 22nd of February, 1868, having duly executed a will and codicil. In the will he appointed an executor in the following terms: "I appoint my nephew, Joseph Grant, executor of my will." One of the plaintiffs, Joseph Grant, was a nephew of the deceased's wife, had been brought up and educated by the deceased, and lately had managed the deceased's business. The defendant, Joseph Grant, was a son of the deceased's brother.

A petition, answer and replication had been filed, in which the parties respectively claimed to be the executor named in the will, but the validity of the will was in no way questioned by them.

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Dr. Swabey, for the defendant, moved on affidavit for the appointment of an administrator *pendente lite*, and of a receiver of the real estate of the deceased.

LORD PENZANCE.—The Court is empowered, by the 71st section of the Probate Act, "to appoint a receiver of the real estate of any deceased person pending any suit in the Court, touching the *validity* of the will of any such deceased person, by which his real estate is affected." There is no such suit pending in this case, and I have no authority to appoint a receiver.

PROBATE. May 25, 1869.

TICHBORNE *v.* TICHBORNE; *In the goods of* LADY TICHBORNE.

38 L. J. P. 55; L. R. 1 P. & D. 730; 20 L. T. 820; 17 W. R. 832: see (on renewal of application), [1869] E. R. A. 829; 38 L. J. P. 70; 20 L. T. 1015.

Administrator pendente Lite—Concurrent Suits in Court of Chancery and Court of Probate.

WILL.—*The Court refused to appoint an administrator pendente lite where the Court of Chancery had already appointed a receiver of the personal estate and effects of the deceased intestate, but intimated that, if the Court of Chancery entertained an application for payment of the debts of the deceased, it would then appoint an administrator, if such appointment were necessary to effect the purpose of the Court of Chancery.*

This was an application, on behalf of a creditor, for the appointment of an administrator *pendente lite;* and the question was, whether the Court would appoint an administrator where the Court of Chancery had already appointed a receiver of the personal estate and effects of the deceased.

Besides the administration suit pending in the Court of Probate, raising the question as to the rights of the plaintiff and the defendant to a grant of administration of the estate and effects of Lady Tichborne, deceased, there was also a suit in Chancery pending between the same parties. In such suit, Stuart, V.C. appointed Mr. Richard Humphreys receiver of the personal estate of the deceased, and by the terms of the order the receiver was directed, after passing his accounts on a specified day in each year, to pay in the balance of the estate to the Accountant General to the credit of the cause.

Dr. Deane, on behalf of Mr. Norris, a creditor, moved the Court to appoint Mr. Richard Humphreys also administrator *pendente lite*.—As receiver, he has simply power to collect the estate; as administrator, he will have power to pay the debts. There can be no prejudice to the estate, as the debts must be paid at some time.

LORD PENZANCE.—Has the Court ever made a grant of administration *pendente lite* on the application of a person not a party to the suit?]

I know of no case to that effect, but the act of 1857 has extended the power of the Court in this respect.—(He referred to *Bellew* v. *Bellew* (34 L. J. Pr. M. & A. 125) and *Veret* v. *Duprez* (37 L. J. Ch. 552).)

Dr. Tristram, for the plaintiff, consented to the appointment of an administrator, but objected to the receiver of the Court of Chancery being appointed.

The Solicitor General (*Sir J. D. Coleridge*), with him *Bayford*, for the defendant, contra.—The Court of Chancery has already made an order for the payment of the funeral expenses of the deceased, and there is no reason to suppose that it has not also power to order payment of the debts. *Veret* v. *Duprez* is a case in point against the application. There Malins, V.C. refused to appoint a receiver where the Court of Probate had appointed an administrator *pendente lite*. Even if an administrator is appointed, how is he to get the estate out of the hands of the receiver?

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[LORD PENZANCE.—The question is, whether the Court should give him additional powers by appointing him also administrator *pendente lite*.]

As receiver he is bound to pay the balance of the estate into the hands of the Accountant General, and to deal otherwise with the money would bring him into contempt in the Court of Chancery. The estate is small (1,500*l*.), and when the costs are paid very little will be left.

LORD PENZANCE.—There are many difficulties in the way of this application. I do not know if there has ever been an application before to appoint an administrator *pendente lite*, except at the instance of a party to the suit. At the same time I was struck on reading the papers with this, that if there is a creditor, say for 100*l*., and a sufficient estate, it seems contrary to justice and good sense that he should remain unpaid while the two relatives are squabbling as to which should take the administration. It would be desirable, at least, that provision should be made to deal with such a state of things, but, as I have said, I am not aware at present of an administrator *pendente lite* having ever been appointed at the instance of a person not a party to the suit. Then comes the more material question, whether it would be desirable to appoint an administrator when there is already a receiver appointed by the Court of Chancery. As to appointing any person but the receiver, that is out of the question. If any one else were appointed and the estate were not got in, there would be two persons making claim to it and contending for its possession. But even though the same person were appointed administrator and receiver, another difficulty presents itself. The person who has got in the estate has got it in under an order of the Court of Chancery, and that order is to the effect that, when he has got it in, he is within a certain time to file his accounts and pay in the balance to the Accountant General. Here, then, he has a distinct authority from the Court of Chancery to pay the money in the direction indicated by its order. If appointed administrator *pendente lite*, he would have authority to deal with the same money in an entirely different manner, and thus there would arise a sort of conflict between the Courts, which is very undesirable. Again, I am by no means satisfied that in a case like this, where there is a sufficient estate and a clear good debt, the Court of Chancery has not the power to order that debt to be paid. At any rate, it seems to me that the Court which has appointed the receiver, and under whose order the estate has been got in, is the Court to which application for the payment of this debt should, in the first instance, be made. I shall, therefore, for the present, refuse the application. But if the Court of Chancery should say that it would be desirable from any technical reason that an administrator should be appointed, I shall then be happy to make the order, and to carry out its purpose.

MATRIMONIAL. June 2, 3, 1869.

ST. PAUL *v.* ST. PAUL AND FARQUHAR (*The Queen's Proctor intervening*).

38 L. J. P. 57; L. R. 1 P. & D. 739; 21 L. T. 108; 17 W. R. 111.

Dissolution of Marriage—Intervention by Queen's Proctor—"Neglect or Misconduct"—Connivance—20 & 21 Vict. c. 85. s. 31.

DIVORCE AND MATRIMONIAL CAUSES.—*The "wilful neglect or misconduct" which, by the 31st section of the 20 & 21 Vict. c. 85, is made a bar to the husband's right to a decree is not that neglect or misconduct which may have led to any particular act of adultery after the wife's lapse from virtue, but the neglect or misconduct which has directly conduced to her fall.*

In this case a decree *nisi* was granted for dissolution of the marriage on the ground of the respondent's adultery with the co-respondent.

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The Queen's Proctor subsequently obtained leave to intervene, and filed pleas in which he charged the petitioner with collusion, connivance, the suppression of material facts and misconduct conducing to the adultery of the respondent. The petitioner traversed these allegations. The facts are so fully set out in the judgment that a brief outline of the case will here suffice.

The petitioner, a solicitor, married the respondent, who was the daughter of an Irish gentleman, in September, 1859, and they cohabited first at Clifton and afterwards at Maidenhead. About the end of 1865, or early in January, 1866, Mrs. St. Paul went to a hydropathic establishment at Blarney, near Cork, where her father resided. While there she made the acquaintance of the co-respondent, Captain Duncan Anderson Farquhar, whose regiment was at that time stationed at Cork. At Easter, 1866, Mr. St. Paul visited his wife at Blarney, and was introduced by her to Captain Farquhar, who spent a few days with them by invitation. In the following July, the petitioner having in the meantime returned to Maidenhead, Mrs. St. Paul went to the Isle of Man, where she gave birth to a child, in January, 1867.

The petitioner (who was examined and cross-examined by permission of the Court) admitted that before her confinement he had entertained some doubt as to the paternity of the child, and that he had said if its hair were of a certain colour he should know that he was not the father, but he declared that his doubts were removed by the explanation of his wife, and that his remark as to the child's hair had no reference to Captain Farquhar. He was with his wife during her confinement, and learned from her incidentally that Captain Farquhar with some friends had been at the island and had called upon her, and had partaken of some refreshment. She returned to Maidenhead shortly after her confinement. She still complained of being unwell, and asked to be allowed to visit the petitioner's mother at Clifton, to which the petitioner consented. A few days afterwards she informed him that she had had the offer of a return ticket to Dublin, and suggested that he should allow her to avail herself of it in order that she might visit her father at Cork. She also stated that Captain Farquhar was going to Ireland at the same time and that he would act as her escort. The petitioner was himself anxious that she should see her father about a pecuniary matter in which he was interested, and assented to the proposed arrangement, it being understood that the respondent was to return from Cork to Bristol. She accordingly left for Dublin with Captain Farquhar, by the night mail, on Sunday, the 24th of February, 1867, and slept with him that night at Stafford. Arrived in Dublin she wrote to say that she should not be in Cork for the next week, and requested that letters or parcels might be forwarded to her hotel. To this the petitioner replied:

"27th February, 1867.

"My dear Lucy,—I cannot help saying I am vexed much that you did not go straight to Cork as intended. You were well aware a word in season might be beneficial in a certain matter. You would have been in ample time, since I have not as yet heard from father. I shall blame you greatly if the affair miscarries. If you knew of this before starting, you ought to have informed me. If, on the other hand, this is a new scheme, surely you ought to have told me in your letter with whom you are staying. If at a friend's house I might not see so much objection, but at a hotel to allow other people to incur expense is very wrong. I, of course, assume you are not reckless enough to incur such expense yourself. You keep far too much back from me. I cannot see why (as you are allowed every liberty) you should do so. I had before the receipt of your letter posted one to Cork. I have consequently been obliged to write to your father to explain why you were not with him. Please go at once to him on receipt of this letter. All letters will be forwarded."

A few days afterwards he received the following communication from his wife:

"Reynolds's Hotel, Dublin, 3rd March, 1867.

"My dear Albert,—Papa is here, and means to write to you to-night, and

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I scarcely know if the subject of his letter will surprise you; I think not. When I said good-bye to you on Sunday evening I meant it then and mean it now to be final. I shall never live with you again. You will have as little to do with me as though I never existed or that I was dead. This I feel sure will be some consolation to you, and will enable you to bring your bachelor habits and *ménage* to great perfection; and so I pray you grant my last request, the necessary separation. This can be soon arranged, in a few days, and so the whole matter settled, unless you require time for any consideration. Let me hear from you as soon as possible, as any unnecessary delay here will be inconvenient to me; and I presume in this matter I may look for as much courtesy from you as you would vouchsafe to a perfect stranger."

The petitioner immediately proceeded to Dublin, where he met the respondent's father, and went with him to her hotel. A reconciliation was effected, and the three dined with Captain Farquhar in the evening. Mr. St. Paul left the hotel after dinner, and the respondent and the co-respondent slept there together the same night, but he declared that when he left he was under the impression that Captain Farquhar had started for Newbridge, where his regiment was quartered. In the following May he discovered that his wife was still carrying on a correspondence with Captain Farquhar, and taxed her with her guilt, offering, however, to continue the cohabitation if she ceased all intimacy with him. This she refused to do, and ultimately, on receiving an undertaking in writing that no claim for damages would be made, both she and the co-respondent confessed the adulterous intercourse, placing the occasions of their guilt at Stafford and Dublin in February, 1867. This was the adultery charged in the petition; but the evidence adduced on behalf of the Queen's Proctor proved that the intercourse had been established as early as January, 1866. It was also proved that after the Queen's Proctor had intervened, the co-respondent's solicitor offered Mr. St. Paul 1,000*l.* to withdraw the petition, and that he indignantly refused it.

The case was heard before Lord Penzance, on the 2nd and 3rd of June.

The Attorney General (with him *Dr. Spinks* and *Archibald*), for the Queen's Proctor.

H. Giffard (with him *M'Intyre* and *E. J. Dunn*), for the petitioner.

Pritchard, for the co-respondent.

Dering v. *Dering* (37 L. J. Pr. & M. 52; L. R. 1 P. & M. 531).

Lord Penzance.—The facts of this case force upon the Court a very difficult and very critical duty. I may say at the outset that no one who has heard the evidence can doubt that if Mr. St. Paul has suffered both by mental anxiety and by the costs incurred in these proceedings, he has only himself to blame. Because, whatever view the Court may take of the legal result of his conduct, nobody can doubt that he was wanting in decision, wanting in firmness, wanting in a manly assertion of his own rights, and I should say also, wanting in judgment with regard to the facts that were brought to his cognizance, and the course that he ought to take. It is these deficiencies on his own part that have led to these proceedings.

Turning from the petitioner to the respondent, it is equally plain from the evidence that she was a very self-willed, determined woman, who cared little or nothing for her husband from the outset, who was determined to have her own way, and who appears, as far as I can judge, to have obtained a sort of moral ascendancy over her husband, which enabled her to have that way whenever she was so minded. The Queen's Proctor, instigated, it is said, by the co-respondent, or, if not by him, by his father, who wishes to stand in the way of this decree being made absolute, has brought before the Court various facts and made certain charges; and I may say, in passing, that it seems to me to be no wrong whatever that a co-respondent or a respondent should furnish to the Queen's Proctor these facts in cases of this kind. It is for the Queen's Proctor, when he has the facts, to submit them to Her Majesty's Attorney General, and it is then for the Attorney General to consider and direct whether

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in the interests of the public the expense ought to be incurred of proving the facts with a view of stopping the decree. To my mind, therefore, it matters little or nothing from what source the information came. I have to deal with the facts as they are proved, and to ascertain to the best of my ability whether they support the Queen's Proctor's pleas.

The substance of the complaint against the petitioner is twofold. The first complaint against him is, that he was guilty of conduct conducing to his wife's adultery. The language of the statute is, that the Court may withhold a decree where it is satisfied that the petitioner has been guilty of "such wilful neglect or misconduct as has conduced to the adultery." Now that is a most salutary provision. It is salutary as regards the public, because it is some safeguard against a man first throwing his wife into temptation, first allowing her to be exposed to the addresses of other men, and then afterwards casting her aside. But it is also a measure of fairness to the wife herself, because if a wife can come to this Court and say, "Notwithstanding that I have sinned my sins really have been brought about or very much helped forward by the carelessness, neglect and indifference of my husband," that is a matter which clearly ought to be taken into consideration even in favour of the wife who is herself a sinner.

But this is very delicate ground, and the Court must be very careful in applying the provision of the section, that it is able to see its way pretty clearly to the conclusion that the conduct of the husband did really conduce to the adultery of the wife before refusing a decree. The statute says, "conduce to the adultery," but in reflecting upon those words of the statute the conclusion at which I have arrived is this: That the legislature did not mean that a husband should be deprived of his remedy if his conduct had conduced to any particular act of adultery after his wife's first fall from virtue, but that it meant that his remedy should be withheld from him, if he had so acted as to bring about the fall of his wife or the loss of her virtue. What the legislature appears to me to be pointing at under the word "adultery" is the lapse from virtue of the wife. And I think the intention was, that the husband, who had led to that lapse by his own conduct, should not afterwards take advantage of it. But it is quite consistent with that that a case might arise in which a husband would be perfectly blameless as to his wife's adultery in the first instance, and that after she had established her adulterous intercourse with another man the two together might throw dust in his eyes, and his conduct might appear more or less neglectful. It seems to me that the neglect which is followed by a subsequent act of adultery, after the loss of virtue by the wife, is not the neglect which the statute meant; it must be that neglect which conduced to the fall of the wife.

Now the circumstances of this case bring that distinction into prominent relief. The lady went in 1865 or the beginning of 1866 to stay at a hydropathic establishment, about seven miles from Cork, where her father resided. It was at her father's instance that she went to this place; and, looking to the sort of life that the petitioner and his wife had led,—her determination to be as little with him as possible—the want of affection that appeared to exist between them, at any rate on her part, and the little control that he had over her, it is impossible to say that allowing her to go to that hydropathic establishment, avowedly for the sake of her health, was a matter that can be imputed to the petitioner as an act of wilful neglect. She goes there, and the Court fortunately has a date from the mouth of the groom of the co-respondent which fixes the period of her guilt; it does not indeed fix the first time, but it fixes a time at which this adulterous intimacy undoubtedly subsisted. The groom says, "About January, 1866, I saw the respondent go to the co-respondent's room at the barracks. After that she used to come with him once or twice a week. Sometimes she came on horseback. She always used to come with the co-respondent. She used to go into his room and remain alone with him for hours." It is quite plain, therefore, that in January, 1866, this adulterous intercourse was thoroughly established, and that, so far as the wife's loss of virtue is

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concerned, whenever it first took place it had taken place long before the period which is afterwards spoken to as the date of the husband's visit. The husband never went to the hydropathic establishment until Easter, 1866. Well, what took place? The wife, carrying on at that time this illicit intercourse, persuaded the husband to ask the co-respondent over to the hydropathic establishment as his guest. He did so, and the co-respondent, I think, made himself agreeable to him, and offered to take him over to his rooms at the barracks to see some races or some other amusement that was going on. They also used to play billiards together, and were apparently on friendly terms. The Court has very little doubt that then, at that very time, whenever opportunity offered, the same adulterous intercourse was going on. But it is impossible up to this period to put one's finger upon anything that the husband had either done or omitted to do which led to the wife's misconduct. He had done nothing and omitted to do nothing. His position was that of a man who was hoodwinked for the time—who had no reason to suspect anything, because those who saw the lady and the co-respondent at the time, even the nurse who was constantly in the room with her, and living with her, declare that they never saw any signs of familiarity between these two people. Therefore, there really was nothing to shew the husband at that time that anything wrong was going on. It is said that he allowed her to go out riding with the co-respondent, but on turning to the evidence of the groom, I find he says he only took the horses over to the hydropathic establishment once while the husband was there, and the husband swears that it was so; that the horses were brought there once, but that he rode out with them, and was by his wife's side the whole day. Therefore, carefully looking at the evidence at this period of the transaction, the Court is really unable to discover anything in the charge against the petitioner as to neglect or misconduct.

The subsequent history of the case is, no doubt, very different. In Easter, 1866, this visit of the husband was paid. The lady remained at the hydropathic establishment until the month of July following. She then writes to him and says she wishes to go to the Isle of Man. I put the question to him, and he swears positively that he objected to her going to the Isle of Man. There does not seem to have been any reason for it. The reason that she assigned was, that they were badly off, and the Isle of Man was a cheap place; but to the Isle of Man she went, and after she had been there some time she came back to the mainland and went down to Maidenhead, where her husband was living. She then returned to the Isle of Man; and after she had got back, as far as I can gather dates correctly, the co-respondent seems to have come and stayed there three or four days.

Now, to shew the footing the parties were on at that time, the husband had "asked" her (that was his expression) to be allowed to come and see her at the Isle of Man, and she refused. Well, he seemed to have acquiesced in that refusal, and accordingly went to spend his Christmas with his relatives at Clifton. When he returned to business he again wrote to her, saying, "Your confinement is about to take place, and may I come and see you?" She answers by telegraph, "Yes, you may." Thereupon he did so. He arrived a week before her confinement and stayed with her during her confinement. Now, the Court is at a loss to see any other object in the petitioner going there at that time, except the pleasure of indulging his affection and being with his wife. She was about to undergo her confinement, and it appears to the Court that the petitioner had a most praiseworthy motive in going and remaining by her side on the occasion. When he got there, he said at first that he did not learn that Captain Farquhar had been in the island. It afterwards turned out, upon better reflection, that he did learn the co-respondent had been there, but then it came out incidentally. It was said he had been there with some other gentlemen, and it arose upon the question how some wine came into the house, which the wife explained in that way. Well, up to that time the Court must bear in mind that there is not a tittle of evidence to shew that Mr. St. Paul knew of

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the adultery that had taken place at the hydropathic establishment while the respondent was resident there. There is not a tittle of evidence to shew that any familiarity had been seen or known to have taken place between her and the co-respondent. We now know that there was flagrant, open adultery carried on from week to week, from day to day, the lady visiting the barracks where this man lived; but the petitioner did not know that, and the mere fact that she told him that Captain Farquhar and some other gentlemen had come over to the island and had called and asked for refreshment, which led her to send for some wine, in the then state of the petitioner's knowledge, is not such a fact as, it seems to me, ought to have led him to take any definite step with a view to his wife quitting the Isle of Man or dropping the acquaintance of Captain Farquhar.

She was confined in January, 1867. She came over to England on the 18th of February in that year. She went down to Maidenhead with her husband. The next thing that happened is that, on Sunday, the 24th of February, or the day before, she announced to her husband her intention of going to Clifton—so he says. She seems never to have been easy and at rest when she was at home at Maidenhead. He combated the idea of going to Clifton, but ultimately yielded; and then she said she had had a return ticket given to her to go to Dublin, and that she should also like to go to Cork and see her father, who was said to be unwell. There was likewise a pecuniary matter involved in this proposed visit to Ireland—some bill that had to be renewed or taken up, or an account guaranteed; and the husband was interested in her going to see her father. Well, the Court bearing in mind the position of the parties at that time, that the wife was carrying on this adulterous intercourse and wanting to get away from her husband in order that she might consort with the co-respondent, and that the petitioner was ignorant of it—the Court can understand perfectly well, that the wife might wheedle him into consenting to the proposed arrangement, or if she did not wheedle him into consenting, that she might be strong enough of her own will to force him into it. His representation is, that he consented reluctantly to her going. She did not seem to have made any concealment as to Captain Farquhar accompanying her, because she said that Captain Farquhar happened to be going to Ireland at that time, and that he had consented to escort her.

Now, no one can doubt that the arrangement by which this young lady was to travel down by the night mail to Holyhead, with Captain Farquhar, was a very imprudent one; but supposing that the husband saw no reason to suspect Captain Farquhar at that time, it is not an imprudence of that kind that would lead the Court at once to come to the conclusion that he had been guilty of wilful neglect or misconduct.

However, I have already pointed out what the Court has to inquire into at this period of the case, is not whether there was neglect or misconduct, but whether there was connivance; and in that aspect of the case everything that fell from all three of the parties, every expression used by the wife, by the respondent, and by the co-respondent, appears to me to negative the idea of connivance. She was making excuses. She was pretending about a return ticket, she was invoking her father's illness, she was raising this matter about the bill, all for the purpose of deluding her husband, and he was, no doubt, more or less deluded by it. When I say "more or less" I mean that a more vigilant man, a man of stronger temperament, would have probably burst the sort of veil that was thrown over this relation, and would have seen his way clearly to the thing that really existed. She went to Dublin, and then several letters passed between her and the petitioner. He thought she was going straight through to Cork. She writes from Reynold's Hotel, Dublin, and tells him that she is stopping there, upon which he writes and expresses his displeasure at it, and in doing so makes use of an expression about the expense, which very strongly attracted the attention of the Court in the first instance. He says, "Surely you ought to have told me with whom you were staying"—

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that is when he finds that she is staying in Dublin. "If you knew before you started of this" (that she was going to stop at Dublin) "you ought to have informed me. If, on the other hand, this is a new scheme, surely you ought in your letter to have told me with whom you are staying—if a friend's private house I might not see so much objection; but at a hotel, to allow other people to incur expense is very wrong. I of course assume that you are not reckless enough to incur such expense yourself." The natural suspicion that crosses the mind of the Court on reading that passage is this. He knew she had been there with Captain Farquhar, and who else did he think was paying the expenses, except this man with whom she had gone? But that may not have been, I think, what he meant, although it is open to that construction. The Court ought to see its way very clearly before it comes to an adverse conclusion on that matter, and when I look at this letter by the light of his subsequent conduct I see nothing to induce me to believe that he at that time knew that she was under the charge of Captain Farquhar, and that he was paying her expenses, although of course he might have suspected it, and probably did suspect it from what he afterwards said. He goes to Dublin, and then took place those various meetings that have been referred to at length in the evidence. The sum and substance of them is this: that his wife had before he got there pressed upon her father the necessity for a separation; that appears most distinctly from the father's letter written at the time. It is equally plain from the father's statement, and from the statement of the petitioner himself, that he opposed a separation. He went to the father, and with the father he went to the hotel and saw his wife. The account he gives of that interview sheds a pretty strong light on the temperament and nature of this lady and the terms they were upon. The father said that he found upon consideration, and after talking with his son-in-law, that there was no need for a separation, upon which the wife called him an "old weathercock," and got very angry with him for having changed his opinion. When he burst out crying she said he was an old fool, and that his tears were very near his eyes. That seems to have been a somewhat boisterous meeting, and in the course of it no doubt the petitioner ascertained by finding a great-coat in the room that Captain Farquhar had been there. Afterwards he saw Captain Farquhar. The question is, upon all that took place between them, was there anything to lead the Court to the conclusion that the petitioner either knew of the adultery, or so strongly suspected the adultery of his wife on sufficient grounds, that he could be said to have connived at or acquiesced in it? It seems to me that the whole tendency of the evidence is the other way. He wanted her back; he was averse to a separation. The father and the co-respondent both tried to persuade him, and succeeded in doing so, that nothing wrong had taken place. He went down stairs to ascertain whether his wife and the co-respondent had been living at the hotel as man and wife, and was told that they had not, that they had separate rooms; and he tried also to ascertain whether the co-respondent had undertaken to pay for his wife, and could get no satisfactory answer about that. The result of the whole is, that there was a good deal of weakness on his part, and want, as I said before, of proper spirit and determination in the matter; but I do not think that there was connivance.

Well, then, the rest of the history is soon told. He gets his wife back to London, and endeavours, but in vain, to withdraw her from this man, the co-respondent. He more and more suspects her guilt, and charges her with it. At first she admits it, and declares that she will give him the proofs. Afterwards she retracts the confession and leads him to believe that there was no guilt; and then, at last, there comes the meeting at Maidenhead, when she and the co-respondent openly and unblushingly tell him that they had been guilty over and over again, placing the first occasion of their guilt at Stafford.

Now, here, again, if I am asked whether there was connivance—whether all this was taking place with the consent of the husband—I say here is a letter of the co-respondent, written on the 8th of May, which dissipates the possibility

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of any such conclusion, because it is an answer to a letter in which the petitioner had charged this man with being guilty with his wife, and in terms desired that he would cease all correspondence with her, and here is the manner in which that communication was answered: "Cambridge House, Piccadilly, May 8th, 1867. —Dear Sir,—I am only just in receipt of your letter, dated Maidenhead, 6th of May. In answer, I beg to say that I have no intention to explain what you ask, as I have nothing to explain. I was on an intimate acquaintance with both your wife and yourself, and until you give me some reason to withhold correspondence in a friendly way with your wife, I shall always act as I have hitherto done. I can but ascribe your ridiculous epistle as an after-dinner ebullition of temper, and as such I treat it. If your lucid memory had been of any service to you when you penned your epistle, you would have remembered that in Dublin (of which time you speak) you asked me to assist you in inducing your wife to return to England. I consider your conduct somewhat strange, especially as you yourself had made arrangements for me to escort your wife to Ireland. Did not I treat the insinuation in your letter with the ridicule it deserves, I should take matters into my own hands." A high-handed, impudent letter, in which the co-respondent is repudiating the slightest insinuation against him, and openly telling the petitioner that inasmuch as he has nothing with which to charge him, nothing which he can put on paper and prove, he shall continue to carry on his correspondence with his wife. It is impossible, unless the Court believes that letter to be part of a plan or a scheme to defeat the ends of justice, or to cause a false complexion to be put upon this case—treating that as genuine, it is impossible to imagine that the husband, who wrote the letter to which that is an answer, was all the time conniving at the wife's adultery. It seems to me, therefore, that upon the whole facts of this case, neither the charge of collusion nor connivance has been made out against this gentleman.

As I have said before, there was much in the case that the Court might reprehend. There was much in his conduct in 1867 which, if it had been followed for the first time by his wife's adultery, might have led to a very different result to that at which the Court now arrives. There was much in his conduct in the spring of 1867—the visit to Dublin, his conduct at Dublin, and even in his subsequent conduct, which, if it had led to the first adultery and loss of virtue by his wife, might have induced the Court to come to the conclusion that the wife's sin had been caused by the husband's neglect or carelessness; but bearing in mind that the real adultery, the real seduction, the real loss of virtue by the wife, was a whole year before this, the Court can only look upon the matter in this light, that the two people who were principally concerned successfully contrived to throw dust in the eyes of a very weak and not very wise man.

It only remains for the Court to state what its finding is on the several issues which the Queen's Proctor has put forward. His Lordship then went through the several pleas, and found that the petitioner had not been guilty of collusion, connivance, the suppression of material facts, or of conduct conducing to the adultery of the respondent, but added that the Queen's Proctor had done right in bringing the matter before the Court.

MATRIMONIAL. July 20, 1869.

MILFORD *v.* MILFORD.

38 L. J. P. 63; L. R. 1 P. & D. 715; 21 L. T. 155; 17 W. R. 1063.

Judicial separation at suit of Wife—Permanent Alimony—Custody and Maintenance of Children—22 & 23 Vict. c. 61. s. 4.

DIVORCE AND MATRIMONIAL CAUSES.—*The wife obtained a decree for judicial separation, on the ground of the adultery of the husband, who was of very profligate habits. The father and sister of the respondent offered to take charge*

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of the two children of the marriage, daughters, and to bring them up in a manner suitable to their position in life.

The Court declined to deprive the mother of the custody of the children, and, in addition to permanent alimony at the rate of one-third of the joint income (798l.), ordered that the respondent should contribute 30l. a year towards their maintenance and education.

This was a suit, originally promoted by the wife for dissolution of marriage, on the ground of adultery coupled with cruelty. On the hearing of the petition she proved gross profligacy on the part of the husband, but failed to establish the charge of cruelty; and on the 18th of December, 1866, the Court pronounced a decree of judicial separation on the ground of adultery. Against this judgment she appealed to the House of Lords, but the appeal was dismissed.

The matter now came before the Court on application by her for permanent alimony and an allowance for the maintenance and education of the children of the marriage—two daughters, aged respectively twelve and ten years.

The Registrar reported the net income of the respondent at 550l. and that of the petitioner at 248l. per annum; both sums were taken by agreement. On behalf of the respondent, affidavits were filed by his father, a banker at Exeter, and his sister, who stated that they were willing to take charge of the children, and to bring them up in a manner suited to their future position in life.

Dr. Spinks (with him *Dr. Tristram*) submitted that the petitioner was entitled to at least one-third of the joint income as permanent alimony, and also to the custody of the children. No charge of misconduct was made against her.

Dr. Deane (with him *Searle*), for the respondent, contended that it would be for the advantage of the children to have them brought up by their grandfather, and that the Court ought to be influenced by that consideration. If, however, the petitioner elected to retain their custody, she was not entitled under the circumstances to claim from the respondent an allowance for their maintenance—*Marsh* v. *Marsh* (1 Sw. & Tr. 312; 28 L. J. Pr. & M. 13); *Boynton* v. *Boynton* (1 Sw. & Tr. 324); *Whieldon* v. *Whieldon* (2 Sw. & Tr. 388; 30 L. J. Pr. & M. 174); were referred to.

Lord Penzance.—I am clear in this case that the children ought not to be taken away from the wife and handed over to the husband's father, and for this simple reason, that the wife was clearly without blame in the suit. No charge is made against her, and she has done nothing whatever to forfeit her natural rights as a mother, or the indulgence of her affections in the possession and care of her children. All that has happened in the case has been the husband's doing. He was proved to have lived a very profligate life, and the wife has obtained a decree of judicial separation on the ground of that profligacy. In considering what ought to be done in regard to the custody and maintenance of the children, the Court always looks to see whose fault it was that led to the breaking up of the common home. In this case it was undoubtedly the husband's fault. Not only did he so act as to bring about the separation, but his misconduct was such that the Court could not possibly place these two children, both of them girls, under the control and supervision of such a man. All these cases must depend on their circumstances. It is impossible to lay down a principle one way or the other; but I am clear from the reasons I have stated that the children ought to live with their mother.

The next question is, whether any allowance ought to be paid by the husband towards their maintenance? Looking at the circumstances I have mentioned, the disqualification of the husband and the fact that his home could not be a proper resort for his children; and looking also at the incomes, I think that I ought to make some allowance. I allot to the petitioner permanent alimony at the rate of 266l. a year (one-third of the joint income); and, in addition, the respondent must pay 30l. a year towards the maintenance of the children; both orders to go from the date of the decree.

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PROBATE. June 1, 22, 1869.

In the goods of ALGERNON HICKS.

38 L. J. P. 65; L. R. 1 P. & D. 683; 21 L. T. 300.

Will—Memorandum of Revocation—Probate—Practice.

WILL.—*On the death of H. his will was found cancelled, and beneath the signature there appeared this memorandum, which was duly executed: "This my last will is hereby cancelled, and as yet I have made no other." The Court, following* Brinchley *v.* Still, 2 *Robert.* 162, *admitted the memorandum to proof.*

The testator, Mr. Algernon Hicks, late of Connaught Square, Hyde Park, died on the 26th of April, 1869. On his death a will, dated the 4th of August, 1864, was found. It had been duly executed, but several bequests and the signature of the testator had been struck through with a pen, and beneath the signature was written this memorandum:

"14 August, 1868. Mem. This my last will is hereby cancelled, and as yet I have made no other.

"A. Hicks.

"Witnesses, { Ann Carter, cook, Mary Coles, housemaid."

There was evidence that the memorandum was duly executed by the deceased in the presence of the witnesses.

Dr. Tristram moved the Court (*June* 1) to decree letters of administration with the memorandum at the end of the will annexed to Mrs. Priscilla Hicks, the widow of the deceased.—He referred to *Brinchley* v. *Still* (2 Robert. 162).

LORD PENZANCE.—The will is revoked, and you are entitled to administration; but I doubt whether it ought to include the "memorandum." It seems to me to fall within the words of the statute as simply a "writing declaring an intention to revoke" and not entitled to probate.

The matter was again mentioned on the following motion day, and *In the goods of Hubbard* (35 L. J. Pr. & M. 27; 1 L. R. P. & D. 53) was referred to.

Cur. adv. vult.

LORD PENZANCE (*June* 22)—The question in this case was whether a paper signed by the deceased, and which in terms revoked a will under which it was written, was or was not properly executed. The Court, upon the whole, came to the conclusion that it was, and was prepared accordingly to let the administration go. But then the question arose whether the administration should go with this paper annexed as being of a testamentary character, or whether it should go without the paper annexed. Now, the section of the statute (1 Vict. c. 26. s. 20) which deals with the revocation of wills says that, "No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same," &c. The language of the statute therefore implies that a will may be revoked either by a subsequent will, or by something which is neither a will nor a codicil, namely, "some writing declaring an intention to revoke" the will. I had serious doubts whether this paper ought not to be looked upon merely as "some writing," and consequently neither a will nor a codicil, so as properly to be made the subject of a probate or administration with the will annexed. A case was however cited—*Brinchley* v. *Still* (2 Robert. 162)—in which a paper, not quite similar to this, inasmuch as the writer began by calling it a codicil, but which in substance was the same as this, because it did nothing and effected nothing except the revocation of a previous will; and there the learned Judge thought that probate ought to go of the paper. In deference to that authority, I think that in this

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case also the proper course will be to allow the grant to go with the paper annexed.

Dr. Tristram.—Will the grant include the revoked will?

LORD PENZANCE.—No. In *Brinchley* v. *Still* (2 Robert. 162) the previous papers that were revoked were not annexed.

PROBATE. May 22, June 8, 1869.

PECHELL *v.* HILDERLEY AND OTHERS.

38 L. J. P. 66; L. R. 1 P. & D. 673; 20 L. T. 1014; 17 W. R. 865.

Will—Execution—Codicil, Execution in accordance with the Forms of, although not Valid by, the Law of the Country where made—Confirmation—Foreign Law—24 & 25 Vict. c. 114.

WILL.—*A testator made a will in India, and added a codicil at Florence. They were not witnessed, and were invalid both by the law of England and Italy. He wrote on the back of the will, at Genoa, a second codicil, which was also not witnessed, but which was well executed, though not valid, according to the law of Italy*:—Held, *that in determining the question whether a paper is valid as a testamentary instrument under* 24 *&* 25 *Vict. c.* 114, *the Court can have regard to the law of one country only at a time. It therefore declined to regard so much of the Italian law as held the second codicil well executed, and then, recurring to the English law, to apply the principle of confirmation, and refused probate of all three papers.*

The testator, Capt. Horace Seymour Kerr Pechell, late of the Royal Artillery, died at Alton House, Alton, in the county of Hants, on the 20th of December, 1867, leaving behind him a paper writing purported to be a will, which was executed, in India, in 1863, but was witnessed by only one witness. On the back of the will he wrote two codicils, one at Genoa, the other at Florence; but neither was witnessed. They were as follows:

"Codicil, April, 1866.—I hereby leave (being of sound mind) 50*l.* to Caroline Anne Pechell, Bix Henley, Oxon.—Horace Seymour Kerr Pechell, Florence."

"Second codicil.—I hereby leave to Signor Zenone Pineschi 500 francs annuity, payable by my bankers, Messrs. Fleury Héraud, Paris.—Horace S. K. Pechell. Genoa, June 20, 1867."

The defendant Hilderley, as representative of the residuary legatee named in the will, propounded all the papers; the material allegation in the declaration being that they were testamentary documents made by the deceased, wholly in his handwriting, and signed by him; and that the last indorsement was a codicil and testamentary disposition confirming and incorporating the preceding written disposition, and was made by a British subject then residing in parts beyond the seas, to wit, Genoa, in the kingdom of Italy, and was wholly in his handwriting, and was executed in a manner valid according to the provisions of the laws of Italy. The plaintiffs denied the validity of the papers; and the case was heard before Lord Penzance on the 22nd of May.

Signor Ottolenghi, an Italian advocate, deposed that, by the law of Italy, the first codicil was void as a testamentary disposition, the day of the month being wanting to the date therein written; and as to the second codicil, his affidavit thus proceeded:

"And I further say that, according to the said testamentary laws of Italy, the second indorsement, assuming that the whole and each word thereof was written by the testator, would, taken by itself, so far as the extrinsic form is concerned, be valid as a testamentary disposition, but as a codicil containing

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merely an amendment to a will, the Italian Courts would not give it an independent existence, and would consider it to be valid or invalid according as the will to which it related is valid or invalid.

"And I lastly say that, by the testamentary laws of Italy, a will which is not itself executed in accordance with the requirements of the civil code of that country, and which is therefore invalid, will not acquire validity by the fact that a testamentary disposition properly executed is afterwards indorsed upon the back of it, even although such testamentary disposition refers in express terms to the date or contents of such will."

Underdown, for the defendant, argued that the Court was not bound to look to the character or effect of the second codicil according to the Italian law. It was a codicil, it was well executed, and it confirmed or incorporated the will. —He referred to *Gordon* v. *Reay* (5 Sim. 274).

Dr. Middleton, for the plaintiff.—The principle of incorporation does not apply. According to the English law no one of the documents is good; according to the Italian law no one of them is good. To make them valid the principles of both laws must be combined; but the Court will not do that. It will have regard either to the principle of the English law or the Italian law. Even assuming the second codicil to be valid, it will not suffice to confirm the will. There is no case in which the word "codicil" alone has been held sufficient to set up the contents of an unexecuted paper.—He referred to *In the goods of Allnutt* (3 Sw. & Tr. 167; 33 L. J. P. M. & A. 86).

Cur. adv. vult.

Judgment was given on June 8, as follows:—

Lord Penzance.—The testator in this case left behind him a paper writing purporting to be a will. It was executed by him in India, and at that time was not witnessed by more than one witness, if witnessed at all. This paper, it is admitted, fails for want of due execution, unless it is set up by one or other of the two codicils which are indorsed upon it. The first codicil appears to have been written three years after the will, when the testator was at Florence. It is holograph and signed by the testator, but not witnessed. It is also dated so far as the month and year are concerned, but not the day of the month, for it is headed, "Codicil, April, 1866." The second codicil is also holograph and signed by the testator, and is further fully dated. It is headed, "Second codicil." This codicil was executed in Genoa. Neither of these codicils having been duly executed according to the English statute, the first question that arises is, whether either of them was so executed as to constitute a valid testamentary disposition according to the law of Italy. The affidavit of the Italian advocate, which has been laid before the Court, establishes the contrary. As to the first codicil, it appears that the execution of it fails for want of the full date, including the day of the month, being inscribed thereon. As to the second codicil, it appears that the execution is sufficient, but that, being only a codicil to a will, it would not be upheld by the Italian law as an independent paper; and that, unless the will were valid, the codicil must fail with it. The affidavit further states that by the Italian law this codicil would have no operation upon the will, though indorsed upon, and referring to it. The will, therefore, being originally invalid, and the codicil having neither the effect of establishing it nor the right to be considered a testamentary paper standing alone, neither of these papers would be held valid in Italy, the country where they were made. It was, however, further argued that by regarding the validity of these papers, partly according to the Italian law and partly according to the English law, a valid will and codicil would be the result. The Court was invited to regard so much of the Italian law as held the second codicil well executed, and then, dropping the Italian law and recurring to the English, to hold that this paper being well executed, indorsed upon the will, and referring to the will, operated as a republication of the will, and thereby established it. Whether such would be the effect of applying the English law in the manner proposed, it is not necessary to discuss; for I am of opinion that, in determining

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the question whether any paper is testamentary, regard can be had to the law of one country only at a time, and that the mixing up of the legal precepts of two different countries can only result in conclusions conformable to neither. The Court, therefore, pronounces against all the papers; the costs of both parties to come out of the estate.

PROBATE. June 15, 1869.

WRIGHT *v.* ROGERS AND GOODISON. (WINTERBURN *intervening.*)

38 L. J. P. 67; L. R. 1 P. & D. 678; 21 L. T. 156; 17 W. R. 833.

Approved, *O'Meagher* v. *O'Meagher*, 1883, 11 L. R. I. 117 (Prob.). See, *Harris* v. *Knight*, 1890, 15 P. D. 170; 62 L. T. 507 (C. A.).

Will—Execution—Signature of Witnesses in Presence of Deceased—Evidence.

WILL.—*A testator made his will, which purported to be witnessed by B, an attorney, and H, his clerk. On the death of the testator B. made an affidavit, in order that the executors might obtain probate in common form, as to interlineations and the due execution of the will, and this affidavit was filled in by H, who knew its purport. B. died about a year afterwards. H. then stated for the first time that the will was not witnessed in the presence of the deceased, and there was no evidence the other way. The Court, not being satisfied under all the circumstances with the evidence of H, declined to act upon it, and pronounced for the will.*

The testator, Mr. Thomas Pearce, late of Albion Grove West, Barnsbury, in the county of Middlesex, died on the 4th of April, 1868, leaving a will, dated the 2nd of April, 1868, in which he appointed the defendants executors. The will was prepared by Mr. Charles Bell, a solicitor of large experience, from instructions given by the deceased, and had the following attestation clause:

"Signed, published and declared by Thomas Pearce, the testator, in the presence of us and in the presence of each other (all being present at the same time), who at his request and in his presence have subscribed our names as witnesses hereto.

"C. Bell, solicitor, 36, Bedford Row, London.

"J. E. Haynes, clerk to the above-named C. Bell."

Probate in common form was granted to the executors on the 23rd of April, 1868, an affidavit as to interlineations and due execution having been first made by Mr. Bell. This affidavit was on a printed form, and the blank spaces were filled up in the handwriting of Mr. Haynes. Mr. Bell died on the 17th of March, 1869. A few days afterwards Mr. Middleton, of the firm of Belfrage & Middleton, who succeeded to his business, requested Mr. Haynes to write out a rough statement of the circumstances which attended the execution of the will. Mr. Haynes thereupon furnished the following account of the transaction:

"I accompanied Mr. Bell in a cab to Mr. Pearce's, and, on the street-door being opened, we were admitted into the house by Miss Whipp and shewn into the parlour. Mr. Pearce was lying on a bed in the front parlour, and Mr. Bell went to the bedside. I waited in the back parlour, and at that distance I observed what took place, the parlours having folding-doors, which were thrown open and enabled me to do so. Mr. Bell first read to the deceased or said something to him about a deed of revocation,[1] and laid it down on the table, and then he read the will. When Mr. Bell had finished reading the will he beckoned to me to come into the front room, and the bell was rung for pen

(1) The object of the deed was to revoke a post-nuptial settlement made by the testator in 1854, in order that certain leasehold property therein mentioned might pass under the will. It was prepared by Mr. Bell, and was taken by him with the will to be executed by the deceased.

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and ink. Miss Whipp answered the bell (she had been previously requested by Mr. Bell to retire) and produced the pen and ink, and raised the testator up and so held or supported him while he executed the will. Having executed the will the testator sank down in the bed in a very exhausted state, and, as I thought, in a dying state, and Mr. Bell seemed to have the same impression, for he said to me, on retiring to the back room, 'That was a very near thing.' Miss Whipp remained in the front parlour, and was shortly afterwards joined by Mr. Bell. After waiting in the back parlour about an hour, I saw Miss Whipp beat an egg and mix it with a liquid which she put to testator's mouth, and he swallowed it. He appeared to revive a little, but not sufficient to be enabled to sit up, and Miss Whipp tried to raise him in bed, but was not strong enough; whereupon she summoned Mr. Windred into the room, who lifted Mr. Pearce into a sitting position, in which position Miss Whipp supported him, and Mr. Windred left the room. The testator then received the pen from Mr. Bell and executed the revocation, but being to weak to write Mr. Bell directed me to guide the testator's hand, and the matter was completed. The anxiety consequent upon Mr. Pearce's condition, and my and Mr. Bell's watchfulness for the opportunity to get the deed of revocation executed, which, *pro forma*, should have been done before the execution of the will, caused us to neglect the attestation of the will in the presence of the testator. In fact, neither the will nor the deed of revocation was attested until we returned to the office; for as soon as the deed of revocation, which had been so anxiously watched for, had been executed Mr. Bell hastily snatched up both documents unattested. Mr. Bell being anxious to get back to his business, we hastily left the testator's house, jumped into a cab and returned to the office; and upon arriving at the office I immediately pointed out to Mr. Bell that the will had not been attested, whereupon Mr. Bell said, off-handedly, that it did not matter, and, at Mr. Bell's request, both the deed of revocation and the will were attested by us at Mr. Bell's office, in Bedford Row."

In his first draft of this statement Mr. Haynes said nothing about the attestation, either of the will or of the deed of revocation, but when his attention was called to the matter by a note in the margin by Mr. Middleton, "Query, whether the will was attested in the front or back room," he then added the further particulars as to the attestation taking place in Mr. Bell's office.

The probate having been called in at the instance of the plaintiff, the defendants propounded the will. The plaintiff pleaded that it was not executed in accordance with the provisions of the statute 1 Vict. c. 26; and the case was heard before Lord Penzance on Tuesday, June 15.

Keane (with him *Dr. Swabey*), for the plaintiff.

Dr. Spinks (with him *Dr. Tristram*), for the defendants.

Ballantine, Serjeant (with him *Inderwick*), for the intervener, who was beneficially interested under the will.

Mr. Haynes was called, and repeated, in substance, the account given by him in the above statement as to the execution and attestation of the will. On cross-examination he stated that he was cashier and accountant to Mr. Bell, and that he had attested two or three wills before. Mr. Bell was an experienced attorney, and had a large practice, and as a general rule was a man of great accuracy, and it was not until after his death that witness mentioned the matter about the attestation to anyone. He filled up the affidavit, and knew its purport.

Mrs. Winterburn (*née* Jane Whipp) was also called. She stated that she left the room at Mr. Bell's request, and did not see the will executed.

LORD PENZANCE.—The will in question was made by the testator, on the 2nd of April, 1868, in the presence of an attorney and his clerk. It was drawn by the attorney, a gentleman of large practice and forty years' experience; it was copied by his clerk, and it has a perfect attestation clause. So far as presumption is concerned, *prima facie* there could not be a stronger case upon which the Court would properly presume that the will was duly executed. But

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the matter does not end there, because after the death of the testator an affidavit was drawn out by Mr. Bell to swear to; the written parts of it were filled in by the clerk, and the parts so filled in by him, coupled with the printed matter, represented that the will was duly executed; that it was signed by the testator in the presence of the witnesses, and that the witnesses signed in his presence. The will was then proved. Mr. Bell died, and two or three days after his death Mr. Middleton, whose position in the matter I do not know, but who was then the employer of Haynes, asked him to make a statement in writing of the circumstances under which the will was executed; and thereupon Haynes made the statement which now lies before me.—[His Lordship read the statement, and continued]—This statement having been made, and Mr. Middleton observing that nothing was said about the attestation, put this query in pencil, "Was the will attested in the front or back room?" I asked Haynes whether he had told anyone as to the defect in the attestation, because if he had it might have come to Mr. Middleton's ears, and might have led him to make this inquiry; but it appears that Haynes had never mentioned it to anybody, and therefore the query of Mr. Middleton was rather a curious one. It may, however, have been a perfectly proper inquiry, and the Court is not disposed to place much reliance on it. The query was put down and answered, and when in the witness-box Mr. Haynes repeated the story. Now, I think too much has been said about his coming here with a fraudulent desire to conceal the truth. There is another and, as I think, a more proper question to ask, namely, whether the Court can rely altogether upon his memory in this matter. There was a deed to be signed as well as the will, and he may have mixed up the two things, and so satisfied himself that the will was not attested in the presence of the deceased when the circumstances may have occurred only in the case of the deed. The presumption, as I have said, is in favour of the will. The presumption is of course capable of being rebutted; but when two persons, one of them a professional man of large experience who well understood what the law required, have signed an attestation clause duly worded, the Court ought to have the strongest evidence to induce it to believe that the statement in the clause is not true. Nothing would tend more to greater uncertainty in the proving of wills than a contrary practice, and the consequence is, that where there is a duly worded attestation clause the Court is always in the habit of presuming as largely as possible in favour of the due execution of the instrument. The proof of the due execution lies upon those who set up the will, and when the two attesting witnesses come and swear that the will was not duly executed, and there is no evidence the other way, the Court has nothing upon which to take its stand in maintenance of the presumption. That was the case in *Croft* v. *Croft* (34 L. J. Pr. M. & A. 44; 4 Sw. & Tr. 10). In this case the Court has the evidence of only one witness to the fact that they did not sign in the presence of the deceased; and when I find that he stood by and assented to an affidavit made by his fellow witness, to the effect that the will was duly executed, and also remained so long without disclosing the alleged defect in the attestation, I cannot rely upon his recollection of what took place. Under all the circumstances I am not satisfied with the evidence, and I shall therefore hold that the will was well executed.

PROBATE. June 22, 1869.

TICHBORNE *v.* TICHBORNE. *In the goods of* LADY TICHBORNE.

38 L. J. P. 70; L. R. 1 P. & D. 730; 20 L. T. 1015; 17 W. R. 832: see also, [1869] E. R. A. 814; 38 L. J. P. 55; 20 L. T. 820.

See, *In re Toleman*, [1897] E. R. A.; 66 L. J. Ch. 452; [1897] 1 Ch. 866; 76 L. T. 381; 45 W. R. 548 (Ch. D.); *In the Estate of Cleaver*, [1905] E. R. A.; 74 L. J. P. 164; [1905] P. 319; 94 L. T. 99 (P.D. & A.).

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Concurrent Suits in Court of Chancery and Court of Probate—Receiver of Personal Estate—Administrator pendente Lite at Instance of Creditors—Practice.

WILL.—*Concurrent suits were pending between the same parties in the Court of Chancery and Court of Probate, and the former had appointed a receiver of the personal estate of the deceased. The Court, being satisfied that no conflict of jurisdictions would arise, and that the justice of the case required the order, appointed the receiver of the Court of Chancery also administrator pendente lite at the instance of the creditors of the deceased, with the view of enabling them to obtain speedy payment of their debts.*

In this case the Court was moved (on May 25), on behalf of a creditor, to appoint the receiver, under the Court of Chancery, of the personal estate of the deceased intestate also administrator *pendente lite*. The Court refused the motion, but intimated that it would again entertain the application if the Court of Chancery thought that an administrator should be appointed before the debts of the deceased could be paid. The estate was solvent and the debts were admitted—see 38 L. J. P. & M. 55.

On the 12th of June, the matter was brought before Stuart, V.C., on a motion that an account of the intestate's debts might be taken in the suit, and a sufficient part of her personal estate appropriated for their payment. The Vice Chancellor was of opinion that a legal personal representative of the deceased should first be appointed, and recommended that the application to the Court of Probate should be renewed; adding that, if an administrator were appointed, his first duty would be to apply to the Court of Chancery to discharge the receiver, and that he would administer nothing without first going to the Court of Chancery.

Dr. Deane (*Ramadge* with him), on behalf of Mr. Norris, a creditor, now renewed the application, and stated that it was made on the suggestion of Stuart, V.C.

Dr. Tristram, for the plaintiff, consented to the appointment of an administrator, but objected to the receiver of the Court of Chancery being appointed.

Bayford, with him the *Solicitor General (Sir J. D. Coleridge)*, for the defendant, opposed the motion.

LORD PENZANCE.—The argument in opposition to this motion starts with what is a palpable injustice; namely, that certain persons who are creditors of the deceased should wait to get their debts paid until two members of the deceased's family, or those who profess to be members of her family, have ascertained by a long litigation which of them is entitled to take out administration. That is a dispute plainly in which the creditors have no interest; and unless good reason were shewn, it would be a great hardship that they should be kept waiting for their debts, which I assume are not denied, until that litigation is concluded. Therefore, I should be strongly disposed to use any power that the Court has to help them on their way towards payment of their debts. This Court has no power to order their debts to be paid, but it has the power to take the first step towards it by appointing an administrator *pendente lite*. The first difficulty in the way of such an appointment is a technical one; namely, that no such order has hitherto been made at the instance of a person not a party to the suit. By the practice of the Prerogative Court, perhaps, that could not be done. But this Court has statutory powers, conferred by the 20 & 21 Vict. c. 77. s. 70, which says, "Pending any suit touching the validity of the will of any deceased person, or for obtaining, recalling or revoking any probate or any grant of administration, the Court of Probate may appoint an administrator of the personal estate of such deceased person," &c. There is no qualification in these words; there is nothing to limit the powers of the Court to cases in which the application for such an appointment is made by parties to the suit. The words are perfectly general, and seem to me to confer

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on this Court this power. Directly there is a suit either touching the validity of a will or touching the rights of different parties to a grant of administration, this Court has the power, upon the application of any person, if it think it just and proper so to do, to appoint an administrator *pendente lite*. Therefore, if there had been no precedent, I should be prepared to make one. The difficulty I had with the former application was this: I was told that a receiver had been appointed by the Court of Chancery, and that he had got in the estate; and it appeared to me that I should be creating a conflict of jurisdictions if I appointed an administrator *pendente lite*. But the remarks of the Vice Chancellor have relieved me from that difficulty. He suggested, as I understand, that the parties might again make an application to this Court for the appointment of an administrator *pendente lite*, and I gather from what he said that, as soon as he found anybody clothed by this Court with the power and position of an administrator, he would then discharge the order which he had previously made for a receiver; but that the Court of Chancery, would hold its hand over the administrator and make such order for payment of the deceased's debts as it thought right. Under these circumstances it seems to me that there is no danger of any conflict of jurisdictions, and, in fact, no difficulty or trouble whatever in the matter. It is, however, said that the appointment of an administrator will be worth nothing, inasmuch as by the rules of the Court of Chancery the costs of the suit must be first paid out of the estate. I do not know how that may be, but I must say it is hard justice if those who are the creditors of an intestate should not have their debts paid because the relatives of the deceased want all the money to carry on their litigation. But with that I have nothing to do. All that I have to do is, to see that I put these persons in the way of getting their debts paid. The order for the appointment of an administrator *pendente lite* will therefore go. The next question is, who should be the administrator? And as to that, I have no doubt that Mr. Humphreys, the receiver under the Court of Chancery, is the proper person to be appointed.

Dr. Deane asked that the creditors might be allowed the costs of the application.

LORD PENZANCE.—I think they ought to have their costs out of the estate, for the application was a part of the necessary process for getting their money.

PROBATE. July 6, 1869.

In the goods of DAVID JENKINS.

38 L. J. P. 72; L. R. 1 P. & D. 690; 21 L. T. 300.

Testamentary Suit—Guardian ad Litem—Next-of-Kin of Minor—Citation—Practice.

WILL.—*The testator, by his will, appointed his wife sole executrix and guardian of his child, a minor of the age of eight years. The Court refused to appoint the paternal uncle of the minor guardian ad litem, with the view of contesting the validity of the will, until the mother was first cited.*

The testator, David Jenkins, died on the 28th of November, 1867, leaving a will, dated the 26th of November, 1867, in which he appointed his wife guardian to his only child, eight years of age, and sole executrix.

Mrs. Jenkins proved the will on the 14th of December, 1867.

Bayford moved the Court to appoint John Jenkins, the paternal uncle of the minor, his guardian, for the purpose of calling in the probate and contesting the validity of the will of the deceased. As the minor was living with his mother he was not in a position to elect an independent guardian. He referred to the practice in the Court of Chancery—1 *Sidney Smith's Chancery Practice*, 7th edit., pp. 271-273.

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LORD PENZANCE.—Does he propose to give security for costs?

Bayford.—I presume he will. He will at all events be liable for them.

LORD PENZANCE.—But may it not be a vexatious suit? I cannot grant the application behind the mother's back. You must first cite her to shew cause why the uncle should not be appointed guardian *ad litem*.

MATRIMONIAL. July 6, 20, 1869.

MUMBY *v.* MUMBY.

38 L. J. P. 72; L. R. 1 P. & D. 701; 21 L. T. 155; 17 W. R. 1115.

Petition for Alimony pendente Lite—No Answer—Respondent's Faculties proved by Affidavit—Practice.

DIVORCE AND MATRIMONIAL CAUSES.—*The wife petitioned for alimony pending her suit for judicial separation. The respondent, who carried on the business of a quack doctor at Kingston-on-Hull, filed no answer.*

The Court, in order to save expense, allowed the respondent's faculties to be proved by affidavit; but required that notice should be served on the respondent that the affidavits had been filed in the Registry, and that it was intended to ask the Court to allot alimony upon them.

This was a petition by the wife for judicial separation. No appearance was entered on behalf of the respondent. The matter now came before the Court on the petitioner's application for alimony *pendente lite*. In the petition she alleged that the respondent carried on business as a quack doctor at Kingston-on-Hull, in Yorkshire; that he had also property there, and that his net income was not less than 250*l*. per annum.

Dr. Swabey, for the petitioner, asked the Court to allow the respondent's income to be proved by affidavits. She had no means of her own, and the expense of bringing witnesses from Kingston would be very great.

LORD PENZANCE.—I think, in order to save the expense of bringing witnesses from the other end of the kingdom, that I should grant the motion; but you must give notice to the respondent that you have filed the affidavits in the Registry where he can see them, and that you intend to ask the Court to allot alimony upon them.

Affidavits as to the respondent's faculties were filed in the Registry, and on the 20th of July, alimony *pendente lite*, at the rate of 52*l*. a year, was allotted to the petitioner.

MATRIMONIAL. June 11, 29, 1869.

BUCKMASTER *v.* BUCKMASTER.

38 L. J. P. 73; L. R. 1 P. & D. 713; 21 L. T. 231; 17 W. R. 1114.

See, *Newsome* v. *Newsome*, [1871] E. R. A.; 40 L. J. P. 71; L. R. 2 P. & D. 306; 25 L. T. 204; 19 W. R. 1039 (Mat.). Distinguished, *De Laubenque* v. *De Laubenque*, [1899] E. R. A.; 68 L. J. P. 20; [1899] P. 42; 79 L. T. 708 (P. D. & A.).

Dissolution of Marriage—Desertion—Agreement by Wife not to insist upon her Right to Cohabitation—Subsequent Petition for Restitution of Conjugal Rights.

DIVORCE AND MATRIMONIAL CAUSES.—*The wife agreed, shortly after the marriage, in consideration of a sum of money paid to her by her husband's*

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father, not to insist upon her right to live with him. Subsequently she filed a petition for restitution of conjugal rights, but was unable to serve it on her husband, who left the country. On his return to England she again applied to him, but in vain, to provide a common home, and to renew the cohabitation:— Held, *in a suit by the wife for dissolution of the marriage, that the wife having agreed to live apart from her husband, and cohabitation never having been resumed after such separation, the husband was not guilty of desertion.*

This was a petition by the wife for dissolution of marriage on the ground of adultery and desertion.

The respondent appeared, but filed no answer.

The marriage, which was a clandestine one, took place on the 20th of November, 1861, at the parish church of St. Marylebone, in the county of Middlesex. On the same day the petitioner and the respondent returned to their respective homes, the one to her sister's house at Houghton Regis, the other to his father's, at Doolittle Mill, near Barnstaple, the respondent promising that he would endeavour to prevail upon his parents to find a home for them. A few days afterwards the petitioner went to the respondent's father's house, but his parents would not allow them to cohabit; and ultimately, in consideration of a sum of 100*l.* paid to her by the respondent's father, she signed an agreement that she would not further molest him.

In March, 1862, she applied to her husband for further assistance, which was refused, and in the following April she filed a petition for restitution of conjugal rights, but was unable to serve the petition on the respondent, who sailed for Australia in the month of September in the same year. He returned to England in July, 1864, and in December, 1866, paid the sum of 10*l.* to the petitioner's solicitors in settlement of the costs incurred in respect of the petition for restitution. On his return from Australia the petitioner again applied to him, but in vain, to provide for her a home.

The case was heard (*June* 11) before Lord Penzance.

Inderwick, for the petitioner.

The charge of adultery was proved, and judgment was reserved on the question of desertion.

Judgment was given (*June* 29) as follows:

Lord Penzance.—In this case the Court took time to consider whether the petitioner was entitled to a dissolution of marriage on the ground of adultery and desertion. The adultery was proved, and the question was as to the desertion. It appears that the parties were married unknown to the family of the husband, and that after the marriage they returned to their homes, he to his father's, the wife to her sister's house. Her account of the matter is this; she says: "We returned the same day to our own homes. He was to endeavour to get his parents to consent to find a home for me. Receiving no letter I went to the 'Mill' (his father's place), and he still said he would find a home in a day or two. I had to sleep away from him because his parents would not allow me to sleep in the house. He was much under the influence of his parents. I saw Mr. Chambers, and asked his advice. He saw my husband's parents, and the result was that I should take 100*l.* not to molest him any more." The receipt or the undertaking is not forthcoming, but the solicitor was called, and he says it was an agreement that in consideration of 100*l.* the petitioner should abstain from molesting her husband by insisting upon her right to live with him. The upshot of the matter then is this, that the wife consented shortly after the marriage not to insist upon her rights; that, in short, she resigned them for the sum of 100*l.*, and that they had never lived together since. According to the principle that I have endeavoured to lay down in one or two previous cases, that I think does not constitute desertion on the husband's part. The wife chose to bargain with him that they should not live together, and unless the cohabitation was afterwards resumed it seems to me that there could be no desertion. All that the wife is entitled to is a decree of judicial separation on the ground of adultery.

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PROBATE. May 29, June 29, 1869.

BLACK v. JOBLING.

38 L. J. P. 74; L. R. 1 P. & D. 685; 21 L. T. 298; 17 W. R. 1108.

Considered, *In the goods of Savage*, [1870] E. R. A.; 39 L. J. P. 25; L. R. 2 P. & D. 78; 22 L. T. 375; 18 W. R. 766 (Prob.); *In the goods of Turner*, [1873] E. R. A.; L. R. 2 P. & D. 403; 27 L. T. 322; 21 W. R. 38 (Prob.). Followed, *Gardiner* v. *Courthope*, [1887] E. R. A.; 56 L. J. P. 55; 12 P. D. 14; 57 L. T. 280; 35 W. R. 352 (P. D. & A.).

Testamentary Paper called a Codicil—Will not forthcoming—Revocation—Codicil admitted to Proof—1 *Vict. c.* 26. *s.* 20.

WILL.—*A. made a will and a codicil thereto which he retained in his own possession. He subsequently executed a second testamentary paper, which he also called a codicil, and this paper he gave to one of the legatees named therein. The will and first codicil were not forthcoming at his death*:—Held, *that, as the second codicil had not been revoked by any of the modes indicated by the 20th section of the* 1 *Vict. c.* 26, *it was entitled to proof.*

Clogstoun *v.* Walcott (5 Notes of Cases, 623), *and* Grimwood *v.* Cozens (2 Sw. & Tr. 364), *considered.*

The testator, Ebenezer Black, late of Grindon, in the county of Northumberland, farmer, died on the 8th of May, 1868. He made a will on February, 1865, and added a codicil in October, 1866. The codicil substituted an annuity of 100*l.* a year for a bequest of forty shares in the West Hartlepool Dock and Railway Company, which he had given by the will to his daughter Ann Jobling, and directed his trustees to dispose of his interest in his farm of Fenham Hill, farming stock, &c., and to hold the moneys arising therefrom in trust for the five children of his said daughter Ann Jobling. By a deed of gift dated the 25th of May, 1867, and in the terms following, he gave the same farm of Fenham Hill to his daughter and her children:

"I, Ebenezer Black, of the township of Grindon, in the parish of Norham, and also the occupier of the farm of Fenham Hill, in the county of Northumberland, on a lease of seven years unexpired, at the yearly rent of seven hundred, paying all rates and taxes, do give and devise all the property of the stocks, crops and implements of husbandry on the said farm of Fenham Hill aforesaid, to my daughter Ann Jobling and her children, under the covenants and conditions as stated in the lease, for their benefit respectively; my grandson Thomas Jobling to have the management of the farm as steward and keep regular accounts from year to year, and also to pay all servants' wages, rents, taxes and cesses from the produce of the farm during the continuance of the lease; and for so doing the said Thomas Jobling is to have 15*l.* a year; and after the expiration of the lease, the whole of the stock, crop and implements of husbandry will be sold and converted into money, and equally divided, share and share alike, amongst my five grandchildren, having already made a provision in my will in favour of my said daughter Ann Jobling, by giving her an annuity of 100*l.* a year during her life; as witness my hand this 25th day of May, 1867.

"EBENEZER BLACK.

"Witness to the signing hereof,
Adam White, writing clerk,
Berwick."

Subsequently he executed the following testamentary paper and gave it to his grandson, Thomas Jobling, the defendant, who retained possession of it until his death:

"Grindon, 19th October, 1867.

"I, Ebenezer Black, farmer, Grindon, parish of Norham and county of Northumberland, having already bequeathed to my five grandchildren, issue

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of my daughter Ann Jobling, to wit, Mary, Thomas, Jane, William and Ann Jobling, the lease, stock and profits, with everything upon and relating to the farm of Fenham Hill, they paying all rents, taxes and whatever charges may come against the said farm of Fenham Hill: in addition to which I now bequeath to each of the above-named children of my daughter Ann the sum of 300*l.* sterling money, when they attain the age of twenty-one years, out of my capital, to be paid to them individually by my executors.

"Signed by the testator as a codicil to his last will and testament in the presence of us, who in his presence and in the presence of each other have hereunto subscribed our names as witnesses.

"EBENEZER BLACK.

"Thomas Hood Mitchell.

"Andrew Elliott."

The will of February, 1865, and the codicil of October, 1866, were in the possession of the deceased, but they could not be found after his death.

The defendant, as a legatee named therein, propounded the paper of the 19th of October, 1867. The plaintiff pleaded that it was not executed according to the provisions of the statute 1 Vict. c. 26; that if well executed it was executed as a second codicil to his last will and testament; and that he destroyed the said will and first codicil with an intention to revoke the same and also the said alleged codicil.

The case was heard, before Lord Penzance, on Saturday, May 29th.

T. H. Mitchell proved the due execution of the paper. He stated that on the day it bore date the testator called at the Berwick Union Workhouse, of which witness was the master, and asked him to write a "codicil to his will," observing that his capital was increasing, that he had 1,500*l.* which he wished to give to the family of his daughter, and that he "had already provided a little for them by a farm and the stock upon it." The witness then wrote out the paper, copying the attestation clause from a printed form, and when it was executed the testator took it with him, saying that he should put it aside with his will and other papers.

Thomas Jobling, the defendant, deposed that in December, 1867, the deceased gave him the paper and said that it was something for the family, and that he did not wish his son James Black (the plaintiff) to know of it.

Dr. Deane (with him *Pritchard*), for the plaintiff.—The deceased meant to do something in addition to his will. At the time he executed the paper he had the will present to his mind, and he told the draftsman to "write a codicil to his will." It is dependent on the will and falls with it.

A. Staveley Hill (with him *Dr. Tristram*), for the defendant.—The deed of gift had practically annulled the first codicil. The reference in the paper is to the deed and not the will; and the evidence shews that it was the intention of the deceased that it should be independent of the will. The intention being clear, the paper is entitled to probate as a substantive instrument—*Barrow* v. *Barrow* (2 Lee. 335).

Judgment was given on the 29th of June as follows:

LORD PENZANCE.—In this case the deceased died having made several wills, but upon his death no will was found. There was, however, in the hands of a legatee an instrument made by the testator, and called a codicil, of the 19th of October, 1867. The codicil recited that the testator had already "bequeathed," as he called it, to his grandchildren everything upon and relating to a certain farm, and it then goes on to say, "in addition to which I now bequeath to each of the above-named children of my daughter Ann the sum of 300*l.* sterling money, when they attain the age of twenty-one years, out of my capital, to be paid to them individually by my executors." And the question in the case is, whether that paper can be admitted to probate. The codicil, I should say, speaks of his having "bequeathed his farm." It is in evidence that he had previously disposed of it by deed of gift, but the person

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who drew the codicil, and who was called as a witness, could not say whether or not the deceased was at the time speaking of the deed of gift which he made in May, 1867, and which was produced to the Court.

The ground relied upon against the codicil was that a codicil stood or fell with the will. No doubt that was a general proposition which obtained in the Prerogative Court, but it was subject to certain exceptions. I took the trouble to ascertain what under the old law were the exceptions, but the result of the cases does not appear to me to be by any means satisfactory. The earliest case is the case of *Barrow* v. *Barrow* (2 Lee. 335). There the testator made a will and a codicil, the whole effect of the codicil being to give the residue of his property to his wife. He afterwards burned the will, saying "it was useless, Mr. Wood (the gentleman who drew the codicil) having made his will for him." And here the Court held that it was clear the codicil was not destroyed by the burning of the will, but was a substantive instrument or testamentary schedule. The codicil gave the residue, and no one could say what was the residue unless he had read the will which disposed of the other portions of the property, but the Court nevertheless held that it was not destroyed by the burning of the will, but was entitled to probate as a substantive testamentary instrument. The next is the case of *Medlycott* v. *Assheton* (2 Add. 231), which was decided in 1824. There the will was made in April, 1820, and in December, 1820, the testatrix wrote a codicil, giving 100*l.* each to the two trustees named in her will, and dividing some trinkets among her family. In January, 1824, she looked over the papers in her writing-desk, several of which she burnt, and a few days afterwards wrote to her attorney, desiring him to destroy her will. The Court held that it was altogether a question of intention, and that the legal presumption that the codicil fell with the will might be rebutted by shewing that the testatrix intended the codicil to operate notwithstanding the revocation of the will, and as the circumstances were not sufficient to establish such an intention the codicil was held invalid. The next was the case of *Tagart* v. *Hooper* (1 Curt. 289), which was decided in 1836. The paper was found in the writing-desk of the deceased, and it commenced thus: "This is a codicil to my last will, and to be taken as a part thereof." The Court, in pronouncing for the paper, held that in all cases where a codicil had been considered void by the destruction of the will there were circumstances which shewed that the codicil was dependent upon the will. That put the burden of proof the other way. In the other cases it was laid down that the presumption was that the codicil was revoked when the will was revoked; but in this it was held that where the codicil was so revoked there were circumstances which shewed that it was dependent on the will.

These are all the cases on the point before the passing of the statute, and certainly their consideration leaves upon the mind no very definite idea of what is meant by "dependent on the will." In one sense, any codicil that makes any disposition of property at all must be considered to be dependent on the will which disposes of the rest; for the codicil conveys only a part of the testator's intention regarding his property, and the motives inducing that particular part of his intention cannot with any certainty be dissevered from the motives which induced the disposition of the rest. It is difficult, if not impossible, to predicate of a particular bequest in a codicil that the testator would have made it if he had disposed of his other property in any different manner than that expressed by his will. It may be that the independence of the will spoken of must be something of a more limited character. And the meaning of the cases may be that a codicil is independent of the will, unless it is of such a character that the giving validity and effect to it without the will to which it was intended to be attached would produce some manifest absurdity. I am not sure that even this rule is capable of being easily applied to all the cases that might arise; and I have serious doubts whether such a rule is to be gathered from the cases with sufficient distinctness to justify the Court in adopting it.

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But all these cases occurred before the Wills Act. Now the 20th section of that act is most distinct and positive in its terms. It says: "No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid (marriage), or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator." There certainly is language as plain as language can be, to the effect that no will or codicil can be revoked except by some of the methods specified in the statute; and I should have had no hesitation in holding that the intention of the section was to do away with all implied revocations and relieve the subject from the doubt and indistinctness in which the cases had involved it. But there have been two cases decided since the act. The first of these is *In the goods of Halliwell* (4 Notes of Cases, 400). There the codicil was dated the 5th of September, 1845, and commenced thus: "This is a codicil to the will of me R. H., and which I desire to be added to my will"; and it related solely to accounts between himself and his partner, containing no bequest or appointment. The testator died on the 7th of September, 1845, and he expressly declared, shortly before the making of the codicil, that he had made a will and that it was then in existence. In that case the Court said that, supposing the will to have been destroyed by the deceased, the codicil would, upon the general principle, fall with it, but held that there was an exception in favour of the paper, inasmuch as it seemed to have been made for a particular purpose, and admitted it to proof. Then comes the case of *Clogstoun* v. *Walcott* (5 Notes of Cases, 623), in which the will was made in 1840 and the codicils in 1842. In April, 1846, the testator destroyed the will, and in doing so expressed anxiety about the codicils, observing to his brother, "It will not affect the codicils, will it?" In that case, for the first time, the Wills Act was cited, and the way the learned Judge referred to it was as follows: "Under the old law, the effect of destroying a will was, by presumption, to defeat the operation of the codicils to that will; but by the present law there must be an intention to destroy. Here, however, the deceased did not mean to destroy the codicils, which remain entire, but, on the contrary, he expected at the time, and declared afterwards, that the parties interested in the codicils would have the benefit of the legacies he had given them. I am of opinion that the Court is bound to pronounce for the validity of the two codicils, and I decree probate of them to the brother, who is executor according to the tenor in the first codicil." Since this Court was established a case occurred—*Grimwood* v. *Cozens* (2 Sw. & Tr. 364)—which was heard in 1860, and in that case Sir Cresswell Cresswell said, "I think it has been established by the cases cited at the bar, that previous to the passing of the 1 Vict. c. 26. a codicil was *prima facie* dependent on the will, and that the destruction of the latter was an implied revocation of the former; and, moreover, that Sir H. J. Fust was of opinion that no alteration of this principle was made by the passing of the statute. The question, then, is entirely one of the intention of the deceased. Where a will and codicil have been in existence, and the will is afterwards revoked, it must be shewn, by the party applying for probate of the codicil alone, that it was intended by the deceased that it should operate separately from the will; otherwise it will be presumed that, as the will is dstroyed, the codicil is also revoked."

Now, in reviewing these decisions, I cannot perceive that the effect of the statute has been fully considered by the Court. Sir Cresswell Cresswell seems to have thought that it had been decided that the statute made no difference, and passed it by as having been so; and Sir Herbert Jenner Fust dismissed the point without any reasoning whatever, merely affirming that the statute had made it necessary that there should be an intention to revoke. But the statute says nothing of the kind; and unless it makes an actual revocation necessary, it does not interfere with the existing law at all. In this unsatisfactory state of decision, I think I shall do best in such a case as the present by adhering

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to the statute, and by holding that as this codicil has never been revoked in any of the modes indicated by the statute as the only modes by which a codicil is to be revoked, it remains of full force and effect, and is entitled to proof.

Probate of the codicil decreed.

PROBATE. Aug. 3, 1869.

BROWN AND ANOTHER, *executors*, *v.* BROWN.

38 L. J. P. 78; L. R. 1 P. & D. 720; 21 L. T. 339; 17 W. R. 1110.

Discussed, *Andrew* v. *Brooke*, [1874] E. R. A.; 43 L. J. P. 39; L. R. 3 P. & D. 181; 31 L. T. 102; 22 W. R. 712 (Prob.).

Practice—Testamentary Suit—Examination de bene esse of Surviving Attesting Witness—20 & 21 *Vict. c.* 77. *s.* 32.

WILL.—*In a testamentary suit, pending in the Court, an order was made, on the application of the executors, the plaintiffs, for the examination de bene esse of the surviving attesting witness to the will, upon affidavits which stated that he was sixty-five years of age, and that the plaintiffs could not safely proceed to trial without his evidence, but were silent as to his then state of health.*

The plaintiffs, as executors, propounded in a declaration the will of Mr. E. B. Brown, late of Ealing, in the county of Surrey, who died in May, 1869. The defendant pleaded that it was not executed according to the statute 1 Vict. c. 26; that certain alterations in it were not made prior to its execution by the testator; that at the time of its execution the testator was not of sound mind; and that he did not know and approve the contents thereof.

Dr. Tristram, for the plaintiffs, moved the Court to grant an order for the examination *de bene esse* of James Secker, the surviving attesting witness to the will. He submitted that the Court was empowered to make the order by the 32nd section of the Probate Act (20 & 21 Vict. c. 77), which confers on it in such matter all the powers exercised by the Courts of Common Law at Westminster. And in support of the application, he relied on two affidavits: one by the plaintiff, to the effect that Secker frequently suffered from ill-health; the other by the plaintiff's solicitor, to the effect that Secker was sixty-five years of age, and that the plaintiff could not safely proceed to trial without his evidence.—He referred to *Daniel's Chancery Practice*, vol. 1, p. 853.

Bayford, for the defendant, opposed the application.—Secker was, no doubt, the surviving attesting witness; but Mrs. Hamonts, a legatee, was also present, and could be examined as to the due execution of the will. Further, his cross-examination would disclose the defendant's case. The cases in Chancery did not apply; and, as to the practice of the Courts of Common Law, the witness at the time of the application should be in such a state of health, certified by a medical man, as to render it improbable that he would be able to attend the trial before an order for his examination would be made. Here there was no such statement or certificate.—He referred to *Lush's Practice*, vol. 1, 3rd edit. 511.

LORD PENZANCE.—The first question is, whether the Court has power to grant the application? I think it has. The 32nd section of the 20 & 21 Vict. c. 77. not merely confers upon the Court this power; but it also in so many words confers upon the Court all the powers given to the Courts of Common Law at Westminster by the 13 Geo. 3. c. 63. and the 1 Will. 4. c. 22. I am therefore clear that the Court has the power. It is said that, under the circumstances of the case, the Courts of Common Law would not grant an order for the examination of the witness. But that is one of the misfortunes of their practice, because

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the Court of Chancery might, in the meantime, step in and grant the relief refused by the Court of Common Law; and nothing, I think, is of greater evil than that a suitor should be obliged to go from the Court in which the suit is pending to some other Court to get that relief which the Court in which the suit has been instituted has the power of granting. I am satisfied that the Court of Probate has the power, and ought to exercise it where the testimony of the witness is so material that its loss by his death would be a serious injury to the suit. It is said that the witness is under seventy years of age; but it is idle to draw a distinction whether he is sixty or seventy. The substance of the matter is this: is his testimony so pertinent to the point at issue as to make it of that valuable character that if it were lost the interests of the suitor would be seriously compromised? I think that is the only way in which the Court can apply the rule. This witness being an attesting witness, falls within the category I have named, and I think he should be examined. On the other side, the only real objection is, that they would disclose their case by his cross-examination. But that is the case in Chancery where a bill of discovery is filed, and is the case at Common Law where interrogatories are delivered. The notion that an advantage is to be gained by leaving a case in the dark is, I am happy to say, exploded in modern times. The advantage is, I think, the other way. I am therefore not at all pressed with the difficulty suggested on the part of the defendant, and shall make the order for the examination of the witness.

Examination ordered.

PROBATE. Aug. 3, 5, 1869.

In the goods of BRIDGET GAYNOR.

38 L. J. P. 79; L. R. 1 P. & D. 723; 21 L. T. 367; 17 W. R. 1062.

Administration—Executor—20 & 21 Vict. c. 79. s. 95.—Chain of Representation.

WILL.—*A. died in Ireland. B., his executor, proved his will in Ireland. B. died, and C, his executor, proved his will in Ireland and had the Irish grant re-sealed in the principal registry of the Court of Probate in England:*—Held, *that the chain of representation was not continued, and that C. was not entitled to a grant of administration of the personal estate and effects in England of A.'s wife, who predeceased her husband.*

Bridget Gaynor, late of Athlone, in the county of Westmeath, Ireland, died intestate in 1841, leaving William Gaynor, her lawful husband, her surviving. She had no property in possession at the time of her decease, but was entitled to a sum of 200*l.* on the death of Barbara Smith, who died in December, 1863.

William Gaynor died in 1848, without having taken out letters of administration of his wife's personal estate and effects, and by his will appointed John Gaynor sole executor and residuary legatee. John Gaynor proved the will in the Prerogative Court of the Archbishop of Armagh, in Ireland, and died in 1865, leaving a will whereof he appointed James John Gaynor, George Atkinson and William Stanley executors. The executors proved the will in Ireland in September, 1865, and in May, 1869, the Irish probate was re-sealed in the principal registry of the Court of Probate in England.

M'Mahon now moved the Court to grant letters of administration of the personal estate and effects of Bridget Gaynor to William Stanley, executor of John Gaynor. He submitted that the chain of representation was complete, and referred to *Williams on Executors*, vol. 1, 5th edit., 274; *Shaw* v. *Storton* (1 Freem. 102); *M'Mahon* v. *Rawlings* (16 Sim. 429); *Fowler* v. *Richards* (5 Russ. 39); *In the goods of Powell* (3 Hagg. Eccl. 195); *In the goods of John Owen* (2 Robert. 561); *Jermyn* v. *Baxter* (5 Sim. 568); *Jossaume* v. *Abbott*

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(15 Sim. 127); *Williams* v. *Bland* (2 Col. 575); *Twyford* v. *Trail* (7 Sim. 92); and *In the goods of Tucker* (2 Sw. & Tr. 123).

Cur. adv. vult.

Judgment was delivered (*Aug.* 5) as follows:

LORD PENZANCE.—An application was made to the Court on Tuesday last for a grant in this case. The intestate, Bridget Gaynor, was the wife of William Gaynor. She predeceased him, and William Gaynor died in 1848, before this Court was established. William Gaynor made a will, whereof he appointed John Gaynor executor. John Gaynor proved the will in the Prerogative Court of Armagh, in Ireland, but did not prove the will in England. He died, having made his will, by which he appointed three persons his executors. They have proved, and they now represent him, and this is an application on their part for a grant of administration of the estate of the deceased wife of William Gaynor, the first testator. The objection which was made to the grant in the registry was in conformity with the practice of the Court. The applicant being the executor of John Gaynor, and John Gaynor never having proved the will of his testator in this country, it was said that the chain of representation was broken. It was insisted upon the other side that the effect of John Gaynor having proved the will in Ireland, although it gave him no power over assets in England, was yet sufficient to continue the chain of representation, and that is the question for the Court to consider. Now, after the best consideration that I have been able to give to the case, I have come to the conclusion that the applicant is not entitled, and that the chain of representation is not continued. The matter may be simplified by considering it as if it arose during John Gaynor's life. Mrs. William Gaynor having died, her property passed to her husband. He died after having made his will, whereof he appointed John Gaynor executor. John Gaynor proved the will in Ireland. Question: Can he take a grant of administration of the goods of Mrs. William Gaynor without first proving William Gaynor's will in this country? And it seems to me that he cannot, for after all this system of taking the grant of probate to form the chain of representation is in fact nothing but following the interest. Under the Irish probate, John Gaynor had no control over the effects of William Gaynor, his testator, in England. That grant gave him no power to deal with such assets, and could certainly give him none. At the time of William Gaynor's death he was possessed of assets in England, namely, his wife's assets; and therefore if John Gaynor wished to possess himself of those assets he must have taken a grant of probate of his testator's will in this country. Having obtained no such grant, he was entitled to no control over them. His executors cannot stand in a better position than he stood in. Whatever rights they have are transmitted rights. But if he had no rights himself—if he could not come to this Court and ask for this grant, *a fortiori* those to whom he has transmitted his rights cannot do it. There are a great many cases that throw considerable doubt upon the matter, but it seems to me that in principle the case of *Twyford* v. *Trail*—the marginal note in which runs thus—"A. died in India. B, one of his executors, proved the will in India. B. died, and C, his executor, proved his will in England. C. is not the personal representative of A."—decides the question with which we are now dealing. It was suggested that some sort of difference existed between the full rights of an executor, with which it was conceded the party here was not clothed, seeing that he had only taken the grant in Ireland, and a certain sort of partial rights sufficient to continue the chain of representation. The Court, with the object of avoiding superfluous grants, has very much considered that view of the case, to see if it rests upon any solid foundation, but I am unable to ascertain that it does. Therefore, I think that in this case the grant cannot go as moved for. The applicant, however, will have no difficulty in getting a grant, because it turns out that John Gaynor, as well as executor, was also residuary legatee, and therefore through that interest he will be entitled to take the grant in the ordinary way.

Grant of letters of administration refused.

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PROBATE. April 27, 1869.

CLEARE AND ANOTHER v. CLEARE.

38 L. J. P. 81; L. R. 1 P. & D. 655; 20 L. T. 497; 17 W. R. 687.

Practice—Proof in Solemn Form—Plea that Deceased did not know and approve of Contents of Will—Burden of Proof—Right to Cross-examine—Notice under Rule 41.—Liability for Costs.

WILL.—*The burden of proving that a testator knew and approved of the contents of his will lies upon the party propounding it. A party who pleads that the deceased did not know and approve of the contents of his will may therefore upon that question cross-examine the witnesses produced by the plaintiff without being liable to costs, if he has given the notice required by rule* 41.

Charles Cleare died on the 7th of December, 1868, leaving a will. After directing the payment of debts, funeral and testamentary expenses, the will contained the following clause: "I give, devise and bequeath all the residue of my real and personal estate to H. Cleare and G. F. Forster, in trust, to apply to such uses as I may hereafter instruct them; but in case no such further instructions are left, then I give the same to them absolutely, trusting in their Christian love that they will carry out my wishes as they have been verbally explained to them; and I hereby appoint H. Cleare and G. F. Forster executors."

The plaintiffs, as executors, filed a declaration propounding the will in the usual form:

The defendant, the brother and next-of-kin of the deceased, pleaded, 1, that the will was not duly executed; 2, incapacity; 3, that the deceased at the time of the execution of the said alleged will did not know and approve of the contents thereof. The following particulars were filed as to the case intended to be set up under the third plea:

"The substance of the case which the defendant intends to set up is, that the alleged will was not read over and explained to the deceased before its execution, and he was not aware that its effect was to give the whole of his property absolutely to the plaintiffs."

The defendant with the pleas also gave notice under rule 41. of Rules and Orders, 1862, that he merely required the will to be proved in solemn form, and that if both the attesting witnesses were produced by the plaintiffs he only intended to cross-examine the witnesses produced in support of the will.

Bayford moved the Court to order that the third plea should be struck out.—The defendant having given notice that he intends only to cross-examine the witnesses called by the plaintiffs, he has no right to raise the question whether the deceased knew and approved of the contents of the will. He can only cross-examine those witnesses as to matters the burden of proving which lies upon the plaintiffs, viz., due execution and capacity. The burden of proving that the deceased knew and approved of the contents of his will does not lie upon the plaintiffs. When they have proved that the will was duly executed and that the deceased was competent, they have done all that is required by the Wills Act to constitute a valid will; and unless there be special circumstances in the case the presumption would be that the deceased knew and approved of the contents of the will. If there be such special circumstances the onus of proving them lies upon the defendant. The third plea is not a traverse of any allegation in the declaration, and the onus of proving the issue raised by it therefore does not lie on the plaintiffs.

[LORD PENZANCE.—It is simply a question of the burden of proof, and it stands upon the same footing as the question of capacity. The law presumes that everyone is capable of making a will, but directly the defendant gives any evidence, by cross-examination or otherwise, that the deceased was of unsound

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mind the burden of proof shifts, and the onus lies on the parties propounding the will to satisfy the Court that he was not; as was laid down in *Sutton* v. *Sadler* (3 Com. B. Rep. N.S. 87; 26 L. J. C.P. 284).]

The third plea does not stand upon the same footing as the plea of incapacity. If the third plea is not struck out, the notice ought to be withdrawn, for in this case the will is in a peculiar form, and no written instructions were left by the testator. The questions which must arise under the third plea will involve a long and expensive inquiry, which the plaintiffs ought not to be compelled to undertake except upon the usual terms that the defendant, if unsuccessful, must pay costs. He cited *Ireland* v. *Rendall* (35 L. J. Pr. & M. 79); *Hastilow* v. *Stobie* (35 L. J. Pr. & M. 18); *Goose* v. *Brown* (1 Curt. 707); *Barry* v. *Butlin* (2 Moore, P.C. 80); and 1 *Williams on Executors*, edit. 1867, 337.

Searle, for the defendant.—The application is premature, for it amounts in reality to a question of costs, which can best be settled at the hearing. The proposition relied on by the plaintiffs is contrary to principle and authority. It is not true that the plaintiffs are only bound to prove due execution and capacity; they are also bound to shew, as alleged in the declaration, that the instrument propounded is the *will* of the deceased. A traverse of that allegation was held by Sir C. Cresswell to be a good plea, and under such an issue the plaintiffs would have been bound to give some evidence that the deceased knew and approved of the contents of the will. The third plea is a novel substitution for that traverse. According to the practice of the Ecclesiastical Courts, the plaintiffs were bound to produce the attesting witnesses, and the defendant might put any question to them as to the *factum* of the will, viz., as to the instructions for the reading over or custody of the will, without being liable to pay costs. If he should go further, and unsuccessfully impute fraud, undue influence or other improper conduct, he would be liable for costs. He cited *Barry* v. *Butlin* (2 Moore, P.C. 80); *Goodacre* v. *Smith* (36 L. J. Pr. & M. 43; L. R. 1 P. & M. 359); *Croft* v. *Day* (1 Curt. 782); and *Leeman* v. *George* (37 L. J. Pr. & M. 13; L. R. 1 P. & M. 542).

Bayford, in reply, cited *Barry* v. *Butlin* (2 Moore, P.C. 80).

Cur. adv. vult.

Lord Penzance.—This was an application to strike out a plea, or, at any rate, a notice filed by the next-of-kin. The next-of-kin having traversed the due execution of the will and the capacity of the deceased, further pleaded that the deceased did not know and approve of the contents of the will, and gave notice that he only intended to cross-examine the witnesses produced by the plaintiffs in support of the will. I hold it to be clear, since the careful decision in the case of *Sutton* v. *Sadler* (3 Com. B. Rep. N.S. 387; 26 L. J. C.P. 284), that in all cases, whether through the medium of a presumption unrebutted, or of positive evidence to that end, the party who puts forward a document as the will of a testator must establish the fact that the testator was competent to make a will when he executed it.

This competency forms part of the proposition that a will was made. For if there is no competency, no testable capacity, there can be no will. I am of opinion that the testator's knowledge of the contents of his alleged will stands upon the like footing. That he knew and approved of these contents is a proposition implied in the assertion that a will was made by him. For if a man were to sign a paper of the contents of which he knew nothing, it would be no will—*Hastilow* v. *Stobie* (35 L. J. Pr. & M. 18).

That the testator did know and approve of the contents of the alleged will is therefore part of the burden of proof assumed by every one who propounds it as a will. This burden is satisfied, *prima facie*, in the case of a competent testator by proving that he executed it. But if those who oppose it succeed, by a cross-examination of the witnesses or otherwise, in meeting this *prima facie* case, the party propounding must satisfy the tribunal affirmatively that the testator did really know and approve of the contents of the will in question

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before it can be admitted to probate. It follows from this reasoning that the next-of-kin may cross-examine the witnesses brought to support a will upon this matter, as well as upon the capacity of the testator or the execution of the will, without exposing themselves to costs, provided they give the notice required by the rules.

This is sufficient for the decision of this case. But on consulting the authorities in the Prerogative Court, it appears that the liberty of the next-of-kin to cross-examine the witnesses upon proof made in solemn form, without exposing themselves to costs, was not confined in all cases to those matters the proof whereof lay on the party propounding. And it is open to question, therefore, whether the same system ought not to prevail in this Court.

PROBATE. May 4, 1869.

In the goods of IRVING.

38 L. J. P. 83; L. R. 1 P. & D. 658; 20 L. T. 684.

Administration Bond—Failure to duly Administer—Case in which Bond not assigned for Purpose of suing Surety.

WILL.—*An administrator swore the estate under 20l., and gave the usual bond with A. for surety. Subsequently, he re-swore the estate under 600l., and gave a fresh bond with two other sureties. He then became bankrupt without having duly administered. The Court ordered the second bond to be assigned, but refused to order the assignment of the first until after the action on the second bond should be decided, it appearing that the estate had been duly administered to the amount for which the surety to the first bond was liable.*

F. C. Irving died, in July, 1867, intestate, a spinster, without parent. Her nephew R. B. Johnston took out letters of administration in December, 1867, and made oath that her personal estate did not amount in value to 20*l.* W. A. Ward joined with him in a bond in the penal sum of 40*l.* for the due administration of the effects of the deceased. Johnston afterwards re-swore the value of the deceased's estate as under 600*l.*, and, on the 24th of March, 1868, he executed a fresh bond in the penal sum of 1,200*l.*, J. H. Nuttel and T. C. Hutton being sureties. At the time of her death the deceased owed 8*l.* to Messrs. Hope & Mackay, who were also creditors to the amount of 18*l.* for rent and 13*l.* 13*s.* for the funeral expenses of G. A. Irving, a brother of the deceased who survived her, and was entitled to a share in her estate, no part of which had been received by him.

In June, 1868, Johnston received on account of the deceased's estate a sum of money, out of which, after payment of debts and funeral expenses, there would have remained 290*l.* for distribution. Johnston neither paid the debts nor distributed the estate amongst the parties interested, and, in August, 1868, he was adjudicated bankrupt on his own petition. There was no fund out of which the claims on the deceased's estate could be satisfied except by suing the sureties to the administration bonds. Johnston had not filed an inventory or account. An order had been made by this Court calling upon the sureties to the two bonds to shew cause why the bonds should not be assigned for the purpose of being sued upon. The order was served upon two of the sureties. Hutton could not be found. Ward appeared and, in an affidavit, stated that he had executed the bond upon the faith of Johnston's statement that the value of the deceased's estate did not exceed 20*l.*; that he was afterwards requested to execute a bond for a larger amount, but refused, and was then told that the bond he had executed had not been used and was of no use; and that he executed the bond in the belief that after Johnston had paid

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the expenses of taking administration there would only remain 10*l.*, for the due administration of which he would be liable.

Dr. Spinks, for Ward.—The Court ought not to order the first bond to be assigned unless a *prima facie* case is made out that, if it be sued on, the plaintiff will succeed. Ward's liability has been discharged, for as far as he is concerned the estate has been duly administered by payment of the expenses of obtaining administration, which exceed 10*l.*, the amount for which he undertook to be liable.—He cited *In the goods of Stark* (35 L. J. Pr. & M. 42).

Searle, for the creditors.—Ward's liability on the first bond cannot be discharged or increased by the execution of the second. His liability is limited to the amount of the first bond. He can set up any answer that he may think fit in the action, and the Court ought therefore not to refuse to assign the bond.

LORD PENZANCE.—I think it will be more equitable and fair to proceed first against the sureties to the second bond. I shall therefore order the second bond to be assigned, but hold my hand as regards the first bond until I know the result of the action.

PROBATE. May 11, 1869.

In the goods of ALLCHIN.

38 L. J. P. 84; L. R. 1 P. & D. 664; 20 L. T. 757.

Practice—Amendment of Grant—Probate of Will wrongly Dated—Amendment of Probate by stating true Date.

WILL.—*An original will and the copy of it in the probate bore a wrong date. The Court ordered the probate to be amended by stating the true date.*

Administration with the will of C. Allchin annexed was granted in August, 1865. The will was executed on the 11th of January, 1864, but by mistake the original will and the copy of it in the letters of administration bore date the 11th of January, 1863. The error was discovered during the progress of a suit in Chancery to administer the estate of the deceased, and Vice Chancellor James suspended the proceedings in order that the letters of administration might be amended.

R. Pritchard, for the administrator, moved the Court to order that the date in the will and in the copy of the will in the grant should be rectified, or that the true date of the execution of the will should be entered or notified upon the proceedings filed in the registry and upon the letters of administration.

Bayford appeared for the widow and two children of the deceased.

LORD PENZANCE.—I think it is the function of this Court to ascertain the date of the execution of a will as well as the fact of its execution. I am satisfied that the true date of the will is "January 11th, 1864," and I shall order the grant to be amended so as to shew on the face of it that the will was executed on that day.

PROBATE. May 25, 1869.

In the goods of MARY ANN McVICAR.

38 L. J. P. 84; L. R. 1 P. & D. 671; 20 L. T. 1013; 17 W. R. 832.

Will, Execution of Power of Appointment by—Subsequent Marriage—Revocation—Persons entitled as Next-of-Kin—1 Vict. c. 26. s. 18.

WILL.—*A. by his will gave a power to B. to dispose by will of certain property, which, in default of appointment by her, was to devolve on the person or persons who, at her decease, should be her "next-of-kin." B, in pursuance*

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of such power, executed a will in favour of C, whom she afterwards married, but who died in her lifetime:—Held, *that B.'s will fell within the exception of the 18th section of the Wills Act, and was therefore not revoked by her subsequent marriage.*

Mary Ann McVicar, late of Waterloo, Lancashire, widow, died on the 3rd of April, 1869, leaving her surviving Nicholas Magraw, her lawful uncle and one of her next-of-kin. Nicholas Magraw the elder, by his will gave and devised to the trustees named therein (Morris Hore and Edmund Joseph Hore, who were also appointed executors) certain real and personal property, upon trust to permit his great-niece, Mary Ann Bagraw (afterwards Mary Ann McVicar), to have the use and enjoyment thereof during her life, and from and after her death in trust for her children, and in case there should be no child, in trust for such person or persons, and in such manner generally as she should by her will appoint, and in default of such appointment in trust for the person or persons who, at her decease, should be her "next-of-kin."

On the 14th of January, 1863, Mary Ann McVicar, then Mary Ann Magraw, duly executed her last will and testament in writing; in which, after reciting the power given to her by the will of her great-uncle, and referring to her then intended marriage, she directed and appointed that the trustees or trustee for the time being of the will of her said great-uncle, Nicholas Magraw, should stand seised and possessed of the said trust property, upon trust to raise and pay thereout to her old servant Margaret, the wife of Oliver Petty, a sum of 50*l*., and that subject thereto the said trustees should stand seised and possessed of all and singular the said trust property, upon trust for Duncan McVicar, his heirs, executors, administrators and assigns, absolutely, according to the nature and quality thereof respectively; and she appointed the said Duncan McVicar sole executor. After the execution of this will Mary Ann Magraw intermarried with the said Duncan McVicar, who died in her lifetime. Mary Ann McVicar died possessed of considerable personal estate in her own right, and in addition to the property over which she had a power of appointment.

Bayford moved the Court to decree administration with the will of Mary Ann McVicar annexed to Nicholas Magraw, her lawful uncle and one of her next-of-kin. He submitted that the will came under the exception of the 18th section of the 1 Vict. c. 26, and was not therefore revoked by the subsequent marriage of the deceased. The words "next-of-kin," used *simpliciter*, are to be taken to mean "nearest of kin," and not those entitled under the Statute of Distributions. He referred to *Elmsley* v. *Young* (2 Myl. & K. 780); *Jarman on Wills*, vol. 2, p. 94; *In the goods of Sir C. A. Fitzroy* (1 Swa. & Tr. 133); *and In the goods of Charlotte Fenwick* (36 L. J. Pr. & M. 54; L. R. 1 P. & D. 319).

LORD PENZANCE.—That, I think, is the true view of the case. In *Elmsley* v. *Young* (2 Myl. & K. 780), when decided on appeal, it was held that the words "next-of-kin," taken alone, do not imply the same class of persons as the next-of-kin under the Statute of Distributions. In this case the will under which the power was given provided that, in default of appointment under the power, the property should go to those who, at the time of the death of the deceased, should be her "next-of-kin." The only question therefore is, whether, under these circumstances, adverting to the terms of the 18th section of the Wills Act, the property in default of appointment would pass to her heir, customary heir, executor or administrator, or the person entitled as her next-of-kin under the Statute of Distributions. But when once you get so far as this, that the words "next-of-kin" as ordinarily used in a settlement or will mean something different from next-of-kin under the Statute of Distributions, it is quite plain that in this case the property would not go in default of appointment to the persons who would be entitled under the statute. The will therefore falls within the exception of the 18th section of the Wills Act, and

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is not revoked. Before, however, administration can issue to the next-of-kin, the trustees of Mr. Magraw's will, who are residuary legatees in trust under the will of Mrs. McVicar, must renounce.

PROBATE. July 27, 1869.

In the goods of JOHN SMITH.

38 L. J. P. 85; L. R. 1 P. & D. 717; 21 L. T. 340; 17 W. R. 1110.

Testamentary Paper — Condition — Validity dependent upon Option of Individual.

WILL.—*A. made a will and codicil. He subsequently executed a second codicil, which concluded as follows: "I give my wife the option of adding this codicil to my will or not, as she may think proper or necessary." The widow, who was also sole executrix, having exercised her option by refusing to recognize the validity of the second codicil, the Court decreed probate of the will and first codicil only.*

The deceased died on the 3rd of June, 1869, having made and executed a will and codicil, bearing date respectively the 24th of August, 1844, and the 21st of February, 1860. On the 15th of May, 1867, he with his own hand drew out and executed a paper, which he described as a second codicil to his last will and testament, and this concluded as follows:

"I give my wife the option of adding this codicil to my will or not as she may think proper or necessary."

The widow, who was also the sole executrix appointed by the will, in an affidavit, stated that she had decided not to add the paper to the testator's will or to avail herself of the powers intended to be given to her by it.

Dr. Spinks accordingly moved the Court to decree probate to issue of the will and first codicil only.

LORD PENZANCE.—There is no doubt of this proposition that the mere fact of a man having executed a paper in the form of a will does not necessarily make that paper testamentary. There must be the *animus testandi*. A man must intend the paper to operate as a testamentary instrument to make it such. What the testator has here done is this: he has endeavoured to leave to his wife the right of saying whether this paper shall be testamentary or not. He has not said that its testamentary effect should depend on his disposition at the time he signed the paper, but on an event that should happen after his death, namely, the determination of his wife to treat it as testamentary. It is the business of this Court to carry out a man's intentions so far as it can be law; and the only question in the case is whether there is anything illegal in the testator's object. It seems to me that there is not. It is quite true that a testator cannot confide to another person the right of making his will after his death, nor can he leave in the hands of another the power of revoking a paper which is testamentary at the time of his death, because the statute says the revocation must be done in his presence; but I do not know of anything in the statute which would prevent a testator from saying that the question whether a paper shall be testamentary or not shall depend upon an event to happen after his death, and that event may be the assent of an individual. I have looked into the books for a case bearing on the point, and the only one I can find is *Parsons* v. *Lanoe* (1 Ves. sen. 190), which, however, I think is conclusive that such a thing can be done. I think in this case that the testator's object was lawful, and as the widow has exercised her option by refusing to recognize the validity of the second codicil I shall decree probate of the will and first codicil only.

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IN THE PRIVY COUNCIL. Nov. 26, 30, 1868.

THE OWNERS OF THE SHIP "CHETAH," *appellants;* THE OWNERS, MASTER AND CREW OF THE VESSEL "ANNIE GRANT," *respondents.* "THE DUBLIN" AND OTHER STEAMERS, *appellants;* THE OWNERS OF THE SHIP "CHETAH," *respondents.**

38 L. J. Adm. 1; L. R. 2 P.C. 205; 5 Moo. P.C. N.S. 278; 16 E. R. 520; 19 L. T. 621.

See, *Reid* v. *Aberdeen Steam Co.*, [1869] E. R. A.; 38 L. J. Adm. 5; L. R. 2 P.C. 245; 19 L. T. 678; 17 W. R. 209 (P.C.); "*The Woburn Abbey*," 1870, 21 L. T. 707 (P.C.). Discussed, "*The Amérique*," [1875] E. R. A.; L. R. 6 P.C. 468; 31 L. T. 854; 23 W. R. 488 (P.C.).

Salvage—Increasing and Diminishing Amount—Practice.

SHIPPING.—*Although a party who seeks, by appeal to the Judicial Committee, to increase or diminish the remuneration awarded in the discretion of a Judge before whom a case of salvage is brought undertakes a difficult task, yet the Judicial Committee will diminish as well as increase the quantum of salvage, where the amount awarded is exorbitant or manifestly excessive.*

These were two appeals from a decree of the Judge of the High Court of Admiralty of England.

The causes from which these appeals were brought arose out of certain salvage services rendered by the schooner "*Annie Grant*" and by the steamers "*Dublin*," "*Tintern*," "*William Wallace*," "*Gipsy*" and "*Camilla*," to the ship "*Chetah*" and her cargo.

The circumstances of the case were as follows: The "*Chetah*," a ship of 759 tons register, manned by her master and a crew of twenty-one hands, sailed from Macao in China, with a general cargo for London. The ship, cargo and freight were of the value of about 50,000*l*. On the 17th of March, 1866, the "*Chetah*," when in latitude 48 deg. 46 min. N. and longitude 9 deg. 39 min. W., met with a gale of wind, in which her rudder-stock was broken and her rudder broke adrift, and on the following day was lost. A jury-rudder was constructed by the crew of the "*Chetah*." In the meantime the "*Chetah*" was steered by means of her sails.

On the 22nd of March, at about 4 p.m., whilst the crew of the "*Chetah*" were employed in shipping the jury-rudder, the schooner "*Annie Grant*" came to the "*Chetah*" and offered to assist her; and the master not having ascertained that the jury-rudder would enable him to steer, arranged that the "*Annie Grant*" should lie-by during the night, and that, in the event of the jury-rudder not proving efficient, the "*Annie Grant*" should tow the "*Chetah*" into the English Channel. The following day the jury-rudder broke adrift, and at about 6 a.m., the weather having become moderate, the "*Annie Grant*" came under the lee of the "*Chetah*," and it was arranged that the "*Annie Grant*" should take the "*Chetah*" in tow, and at 9 a.m. a hawser was made fast between the vessels, and the "*Annie Grant*" endeavoured to tow the "*Chetah*"; but in a short time it was found that the "*Annie Grant*" would not steer, and she got down on the starboard-quarter of the "*Chetah*," and the bridle parted. The "*Annie Grant*" remained by the "*Chetah*" until 1.30 p.m., when she again made fast to and commenced to tow her, but in a short time became unmanageable and fell astern on to the port-quarter of the "*Chetah*," and carried away the spritsail-yard of the "*Chetah*" and damaged the hawser. The "*Annie Grant*" again made fast to the "*Chetah*," which, with the aid of her jibs and by working her yards, succeeded in steering after her until 6 a.m.

* Present, the Right Hon. Lord Chelmsford, Sir J. W. Colvile, Sir E. V. Williams, Lord Justice Wood and Lord Justice Selwyn.

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of the 24th of the said month, when the " *Annie Grant* " became unmanageable and went astern. The ends of two other hawsers were then got on to the damaged hawser, and at 10 a.m. the " *Annie Grant* " again went ahead and got a spring on the hawser. She continued her effort to tow the " *Chetah* " until 11.40 a.m. of the 25th of the said month, when the Bishop's Rock Lighthouse was sighted. The weather being too boisterous for towing, the " *Annie Grant* " remained by the " *Chetah* " until 4 p.m. of the 26th, when the mate of the " *Annie Grant* " boarded the " *Chetah*," and it was arranged that the " *Annie Grant* " should still remain by the " *Chetah*," which she did till the following day, when the mate of the " *Annie Grant* " again boarded the " *Chetah*," and it was arranged that the " *Annie Grant* " should make fast astern of the " *Chetah* " and endeavour to steer her. At 9 a.m. of the said 27th day all sail was made on the " *Chetah*," and the " *Annie Grant* " having been made fast astern to her, the " *Chetah* " proceeded under sail, towing the " *Annie Grant* " towards the coast of Ireland until 4 p.m., when Cruach's Hill was sighted, bearing north by west, and the " *Chetah* " stood on, towing the " *Annie Grant* " until 9.30 p.m., when the Hook of Waterford Light was made out bearing north by west, and the Conningbeg Light was also made out bearing north-east by north, and at 10 p.m. sail was shortened, and at midnight the " *Chetah* " wore to the south, and stood off shore, still towing the " *Annie Grant* " until 4 a.m. of the following day, when she again wore, and stood in towards the land until 9 a.m., when a screw steamer, called the " *Dublin*," was seen coming out of Waterford, and was signalled to come to the " *Chetah*," which she did, and at 10 a.m. passed a rope to the " *Chetah*," and began to tow her and the " *Annie Grant* " towards Waterford. In a short time, it being found that the " *Dublin* " was not powerful enough to tow the " *Chetah* " and " *Annie Grant* " to Waterford, it was arranged that the " *Chetah* " should bring up, and that the " *Dublin* " should return to the shore for further assistance, and the " *Chetah* " accordingly let go an anchor, and brought up. The " *Chetah* " remained brought up, with the " *Annie Grant* " hanging astern of her, until 5.40 p.m., when the " *Gipsy* " came to the " *Chetah* " and made fast to her. The " *Chetah* " then slipped from her anchor and chain, and the " *Gipsy* " then proceeded to tow her, with the " *Annie Grant* " astern. The " *Gipsy* " so towed the " *Chetah* " until 9 p.m., when the " *Dublin* " again came to her, but finding her in tow of the " *Gipsy*," kept off at a distance from her. At 10 p.m. the steamship " *Camilla* " came and attempted to make fast to the " *Chetah*," but did not succeed in doing so, and at 10.30 p.m. the two steam-tugs, the " *Tintern* " and " *William Wallace*," came and made fast alongside the " *Chetah*," and began to assist in steering her after the " *Gipsy*." At this time the " *Gipsy* " had passed inside the Hook Light at Waterford. The " *Chetah* " proceeded in tow of the " *Gipsy* " with the " *Annie Grant* " astern of her, and the said two steam-tugs alongside, until shortly before midnight, when she let go her anchor, and the services of the " *Annie Grant* " terminated. Salvage suits were instituted on behalf of the owners, master and crew of the schooner " *Annie Grant*," and of the owners, masters and crews of the steam-vessels " *Dublin*," " *Tintern*," " *William Wallace*," " *Gipsy* " and " *Camilla* " against the " *Chetah*," her cargo and freight. Both suits were heard on the 20th of December, 1867.

The learned Judge of the Admiralty Court awarded to the master and crew of the " *Annie Grant* " by way of salvage for their services, the sum of 3,150*l.*, together with the sum of 535*l.* in respect of alleged damage and loss sustained by the owners of the " *Annie Grant* " in rendering the services. He also awarded to the steamers for their services sums of money amounting in the whole to 355*l.*

From this judgment the present appeals were brought, on the grounds that the amount awarded to the owners, master and crew of the vessel " *Annie Grant* " was excessive; and that the amounts awarded to the owners, masters and crews of the five steam-tugs were inadequate.

Dr. Deane and *Clarkson* for the " *Chetah*."

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Milward and *Lushington* for the steam vessels "*Dublin*," "*Tintern*," "*William Wallace*," "*Gipsy*" and "*Camilla*."

Dr. Spinks and *Dr. Pritchard* for the "*Annie Grant*," referred to "*The Neptune*" (12 Moore, P.C. 346); "*The Clarisse*" (12 Moore, P.C. 340); "*The Messenger*" (Swabey, 191); "*The Andrew Wilson*" (9 Jur. N.S. 474); "*The Harriet*" (Swabey, 218).

LORD CHELMSFORD delivered the judgment of their Lordships.—These appeals are from the sentence or decree of the High Court of Admiralty in causes of salvage for services rendered by a schooner called the "*Annie Grant*" and by five steam vessels, called respectively the "*Dublin*," the "*Camilla*," the "*Gipsy*," the "*Tintern*," and the "*William Wallace*," to a vessel called the "*Chetah*," of the value, with her cargo and freight, of 50,000*l*.

The learned Judge of the Court of Admiralty awarded to the "*Annie Grant*" a sum of 3,150*l*. for her services, and, in addition, a sum of 200*l*. for damages sustained, and 335*l*. for detention of the vessel while rendering the services, making in the whole the sum of 3,685*l*.; and for the services of the five steam vessels he awarded a sum of 355*l*., which he distributed amongst them in certain proportions.

The owners of the "*Chetah*" have appealed from the decree in favour of the "*Annie Grant*," on the ground of the amount awarded being excessive. And the owners, masters and crew of the five steam vessels have appealed on the ground that the sum of 355*l*. is wholly an inadequate reward for their services.

In dealing with these cases their Lordships have felt some degree of embarrassment, in consequence of the unwillingness which has been invariably shewn by this committee to interfere with the judicial discretion which has been exercised in questions of salvage where the quantum awarded was alone the subject of appeal.

Thus, in the case of "*The Carrier Dove*" (2 Moore, P.C. 243), Lord Justice Knight Bruce, in delivering the opinion of their Lordships, said, "It has never been the rule or practice of the Committee to enter into the question of quantum where there has been nothing (to use a familiar expression) to shock the conscience, nothing gross, nothing extravagant." In the case of "*The Clarisse*" (12 Moore, P.C. 340), the same learned Judge, expressing the opinion of the Judicial Committee in less forcible terms, said, "It is a settled rule, and one of great utility, particularly with reference to cases of this description, that the difference ought to be very considerable to induce the Court of Appeal to interfere upon a question of mere discretion."

In the case of "*The Cuba*" (Lush. 14), which was an appeal from an award of salvage by Justices of the Peace, Dr. Lushington said, "The question for me to decide is, whether the sum awarded by the Justices is so exorbitant, so manifestly excessive, that it would not be just in me to confirm it."

And, lastly, in the case of "*The Fusileer*" (3 Moore, P.C. 5), it was said, "Their Lordships would always be slow to disturb an award of salvage by the learned Judge of the Court of Admiralty, on the ground of his having given too large a sum to the salvors, unless they were satisfied beyond all doubt that he had made an exorbitant estimate of their services."

These cases shew that a party who seeks by appeal to increase or to diminish the remuneration which, in the discretion of a Judge before whom a case of salvage is brought, is a proper estimate of the value of the services rendered, undertakes a very difficult task.

It was agreed by the counsel on both sides that no case was to be found where, upon an appeal from a decree for salvage services, the amount awarded had ever been reduced. The deduction which the counsel for the "*Annie Grant*" rather left to be drawn than drew himself, from the absence of such precedents, seems to have been that this Committee would never disturb the award of the Judge in this direction. But there are cases in which their Lordships have increased the amount awarded for salvage services, on the

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ground that the Judge had formed too low an estimate of the value of such services; and, in principle, there can be no difference between increasing and diminishing an amount awarded in these cases, both being equally an interference with judicial discretion. The fact of no instance being found of the reduction of a decree for salvage upon appeal may possibly be accounted for by the very natural desire which must always be felt to accept the most liberal estimate of services, which are usually of a highly meritorious character, and generally attended with peril of life and property. But however this may be, to assume, from there being no case in which a decree for salvage services has been reduced in amount upon appeal, that it ought never to be done, would be to draw an inference in opposition to the authorities previously mentioned; which, stating negatively that the Committee will not interfere with the discretion of a Judge as to the quantum of salvage, where there has been nothing exorbitant, or manifestly excessive, in his estimate of the value of the services rendered, necessarily imply that where such excess or exorbitance exists, they will exercise their own judgment as to the proper remuneration to the salvors, and reduce it to a just and reasonable amount.

After the most careful consideration of the circumstances upon which the claim of the "*Annie Grant*" is founded, and with an anxious desire that the salvors should receive not merely a fair but a liberal remuneration for their services, their Lordships have come to a conclusion as to the value of the services rendered widely differing from that of the learned Judge of the Court of Admiralty. The first and most important question in cases of this description is the degree of danger to which the vessel was exposed, and from which she was rescued by the salvors. The learned Judge formed his opinion of the peril in which the "*Chetah*" was originally placed upon evidence to which the appellants could have no possible objection, viz., the protest of her master. But not being assisted with the advice of nautical assessors, he seems to have considered that that document described a state of things in which the "*Chetah*" was in imminent danger of being lost, unless prompt assistance had been afforded. Possibly, their Lordships, reading the protest by the light of their own understandings, might have arrived at the same conclusion with the learned Judge; but they are advised by the nautical gentlemen, to whose knowledge and experience they have referred, that the description of the condition of the "*Chetah*" at the time when the "*Annie Grant*" tendered her services by no means indicates that degree of peril which the learned Judge seems to have supposed. She had, indeed, lost her rudder; but this loss might have been supplied by some temporary expedient, for which there were materials on board.

The most important element in a claim for high salvage reward, viz., the imminent peril of destruction of the vessel to which assistance is rendered, is therefore wanting in this case.

Again, the mode in which the services of the "*Annie Grant*" were first applied, appears to their Lordships to detract considerably from their merit. They are advised that it was a very injudicious course to attempt to tow the "*Chetah*," being without a rudder, with a small schooner like the "*Annie Grant*." That this opinion is well founded is proved by the fact that, in the course of the towing, the "*Chetah*" over-reached the "*Annie Grant*," and occasioned part of the damage which she sustained, and for which a compensation has been awarded. The learned Judge of the Admiralty, adverting to this attempt at first to tow the "*Chetah*," says, "It may be, for all I know, that this was an imprudent attempt, and that greater nautical skill and knowledge would have told the "*Annie Grant*" that it would turn out, as it did, a failure." He adds, indeed, that "no remonstrance was made on behalf of the "*Chetah*," but, on the contrary, the "*Annie Grant*" seems to have acted under the direction of the "*Chetah*." Whether this was so or not, it is clear, that as salvage is a reward for benefits actually conferred, not for a service attempted to be rendered, all the period during which the "*Annie Grant*" was

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unsuccessfully endeavouring to tow the "*Chetah*," should have been left out of the account in estimating her merit and the value of her services.

With respect to the risk incurred by the "*Annie Grant*" (which is always a circumstance to be considered in determining the amount of a salvage reward), it is observable that the greatest peril to which she was exposed was the consequence of her own injudicious and imprudent act of taking the "*Chetah*" in tow.

The really meritorious services of the "*Annie Grant*" commenced when, abandoning the repeated unsuccessful attempts to tow the "*Chetah*," she was made fast to the "*Chetah's*" stern, in order that she might act as a steerage-power upon her. Unless this course had been adopted the "*Chetah*" would have been unmanageable at a time when, being near the Irish coast, she would have been exposed to the greatest danger. But with the assistance thus afforded by the "*Annie Grant*," the "*Chetah*" was enabled to wear and stand off shore, and afterwards, on the following day, to run in towards the land, so as to be able to avail herself of the services of the steam vessels whose claim is the subject of the other appeal.

That the "*Chetah*" was rescued from a situation of considerable peril by the exertions of the master and crew of the "*Annie Grant*," and by the application of proper means for securing her safety at a time when, being crippled by the loss of her rudder, she would most probably, if not inevitably, have been driven on shore, there can be little (if any) doubt, and the services of the "*Annie Grant*" have, therefore, been the means of saving very valuable property from impending destruction. That they are entitled to a high salvage reward it is impossible to deny. But their Lordships are of opinion that the learned Judge of the Court of Admiralty, acting upon his own unassisted judgment, has greatly overrated the value of the services rendered by the "*Annie Grant*," and that it is a case in which they are bound to reduce the amount awarded.

They think that if the owners, master and crew of the "*Annie Grant*" receive a sum of 1,500*l.* for the salvage services of the vessel, they will be most liberally and abundantly rewarded.

They will, therefore, recommend to Her Majesty to alter the decree of the Court of Admiralty in the case of the "*Annie Grant*," by reducing the sum of 3,150*l.* for salvage to the sum of 1,500*l.*, and to affirm the decree as to the sum of 535*l.* for the damage and detention of the vessel, and that there should be no costs of the appeal on either side.

As to the case of the steam vessels, their Lordships will humbly recommend Her Majesty to affirm the judgment of the High Court of Admiralty, and to dismiss their appeal, with costs.

IN THE PRIVY COUNCIL. Nov. 30, 1868.

JOHN REID AND OTHERS, *appellants;* THE ABERDEEN, NEWCASTLE AND HULL STEAM COMPANY, *respondents.**

("THE PRINCESS ALICE" AND "THE ALICE.")

38 L. J. Adm. 5; L. R. 2 P.C. 245; 19 L. T. 678; 17 W. R. 209.

See, "*The Glannibanta*," [1876] E. R. A.; 1 P. D. 283; 34 L. T. 934; 24 W. R. 1033 (C. A.).

Judicial Committee—Appeal—Questions of Fact—Practice.

SHIPPING.—*On an appeal to the Judicial Committee, if their Lordships find that, in the Court below, there was clear and distinct evidence upon one side, and possibly evidence which the appellants might think to be clear and*

* Present, the Right Hon. Lord Chelmsford, Sir J. W. Colvile, Lord Justice Page Wood and Lord Justice Selwyn.

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distinct on the other side, nevertheless, if the Judge in the Court below, in his discretion, having the opportunity of seeing the witnesses and observing their demeanour, has come, on a balance of testimony, to a clear and decisive conclusion, those who undertake to reverse that conclusion, on the ground that the Judge has erred in giving credence to one class of witnesses rather than to the other, undertake an almost impossible task.

This was an appeal from a decree of the Judge of the High Court of Admiralty of England.

The cause from which the appeal was brought arose out of a collision which occurred between the screw steamer "*Alice*," belonging to the appellants, and the paddle-wheel steamer "*Princess Alice*," belonging to the respondents. There were cross-actions between the same parties, arising out of the same collision. The pleadings in these two causes raised the same questions, and the cases were heard, in the Court below, at the same time and depended upon the same evidence.

The collision occurred between 6.30 p.m. and 7 p.m., on the 15th of November, 1867, in the river Tyne, at or about a place called The Narrows. The "*Princess Alice*" was coming up, and the "*Alice*" was going down the river. Both the vessels had the usual regulation mast-head and coloured side-lights exhibited and burning.

The case on the part of the "*Princess Alice*" was, that she was proceeding, under steam alone, slowly and carefully up the north side of the River Tyne, that being her proper side; that the red and mast-head lights of the "*Alice*" were seen on the port bow, and at the distance of about a quarter of a mile from the "*Princess Alice*"; that the helm of the "*Princess Alice*" was ported, and that, upon the green light of the "*Alice*" coming into view, the engines of the "*Princess Alice*" were stopped; but the "*Alice*" with her stem struck the "*Princess Alice*" with great violence on her port midships, doing her so much damage that her master was compelled to run her ashore to save her from sinking.

The owners of the "*Princess Alice*" alleged the collision to have been occasioned by the improper navigation of the "*Alice*"; and they, in particular, charged the "*Alice*" with four distinct grounds of blame: first, with not having navigated on the south side of the river; secondly, with having omitted to duly port her helm; thirdly, with having improperly starboarded; and fourthly, with having improperly neglected to slacken her speed, or to stop or reverse her engines.

The owners of the "*Alice*," on the other hand, alleged that the "*Alice*" was keeping as close along the south shore as was practicable; that the "*Princess Alice*," instead of being on the north side of the river, was improperly coming up on the south side, and even further over to that side than the "*Alice*" herself was; and that the "*Princess Alice*" brought about the collision by altering her course under a port helm, and bringing herself across the bows of the "*Alice*."

The learned Judge of the Court below delivered judgment in both cases, pronouncing the "*Alice*" to have been alone to blame for the collision, and decreed accordingly.

From this judgment the present appeal was brought.

The Queen's Advocate (Sir Travers Twiss) and *Butt*, for the owners of the "*Alice*."

Milward and *Clarkson*, for the owners of the "*Princess Alice*," were not heard.

LORD JUSTICE PAGE WOOD.—In the course of the argument on this case, one of their Lordships has already cited the decision in the case of "*The Julia*" (14 Moore, P.C. 210), which laid down in very clear and precise terms the course that this Board thinks it right to take with reference to appeals from the judgment of the Court below upon matters which are entirely matters of fact. If

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this Board finds that, in the Court below, there was clear and distinct evidence upon the one side, and possibly evidence which the appellants might think to be as clear and distinct on the other side, nevertheless, if the Judge in the Court below, in his discretion, having the opportunity of seeing the witnesses and observing their demeanour, has come, on the balance of testimony, to a clear and decisive conclusion, those who undertake to reverse that conclusion, on the ground that the Judge has erred in giving credence to the one class of witnesses rather than to the other, undertake, as expressed in the case of the "*Julia*," an almost impossible task. This Board has no opportunity of seeing the witnesses, of considering in what respect credence should be given to one class rather than the other from the mode in which their evidence has been given; and it would have to perform a duty of a most painful character if it were not merely to reverse the decision of the Judge below with reference to the finding that he has come to adverse to the appellants, but had, in such a state of circumstances, to do that which would be a necessary corollary from such a step, viz., to give a deliberate judgment in favour of the respondents, without the same means of ascertaining the real truth as was possessed by the Judge of the Court below. Now, it is of course not wise at any time to lay down rules of such extreme accuracy of definition as would induce a Court of Appeal to hold itself bound upon any future occasion to a fixed and determined line, which cannot be overpassed on the one side or the other. We have had to consider that question, on a different subject-matter, during this very day, with reference to the course to be taken by this Board as to the augmenting or diminution of the amount which may be awarded in salvage cases.[1] A useful line had been drawn by the decided case of the "*Alice*" with reference to our proceedings in such a case as that, viz., that it requires a case of extreme and overwhelming pressure to induce us to vary from the decision of the Court below as to the amount of damage with reference to salvage. Still, such a case may occur; and we, sitting here, have this very morning decided that such a case has been laid before us. It is just possible to suppose that some such case might be produced with reference to this question of evidence, and it might be possible to shew that the Judge had so plainly, manifestly and clearly erred upon the face of documents before us, that we ought to reverse his judgment. But it is not shewn on the face of the evidence before us, either from the character of the deposition of the witness whose veracity it is sought to impugn, or from that which is found recorded as his evidence, that his testimony is so utterly inconsistent in itself, so contrary to all human probability, that a Judge must have been guilty of error who could give credit to a witness of such a character.

But, on the contrary, what we are asked to do is this: we are asked to reverse the judgment of the Court below in a case in which the principle established by the decision in the "*Julia*" is most singularly applicable, because the learned Judge, finding a conflict of testimony, as unfortunately in most of these cases of collision there must be, has relied very strongly on the evidence of a pilot, a witness of the name of William Young, and has thus characterized that witnesses evidence: he says he has had the assistance of the Elder Brethren of the Trinity House, and he gives it as the joint opinion of those gentlemen and of himself, "That William Young, the witness from the tug '*Mary Usher*'—whose evidence has been very much discussed—proves that the '*Princess Alice*' was running up on the north side of the channel. It has been very properly admitted that this witness gave his evidence in a manner which entitled him to the credence of the Court; and he proves, in my opinion, beyond all controversy, that the '*Mary Usher*' came up on the north of the mid-channel, with the '*Princess Alice*' between her and the north shore, as far as the Middle Scarp Sand, and that there the tug passed ahead and was proceeding onwards up the river. He says also, that he looked back and saw the collision, and that the '*Princess Alice*,' at the time of the collision, was

(1) See the case next preceding.

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still to the north of the mid-channel. He gave strong evidence also to this effect: that the '*Mary Usher*' having passed the '*Alice*,' he observed that she altered her course and came across towards the north shore. He said that his belief was that those on board the '*Alice*' had not seen the '*Princess Alice*,' and that their attention was occupied with the dredgers and hoppers which were on the south shore." Therefore the learned Judge tells us that this is a witness who is not only unconnected with the case, but a witness who has given his evidence in a manner peculiarly entitling him to credence in the opinion of the learned Judge and his assessors; and, indeed, he says (and we have no reason to suppose that it is in any way an error) that he was *admitted* so to have given his evidence. If that be so, we entirely concur in the observation of the learned Judge, that the evidence of that witness may properly be applied to turning the balance of the conflicting evidence, such as it may be, upon the rest of the case. He has been worthily adopted as a witness of credit, whose evidence ought materially to assist the Judge in coming to the conclusion which he came to, founding it in a great measure undoubtedly upon that person's evidence. Have we, then, been shewn anything in his evidence which, to our minds, makes it clearly erroneous that such weight should have been given to the evidence of that particular witness? Does not his evidence, if believed, prove the case? Clearly and manifestly it does, because his evidence is to this effect, that he himself was somewhere about mid-channel, or slightly on the north side of the river, being in a tug called the "*Mary Usher*," which was so situated, because it had been looking out for employment at the time the "*Princess Alice*" was coming up; he had found that the "*Princess Alice*" was in the hands of a certificated pilot, and did not want his assistance as a pilot; and he says that he then went for some time alongside, as it were, of the "*Princess Alice*," but finding that she went slower than he was desirous of doing, or rather than the tug was desirous of doing, for he does not appear to have been in command of the tug, the tug went ahead; but at the same time, he says, up to the time of the tug going ahead, the "*Princess Alice*" was on the north side of him, and clearly on the north side of the mid-channel, and in her proper position. Now, is he not confirmed in that? It is curious enough that Reid (that, I think, is the man's name)—speaking of a vessel which he does not name, but which clearly is, and was stated by the Queen's Advocate to be the very "*Mary Usher*" in which Young was—says that the tug which then passed him was on the north or proper side of the river, and was proceeding in her proper course. The captain of the "*Alice*" himself also described the "*Mary Usher*" as coming up about the same time; therefore it is plain that she was on the right side of the river, and that the "*Princess Alice*" was to the north of her, and, if we may use such an expression, more in her right place than the "*Alice*." Well, that being so, it is said, how came he to be so near as to be capable of giving the exact account which he does of this collision? Of course it is a remark fit and proper to be made on all occasions with reference to observations made by strangers, that you must have some sort of explanation as to what it is that causes them to take notice of a matter which by itself would be uninteresting to them, such as the position of this other vessel. But this man gives abundant reason for having taken such notice, because he had advanced but a very little way (and the captain says that the "*Mary Usher*" passed him when they were close to the dredgers); therefore the "*Alice*" was near the dredgers, in the immediate vicinity of which the accident happened at the time she was passed by the "*Mary Usher*," and the "*Mary Usher*" cannot have got very far before the collision took place: and this witness gives a very suitable and proper reason for seeing so much of it as he did, for he says, "When I felt that a collision was likely to take place, from noticing these vessels. I immediately had the tug I was in first stopped and then backed, in order that I might be of use in saving life, in the event of any such collision occurring." What could be more natural, and what could be a more proper and reasonable account to give of his making the observation he did? Then, by that operation

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he was brought so near that there can no longer be any doubt of his having had abundant facilities for seeing what took place. He then gives a reason for what afterwards did take place, which meets the observation of the Queen's Advocate as to the improbability of this man's evidence. He explains the cause of the "*Alice*" passing out of her course and throwing her head across the river towards the north, and so going on her wrong side at the time of the collision. His remark is this, "I think she did not see the '*Princess Alice*' steamer." Now it is a curious thing that the captain of the "*Alice*," in giving his evidence, as to what he saw after the "*Mary Usher*" had passed, and on being asked when it was that he first saw the "*Princess Alice*," gives this account: he says, "I saw some lights," and then Mr. Butt asks, "What did you take those lights to be? *A.* A steamer's lights.—*Q.* Any particular sort of steamer? *A.* The steamer attending on the hoppers at the dredgers.—*Q.* Did you see any hoppers? *A.* Yes, there were two hoppers.—*Q.* Where were the two hoppers? *A.* Alongside of the dredger." Therefore he really indirectly corroborates this observation of Mr. Young, in itself not an unnatural one to make. Nobody would have run across the river if they had seen a steamer; of course nobody wished to occasion a collision or a disaster of this description; but he says, "I do not think he saw her"; and what turns out to be the case is this (the captain is giving his own account of it): on first seeing the "*Princess Alice*," he did not take her to be a vessel coming up the river with which he was likely to come into collision; but, judging by his eye, he thought it was a tug in attendance on the hoppers, and not, therefore, in the position of the "*Princess Alice*," which was navigating and coming up the river. We mention these things as shewing that, so far from any ground having been laid to lead their Lordships to conclude that the Judge has erred in trusting to Mr. Young, because, on the face of his evidence, it is inconsistent and improbable, and therefore not such evidence as on the very face of it ought to be trusted to, it appears that all the collateral circumstances, as far as we have other evidence in the case, tend rather to assist and corroborate the view taken by the learned Judge as to Mr. Young's evidence. And I may say in conclusion, that the map which was proved, and which has been laid before us, shewing the position of the vessels immediately after the accident, tends exactly to the same conclusion, because, as has been observed by one of their Lordships, it is difficult to see how such a state and position of the vessels could have been brought about upon any such theory as that presented to our minds by the appellants, whereas it is entirely consistent with that presented by the respondents.

But, in the opinion of their Lordships, the principal point upon which we should rest our decision is this, that following the doctrine laid down in the case of the "*Julia*," we should be most unwilling to come to a conclusion different from that of the Judge of the Court below merely upon a balance of testimony; and on its being affirmed by the appellent that the testimony ought not to have been credited by the Judge of the Court below. He had an opportunity of testing, in the most ample manner, the conduct and demeanour of the witnesses, and we should require evidence that would be overpowering in its effect on our judgment with reference to the incredibility of the statements made by any witness, and the general testimony to which credit has been so given, before we could venture to come to a conclusion, not only in favour of an appellant in a case of this kind, but of course a conclusion adverse to a respondent, thus inflicting on the respondent a loss occasioned by the Board coming to a conclusion different from that which was come to on evidence, as to the value of which we have not the same facilities and means of forming a judgment as were possessed by the learned Judge who decided in the first instance.

It is therefore our opinion that we must advise Her Majesty, in this case, to affirm the judgment of the High Court of Admiralty, and to dismiss the appeal of the "*Alice*," with costs.

Appeal dismissed with costs.

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IN THE PRIVY COUNCIL. Dec. 1, 1868.

JOHN PRENDIVILLE AND OTHERS, *appellants;* THE NATIONAL STEAM NAVIGATION COMPANY, *respondents.* (" THE ENGLAND.")*

38 L. J. Adm. 9; L. R. 2 P.C. 253; 5 Moo. P.C. N.S. 344; 16 E. R. 545; 20 L. T. 46.

See, " *The Woburn Abbey* " 1870, 21 L. T. 707 (P.C.); " *The Amérique,*" [1875] E. R. A.; L. R. 6 P.C. 468; 31 L. T. 854; 23 W. R. 488 (P.C.).

Salvage—Compensation—Discretion of Admiralty Court—Judicial Committee—Practice.

SHIPPING.—*The Judicial Committee will not interfere with the discretion exercised by the Judge of the Admiralty Court in awarding compensation for salvage service, unless the difference between the amount awarded and the amount due in the judgment of the Judicial Committee is very considerable.*

This was an appeal from a decree of the Judge of the High Court of Admiralty in England.

The appellants, the owners, masters and crews of the steam-tugs " *Knight Templar* " and " *Royal Arch,*" sued the ship " *England,*" her freight and cargo, for reward due to them for salvage services.

The " *England* " was an iron screw steamship 2,596 tons gross burthen, and at the time of the salvage services rendered, she had a heavy cargo on board. The value of the ship, freight and cargo was 122,820*l.*

The " *Knight Templar* " and " *Royal Arch* " were steam-tugs, belonging to the port of Liverpool.

The circumstances under which the salvage services arose were as follows: On the afternoon of the 16th of July, 1867, the " *England* " was lying in the Bramley Moore Dock, in the river Mersey, laden with a cargo, and was about to proceed to New York. The " *England,*" being a large and long vessel, required the services of a steam-tug in getting out into the river Mersey, and the steam-tug " *Phœnix* " was employed to perform the service. The " *England,*" by working her own engines, came out of the Bramley Moore Dock, through the Wellington Half-tide Dock, into the Sandon Basin, and the " *Phœnix* " was there ready to pull the head of the " *England* " round into such a position as to enable her to steam out into the river. The wind at the time was blowing a moderate gale from the westward, and it was about half an hour before high water. The " *England* " had two check-ropes out: one of them was fast to the island, between the two entrances of the Wellington Half-tide Dock, and the other was fast to the south pier. Before the " *Phœnix* " had got into position the " *England* " had got so far into the basin that the first check-rope fast to the island had become nearly parallel with the side of the ship, and ceased to be of further use, but in consequence of the strain upon it it broke. The " *Phœnix* " then attempted to get into position, but in doing so, from some mismanagement, she fell across the remaining rope, and broke it, and carried away her own funnel and masts, and so became useless. Under these circumstances the " *England* " drifted into the north-east corner of the Sandon Basin, where she would have remained until the following tide. It was, however, desirable that the " *England* " should at once proceed into the river, and it being evident that the head of the vessel would be more expeditiously got round by employing the services of a steam-tug, signals were made for that purpose. The tug " *Retriever* " came into the basin, and having been engaged, she made her hawser fast to the " *England,*" and proceeded to pull the head of the " *England* " into position, but the hawser broke. Another hawser was then passed from the " *Retriever* " to the " *England,*" and the master of the

* The Right Hon. Lord Chelmsford, Sir J. W. Colvile, Lord Justice Page Wood and Lord Justice Selwyn.

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"*England*" engaged another tug, called the "*Rock Light*," for the sum of 20*l*., to pull the head of the "*Retriever*" round into a proper position to enable her to tow the "*England*." Before, however, the "*Rock Light*" could make fast to the "*Retriever*" the tug "*Knight Templar*," which had been engaged by the Superintendent of the National Steamship Company whilst the master of the "*England*" was making the bargain with the "*Rock Light*," made fast to the "*Retriever*." The master of the "*Knight Templar*" then hailed the steam-tug "*Royal Arch*," and her hawser was made fast to the steam-tug "*Knight Templar*," and both tugs pulled the "*England*" until her head was pointed to the Sandon Basin entrance, when she went out by means of her own steam power, without receiving any further assistance.

The Judge of the Admiralty Court having heard counsel on both sides pronounced the sum of 60*l*. to be due to the master, owners and crew of the steam-tug "*Knight Templar*," and the sum of 20*l*. to the master, owners, and crew of the steam-tug "*Royal Arch*," together with costs.

From this decree the present appeal was brought.

Aspinall and *Lushington*, for the appellants, referred to "*The Saratoga*" (Lush. 318).

Milward and *Clarkson*, for the respondents, were not heard.

SELWYN, L.J., delivered the judgment of their Lordships.—Their Lordships had occasion so very recently to consider the principles upon which this Board acts in reviewing the decisions of the Judge of the Court below, in respect of sums allotted for salvage services, that it will be quite unnecessary to go again through the authorities. But their Lordships think it material to observe that, in the judgment which was pronounced yesterday, it was not the intention of this Board to enunciate, nor in terms did they enunciate, any new principle; but that judgment consisted mainly in a citation of the previously existing authorities, and to those authorities, then and now, their Lordships are determined to adhere. It is unnecessary to refer to them at any length, but there are two principal ones in the same volume of *Moore's Reports*, "*The Clarisse*" (12 Moore. P.C. 340), and "*The Neptune*" (12 Moore, P.C. 346). In the latter case Lord Kingsdown, in expressing the opinion of the this Board, says, "It is a settled rule, and one of great utility, particularly with reference to cases of this description, that the difference ought to be very considerable to induce a Court of appeal to interfere upon a question of mere discretion." That which we therefore have to determine is whether it is right in the present case for us to interfere with the judicial discretion which has been exercised by the Judge of the Court below?

Now, it has been justly observed that we have first to consider the position of danger and difficulty in which the property that was rescued was at the time; and in the argument it has been contended that this ship, the "*England*," was in a position of very great difficulty and danger, and in the case of "*The Saratoga*" (Lush. 318) has been cited as an analogous case. Their Lordships think that case is very useful by way of contrast to the present case; because here, although there was no doubt a gale of some violence blowing (the witnesses differed as to the extent), it must always be remembered that this ship was a ship with its own steam power perfectly ready to be exercised —a ship in a condition to go to sea which had met with no casualty whatever, and which was not only within the harbour and within the river, but actually within the Sandon Basin, no doubt in a position of considerable difficulty. Therefore, it may fairly be said she was in a position which might expose her to some considerable risk of detention, and possibly to some risk of loss, by straining, or otherwise; but she was not, by any means, in the position in which "*The Saratoga*" was, that having been a ship which was in a dismasted and crippled condition. It is admitted here that if she once got her head in the proper direction to the entrance into the river, she would, by means of her own unaided steam power, have been able to proceed upon her voyage.

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Then we have to consider the amount of risk. We are told in the argument that these steam-tugs were rendering services of danger and peril to themselves. Their Lordships have consulted the nautical assessors upon this subject, and their opinion entirely concurs with that which their Lordships had formed for themselves on the evidence, viz., that the tugs on this occasion incurred no danger and no peril. It appears that one tug had already entered into an engagement to liberate this vessel, and by reason of an accident which occurred to that vessel in the peculiar circumstances in which she was placed, she had lost her funnel and her mast; but the other tugs had merely come through the open entrance into the basin, and then endeavoured to liberate the "*England*" from the position in which she was. It appears that a bargain was actually made with one of these vessels—a number of them having been collected together by the signals which had been sent up—a bargain was actually made with one of them, the "*Rock Light*," to perform that very service; and there was no evidence to shew that the "*Rock Light*" was unable or unwilling to perform that very service, which is called a service of peril and danger, but which in our opinion was neither perilous nor dangerous, for a sum of 20*l.*; but by the superior skill or good fortune of the "*Knight Templar*" the "*Rock Light*" was anticipated by the "*Knight Templar*," and the "*Knight Templar*," with the assistance of the "*Royal Arch*," which performed a comparatively trifling service, succeeded in towing this vessel round.

We think, therefore, considering the position in which the "*England*" was at the time, considering that the services rendered by the tugs were rendered in what may be called the ordinary course of their business, and rendered in a manner which exposed them to no danger or difficulty, there is nothing whatever to induce this Board to believe that the sum which was awarded by the learned Judge was other than a reasonable remuneration for the services rendered. And then, when we consider the principle referred to at the commencement of these observations, viz., that the difference ought to be very considerable to induce a Court of Appeal to interfere on a question of mere discretion, we think there is no foundation for this appeal, and that it is our duty to advise Her Majesty to affirm the judgment of the Court below, and to dismiss the appeal with costs.

Appeal dismissed, with costs.

ADMIRALTY. Nov. 3, 25, 1868.

"THE GULDFAXE."

38 L. J. Adm. 12; L. R. 2 A. & E. 325; 19 L. T. 748; 17 W. R. 578.

Followed, "*The Explorer*," [1871] E. R. A.; 40 L. J. Adm. 41; L. R. 3 A. & E. 289; 23 L. T. 604; 19 W. R. 166 (Adm.). Discussed, *Smith* v. *Brown*, [1871] E. R. A.; 40 L. J. Q.B. 214; L. R. 6 Q.B. 729; 24 L. T. 808; 19 W. R. 1165 (Q.B.). Questioned, *Simpson* v. *Blues*, [1872] E. R. A.; 41 L. J. C.P. 121; L. R. 7 C.P. 290; 26 L. T. 697; 20 W. R. 680 (C.P.). See, "*The Franconia*," [1877] E. R. A.; 46 L. J. Adm. 33; 2 P. D. 163; 36 L. T. 640; 25 W. R. 796 (C. A.); *Adam* v. *British and Foreign Steamship Company*, [1898] E. R. A.; 67 L. J. Q.B. 844; [1898] 2 Q.B. 430; 79 L. T. 31 (Q.B. D.).

Jurisdiction—Damage—Loss of Life—Action by Representative.

SHIPPING.—*The High Court of Admiralty has jurisdiction in a suit by the representative of a deceased, for injury to the latter by collision between two vessels.*

The plaintiff in this suit is the mother and administratrix of John Bousted, who was one of the crew of a fishing lugger, which on the 3rd of January last, at about four p.m., was sunk off Brighton, by a collision between that vessel and the "*Guldfaxe*."

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The plaintiff, in her petition, stated the circumstances of the collision, and alleged that it was caused by the neglect, default and mismanagement of the "*Guldfaxe*."

E. C. Clarkson, for the owners of the "*Guldfaxe*" (defendants), moved the Court to reject the petition.—This Court has no jurisdiction to award damages at the suit of the representative of a person killed by a collision. No Court has any such jurisdiction except under Lord Campbell's Act, and that statute, from its terms, does not refer to this Court, but is applicable exclusively to Courts of common law.

Butt, for the plaintiff.—If the injury in this case had not resulted in death the defendants' ship would have been liable—"*The Sylph*" (37 L. J. Adm. 14). Lord Campbell's Act (9 & 10 Vict. c. 93. s. 1.) gives a new right, and not merely a new remedy. The Admiralty Court Act, 1861, s. 7, gives the Court jurisdiction in any claim for any damage, and therefore it is bound to entertain the suit. As to the objection that the damages are to be assessed by a jury, even if that were necessary, this Court has power to summon a jury—"*The Ruckers*" (4 C. Rob. 73, *notis*); or it might direct an issue for the purpose, 3 & 4 Vict. c. 65, s. 11—"*The Harriet*" (1 New Rep. 439). The present suit is not without precedent. In the "*Rouen*" the Court awarded damages under similar circumstances—see *Taylor* v. *Dewar* (5 Best. & S. 50; 23 L. J. Q.B. 141). In certain cases the legislature has directed this Court to assess damages for loss of life—"*The Borodino*" (5 L. T. 291).

Pritchard, on the same side.—The question is not whether the legislature, in passing Lord Campbell's Act, intended it to apply to the Admiralty Court Act, but whether the provisions of the Admiralty Court Act, 1861, have reference to Lord Campbell's Act. The words of the 7th section of the former are large enough to include the present case, and the right of action given by Lord Campbell's Act can be separated from the form of remedy therein prescribed. The words of that statute as to a jury are discretionary only, and there is no occasion for a jury to assess damages in the Admiralty Court, as that Court has already the machinery for doing so in the registrar and merchants, and constantly exercises it.

Sir R. J. Phillimore.—Though it has been suggested, and is possible that this Court may at one time have exercised original jurisdiction in such a suit as the present, I do not think that there is sufficient evidence to be derived from the records of the Court, or from other sources, to warrant me in pronouncing in favour of the jurisdiction of the Court upon this ground. If the Court be competent to entertain this suit it must have derived such competence from statute law, and the counsel for the plaintiff have mainly—I might almost say exclusively—relied upon certain recent statutes, as having conferred this jurisdiction upon the Court.

It becomes necessary, therefore, to examine these statutes. In the year 1846 the statute 9 & 10 Vict. c. 93, commonly called Lord Campbell's Act, entitled "An act for compensating the families of persons killed by accidents," was passed. That statute recited, that "no action at law is now maintainable against a person who by his wrongful act, neglect or default, may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him;" and it proceeds further to enact, that "whensoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." The effect of this statute, then, was to give a new right previously unknown to the common law, according to which all suits founded on a personal injury or tort died with the person. The

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statute proceeds to specify the person for whom, and the manner in which the action shall be brought, and the remedy which shall be applied for the injury as follows (section 2): "that every such action shall be for the benefit of the wife, husband, parent or child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct."

This statute, though it effected the material alteration in the Common Law which I have mentioned, conferred no jurisdiction upon the Admiralty Court. The next statute I have to consider is the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104. s. 514), which enacted as follows: "In cases where any liability has been, or is alleged to have been incurred by any owner in respect of loss of life, personal injury, or loss of or damage to ships, boats or goods, and several claims are made or apprehended in respect of such liability, then subject to the right hereinbefore given to the Board of Trade of recovering damages in the United Kingdom, in respect of loss of life or personal injury, it shall be lawful in England or Ireland for the High Court of Chancery, and in Scotland for the Court of Session, and in any British possession for any competent Court to entertain proceedings at the suit of any owner for the purpose of determining the amount of such liability, subject as aforesaid; and for the distribution of such amount rateably amongst the several claimants; with power for any such Court to stop all actions and suits pending in any other Court in relation to the same subject-matter; and any proceeding entertained by such Court of Chancery, or Court of Session, or other competent Court, may be conducted in such manner, and subject to such regulations as to making any persons interested parties to the same, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of costs, as the Court thinks just."

The Admiralty Court Act, 1861 (24 Vict. c. 10), s. 13, conferred upon the High Court of Admiralty the same jurisdiction which the Court of Chancery possessed under the former statute. It is clear, therefore, that if in this very case of damage there had been several claimants, including the present plaintiff, and if the defendant had instituted a suit in this Court for the purpose of limiting the amount of his liability, and for the distribution of such amount rateably amongst the claimants, it would have been the duty of the Court to have entertained the suit. And it follows from this proposition that the intervention of a jury would not be a necessary or the only means of enforcing the remedy against a wrong-doer under Lord Campbell's Act.

The Admiralty Court Act, 1861, enacts by its 7th section, "that the High Court of Admiralty shall have jurisdiction over *any* claim for damage done by any ship." Following the precedent set me by my learned predecessor, I have already ruled that the words of this section embrace the case of damage inflicted by a vessel upon other property than ships and upon persons—"*The Sylph*" (37 L. J. Adm. 14; L. R. 2 Adm. 24). It is true that Lord Campbell's Act contemplates only an action against the person; but then the 35th section of the Admiralty Court Act, 1861, enacts as follows: "The jurisdiction conferred by this act on the High Court of Admiralty may be exercised either by proceedings *in rem*, or by proceedings *in personam*;" and it was admitted by the counsel for the defendant that the argument to be derived from the language of Lord Campbell's Act was as strong against the jurisdiction of this Court *in rem* as *in personam*. In the much-considered case of *Taylor* v. *Dewar* (5 Best & S. 58; 23 L. J. Q.B. 141), I find the following passage "The vessel insured under this policy, the "*Rouen*," having come into collision with and run down another ship called the "*Magyar*," and the master and five of the crew of the latter having been drowned, the owners of the "*Rouen*" have, by

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the judgment of the Court of Admiralty, been condemned to pay damage to the personal representatives of the deceased, and such damages have been paid accordingly." The jurisdiction of the Admiralty Court appears, from the report of the argument, to have undergone some discussion, but it seems to have been assumed that this Court did possess and had rightfully exercised such jurisdiction.

I referred to this decision in the previous case of "*The Sylph*" (37 L. J. Adm. 14; L. R. 2 Adm. 24), but I had not then caused any inquiry to be made into the history of the cause in the Admiralty Court. But since the institution of this suit I have caused such inquiry to be made, and the result is very remarkable. No trace can be found that either the Court itself or the Registrar acting on behalf of the Court, came to any decision upon the question of payment of damages to the personal representatives of the deceased; or, indeed, as far as I can find, entertained the question at all—perhaps it was an arrangement made out of Court; certainly the declaration assumed the fact that the Court of Admiralty had decided on the case. This case, therefore, it is right to say, does not furnish the assistance to the Court which the passage in the judgment to which I have adverted would at first sight appear to afford. The question is by no means free from difficulty; but upon the whole I have arrived at the conclusion that I ought to pronounce for the jurisdiction of this Court, and accordingly, though not without doubt and hesitation, I do so. But I will give leave to the defendant to appeal from this decision should such be his desire.

ADMIRALTY. Nov. 10, 11, 1868.

"THE GREAT PACIFIC."

38 L. J. Adm. 14; L. R. 2 A. & E. 381; 20 L. T. 44; 17 W. R. 473: affirmed, [1869] E. R. A. 894; 38 L. J. Adm. 45; L. R. 2 P.C. 516; 21 L. T. 38; 17 W. R. 933 (P.C.).

Bottomry—Loss of Ship—Average Salvage.

SHIPPING.—*A bottomry bond contained a stipulation that, "in case of the loss of the ship, such an average" should be paid "as by custom shall have become due on the salvage, or if on the said voyage the said ship shall be utterly lost, cast away or destroyed," then that the bond should be void. The vessel subsequently was compelled to put into another port for repairs, and there condemned and sold, and the proceeds were remitted to this country:*—Held, *that the whole of the proceeds were liable for satisfaction of the bond.*

This was a cause of bottomry instituted on behalf of the holders of a bottomry bond on the ship "*Great Pacific*," against the proceeds of the sale of that vessel. A mortgagee of the ship had intervened, and put in an answer to the plaintiffs' petition; and the case came before the Court on a motion by the plaintiffs to reject so much of this answer as alleged—first, that nothing was due on the bond; and secondly, that the plaintiffs were only entitled to an average on the proceeds of the sale.

The "*Great Pacific*," a ship of 2,088 tons, chartered for a voyage from Callao to the Chincha Islands, and thence to Great Britain, put into Sydney, N.S.W., in need of repairs; and in order to obtain funds the master was obliged to borrow from the plaintiffs, on bottomry of his ship and freight, the sum of 5,037*l*., which, with maritime interest for the voyage at 45*l*. per cent., amounted to the agreed sum of 7,301*l*. After the ship had been refitted, she proceeded to the Chinchas and loaded a cargo of guano, with which she sailed for England. She encountered bad weather on her voyage, was compelled to put into Valparaiso, and was there condemned and sold as unworthy of repairs, and the proceeds of the sale, 3,628*l*., were remitted to England and brought into Court

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in this suit. The bond contained the usual provision that the vessel and freight were assigned for security, and should be delivered to no other purpose until payment of the bond and interest; and it was conditioned to become void in case of payment of the sum of 7,301*l.* before twelve hours after safe arrival, "or in case of the loss of the said ship or vessel, such an average as by custom shall have become due on the salvage," or in case the ship should be utterly lost, cast away, or destroyed by perils of the seas, &c.

C. P. Butt and *Cohen*, for the plaintiffs.—As between shipowner and bondholder there is no such thing as a constructive total loss of the ship; the ship must cease to exist to relieve from the obligation of the bond. The "*Great Pacific*," so far from being destroyed, had been sold as a ship; and it was the voluntary act of her owners by their election not to repair which had prevented her arrival in England, and therefore the bondholders are entitled to be paid and to receive the proceeds of the sale; there is no salvage in this case within the meaning of the bond; and salvage is not used therein in reference to the case of a constructive total loss and a voluntary sale, but to the fragments and relics that might be saved from a total wreck. The use of the phrase may be traced back to the times when it was usual to borrow on bottomry the amounts required to fit out Spanish galleons for the Indies, and such a form of bottomry bond on the "*Queen of the Angels*" and "*St. Charles*," bound from Cadiz to Vera Cruz, is to be found in *Weskett on Insurances*, edit. 1731.

T. C. Mathew and *E. C. Clarkson*, for the defendants.—The "*Great Pacific*" has been lost within the meaning of the condition. For all practical purposes she ceased to be a ship when she could not be repaired, and had been prevented by perils of the sea from completing her voyage. A bondholder is not entitled to any salvage, and the proceeds of this sale were salvage; at all events, an average only on this salvage was due to the plaintiffs, and it is for the registrar and merchants to determine what that average is.

Sir R. J. Phillimore.—The questions which the Court has to decide are, whether a valid defence is set up against the holder of the bottomry bond, who claims to be paid the full amount of his loan.

There is no question as to the validity of the bond, and the freight has been wholly lost. As to the first position, namely, that nothing is due on the bond, it is necessary in this case, as in all cases of the same description, to look carefully at the terms of the instrument itself, although it has always been the practice and is clearly the duty of the Court to put a reasonable and liberal, and not a technical, construction upon them.

The bond contains the usual statement that the "*Great Pacific*" and her freight are assigned over for the security of the respondentia taken up by the said William Baillie aforesaid, "and shall be delivered to no other use or purpose whatsoever until the payment of this bond is first made with the premium that may become due thereon." The condition of the bond is, that the vessel shall with all reasonable speed duly prosecute and complete without deviation her voyage, the perils, damages, casualties and accidents of the seas, rivers and navigation excepted; and that within twelve hours of the safe arrival of the ship at the port of her destination the money due on the bond shall be paid to the lender; and then follow these words, upon which the contention of the defendant has been mainly founded, "or in case of the loss of the said ship or vessel, such an average as by custom shall have become due on the salvage, or if on the said voyage the said ship or vessel should be utterly lost, cast away or destroyed," then the bond was to be void and of no effect.

An examination of the authorities and decided cases upon this subject satisfies me that, generally speaking, money advanced on a bottomry bond becomes due and payable to the lender not only when the vessel arrives in safety at her port of destination, but whenever her voyage is ended at some intermediate place, as in this case, by the voluntary act of her master, the servant of her owner; and that under the category of voluntary acts must be included the sale of the vessel by him at an intermediate port, because the

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expense of her necessary repairs would exceed the reasonable value of the vessel herself—see cases collected on this point in 2 *Parsons on Maritime Law*, p. 409, book 1, c. 19; 2 *Arnould on Insurance*, "Chapters on Absolute Total Loss and Constructive Total Loss of Ship," *Thompson* v. *the Royal Exchange Assurance Company* (1 M. & S. 31), and "*The Elephanta*" (15 Jur. 1185; 18 L. T. 248). I will assume that in this case there was what is called a constructive total loss of the ship, which would have entitled her owners to recover from the underwriters the whole amount of her insurance, but there has not been that actual or absolute total loss which would discharge from his liability the borrower of money upon bottomry, inasmuch as the ship existed in specie at the time of her sale. Such being the general law, can it be successfully contended that the words of the bond to which I have adverted prevent the application of the law to this case? It has been pressed upon me that by these words a distinction was intended to be drawn between the loss and the utter loss of the vessel. That in the latter case the bond was to be entirely void, and the borrower to take no interest whatever; and, in the former case, only an average of the salvage such as by custom might be due; and that the amount obtained from the sale of the vessel represents the total salvage of which the lender, if he be entitled to anything, is entitled to an average, for it can hardly be said to have been seriously contended that to this, at least, he was not entitled. I am unable to accede to the construction of the words in the bond contended for by the defendant. It appears upon an examination of the old forms of bonds (copies of which are to be found in the early editions of *Abbott on Shipping*, and the work of *Weskett*—a complete digest of the laws of insurance—edit. 1781, pp. 46, 48, 58) that a stipulation couched in these very words was of common occurrence, derived probably from the mercantile usage of Spain with respect to vessels trading with the Spanish West Indies; and that it referred to cases in which the ship had been so wrecked that portions of her alone remained, such as planks, spars, rigging and the like, when, to use the expression of *Emérigon* (chap. xvii. sec. 8. vol. ii. p. 213, edit. 1827), "Les débris du navire naufragé existent, mais le navire n'existe plus." It is not necessary that I should express an opinion whether, in the contingency of such a wreck, the lender would or would not be entitled to this kind of salvage by the common law merchant, or whether, in order that he should have this right, the insertion of these words was necessary. In my opinion, they contemplate an event which has not happened in this case, and have no effect on the application of the law to the event in the present instance, which has rendered these proceeds that represent the ship liable to the claim of the bondholder, namely, the sale by the master of the ship at an intermediate port which the law in cases of bottomry like the present holds to be equivalent to the safe arrival of the vessel at her port of destination. I pronounce, therefore, for the prayer of the bondholder, and direct the articles in question to be struck out of the answer.

ADMIRALTY. Nov. 6, 1868.

"THE CHARLES AMELIA."

38 L. J. Adm. 17; L. R. 2 A. & E. 330; 19 L. T. 429; 17 W. R. 624.

Damage—Arrest of Ship after subsequent Sale—Maritime Lien.

SHIPPING.—*In March*, 1866, *the French vessel C. A. having come into collision with the R., the master of the C. A. gave in satisfaction of the damage a bill of exchange for* 82*l.* 5*s.*, *payable on the arrival of the C. A. at her destined port of S. in Scotland. The C. A., instead of proceeding to S., went to France, where she was sold by the syndics of her owner's estate. In December*, 1867, *the vessel again came to England, and was arrested for the damage*:—Held,

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that the lien for damage was not lost by laches or the subsequent sale of the vessel.

This was a cause of damage in which the owners of the English schooner "*Risk*" proceeded against the French schooner "*Charles Amelia*" to recover for the loss resulting from a collision between the two vessels.

The facts were undisputed, and were stated in the form of a special case for the opinion of the Court on the questions of law involved.

On March 13, 1866, the "*Charles Amelia*" came into collision with the "*Risk*" in Bridlington Bay. The French captain admitted that his ship was to blame, and, in order to save her from being arrested, on March 19 drew what purported to be a bill of exchange on his own owner, M. Lapégue, of Bayonne, for 82*l*. 5*s*. (the agreed damage), in favour of the owners of the "*Risk*," payable three days after the arrival of the "*Charles Amelia*" at Sunderland, to which port he represented that he was bound. The owners of the "*Risk*" took no steps at the time to arrest the "*Charles Amelia*," and she put to sea, but, instead of going to Sunderland, sailed home to France. In February, 1867, Lapégue became bankrupt, and in August, 1867, the "*Charles Amelia*" was sold by auction by the syndics of his estate, under the provisions and with the forms prescribed by the *Code de Commerce*. She was purchased by her present owners without any notice of the collision with the "*Risk*," and made one or more voyages as their property, and did not return to England until December, 1867, when, the amount of the bill of exchange not having been paid, she was at once arrested in the present suit by the owners of the "*Risk*."

V. Lushington, for the plaintiffs, insisted that the case was governed by the English and not French law; that a maritime lien attached to the "*Charles Amelia*" at the time of the collision, which had never been lost by laches on the part of the plaintiffs, and therefore affected the vessel in the hands of her new owners; that taking the bill of exchange did not destroy their lien; that the sale of the ship in France was not a sale *en justice*, and if it was, that it would not be noticed by an English Court, because it was not of the nature of a proceeding *in rem*.

C. P. Butt, for the defendants, relied on the proposition that, where one or two innocent persons must suffer, he who has been guilty of laches, or who, having the opportunity, has neglected to enforce his rights, must bear the loss; that the plaintiffs had voluntarily omitted to arrest the "*Charles Amelia*," and had shewn a want of reasonable diligence in not taking proceedings against the owner in his domicil, or making their claim under his bankruptcy; and also that the sale of the ship by the syndics was what the French Code calls *la vente en justice*, and gave to purchasers who had complied with its requirements a clear title to the vessel of which an English Court would take notice.

SIR R. J. PHILLIMORE.—This is a special case, the first I believe which has been brought before this Court, in which the facts stated therein have been agreed upon by both parties, and upon which facts so stated the opinion of the Court as to the law applicable to them has been sought by both parties. It is also agreed that the Court may draw any inference of fact from the statement in the case.

It is necessary to state, as concisely as I can, the facts to which I am to apply the law. On March 13, 1865, the French schooner "*Charles Amelia*," of which the owner was a Frenchman, by name Lapégue, and which was under the command of a Frenchman by name Guicheney, came into collision with an English schooner called the "*Risk*," in Bridlington Bay, and in British waters. The master of the French schooner admitted his liability to make good the damage caused by the collision, and signed the following agreement:

"Bridlington Bay, March 15, 1866.

"Memorandum of agreement made this day between Robert Benzie, owner of the schooner '*Risk*,' of Rochester, one the one part, and Captain Bernard Guicheney, of Bayonne, on the other part.

"That the said Robert Benzie hereby agrees to receive the sum of 45*l*. clear money as a full discharge of his claim against Bernard Guicheney for the

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damage of his, the said Robert Benzie's schooner, '*Risk*' has sustained in the fouling of the two vessels; but the sum does not include the claim of the boatmen who assisted the '*Risk*' into this place, nor any law expenses that may be contingent on the adjustment of the same, the whole of which, namely, the salvage of ships and other charges, are to be fully and entirely borne by the said Bernard Guicheney.

"Furthermore, the said Robert Benzie does not hereby prejudice any claim that he may have to make in this matter if the money is not paid at the agreed time, nor does he bind himself to consider this as a proper compensation should he ultimately have to sue for the cost of the damage the '*Risk*' has sustained.

"B. GUICHENEY.
"ROBERT BENZIE.

"Witnesses, to both signatures,
"T. A. Murray.
"Hy. W. H. Knocker, Com. R.N."

It appears that a further expense was incurred of 33*l*. 13*s*. for the payment of the boatmen who took the "*Risk*" into harbour. The master of the French schooner declared that he was going to Sunderland, and in order to avoid the arrest of his vessel he, at the suggestion of the French Consul, gave to Benzie and Day the following bill of exchange drawn upon the French owner of the vessel:

"Bridlington Quay, March 19, 1866.

"£82 5 0.

"Three days after my arrival in Sunderland pay to the order of Benzie and Day, of Maidstone, in the county of Kent, eighty-two pounds and five shillings, for value received on behalf of my ship the '*Charles Amelia*.'

"B. GUICHENEY.

"To Mr. Armand Lapégue,
"Shipowner, Bayonne."

The plaintiffs in consequence forbore to arrest the French schooner, which sailed from Bridlington on March 19, but the master, in fraud of his agreement with the plaintiffs, took her to France, and she has never since been to Sunderland.

On March 27 the plaintiff's solicitor wrote to the French owner Lapégue as follows:

"27, Leadenhall Street, London,
"March 27, 1866.

"Sir,—Your vessel called the '*Charles Amelia*' recently caused some damage to a vessel called the '*Risk*,' and Captain Guicheney ultimately agreed that the amount of damage so caused was 82*l*. 5*s*. For this sum he drew a bill of exchange upon you, which he handed to Messrs. Benzie and Day, the owners of the '*Risk*.' He promised to pay the amount of this bill of exchange so soon as the ship arrived in Sunderland, but up to the present time we cannot find he has arrived; at all events the bill remains unpaid, and we have now to request that you will be good enough to instruct your correspondents in this country to pay, either to Messrs. Benzie and Day, or to us on their behalf, the said sum of 82*l*. 5*s*., in exchange for the bill of exchange drawn by the captain upon you."

This letter was answered on March 30, and such answer was received by the solicitors on April 2. It was as follows:

"J'ai en mon pouvoir votre de 27 courant. Il est vrai que le Capitaine Guicheney a signé un traité, mais après ce qu'il m'écrit cette signature lui a été extorquée. Aujourd'hui en il est sur territoire Français; il proteste, et je ne peux vous dire si je paierai sette somme avant d'avoir lu son rapport."

No part of the 82*l*. 5*s*. has ever been paid, and the bill of exchange has been brought into Court.

Some time in January or February, 1867, as I was informed by counsel (a blank being left for the date in the case), Lapégue, while still sole owner of the "*Charles Amelia*," became bankrupt at Bayonne. According to the French law certain persons were duly appointed syndics or assignees of his estate;

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and, on August 26, after taking the preliminary measures required by the French law, they caused the schooner to be sold by public auction. The present defendants being the highest bidders, and, having no notice or knowledge of the collision, purchased the schooner, which was in due form of law transferred to them. She made a sea voyage in their name and at their risk, but it has been admitted by counsel that this fact in no way affects the case. The schooner returned to British waters in December, 1867, and was arrested at Dover in the present suit.

The following propositions of fact and law are therefore uncontroverted: first, that the "*Charles Amelia*" has been a wrongdoer, and would, in ordinary circumstances, notwithstanding the change in her ownership, have remained liable to make compensation to the English vessel for the wrong done to her; secondly, that the document referred to as a bill of exchange, whatever be its proper title, has left this liability of the *res* or ship unaffected. The case of "*The Bold Buccleugh*" (7 Moore, 267) establishes the legal proposition that the *obligatio ex delicto* arising from the collision constituted a maritime lien which travelled with the ship to whatsoever owner she might belong. But it has been contended by the defendants in this case that there are peculiar circumstances which take it out of the operation of the principle of law referred to. These circumstances are, first, the laches of the plaintiffs in the prosecution of their claim; secondly, the sentence of a French Court of justice which transferred the ownership of a vessel free from all liabilities or claims to the defendants. The laches is alleged to have taken place at two distinct periods. First, in not immediately arresting the ship, but allowing her to depart in the circumstances which I have stated. It is urged that the plaintiffs had six days at least during which it was competent to them to have arrested this vessel, and that having foregone their right and lost their opportunity they cannot now enforce it to the detriment of the present innocent owners of the vessel. It was further contended that the plaintiffs were at all events guilty of laches in not taking proceedings at Bayonne, which they knew to be the domicil of the then owner of the ship; and in support of these positions the following passage from the case of "*The Bold Buccleugh*" (7 Moore, 267) was relied upon: "This rule, which is simple and intelligible, is, in our opinion, applicable to all cases. It is not necessary to say that the lien is indelible, and may not be lost by negligence or delay where the rights of third parties may be compromised, but when reasonable diligence is used, and the proceedings are had in good faith, the lien may be enforced into whosesoever possession the thing may come." The case of "*The Europa*" (Bro. & Lush. 91; 32 L. J. Adm. 188) was also referred to. Having regard, however, to the admitted facts in this case, I am of opinion that the lien attached to this vessel by the wrongful act of her master has not been obliterated by any laches of the plaintiffs upon either of the occasions which have been adverted to. Not upon the first occasion, for the plaintiffs had every reason to rely on the good faith of the French master, guaranteed as it was in a great degree by the French consul, and had no reason whatever to anticipate the fraud of which it is admitted the French master was afterwards guilty. Not upon the second occasion, for they took reasonable steps to recover the debt by the correspondence which I have read. They received no notice whatever of the bankruptcy of the French owner or of the intended sale of the vessel; and it would be, in my judgment, a great misconception of what the law means by laches to consider them guilty of it because they did not personally pursue the French owner of this vessel to Bayonne and embark in litigation before a foreign Court, which must have been expensive on account of bringing over witnesses, and uncertain on the point of jurisdiction.

There remains to be considered the second branch of the defence, namely, the effect of the sentence of the French tribunal. I have considered the passages in the French *Code de Commerce* which relate to the sale of this vessel, and am by no means satisfied that an *obligatio ex delicto*, such as exists in the present case, would, regard being had to all the circumstances, especially that the obligee was a foreigner resident abroad and wholly ignorant of the proceedings,

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be considered by those who administer French law to have been extinguished by this *vente en justice*. The proceedings in the French Courts were certainly not proceedings *in rem*, but apparently resembled those which would be taken in bankruptcy in this country, and which would not extinguish a maritime lien. I must also consider that the *lex loci commissi delicti* and the *lex fori* agree in holding that the maritime lien on this vessel still subsists.

Upon the whole, I am of opinion that the plaintiffs are entitled to recover in this suit; and I therefore decree in favour of the plaintiffs, and pronounce for the damage proceeded for, and condemn the defendants therein and in costs, and direct that the accounts and vouchers relating to such damage be referred to the registrar and merchants to report as to the amount thereof.

IN THE PRIVY COUNCIL. Nov. 27, 28, 1868.

Right Hon. LORD CHELMSFORD, Sir J. W. COLVILE, Sir E. V. WILLIAMS, LORD JUSTICE PAGE WOOD and LORD JUSTICE SELWYN.

EWARD FAIRFOOT AND OTHERS, *appellants;* WILLIAM CHALWIN AND OTHERS, *respondents.*

("THE ROSITA" AND "THE ALICE.")

38 L. J. Adm. 20; L. R. 2 P.C. 214; 5 Moo. P.C. N.S. 300; 16 E. R. 528; 19 L. T. 753.

Pleading — Variance — Answer — Material Allegation — Proof — Admiralty Rules, 1859, *No.* 67.

SHIPPING.—*On appeal from the Admiralty Court in a case of collision by drifting, between two vessels originally at anchor, the statement in the defendants' answer in the Court below as to the bearing of their vessel in respect to the other when at anchor, varied from the proof*:—Held, *that the statement as to the bearing of one vessel in respect of the other when at anchor was immaterial, and was therefore not necessary under the Admiralty Rules*, 1859, *No.* 67, *and that the variance was therefore immaterial.*

This was an appeal from cross causes in the High Court of Admiralty, by the owners of the brig "*Alice*" and the brig "*Rosita*" respectively, to recover damages for a collision which occurred between the vessels in Margate Roads, on February 6, 1867.

The "*Alice*" was a brig of 238 tons register, and at the time of the collision in question, was bound from Newcastle-upon-Tyne to Havre with coals.

The "*Rosita*" was a brig of 151 tons register, and was bound to Rouen with coals.

On February 4, 1867, in consequence of adverse winds, the "*Alice*" put into Margate Roads, and was brought to anchor. In the afternoon of the same day the "*Rosita*" also came to anchor in Margate Roads. On February 6 both vessels were getting under weigh, and the appellants alleged that the port anchor of the "*Alice*" was hove up to the bow, and that the crew were engaged in catting it. That the starboard chain was still out, with nearly ninety fathoms of chain, and that the "*Alice*" was lying with her head to the north-eastward, with the wind on her port quarter; that whilst in this position the "*Alice*" was sheered to leeward of her starboard anchor, which was lying off her port blow; and that at this time the "*Rosita*," with the wind on her starboard quarter, was lying distant about a cable's length to the north-westward of the "*Alice*" on her port quarter.

In these circumstances the appellants alleged that the "*Rosita*," with a strong wind abaft and her yards nearly square, dragged her anchors, and came down before the wind stem on towards the port quarter of the "*Alice*." That

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the "*Rosita*" was hailed to port her helm, and go astern of the "*Alice*," but her helm was lashed amidships, and nothing was done on board the "*Rosita*," and she came nearly stem on into the port quarter of the "*Alice*" abaft the main rigging, the jib-boom and bowsprit of the "*Rosita*" going over the deck of the "*Alice*." The "*Rosita*" subsequently, rising with the sea, struck with her port bow the port quarter of the "*Alice*" further aft, and then passed across her stern.

By the third article of their answer in the Admiralty Court, the respondents alleged that before the collision the "*Alice*" which had been riding about half a mile to the south-west of the "*Rosita*," came driving down athwart the tide towards the "*Rosita*." That she had but one anchor down, and though hailed from the "*Rosita*," that she did not hoist her foretopmast-staysail, or fill her fore-yard, until it was too late to prevent collision.

The learned Judge of the Court below held that the "*Alice*" was solely to blame.

From this judgment the present appeal was brought.

Milward and *Pritchard*, for the appellants; *Deane* and *Lushington*, for the respondents.

[LORD CHELMSFORD.—Their Lordships have been placed in some little difficulty in this case, and they desire to hear one counsel on a side in the "*Rosita's*" suit, upon this ground, that the cause of injury is not properly alleged in the pleadings. There have been recent decisions in which their lordships have held it to be necessary that a party seeking redress for an injury can only recover *secundum allegata et probata*. In a case in which the circumstances proved did not establish the allegations in the pleadings, although upon the true state of facts the complainant would have been entitled to recover, the learned Judge of the Court of Admiralty having decided against him, upon what their Lordships considered to be an erroneous ground, yet they felt themselves bound to declare that the judgment ought to be affirmed, not upon the ground on which it was pronounced, but because the case set up by the appellants had not been proved by the evidence. In the present case, in the third allegation in the answer of the "*Rosita*," it is alleged that the brig "*Alice*" had been riding about half a mile to the south-west of the "*Rosita*," and that she came driving down athwart the tide towards the "*Rosita*," and so the injury happened. Now, their Lordships are clearly of opinion that it is most distinctly proved that the "*Alice*" was to the south-east, and not to the south-west of the "*Rosita*," and they think it has been shewn very clearly that if the "*Alice*" had been to the south-west of the "*Rosita*," the collision never could have taken place in the way in which it actually occurred. Under these circumstances, the "*Alice*" comes here to meet a different case from that which is alleged on the pleadings of the "*Rosita*." Their Lordships are particularly anxious to hear one counsel on a side upon the subject of the pleadings; and whether, supposing their Lordships should be of opinion that the "*Alice*" was in fault, the "*Rosita*" would be entitled to their judgment, inasmuch as she has not stated her case correctly and properly.]

Pritchard, for the appellants.—It is a rule of pleading that in causes of damages the plaintiffs can only succeed *secundum allegata et probata*—"*The Ann*" (1 Lush. 55; 13 Moore P.C. 198); "*The North American*" (Swabey, 358; 12 Moore P.C. 331), "*The Amalia*" (7 Bro. & Lush. 311). The owners of the "*Rosita*" must under the circumstances be considered the plaintiffs in the suit. The question arises under the allegation in their answers. They can only establish their case in accordance with the facts pleaded. No doubt in certain cases a discrepancy between the pleadings and the proofs is not regarded when the facts incorrectly pleaded are immaterial. But in this case the owners of the "*Rosita*" have not accurately pleaded a fact that is material to their case. The bearings of the vessels when they first came in sight must always be material. The New Rules have modified pleadings in the Admiralty Court. But in "*The Claus Thomesen*" (32 L. J. Adm. 106) the late learned Judge of the

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Admiralty Court decided that in general the requisites of pleadings remain substantially the same as before the New Rules.

Deane, for the respondents.—No doubt the New Rules of Pleading in the Admiralty Court require the plaintiff in the suit to allege in his pleading all the material facts of the case, and it is equally a rule that the plaintiff can only recover *secundum allegata et probata*. It may even be admitted that the owners of the "*Rosita*" stand in this respect, as to their allegation, in the position of plaintiffs in the suit. They present a distinct case to the Court on their own behalf. But what do the Rules of Pleading require? They require that the "article of the pleadings shall contain a statement of the facts material to the issue." But the position of the vessels when at anchor and before they drifted is not a fact material to the issue. The statement as to the position of the "*Alice*" was mere surplusage; the fact that the proof did not support the allegation is immaterial.—They referred to "*The Moderation*" (1 Moo. N.S. 528) and "*The Despatch*" (14 Moore P.C. 83).

Lord Chelmsford (*Nov.* 28).—These cases have been argued before their Lordships upon somewhat different grounds from those upon which the argument, and apparently the judgment, proceeded in the Court below. I say apparently, because it appears that by the correction of an evident mistake in the printed judgment the foundation of the argument against it will be entirely removed. The mistake arises in the statement of the relative positions of the two vessels just before the collision. There is no doubt that, according to the evidence on both sides, when the "*Rosita*" came to an anchor in the Margate Roads on February 4, she was to the north-west of the "*Alice*," and, consequently, the "*Alice*" was to the south-east of her. It does not appear, although the distance between the vessels was probably lessened, that their relative position to each other was ever altered. In the answer on the part of the "*Rosita*," and in her petition in the cross-suit, it is said that the "*Alice*" had been riding about half a mile to the south-west of the "*Rosita*," and that she came driving down athwart the tide towards the "*Rosita*." Their Lordships are satisfied that, under the alleged state of circumstances, the vessels could not have come together as they did, viz., the port quarter of the "*Alice*" in contact with the port bow of the "*Rosita*." It is evident when the learned Judge states that the Trinity Masters think it impossible upon the statement that the collision could have taken place as described, and that they are of opinion that the "*Alice*" must have been to the south-eastward and not to the north-westward of the "*Rosita*" on the morning of the collision; that the words "north-westward" are a mistake, and that it must be read "to the south-westward," or, at all events, that the negative proposition may be rejected altogether, and the opinion of the Trinity Masters taken, that the "*Alice*" must have been to the south-eastward of the "*Rosita*." The great contest between the parties is, which vessel drifted? In the answer of the "*Alice*" to the petition it is said, "The '*Rosita*' was lying on the port beam of the '*Alice*,' and the crew of the '*Rosita*' were heaving in her chains. Under the circumstances aforesaid, those on board the '*Alice*' observed the '*Rosita*' with her port chain taut under her bow, and apparently dragging her anchor, coming down over the tide and before the wind with her yards square, and stem on towards the port quarter of the '*Alice*.'" On the other side, the "*Rosita*" says, that it was the "*Alice*" that drifted upon her.

Now there is contradictory evidence upon this subject, each set of witnesses stating the case in favour of the vessel to which they respectively belong. Upon these questions of fact the learned Judge of the Court of Admiralty states, in concurrence with the opinion of the Trinity Masters, that "the '*Rosita*' says she was riding with sixty fathoms of chain on the port anchor and twenty-five on the starboard, and another anchor attached belonging to the '*Shamrock*'; and this weight of anchors renders it extremely improbable that the '*Rosita*' could have drifted down on the '*Alice*.'" Now, the learned Judge having come to this conclusion upon a question of fact, even if their Lordships doubted whether that conclusion was correct, unless they were perfectly clear that it

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was wrong, they would be disposed to adopt his decision. But their Lordships are satisfied (and they have the assistance of very able assessors here, who concur in that view), that the fact is as the learned Judge has decided it to be. That being the case, if the "*Rosita*" did not drift upon the "*Alice*," the case of the "*Alice*" fails altogether, because it is the very foundation of her case that the "*Rosita*" moved, that she drifted down upon her, and that the collision was occasioned in that way. Therefore, thus entirely failing in the proof of the averment in her petition, of course her case must altogether fail; and their Lordships, under the circumstances, will have no difficulty in recommending to Her Majesty that the sentence of the Judge of the Court of Admiralty should be affirmed, and the appeal of the "*Alice*" dismissed with costs.

Turning to the case of the "*Rosita*" and to the objection, which must be considered as a preliminary objection which is made to the pleadings and to the proof in support of those pleadings, it is objected on the part of the respondent that the statement of the "*Rosita*" that the brig "*Alice*" had been riding about half-a-mile to the south-west of the "*Rosita*" is a material allegation, and, being disproved by the evidence, the case of the "*Rosita*" must altogether fail. Now, their Lordships are extremely anxious to adhere with as much strictness as possible to the rule which has been laid down in the various cases which have been cited in the course of the argument that a party can only recover *secundum allegata et probata*. But the question in this case is, whether the "*Rosita*" has not established every part of the allegation which was material to her cause, and whether the words which are referred to as not having been supported by the evidence were material, and necessary to be proved as part of that allegation.

Before the introduction of the New Rules, the pleadings in the Court of Admiralty were extremely diffuse, of which many of us have had experience, and in framing these rules it was considered important to reduce the length of pleadings, and to bring the parties to a short statement of the facts upon which they respectively founded their cases. Accordingly, the 67th of the Rules of 1859 says, "Every pleading shall be divided into short paragraphs numbered consecutively, which shall be called the 'articles of the pleadings,' and shall contain brief statements of the facts material to the issue." Now, the question upon these pleadings of the "*Rosita*" is, whether the statement that the "*Alice*" was riding to the south-west of her is a fact material to the issue. There can be no doubt whatever that if these vessels had been both in motion the bearings of the vessels with regard to each other would have been a most material fact to be alleged and proved, because the course to be adopted by the one vessel or the other would, of course, depend entirely upon their relative positions when they came in sight. But this is a case in which both the vessels were at anchor, and the material question is, which of the vessels drifted on the other. Now the position of either vessel, with regard to that material fact, does not appear to their Lordships to be an essential element in the statement of the cause of injury, and they have tried that question in various ways. The question was put to Dr. Pritchard whether, if the statement that the "*Alice*" was to the south-west of the "*Rosita*" had been entirely omitted from the pleadings, the allegation would have been insufficient; and he answered that in his view it certainly would not. Then, again, supposing this statement had been omitted altogether, could the respondent have gone to the Court of Admiralty to have the pleadings reformed on the ground of their omission of an essential circumstance in the allegation? There can be no doubt that that course could not have been successfully adopted. That being so, is it not evident that in the case of collision between two vessels originally at anchor, the bearing of the one vessel with respect to the other is not such a material fact as necessary to be stated upon the issue raised between the parties? Therefore we are not infringing any rule of the Court of Admiralty, or going contrary to any of the decisions upon this subject, by holding that the direction in which the "*Alice*" was riding with reference to the "*Rosita*" is not a fact material to the issue, and that the objection to the pleadings on this ground fails. It may be said,

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as it has been said, that the "*Alice*" was likely to have been misled by this allegation, because she must have been aware that if the vessels were in the position alleged by the "*Rosita*," it was quite impossible that the accident could have occurred in the way alleged; that is, by the port quarter of the "*Alice*" coming in contact with the port bow of the "*Rosita*." The parties might therefore have come to the Court prepared to meet a totally different case, and with a very different defence from that which it was necessary to oppose to the proof of a different relative position of the two vessels. But with regard to the possibility of any misleading, there could have been none in this case, because it is quite clear that the "*Alice*" stated the circumstances according to her own view; and placed the vessels in the exact position in which they were proved to be; therefore, even if the possibility of her being misled could have been an objection to these pleadings, the objection would have failed for want of a foundation. Under these circumstances, their Lordships are of opinion that the claim of the "*Rosita*" is not prejudiced by the allegation that the "*Alice*" was lying to the south-west of her before the collision, and that her case is fully established.

Now a very few words in regard to the mode in which the accident occurred. If the "*Alice*" had been to the south-west of the "*Rosita*," it is quite clear that the accident could not have occurred in the way described. But it must be taken as proved that the "*Alice*" was to the south-east of the "*Rosita*." Acting under the able assistance of our nautical assessors, their Lordships are of opinion that, taking the position of the vessels to have been as described, the "*Alice*" lying to the south-east of the "*Rosita*," the wind being to the northward of west, and the tide running in an opposite direction to the wind, the "*Alice*" having catted her port anchor, and the other anchor being out the whole length of the cable, eighty fathoms, the combined action of the wind and the tide would carry the "*Alice*" down towards the "*Rosita*" with a slackened chain, and that having drifted a cable's length (the distance between the two vessels), she would be checked, and then would drift down with the tide and come into collision with her port quarter against the port bow of the "*Rosita*." Thus it is satisfactorily shewn that the damage was occasioned by the drifting of the "*Alice*," and happened exactly in the way in which it has been proved to have occurred.

Under these circumstances, therefore, their Lordships will recommend Her Majesty to affirm the sentence of the Judge of the Court of Admiralty in favour of the "*Rosita*," and to dismiss the appeal of the "*Alice*," with costs.

ADMIRALTY. Nov. 3, 1868.

"THE BIDDICK."

38 L. J. Adm. 24; 19 L. T. 705.

Costs—Witnesses not Called.

SHIPPING.—*The expenses of material and necessary witnesses may be allowed, even though they may not have been called at the trial.*

This was a cause of damage by reason of a collision which took place between the steam-ship "*Biddick*" and a sailing vessel, which latter sank almost immediately. The principal point in the defendant's (the "*Biddick's*") case was that the topsails of the sailing vessel were fitted with patent furling apparatus, and he was prepared with two witnesses to prove the fact; but as it was established, from the cross-examination of one of the plaintiff's witnesses, neither of the two witnesses was called by the defendants. It was the opinion of the Trinity Masters that, whether or no the sailing vessel was fitted with the furling apparatus was an important fact in the case. The Court found that the

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sailing vessel was solely to blame, and decreed accordingly, with costs, and upon the taxation of the defendant's costs, the Registrar refused to allow the costs of the two witnesses in question.

Dr. Deane, for the defendant, moved the Court for an order to the Registrar to review his taxation by allowing the costs of these witnesses.

E. C. Clarkson, contra.

SIR R. PHILLIMORE.—I am of opinion that under the circumstances the evidence of these witnesses was material and necessary. It was the defendant's duty to be provided with it, and had Dr. Deane called the witnesses, even after the fact had been brought out in the course of the plaintiff's case, I should not have considered the time of the Court to have been unnecessarily occupied. It ought to be a question for the Registrar whether evidence is material and necessary; but he should not be altogether influenced by the consideration whether or not a witness is called. I shall therefore refer the matter back to the Registrar for him to allow reasonable costs.

ADMIRALTY. Jan. 19, 27, 1869.

"THE FREEDOM."

38 L. J. Adm. 25; L. R. 2 A. & E. 346; 20 L. T. 1018; 18 W. R. 48.

Disapproved, "*The Rory*," [1882] E. R. A.; 51 L. J. Adm. 73; 7 P. D. 117; 46 L. T. 757 (C. A.).

Damage to Cargo—Pleading—Particulars of Damage.

SHIPPING.—*In a cause of damage to cargo, the plaintiffs alleged that the oil-cake was not delivered in good order according to the terms of the bill of lading, and also that there was a breach of the contract in the bill of lading, or that the damage was caused by the negligence or breach of duty of the master or crew*:—Held, *that the plaintiffs were not bound to set forth the particular acts or the character of the negligence which caused the damage.*

This was a suit by the indorsees of a bill of lading of certain parcels of oil-cake to recover compensation for non-delivery of the oil-cake in good order and condition, and this was an application to order the plaintiffs to give particulars of the negligence or cause of damage.

The petition alleged, amongst other matters, (art. 3.) that 500 bags of linseed cake were shipped in good order and condition on board the "*Freedom*" at New York, "to be delivered in the like good order and condition at the port of London, the dangers of the seas only excepted"; that (art. 6) "the said 500 bags were not delivered according to the terms of the said bills of lading in as good order and condition as when they were shipped on board the said vessel at New York, but, on the contrary, the same were delivered to the plaintiffs much damaged and in much worse order and condition"; and (art. 11.) that "the damages . . . . were the consequences of breaches of the contracts contained respectively in the said bills of lading, or they were occasioned by negligence or breach of duty on the part of the master or crew of the said ship."

The defendants in their answer, besides denying the articles of the petition, alleged that "the damage (if any) to the oil-cake . . . was occasioned by the dangers of the seas or by the natural qualities of the said oil-cake, and not by any breach of contract contained in the bills of lading, . . . or by any breach of duty on the part of the master or crew."

E. C. Clarkson, for the defendants.—The plaintiffs have filed such a pleading as would oblige the defendants unless particulars are given, to prepare different lines of defence, inasmuch as the plaintiffs have pleaded not only breach of

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contract but negligence on the part of the defendants, and the plaintiffs ought to furnish particulars of such negligence.

Cohen, for the plaintiffs.—By the bill of lading in this suit, the owners of the "*Freedom*" contracted by their servant, the master, to deliver the oil-cake in question "in the like good order and condition at the port of London, the dangers of the sea only excepted," as it had been shipped on board the vessel, and therefore it was only incumbent upon the plaintiffs to prove that the oil-cake was shipped in good order and delivered in bad condition. It is for the defendants, if they can, to establish by proof that the deterioration was caused by the only specified exception to the obligations contained in his contract, namely, "dangers of the seas." The averments as to negligence in the master or crew were pleaded to guard against the possibility of the contract not being technically holden to have passed to the indorsees, who would nevertheless, under the authority of "*The Figlia Maggiore*" (37 L. J. Adm. 52; L. R. 3 Adm. 102), be entitled to sue the defendants on the ground of damage arising from negligence.

The cases cited were *Key* v. *Wheeler* (36 L. J. C.P. 181; L. R. 2 C.P. 302); *Lloyd* v. *the Iron Screw Collier Company* (33 L. J. Ex. 269; 3 Hurl. & C. 284); *Czech* v. *the General Steam Navigation Company* (37 L. J. C.P. 3; L. R. 3 C.P. 14); and "*The Figlia Maggiore* (37 L. J. Adm. 52; L. R. 3 Adm. 102).

Sir R. J. Phillimore.—The principal object of the rules of pleading in this Court is to prevent either party being taken by surprise at the hearing of the cause, and to obviate the necessity of the trial being postponed upon this ground. The pleadings by the plaintiffs and the defendants ought to be such as fairly to apprise the adversary of the nature of the case which is meant to be proved, and the rules and the practice are intended to ensure brief and fair statements, and to avoid prolix or obscure pleading. In deciding whether the pleading complies with the principle of fairly disclosing the nature of the case intended to be proved, it must be considered whether the matter charged be or be not within the knowledge of the party charged. In the case before me, if damage was done to the goods, it was done on board the ship of the defendants, where the plaintiffs were not. The cause of the damage must be presumed to be within the knowledge of the defendants, and accordingly in their answer they have stated what the causes of the damage were. It is to be borne in mind also that if the fact of the damage be established by the plaintiffs the burden of proving affirmatively that such damage was the consequence of the excepted perils lies unquestionably upon the defendants; and I think that the burden of proving affirmatively that due care was taken of the goods also lies upon them. If there was negligence in this respect, it must be presumed to be within their knowledge, and it does not appear to me that the plaintiffs are bound to set out the particular acts or the character of the negligence which caused the damage on board the defendants' ship. If indeed during the trial it should appear that the plaintiffs relied upon a particular act of negligence of which they were aware, and to which they ascribed the damage, and which took the defendants by surprise, I shall be disposed to afford them every opportunity of producing evidence in contradiction; but I cannot anticipate any such case, and as I think, having regard to the character and wording of the contract contained in the bill of lading, that the pleading of the plaintiffs fairly apprises the defendants of the case which they have to meet, I shall not make an order upon them to furnish further particulars.

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ADMIRALTY. April 21, 28, 1868.

"THE WHY NOT."

38 L. J. Adm. 26; L. R. 2 A. & E. 265; 18 L. T. 861.

Applied, "*The Orient*," [1870] E. R. A.; 39 L. J. Adm. 8; 21 L. T. 761 (Adm.).

Collision—Pleading—Answer—Insufficiency for not stating Cause of Collision.

SHIPPING.—*To a petition alleging that the ship M. had been for some time close-hauled on the starboard tack, and that the ship W. N. on the port tack came into collision with her, the answer admitted that the W. N. was close-hauled on the port tack, and alleged that the M. was seen on the port tack, distant about a mile*:—Held, *that the defendants were bound also to allege what was subsequently done on board the W. N. and before the collision, and the mode of the collision.*

This was a motion in a cause of collision, in objection to the sufficiency of the answer.

The plaintiffs in the 3rd article of the petition alleged that "The '*Margaret*' was close-hauled on the starboard tack, and so continued for some time prior to and until the collision hereinafter mentioned. The '*Why Not*' was on the port tack, and approaching her under such circumstances as rendered it the duty of the '*Why Not*' to avoid the '*Margaret*'; but the '*Why Not*,' nevertheless, came into collision with her, the stem and port-bow of the '*Why Not*' striking the port-bow of the '*Margaret*' by the fore rigging."

The defendants in the 3rd, 4th, 5th and 6th articles of their answer alleged that, "The '*Why Not*' was close-hauled on the port tack. She was carrying the regulation lights duly exhibited, brightly burning, and a good look-out was being maintained on board of her."—"In these circumstances the red light of a vessel, which proved to be the '*Margaret*,' also on the port tack, was observed about W. by N., distant about a mile."—"The '*Margaret*,' which was sailing more rapidly than the '*Why Not*,' afterwards came under the lee of the '*Why Not*,' then crossed her bow, and then ran down under the '*Why Not's*' lee and hauled up and spoke the '*Why Not*.' Shortly afterwards the '*Margaret*' improperly came round in stays, rendering a collision imminent. The '*Why Not*' immediately put her helm down, but failed to stay, and the collision then ensued; the jib-booms of the two vessels being the parts first in contact."—"The said collision was caused by the improper navigation of the '*Margaret*,' and the negligence of those on board her."

Pritchard, for the plaintiffs.—The defendants are bound to state what in their opinion occurred after the "*Margaret*" had been so observed at the distance of a mile, and how the vessels came into collision. According to the rules of the Court, the defendants must have already done this in their preliminary act.

Lushington, contra.—The defendants are entitled to stand entirely on the defensive, not to plead any circumstances at all, and to rely on a simple negative —"*The East Lothian*" (14 Moore P.C. 177).

Pritchard, in reply.—Such a course is at variance with the usual practice of this Court, both before and after that decision.

SIR R. J. PHILLIMORE.—The rules of pleading ought to be adapted to the nature of the case which it is their object to bring before the Court. They are not to be considered as constituting a game of skill between the advocates, but ought to be so framed as to assist, not only the party in the statement of his case, but the Court in its investigation of the truth between the litigants.

The cases of collision tried in this Court are of a peculiar character, and such as require the application of particular rules of pleading in order to second the due administration of justice, and much experience has proved that justice was often defeated by a case set up in Court to meet the case developed by the

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evidence on the other side; but which the Court, assisted by assessors of nautical experience, well knew could not have been the true statement of the actual circumstances of the collision; and to remove this obstacle to the administration of justice, rules were framed by the Court requiring each party in a cause of collision to file, before any pleadings had taken place, what is called a preliminary act—public documents sealed up, and not opened till the hearing. They contain the answer of each party to several questions carefully framed to elicit the facts as to the leading points in every case of collision; and experience has fully justified the order for this mode of procedure, which is adopted in this Court alone and suited to the peculiar constitution of this tribunal. Much of the advantage of the preliminary act is derived from the opportunity which it affords of contrasting the statements as to the causes of the collision, set up by the parties before they know the case which either intends to rely upon in their pleadings, and it is obvious that this advantage would be impaired if a defendant might content himself in his answer with relying on a simple negative. A question of this kind was brought before my predecessor in the case of "*The Claus Thomsen*" (32 L. J. Pr. M. & A. 106). In that case an objection was made to an answer, and Dr. Lushington said, "Without considering the principles of pleading by which this Court is governed, it is sufficient in this case to notice one objection to the answer. Every pleading, whether the petition or answer, ought to be so framed as that if the evidence was taken before an examiner the pleadings alone would enable him to elicit all the facts of the case."

This seems to be a decision very much in point in the present case. "*The East Lothian*" (14 Moore P.C. 177) established the principle that the plaintiff must succeed upon the strength of his own case, and not upon the weakness of the defence, and therefore where the plaintiff had clearly failed in proving that the collision had happened in the manner alleged in his petition, the defendant was entitled to be dismissed with costs, although he had in his answer attributed the collision to causes disproved by the evidence. To this decision and the principle upon which it is founded I readily subscribe, and it does not seem to me to furnish an authority for the novel experiment in pleading attempted in the answer before me.

I direct a fuller statement to be made as to what the "*Why Not*" did between the time of sighting the "*Margaret*" and the collision.

ADMIRALTY. Dec. 17, 18, 19, 1868; Jan. 14, 1869.

"THE WOBURN ABBEY."

38 L. J. Adm. 28; 20 L. T. 621.

See, "*The Princeton*," [1878] E. R. A.; 47 L. J. Adm. 33; 3 P. D. 90; 38 L. T. 260 (P. D. & A.); "*The Servia*," [1898] E. R. A.; 67 L. J. Adm. 36; [1898] P. 36; 78 L. T. 54; 46 W. R. 492 (P. D. & A.).

Damage—Swinging to the Tide—Pilot's Responsibility.

SHIPPING.—*The W. A, in charge of a pilot, came to anchor in the Mersey and gave the B. T. a foul berth. Various remonstrances were from time to time made by those on board the B. T, and after a few days the vessels in swinging to the tide came into collision*:—Held, *that the owners of the W. A. were responsible for the damage.* 1. *Because while the vessel was at anchor, the employment of the pilot was not compulsory.* 2. *Because, even if the pilot had not properly moored the W. A, her master was not relieved from responsibility, and therefore her owners were liable for the damage.*

This was a cause of damage. In the month of October, 1868, the ship "*British Trident*," from Quebec, with timber, arrived in the Mersey and anchored in the Sloyne, about half way between Tranmere and Rock Ferry, and

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on the 27th of that month, the ship "*Woburn Abbey*," from Rangoon, with rice, having then a pilot in charge of her, came to anchor about a ship's length distant from the port quarter of the "*British Trident*." The tide was then ebb, and the vessels swung to the tides for some days, and were kept from coming into collision by setting sail and other manœuvres. Various remonstrances were made to those on board the "*Woburn Abbey*" that she had given a foul berth, but they were not attended to, and on the night of the 29th the vessels swung to the ebb tide, and the "*British Trident*," swinging with her stern to the Cheshire shore, got her head to S. by W, when the tide caught her, and with her starboard quarter she came into collision with the port bow of the "*Woburn Abbey*," and the vessels remained in collision drifting to the northward.

Milward (*Butt* with him), for the owners of the "*British Trident*."—The collision was occasioned by the "*Woburn Abbey*" having given the "*British Trident*" a foul berth, and the owners were not exempt by reason of having a pilot on board—first, because the ship having been brought to anchor compulsory pilotage ceased[1], and there was no obligation to employ the pilot again until the ship was moved to be taken into dock; secondly, if the pilot was compulsorily in charge, the master was ashore, the mate in bed, and the crew inefficient, and therefore the pilot had not the efficient assistance which the owners were bound to provide for him.

Dr. Deane (*E. C. Clarkson* with him).—According to the terms of the statute, the pilot's duties do not cease until the vessel is "properly moored," and the facts of the case shewed that the crew efficiently obeyed all the orders given by the pilot.

SIR R. PHILLIMORE.—The evidence establishes to the satisfaction of the Court and of the Trinity Masters that the "*British Trident*" was properly anchored in a safe berth, and that the "*Woburn Abbey*" was improperly anchored and gave her a foul berth; that she had ample time to remedy the fault, but neglected to do so; and that she was alone to blame for this collision. The pilot of the "*Woburn Abbey*" swears that he did properly moor her; but it has, nevertheless, been argued, on behalf of the "*Woburn Abbey*," that he did not do so, and therefore that he must be considered by intendment of law to have been in charge of the vessel at the time of the collision; and partly in support of this proposition "*The Northampton*" (1 Spinks, 152) and *Rodrigues* v. *Melhuish* (10 Ex. 101; 34 L. J. Ex. 26) were cited. On the other side, "*The Annapolis*" (1 Lush. 295; 30 L. J. Pr. M. & A. 201) and the Mersey Dock Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), s. 128, were relied upon.

It is important to state that I am not considering, in the present instance, the case of a ship only temporarily moored, and going into dock almost immediately or on the next day. I am considering the case of a ship moored by the pilot for such a length of time as caused him to be *functus officio* so far as the legal obligation to employ him was binding upon the master. And the argument which in these circumstances would still continue the responsibility of the pilot and the consequent immunity of the master is to this effect, that a pilot because he has improperly moored a vessel remains on that account in charge of her, and that the master, though aware that she has been improperly moored, has no authority to shift her berth. I am glad to say that, in my opinion, this proposition has no legal authority, because I think it would be fraught with mischief to the interests of navigation and to the discipline of ships.

I pronounce the "*Woburn Abbey*" to be alone to blame for this collision, and that she is not relieved from her liability by having been at the time it occurred under the charge of a pilot.

(1) The following is the section of the act referred to: "The pilot in charge of any inward-bound vessel shall cause the same (if need be) to be properly moored at anchor in the river Mersey, and shall pilot the same into some one of the wet docks within the port of Liverpool, whether belonging to the Board or not, without making any additional charge for so doing, unless his attendance shall be required on board such vessel while at anchor in the river Mersey, and before going into dock, in which case he shall be entitled to receive 5*s*. per day for such attendance."—*Mersey Dock Acts Consolidation Act*, 1858, *s*. 128.

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ADMIRALTY. June 11, 16, 27, 1868.

"THE MARY," OTHERWISE "ALEXANDRA."

38 L. J. Adm. 29; L. R. 2 A. & E. 319; 18 L. T. 891; 17 W. R. 551.

Possession—Interrogatories—Practice as to.

DISCOVERY. SHIPPING.—*The practice of the High Court of Admiralty as to interrogatories follows that of the Courts of equity rather than that of the common law Courts.*

In a cause of possession the defendant may be compelled to answer interrogatories if they be such as tend to support the plaintiffs' case and to a complete inquiry into the truth of the issues in the cause.

A defendant will not be compelled to answer an interrogatory if he swear that his answer would subject him to the penalties of the Foreign Enlistment Act.

The ancient and modern practice of the High Court of Admiralty as to interrogatories reviewed.

This was a cause of possession, in which the United States Government were the plaintiffs and Mr. Prioleau was the defendant, and in which the plaintiffs alleged the "*Alexandra*" to be their property, as having been purchased by the government of the so-called Confederate States, out of moneys belonging to the plaintiffs.

The plaintiffs now moved the Court to order the defendant to answer certain interrogatories.

Milward and *Butt*, for the defendant, objected to the interrogatories as irrelevant, or as tending to criminate, or merely to negative the title of the defendant, and not discover any facts which could support the title of the plaintiffs—*Croomes* v. *Morrison* (5 E. & B. 984); *Osborn* v. *the London Dock Company* (10 Ex. 698; 24 L. J. Ex. 140); *Tupling* v. *Ward* (6 Hurls. & N. 749; 28 L. J. Ex. 222); *Robson* v. *Cooke* (2 Hurls. & N. 766; 27 L. J. Ex. 151); *Bartlett* v. *Lewis* (12 Com. B. Rep. N.S. 249; 31 L. J. C.P. 230); *Baker* v. *Lane* (3 Hurls. & C. 544; 34 L. J. Ex. 57); *Bickford* v. *D'Arcy* (35 L. J. Ex. 202; L. R. 1 Ex. 354).

The Solicitor General (Sir W. B. Brett), the Queen's Advocate and *Clarkson*, for the plaintiffs.—The Admiralty Court is also a Court of equity, and before the passing of the 17th section of the Admiralty Court Act, 1861, there was another mode of obtaining the same advantages as those given by administering interrogatories, viz., by compelling personal answers. The Admiralty Court Act gives no new power, but only the same to be exercised in a different way. This Court must mould this power according to its own mode of procedure, and in correspondence with the procedure of the Courts of equity. There is no criminal proceeding maintainable under the Foreign Enlistment Act. A penalty alone may be inflicted. Its provisions cannot apply to the defendant, who is not a natural-born subject, but only a naturalized foreigner; and there can be no forfeiture of the ship, inasmuch as the period specified by the act, beyond which a forfeiture cannot take place, has elapsed. It is said that the plaintiffs can interrogate only as to their own title (not as to the defendant's; but the plaintiffs say the ship was bought, for the Confederate Government, in England, by its agents; and the evidence must be exclusively in the knowledge of the defendant as to the circumstances under which she was bought. The plaintiffs' case is, that all those through whose hands she passed were agents; that the several transfers were fraudulent; that there were simulated bills of sale. It does not follow that because some interrogatories are objectionable all should be disallowed—*Stern* v. *Sevastopulo* (14 Com. B. Rep. N.S. 737; 32 L. J. C.P. 268; *Scott* v. *Miller* (Johns. 328).

Milward replied.

SIR R. PHILLIMORE.—This is an application to the Court to permit certain

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interrogatories to be administered to the defendant in this case. The principles which ought to guide the Court and regulate the practice of it, with respect to this mode of discovering the truth in contested cases, have been discussed at much length upon this occasion, and various authorities, principally derived from the decisions of the common law Courts, have been cited. I think it expedient to say something both with respect to the ancient practice of this Court and the powers conferred upon it by the recent statute.

According to the ancient practice of the Court it would be competent to the plaintiffs to counterplead the averments contained in the plea of the defendant, either absolutely or by giving a different version of the facts to which they relate, and to have required his answer upon oath to these contradictory or explanatory averments in the counterplea; and in this way a great, if not the greater part of the interrogatories before me might practically have been administered, subject always to legitimate objection on the part of the defendant, that his answers were called for upon matters irrelevant, or of which he was ignorant or which would expose him to pains or penalties by compelling him to criminate himself. In fact, the practice of the Court of Admiralty has always, to a certain extent, been that of a Court of equity as well as a Court of law.

With regard to more modern practice, the 17th section of 24 Vict. c. 10 (the Admiralty Court Jurisdiction Act) enacts as follows: "The Judge of the High Court of Admiralty shall have all such powers as are possessed by any of the superior Courts of common law, or any Judge thereof, to compel either party in any cause or matter to answer interrogatories, and to enforce the production, inspection and delivery of copies of any documents in his possession or power."

The powers possessed by the superior Courts of common law are derived from section 51 of the 17 & 18 Vict. c. 125. I have been referred to a variety of decisions by the common law Courts upon the question of incorporating into their practice the use of these interrogatories, but I regret to say that I have not derived much assistance, still less any clear rule for my guidance, from a perusal of these decisions. They are very conflicting, and seem to shew that two schools of thought or opinion with respect to the use of these interrogatories, especially as to those which are said to be of a criminatory character, exist in Westminster Hall. I find, however, that the Common Pleas, under the presidency of Erle, C.J., came to the conclusion that the practice of the Court of Chancery in this matter was not to be considered as binding upon the Courts of common law— *Bartlett* v. *Lewis* (31 L. J. C.P. 230). Erle, C.J., there said: "The interrogatories are sought to be administered under section 51 of the Common Law Procedure Act, 1854, which authorizes a plaintiff or defendant to deliver to the opposite party, provided such party would be liable to be called as a witness in the action, interrogatories in writing upon any matter as to which discovery may be sought. This is an action brought for the recovery of a debt. The defendant pleads a discharge under the Bankruptcy Act, and the question is whether that discharge is valid. These interrogatories bear directly on that question, and *prima facie* they are questions which the 51st section authorizes to be put. But they also bear upon matter which may be evidence of an indictable offence. No simple question, however, directly charges the defendant with having committed an indictable offence, and this it is which appears to me to have been the ground of the demurrer in the cases referred to in the Court of equity. It is clear that these are questions which might be put to the defendant if he were in the witness-box, and there he would be bound, if he desired to protect himself against answering them, to pledge his oath that they tended to criminate him. I think he must also do so now. I think the interests of truth are in the first place to be maintained, subject only to such privileges as the witness can legally claim. Beyond that, there is no reason why the law should protect a man charged with an indictable offence any more than a man charged with fraud or dishonest conduct, which barely escapes being indictable. I found this decision on the form of the interrogatories; but I entirely differ from the argument that the inference which a jury might draw

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from a refusal by the defendant to answer these interrogatories is any reason why the defendant should not be compelled to answer them. Nor do I read the 51st section of the Common Law Procedure Act, 1854, as saying that the practice of the Court of Chancery in respect of bills of discovery is to be imported into the Courts of common law, and that we are not to permit questions to be put in the form of written interrogatories in any case in which a Court of equity would not allow them to be put. I think it means that interrogatories may be put in any case where a bill of discovery might be filed; but I do not think it is intended that the practice of the Court of equity relating to discovery should be introduced."

I have considered the practice of the Court of Chancery upon the subject, as set forth in the 9th chapter of *Daniell's Practice*, "On interrogatories for the defendant in answer to the bill," and in the 14th chapter, section 2, "On the different grounds of demurrer to a bill of discovery," and I have come to the conclusion that the interests of justice require me to mould, as far as I am able, the practice of this Court, rather in conformity with the practice of the Courts of equity than of common law.

The cardinal principle by which I intend to be governed in this matter is, that the interrogatories ought to be such as tend *bonâ fide* to support the case of the plaintiff, and to favour a complete inquiry into the truth of the issue which the Court has to decide. The limitation to this principle which is derived from their tendency to criminate the answerer, I will presently consider. In order to apply the principle to the present interrogatories, I must consider the scheme, so to speak, of the petition and the answer.

The petitioners being the United States of America, claim, in a cause of possession, this vessel, the "*Alexandra*" or "*Mary*," on the ground that she was built, purchased, or acquired by a pretended rebel government, in whose *de facto* possession she was at the time when the rebellion was suppressed, though *de jure* she belonged to the United States; that she never was, and is not, the property of Mr. Prioleau, in whose possession she is. Now it was truly observed by Her Majesty's Advocate that the defendant Prioleau, does not, in his answer, state simply, "I say I am the registered owner, and here is my register"; but he sets up a history by which his title to the vessel is to be established, as it were, by a chain of evidence consisting of various specified links, and relying upon documents which the petitioners contend are tainted with *mala fides* and fraudulent; and they allege that the object of these interrogatories is to prove not only that the title of the defendant is bad, but that in truth the various owners through whom his title is derived, as well as the defendant himself, will appear, when the fraud is unravelled by means of these interrogatories, to have been by intendment of law necessary agents or trustees for the plaintiffs. For instance, the answer states that the ship was built by one Miller, of Liverpool, for the firm of Fawcett, Preston & Co., by them transferred to one Henry Lafone, and by him to Prioleau, the present defendant; and documents of transfer and conveyance are referred to. These interrogatories, it is alleged, will elicit the facts not only that these transfers are simulated and the documents colourable, but they will also shew that the true owner was the rebel government, and on that account the mere holder of property for the benefit of the present plaintiffs, the United States. Therefore it is argued these interrogatories have a *bonâ fide* tendency, not merely to negative and destroy the title of the defendant, but to affirm and render evident the title of the plaintiff. Looking to all the circumstances of the case, I have come to the opinion that this argument is sound, and that adhering to the principle which I have enunciated, the interrogatories, speaking generally, ought to be allowed.

It has been contended that some of the interrogatories are objectionable, either as being superfluous, or as referring to matters of which the defendant is ignorant, or as leading to answers which would criminate him. With respect to the first of these objections, I am not clear that the interrogatories are superfluous; and no injury can arise to the defendant from answering them. And this latter observation extends to the second head of objection; for, if the

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defendant is ignorant of the facts as to which he is interrogated, he can say so. With respect to the third head, the objection is more serious. Many of the interrogatories, it is urged, tend to prove that the defendant was guilty of a breach of the Foreign Enlistment Act, and thereby to subject him to penalties. The Courts of equity appear to have holden that, as a general rule, a person was not compelled to answer so as to subject himself to punishment, in whatever manner that punishment may arise, or whatever might be the nature of that punishment—1 *Daniell's Chancery Practice*, edit. 1865, p. 516, *et seq.* This rule, however, was subject to considerable modification; and in the Courts of equity, underwriters, in cases where policies of insurance were found to have been effected with gross fraud, brought the parties into Court and compelled them to answer, by stating in their bills frauds which would have been indictable—see *Davie* v. *Verelst*, cited in *Macauley* v. *Shackell* (1 Bligh, N.S. 133). In the Courts of common law the practice on this point has been conflicting and contradictory, and in the very last case, decided during the argument in this case, the Court of Exchequer was divided—or rather the Judges were divided—a majority of three to two deciding that the witness was bound to answer questions, though they had a tendency to criminate him—*M'Fadzen* v. *the Liverpool Corporation* (37 L. J. Ex. 193; L. R. 3 Ex. 279). It has been holden, however, both in equity and at law, that a defendant in order to protect himself from answering on the ground that the discovery of the matters inquired after would expose, or tend to expose, him to penalties, must state upon oath his belief that such would be the case: a submission of the question to the Court is not sufficient—*Fisher* v. *Ronald* (12 Com. B. Rep. 762; 22 L. J. C.P. 62) and *Scott* v. *Miller* (2 Johns. 328). It is obvious that in certain cases, perhaps in the present, it may be much more for the advantage of the party desiring to put the interrogatory that the interrogated party should refuse to answer, for the reason so sworn to, than that the question should not be put at all. The tendency of some of these interrogatories to elicit an answer criminating the defendant is maintained on the ground that they would expose him to the penalties of the Foreign Enlistment Act. It has been truly said that the provisions in that statute which affect natural-born subjects do not affect Mr. Prioleau, who is only a naturalized subject. Nor do the provisions which relate to the forfeiture of the ship, inasmuch as the prescribed period of twelve months, within which such forfeiture must accrue, had elapsed. The other provisions in the act which relate to a misdemeanour are indeed not limited to any period of time, and it is with respect to these only that the defendant can claim protection.

Upon the whole, I am of opinion that I ought to allow these interrogatories to be administered; but that if the defendant state upon oath his belief that an answer to any particular interrogatory would subject him to the penalties of the Foreign Enlistment Act, he shall not be compelled to answer such interrogatory.

ADMIRALTY. March 23, April 13, 1869.

"THE ESK"; "THE GITANA."

38 L. J. Adm. 33; L. R. 2 A. & E. 350; 20 L. T. 587; 17 W. R. 1064.

Applied, "*The Englishman*," [1878] E. R. A.; 47 L. J. Adm. 9; 3 P. D. 18; 37 L. T. 412 (P.D. & A.). See "*The Romance*," [1901] P. 15; 83 L. T. 488 (P.D. & A.).

Damage—Vessel with her Anchor down, but Moving—Lights.

SHIPPING.—*A vessel with an anchor down, but not held by or under the control of it, is under way so as to render it obligatory to exhibit her coloured lights.*

These were cross causes of damage.

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The collision occurred about twelve o'clock p.m., of November 18, 1868, near the "Sunk" and "Gunfleet" Sands. The master and pilot of the "*Gitana*," which was under all plain sail, saw a white anchor-light, about half a point on the starboard bow, at the distance of a quarter of a mile; the night was dark and hazy. The pilot of the "*Gitana*," supposing the light to be that of a vessel riding, starboarded to pass under her stern, and the light opened a point and a half to two points, sufficient for him to clear. He then gave the order to "Steady," and still saw the white light, when shouting was heard, "Port your helm; we are shifting our berth; we are still at anchor," or "our anchor is still down." The pilot ordered the helm hard-a-port instantly, and almost immediately the vessels came into collision, the "*Gitana's*" jib-boom catching the fore-stays of the "*Esk*," and afterwards their hulls came together.

On behalf of the "*Esk*" it was alleged that she was brought up by her starboard anchor with thirty or thirty-five fathoms of chain, and heading east with a proper anchor-light exhibited; the crew hove in about fifteen fathoms of chain and the boom-foresail and inner-jib were then set. About seven or eight fathoms more chain were got in when the green light of the "*Gitana*" was seen a quarter of a mile off, and the master of the "*Esk*" hailed as loud as he could that the "*Esk*" was at anchor, and that his anchor was still down. The crew stopped getting in the chain, and the master swore that the anchor was then holding, and that he hailed "Port" because the "*Gitana*" seemed to be coming in on his port bow. The anchor was on the ground at the time of the collision, and one witness swore that he was sure the anchor was not "tripped," for the chain was going over the windlass when the vessel struck them.

Dr. Deane and *Bayford* appeared for the owners of the "*Gitana*"; *E. C. Clarkson* and *E. G. Gibson*, for the owners of the "*Esk*."

Judgment was given, on April 13, as follows:

SIR R. J. PHILLIMORE.—Upon this evidence, and upon all the circumstances of the case, two questions arise, one of fact and another of law. The question of fact is, whether or no the anchor of the "*Esk*" was holding her at the time of the collision? Now, according to her own statement, the "*Esk*" saw the green light of the "*Gitana*" about three points on her port-bow; and the Trinity Masters advise me that if the "*Esk*" was, as she represents herself to have been, then stationary at her anchor, she could have had no reason to suppose that the "*Gitana*" would not, under a starboard helm, pass her to the eastward; the "*Esk*," however, hailed the "*Gitana*" to port her helm, and at the same time that her anchor was "still down" or "down." The Trinity Masters are at a loss to understand why, if the "*Esk*" were holden by her anchor, she should have hailed the "*Gitana*" to port her helm; while, on the other hand, if the "*Esk*" was not holden by her anchor, but had canted and was forging ahead, then the hailing to port the helm would be intelligible, because the "*Esk*" would in that case be actually crossing the bows of the coming vessel. Moreover, it strikes the Trinity Masters as a suspicious circumstance that a vessel with a proper anchor-light up, as the "*Esk*" certainly had, should nevertheless hail the fact of her being at anchor, which it is the very object of the light to indicate. The answer, that the "*Esk*" had hoisted her boom-foresail and inner-jib, which, unless she hailed that she was at anchor, might have deceived the approaching vessel, does not remove this suspicion, because the carrying of these sails in conjunction with a white light would not indicate to a person of competent nautical knowledge that she was under way.

Applying my own judgment to the advice tendered to me by the Trinity Masters, I have arrived at the conclusion that the "*Esk*" was not holden by her anchor at the time of the collision.

The finding of this fact renders necessary the consideration of the question of law, which is of considerable importance, and which, I regret to say, I am called upon to decide for the first time. In the case of the "*George Arkle*" (Lush. 382), in which the decision of this Court was affirmed by the Privy Council, it was ruled, that a vessel driven from her anchors by a gale of wind, and setting sail to get out to sea, is, even if wholly unmanageable, "under

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way," within the meaning of the Admiralty Regulations, 1858, and is bound to exhibit coloured lights; and that though the ship was in great difficulty and danger, the omission in such circumstances to exhibit the coloured lights is negligence, and that the ship is liable for any collision occasioned thereby. This judgment furnishes some assistance to me, but is clearly not decisive of the present case. The object of the regulations, so far as their bearing on the present case is concerned, with respect to carrying lights, is to furnish means of apprising other vessels whether the vessel carrying them be stationary or in motion, in order that the coming or meeting vessel may direct her course accordingly, and give the vessel carrying coloured lights and in motion a wider berth than she would give if that vessel carried an anchor light and was stationary. This is the principle which underlies these rules; it is possible, no doubt, to draw fine distinctions between vessels which have just actually raised their anchors off the ground and those which are in the very act of doing so; but, practically, the true criterion as to the application of the regulation must be, whether the vessel be actually holden by and under the control of her anchor or not. The moment she ceases to be so, she is in the category of a vessel under way, and must carry the appointed coloured lights. The case before the Court strongly illustrates the expediency of these regulations, for had the "*Esk*" when she canted lighted and exhibited her lamps, which appear to have been ready, her red light instead of the white would have been visible to the "*Gitana*" in the first instance, and the "*Gitana*" would have ported *then* instead of starboarding, and this collision would have been avoided. It remains only to notice two positions of the counsel for the "*Esk*," namely, that the collision was caused by a bad look-out, and "by too close a shave" on the part of the "*Gitana*." The first conclusion is not supported by the evidence, and as to the second, the opinion of the Trinity Masters, from which I see no reason to differ, is that the manœuvre of the "*Gitana*" would have afforded ample room for avoiding the collision with a vessel holden by her anchor, as the "*Esk*" was, in the circumstances, rightly presumed to be.

I pronounce the "*Esk*" solely to blame for this collision.

ADMIRALTY. April 17, 27, 1869.

"THE MALI IVO."

38 L. J. Adm. 34; L. R. 2 A. & E. 356; 20 L. T. 681.

See, "*The Delta*," [1876] E. R. A.; 45 L. J. Adm. 111; 1 P. D. 393; 35 L. T. 376; 25 W. R. 46 (P.D. & A.); *McHenry* v. *Lewis*, [1883] E. R. A.; 52 L. J. Ch. 16; 21 Ch. D. 202; 46 L. T. 567 (Ch. D.): affirmed, [1883] E. R. A.; 52 L. J. Ch. 325; 22 Ch. D. 397; 47 L. T. 549; 31 W. R. 305 (C. A.). Considered, "*The Christiansborg*," [1885] E. R. A.; 54 L. J. Adm. 84; 10 P. D. 141; 53 L. T. 612 (C. A.).

Damage—Bosphorus—Lis alibi pendens.

SHIPPING.—*In a cause of damage in respect of a collision between two foreign vessels in the Bosphorus*, semble—*that if a suit as to the same subject-matter is pending elsewhere whereby the plaintiff can obtain full indemnity, the High Court of Admiralty will suspend the proceedings in its Court or put the plaintiff to his election; and the Court will so act whether the proceedings elsewhere are* in rem *or* in personam.

This was a cause of damage.

On the morning of December 12, 1866, the Norwegian brig "*Helmich*," whilst on a voyage from Berdianski to Falmouth, was off Karah Point, in the Bosphorus, when the Austrian brig "*Mali Ivo*" was being towed by a Turkish

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steam-tug up from the entrance of the Bosphorus, and the steam-tug passed clear of the "*Helmich*," but the "*Mali Ivo*" came into collision with her.

On February 2, 1867, the master of the "*Helmich*" cited the master of the "*Mali Ivo*" and also the master of the steam-tug, to appear before the Austrian Consular Court at Constantinople to answer for the damage done; and the master of the "*Mali Ivo*" also cited the master of the steam-tug to answer for any damages for which he might be liable to the master of the "*Helmich*." The master of the steam-tug excepted to the jurisdiction of the Court to entertain the suits against him, he being a subject of the Ottoman Porte; and on February 20, 1867, the exception was allowed in his favour in both suits. Thereupon, as was alleged by the owners of the "*Helmich*," all proceedings on behalf of their master in the Consular Court were abandoned, and on April 25, 1867, the "*Mali Ivo*" was arrested in this cause.

From the decree of the Austrian Consular Court refusing to hear the suit of the master of the "*Mali Ivo*" against the master of the steam-tug, the master of the "*Mali Ivo*" appealed to the Imperial Royal Tribunal of Appeal at Vienna and ultimately to the Supreme Court of Cassation there, but, as was alleged on behalf of the owners of the "*Helmich*," the master of that vessel was no party to either of the appeals.

Dr. Deane and *E. C. Clarkson*, for the owners of the "*Helmich*."—The proceedings in the Consular Court have been, as regards the "*Helmich*," abandoned since February 20, 1867, and this Court is therefore properly seised of the cause. Besides, even if the cause were still pending in the Consular Court it would be no answer to this suit, as this is a proceeding *in rem*, whereas the suit there was *in personam*—"*The Bold Buccleuch*" (7 Moore P.C. 283).

Butt and *Pritchard*, for the owners of the "*Mali Ivo*."—This Court has a discretion to entertain or not a suit between foreigners—"*The Nina*" (37 L. J. Adm. 17), and will exercise that discretion whether the proceedings in the suit pending elsewhere be *in rem* or *in personam*—"*The Lanarkshire*" (2 Spinks, 189); "*The Bengal*" (Swabey, 468); "*The John and Mary*" (4 Swabey, 471). This Court will not interfere if, as in this case, full and complete indemnity may be obtained in the first suit. As to the jurisdiction of the Consular Court at Constantinople, see "*The Laconia*" (33 L. J. Pr. M. & A. 11).

Judgment was given, on April 27, as follows:

Sir R. J. Phillimore.—It has been said by the counsel for the defendant that this Court would not be anxious to entertain such a suit, but it has not, and could not with propriety, have been said that the Court had not jurisdiction over the subject. It is well known that the jurisdiction of the High Court of Admiralty extends to all cases of collision happening upon the seas, that is, within the ebb and flow of the tide. In a case now before me—much discussed both here and in the Privy Council, "*The Halley*" (37 L. J. Adm. 1)—the collision took place in the Scheldt. It is true that in that case one of the parties was a British subject, but that circumstance does not affect the power of the Court to entertain the suit, though it is a circumstance to be taken into consideration, as to whether or no it shall allow its jurisdiction to be put in force. I do not mean to pronounce any opinion as to whether the Court does or does not possess any such discretion.

The discretion which the Court does possess with respect to suits instituted by foreign seamen for their wages against a foreign master whose ship happens to be in one of the ports of this country is certainly distinguishable in principle from a discretion to be exercised, as in the present case, for the purpose of preventing the subject of one foreign nation from suing the subject of another foreign nation in a cause for damage done to the vessel of the former upon the sea.

It is another and different question whether, if there be, as is contended in this case, a *lis alibi pendens*, the Court has not a discretion, or perhaps even a duty, to refuse the exercise of its jurisdiction upon the same subject-matter between the same parties unless that litigation be discontinued. I am aware

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that it has been decided by the Court of Common Pleas, in the case of a foreigner against whom an action of contract was pending in his own country at the suit of the plaintiff, and who came over to this country and was sued here by the plaintiff for the same demand, that the pendency of the action in the foreign country was not a sufficient ground for staying proceedings in the action here—*Cox* v. *Mitchell* (7 Com. B. Rep. N.S. 55; 29 L. J. C.P. 33); and I have considered that part of the case of "*The Bold Buccleuch*" (7 Moore P.C. 283) which refers to this subject. I have referred also to the cases of "*The Griefwald*" (Swabey, 431); "*The Lanarkshire*" (2 Spinks, 189); "*The Bengal*" (Swabey, 468), and "*The John and Mary*" (Swabey, 471); and I have come to the conclusion that it would be my duty either to suspend proceedings in this Court or to put the party to his election as to which Court he would have recourse to, if, indeed, the evidence before me established that there was a *lis alibi pendens* before a tribunal which could afford the plaintiff a complete remedy whether the proceedings were technically instituted *in rem* or *in personam*. I am also of opinion that the Austrian Consular Court of Constantinople would come within this category of a competent tribunal, inasmuch as by the well-known capitulations by treaty, sufferance and usage, the Austrian empire, like other Christian states, has acquired from the Ottoman Porte an exclusive right of jurisdiction, to be exercised over its subjects in suits of this kind within the limits of the Ottoman empire.

As a matter of fact, however, I am satisfied that there is no suit pending elsewhere between litigants now before me on the same subject as that upon which I am now called to adjudicate. The facts appear to be these: The master of the Norwegian brig instituted a suit for damage against the master of the Austrian vessel on December 31, 1866. On February 2, 1867, the Austrian master cited the master of the steam-tug to appear in Court and answer for the damage, on the ground that it was exclusively imputable to him. On February 20, the Court referred the first plaintiff and the defendant to litigate their claims before the Ottoman maritime jurisdiction, whereupon the Norwegian withdrew his deposit of security for costs and abandoned the proceedings; and on April 25, he instituted a cause of damage in the English Court of Admiralty. It is true that on March 4 the Austrian defendant presented an appeal to the Imperial Tribunal of Austria at Trieste, to which appeal the Norwegian was no party. This Court overruled the decision of the Consular Court, and declared that it was competent to entertain the suit. The consular tribunal ordered the Norwegian, who, as I have said, was no party to the appeal, to put in his reply within fourteen days. From this order the Norwegian appealed to the Imperial Royal Tribunal, which, on August 13, annulled the decree as against him. From this decree the Austrian master appealed to the Court of Cassation at Vienna; and what has become of that appeal does not appear, but it is distinctly sworn by the attorney for the Norwegian plaintiff at Constantinople that since February 20 last, all proceedings on his part have been withdrawn. It is true that the attorney for the Austrian defendant says that the suit is still pending in the Consular Court: probably that is the suit between the Austrian master and the Ottoman steam-tug, but whether this be so or not, I am of opinion that, upon the evidence before me, I must hold that the present plaintiff has discontinued the proceedings which he had instituted in the Consular Court.

The merits of the case may be discussed in a few words.

[The COURT then reviewed the facts of the case as to the collision, and held that the "*Mali Ivo*" was alone to blame.]

Decree accordingly.

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ADMIRALTY. Feb. 10, 16, 1869.

"THE ROYAL CHARTER."

38 L. J. Adm. 36; L. R. 2 A. & E. 362; 20 L. T. 1019; 18 W. R. 49.

Distinguished, "*The Livia*," 1872, 25 L. T. 887 (Adm.). See, "*The Juno*," [1876] E. R. A.; 45 L. J. Adm. 105; 1 P. D. 135; 34 L. T. 741; 24 W. R. 902 (P.D. & A.).

Costs—Damage—Pilot alone to Blame.

SHIPPING.—*In a cause of damage the only defence was, that the collision was caused by the fault of a pilot whom the defendants were compelled to take. The defendants having proved their case*:—Held, *that the plaintiffs must be condemned in costs.*

This was a cause of damage in which some of the facts were, by agreement between the parties, stated in the form of a special case. The defendants admitted that the "*Clarinda*" was the wrongdoer, but averred that the collision was caused solely by the neglect of the pilot, whom, at the time and under the circumstances, they were compelled to employ. The plaintiffs, on the other hand, admitted the compulsory pilotage, but denied that the fault was that of the pilot alone. This latter question formed the only issue between the parties, which after evidence given on both sides before the Court and Trinity Masters was found in favour of the defendants.

Butt and *Pritchard*, on behalf of the defendants, contended that the suit should be dismissed, with costs. The only issue raised has been found in their favour, and the plaintiffs have throughout known the defence which has been now established. In one case, "*The Batavier*" (10 Jur. 20; 4 N. of C. 356), Dr. Lushington observed, that if a similar course to the present had been followed he would have given costs, and in another case, "*The Castor*" (6 L. T. 106), he actually did so.

Deane and *E. C. Clarkson*, for the plaintiffs.—It was impossible for the plaintiffs to have known until after this investigation what took place on board the defendants' vessel. It is sufficient hardship that the plaintiffs, who have suffered damage without fault of their own, should nevertheless obtain no redress, and they ought not besides to be condemned in the costs of such a result.

His LORDSHIP, after stating the facts of the case and adverting to the circumstance that the pilot of the defendants' vessel had been called on behalf of the plaintiffs, was of opinion that the defendants were entitled to their costs.

ADMIRALTY. Dec. 22, 1868.

"THE THOMAS LEA."

38 L. J. Adm. 37; 20 L. T. 1017.

Overruled, "*The Benmore*," [1874] E. R. A.; 43 L. J. Adm. 5; L. R. 4 A. & E. 132; 22 W. R. 190 (Adm.).

Practice—Obligation to begin—Damage—Inevitable Accident—Burden of Proof.

SHIPPING.—*In a cause of damage the defendants, by their pleadings, made no charge against the plaintiffs, but only denied generally the averments in the petition, and pleaded inevitable accident*:—Held, *that the defendants ought to begin.*

This was a cause of damage, instituted in the sum of 2,000*l*., and brought

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by the owners of the late brig "*Robinia*" against the crew and steam-ship "*Thomas Lea.*"

Between twelve and one midday of August 18 last, the brig was off the entrance of the Humber, making about two knots an hour. The weather was very foggy, and a fog-horn was being sounded, as required by the regulations, when the whistle of a steam-vessel, the "*Thomas Lea,*" was heard. According to the plaintiffs' case, the steam-vessel was then seen at a distance of about a quarter of a mile, and the brig kept her course. The fog-horn was again and again sounded, but the steam-vessel nevertheless struck the brig, and did her so much damage that she shortly afterwards foundered. The plaintiffs also alleged that the damage and losses were attributable to the neglect and default of those on board the steam-vessel, and to their improper navigation of her, and that no blame was attributable to the brig or those on board of her.

The defendants, in their answer, asserted that there was a dense fog at the time, and the steam-vessel was making under two knots an hour; that the steam-whistle was blown at intervals and a vigilant look-out kept, and that a fog-horn was heard, and at the same moment the brig was seen not a ship's length off; that no blame was imputable to those on board the steam-vessel, and that the collision was the result of inevitable accident. The defendants also denied the allegations of the petition.

Upon these pleadings a contention arose as to the right to begin.

Milward and *E. C. Clarkson*, for the plaintiffs, contended that, inasmuch as the defendants did not charge the plaintiffs with any blame in respect of the collision, and sought to excuse themselves solely upon the ground of inevitable accident, the burden of the case lay with the defendants, and therefore they ought to begin. It was like the case of a vessel run down while at anchor, and in such a case the defendants always begin, unless they charge the plaintiffs with some contributory negligence, as, *e. g.*, that the vessel at anchor had no lights exhibited.

Aspinall and *Butt, contra*, submitted that in their answer they denied all the averments in the plaintiff's petition, and among others, that the fog-horn was continuously sounded, and there was no reported case in which the defendants have been called upon in the first instance to support a plea of inevitable accident.

The COURT was of opinion that it rested with the defendants to shew in the first instance that they were not responsible for the damage, and that therefore they ought to begin.

ADMIRALTY. Jan. 19, 27, 1869.

"THE MARGARET AND JANE."

38 L. J. Adm. 38; L. R. 2 A. & E. 345; 20 L. T. 1017; 17 W. R. 1064.

Salvage—Jurisdiction—Arrest—Costs and Damages.

SHIPPING.—*A vessel which had been saved was valued by a receiver of wreck at less than* 1,000*l. The salvors obtained an order for a commission of appraisement, but did not execute it, and after three weeks gave notice that they proceeded no further in the suit*:—Held, *that they might, within four days of obtaining the order, have ascertained the value, and that therefore they must be condemned in damages for detention of the vessel during the rest of the three weeks.*

This was a cause of salvage, instituted by the owner, master and crew of the vessel "*Ezra*" against the vessel "*Margaret and Jane,*" with her cargo and freight, in the sum of 2,500*l.*

The "*Margaret and Jane,*" whilst on a voyage from Cardiff to Alicante with a cargo of coals, met with tempestuous weather, became leaky, and, having been subsequently abandoned by her crew, was fallen in with by the "*Ezra*"

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and taken to Scilly in a derelict condition, and placed in the custody of the receiver of wreck.

On December 3, 1868, the receiver of wreck, with the knowledge of the plaintiffs, and in pursuance of the 50th section of the Merchant Shipping Act Amendment Act, 1862, valued the vessel and her cargo at the sum of 746*l.*, and on the 8th the plaintiffs instituted the suit in the sum of 2,500*l.* On the 14th an appearance under protest was entered, and on the 18th, the plaintiffs, upon the defendants' motion to dismiss the suit, with costs and damages, elected at the risk of costs to take out a commission of appraisement and sale, but did not execute it; and subsequently, on January 14 filed a declaration that they proceeded no further in the cause.

Butt, for the owners of the "*Margaret and Jane*," applied to the Court to condemn the salvors in the costs and damages, on the ground that at the time when they instituted the suit they were aware that this Court had no jurisdiction, the value of the property salved being under 1,000*l.*

E. C. Clarkson, contra.

Judgment was given, on January 27, as follows:

SIR R. J. PHILLIMORE.—It is admitted that the salvors must be condemned in costs, the only question being as to the damages.

The latter part of the motion is somewhat unusual, but the case of the "*Evangelismos*" (Sw. 378; 12 Moore P.C.C. 352), before the Privy Council, has been cited, in which their Lordships said that "there is no reason in this case for giving damages. Undoubtedly, if the arrest of the ship is an act of *mala fides*, or of that *crassa negligentia*, from which the law implies malice, the Court of Admiralty would be justified in giving damages, as in an action brought at common law damages might be obtained. In the Admiralty Court, however, the proceeding is very convenient, because in the action in which the main question is disposed of damages may be awarded." In this case there is certainly no *mala fides*, and the salvage of the derelict vessel, for such it was, appears to have been one of considerable merit, and it has happened sometimes that the officer of the Court has appraised vessels at a higher value than the receiver of wreck. I think it would be harsh, therefore, to say that when the commission for appraisement in this case was taken out on December 18 the salvors were guilty of *crassa negligentia*, but I think they must have been aware within a short period of the time of taking out that appraisement that the value fixed by the receiver of wreck was substantially correct; and I shall condemn them in costs altogether and in damages from December 22 to the time when the notice was given to abandon the proceedings, viz., January 14.

Decree accordingly.

ADMIRALTY. Feb. 26, 27, March 3, 1869.

"THE QUEEN."

38 L. J. Adm. 39; L. R. 2 A & E. 354; 20 L. T. 855.

Followed, "*The Sussex*," [1904] E. R. A.; 73 L. J. P. 73; [1904] P. 236; 90 L. T. 549 (P.D. & A.).

Collision—Compulsory Pilotage—Duty to Assist the Injured Vessel—Person in Charge.

SHIPPING.—*Two steam vessels, the L. J. R. and the Q., came into collision, and those on board the Q. rendered no assistance to the L. J. R., which greatly needed it. The Q. was in charge of a pilot, compulsorily taken.*

Semble—*That the omission to render assistance after the collision was the fault of the master, as the "person in charge" for this purpose: but that the owners of the Q. would nevertheless not be liable for the collision itself if it had been caused solely by the pilot.*

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This was a cause of damage in respect of a collision, which took place shortly before 11 p.m. on August 29, 1868, in the river Thames, off Deptford Creek, between two steam vessels the "*Queen*" and the "*Lord John Russell.*" Each vessel was in charge of a pilot, compulsorily taken. The "*Queen*" immediately after the collision proceeded up the river without offering any assistance to the "*Lord John Russell.*"

The Court was of opinion that those on board the "*Queen*" had violated the provisions of the 33rd section of 25 & 26 Vict. c. 63[1]; and the Court, advised by the Trinity Masters, came to the conclusion that the "*Queen*" was alone to blame.

Milward and *Butt*, for the owners of the "*Lord John Russell,*" contended that the fact of the "*Queen*" being in charge of a pilot did not exempt her owners from liability: first, because the pilot was not alone to blame for the collision; and, secondly, because, as those on board the "*Queen*" had been guilty of the offence mentioned in the section referred to, the presumption, by the terms of that section, arose that the "person in charge" of the "*Queen*" was alone to blame, and that "person" was the master.

Dr. Deane and *E. C. Clarkson*, appeared for the owners of the "*Queen.*"

Judgment was given, on March 3, as follows:

SIR R. J. PHILLIMORE.—In my opinion, upon the true construction of 25 & 26 Vict. c. 63. s. 33, a presumption of law that the "*Queen*" is the wrong-doer is raised against her by her conduct in running away directly after the collision without any offer or attempt to assist the other vessel. And, moreover, in the opinion of the Elder Brethren and myself the result of all the evidence of the case is that for this collision the "*Queen*" is solely to blame. I therefore pronounce the "*Queen*" solely to blame.

A more difficult part of my duty remains, namely, to determine whether the owners of the "*Queen*" are exempted from their liability by their having a pilot, as it is commonly called by "compulsion of law," on board. It has been argued, on behalf of the "*Lord John Russell,*" that the "*Queen*" is not entitled to claim this exemption, and upon two grounds: first, upon the construction of section 33. of 25 & 26 Vict. c. 63, and this also for two reasons, because the "person in charge" intended by that section must, having reference to the context, be deemed to be the master, and with this part of the argument I agree; and because where the master has been guilty, as in this instance, of a violation of his duty in offering no assistance to the other vessel which came into collision, he is, by the words of the statute, to be deemed alone to blame for the collision, and that it follows by necessary implication that the pilot exemption, so to speak, is taken away; but with this portion of the argument I am unable to concur. There is no doubt, on the assumption of course that the pilot is alone to blame for the collision, that his liability and the exemption of the master attached when that fact took place; and if it was intended by the statute to say that the subsequent misconduct of the master would remove the exemption and fix the liability of the collision upon the master, the language, in order to produce this result, ought to have been much clearer and plainer.

The second ground alleged by the "*Lord John Russell*" is, that the collision was not caused by the incapacity or error of the pilot alone, but by the want of that assistance in the discharge of his functions which he had a right to expect from the crew; in other words, that if there had been a proper look-out on board the "*Queen*" the pilot would have been sooner apprised of the approach of the "*Lord John Rusell,*" and being so apprised would have taken effectual measures for avoiding the collision.—His Lordship then examined the evidence as to this

(1) Sect. 33. "In every case of collision between two ships it shall be the duty of the person in charge of each ship, if and so far as he can do so without danger to his own ship and crew, to render to the other ship, her master, crew and passengers (if any) such assistance as may be practicable and as may be necessary in order to save them from any danger caused by the collision. In case he fails so to do, and no reasonable excuse for such failure is shewn, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect or default."

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part of the case, and after advice from the Trinity Masters, was of opinion that by a proper look-out the "*Lord John Russell*" would have been seen and reported at an earlier period, and that, thereby assuming the pilot to have discharged his duty, the collision would have been avoided.

His Lordship, therefore, pronounced the "*Queen*" not exempt by reason of her having a pilot on board, and that her owners were responsible for the collision.

Decree accordingly.

ADMIRALTY. Nov. 3, 1868.

"THE EGERATEIA."

38 L. J. Adm. 40; 20 L. T. 961.

Mortgage—Arrest by Owner of Four Sixty-fourth Shares—Costs and Damages.

SHIPPING.—*Mortgagee of four sixty-fourth shares of a vessel condemned in the costs, but not damages, occasioned by a wrongful arrest of the vessel.*

This was an application by the owner of sixty sixty-fourth shares in the vessel to condemn in costs and damages for wrongful arrest the mortgagee of four sixty-fourth shares.

C. P. Butt appeared for the owner of the sixty sixty-fourth shares.—The vessel was arrested in the month of July last, and the suit was abandoned on the 10th of September. She had been detained at Liverpool for a long period at a cost of 5*l.* a day for wages and demurrage. The owner of so small a part of the ship ought, even if he had the power to arrest her, to exercise great care not to use his rights vexatiously.

E. C. Clarkson opposed the motion.

The COURT was clearly of opinion that, under the circumstances, the mortgagee was liable for costs, but thought it was not a case in which the Court should condemn him in damages.

ADMIRALTY. Feb. 9, 11, 1869.

"THE ST. OLAF."

38 L. J. Adm. 41; L. R. 2 A. & E. 360; 20 L. T. 758; 17 W. R. 743.

Damage—Arrest—Bail—Value.

SHIPPING.—*In a cause of damage a vessel damaged by the collision was arrested and subsequently repaired, whereby her value was considerably increased*:—Held, *that she was only liable to arrest for her value at the time when she was arrested.*

This was a cause of damage in which an application was made to the Court to order a release of the defendant's vessel upon bail being given for the sum of 1,037*l.*

The defendant's vessel, which had suffered damage from the collision, was arrested in her damaged state, and while under arrest had been extensively repaired. Her present value therefore was much greater than when she was first arrested; and her value, according to the statutory limitation of 8*l.* per ton, would be still greater, amounting to about 3,000*l.*, and the cause had been instituted for the sum of 1,500*l.*

E. C. Clarkson moved the Court to decree a release upon bail being given for the value of the vessel at the time when she was first arrested.

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Pritchard opposed the application.—As the defendants are foreigners and the plaintiff would obtain, if successful in the suit, no further satisfaction of his claim than the amount of the bail, the Court will be disposed to assist him to the utmost. In this case the liability of the defendants is practically unlimited, and even if their property could not be detained till bail was given to the full extent of the plaintiff's claim, the latter is at the least entitled to the highest value of the property while it is under the custody of the Court. If the vessel had been sold and extensively repaired since the collision she would nevertheless be liable to the extent of her value, and the case is stronger against the defendants, who were owners at the time of the collision. The present practice as to bail is regulated by the 33rd section of the Admiralty Court Act, 1861.

Clarkson, in reply.—Before the first act, limiting the liability of an owner for damage done by his vessel, he would be liable to the extent of all his property, and yet the invariable practice of this Court was only to detain the vessel until bail had been given for its actual value, and that practice has continued ever since. The lien for damage implies no more than possession of the property that did it.

Sir R. J. Phillimore.—The law and practice of this Court in a proceeding *in rem* are laid down in the case of "*The Bold Buccleuch*" (7 Moore P.C. 267). It is there stated as follows: "A maritime lien is the foundation of a proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches." Therefore the maritime lien is the foundation of these proceedings. And in the case of "*The Volant*," reported in 1 *William Robinson*, 383, and also in some respects with greater accuracy in the *Notes of Cases*, the learned Judge who preceded me in this chair gave this account of the liability of the owners in cases of a proceeding *in rem*, and the words are material I think for the decision of this case: "The owners," says the learned Judge, "are only called in respect of any right, title and interest in order that they may appear and intervene for their interest in the vessel." The practice I believe, therefore, has been invariably up to the present time to decree the release of the vessel when the value of it has not been disputed, and when the proper bail to the amount of that value has been tendered in Court. But it has been urged upon me by the counsel for the plaintiff that a difference ought to be introduced into the practice of this Court in consequence of a statute passed subsequent to the decisions to which I have referred, namely, the Admiralty Jurisdiction Act, 1861.

It is quite obvious that the object of the 33rd section of the Admiralty Court Act, 1861, is simply this: to make the bail which has been given in the High Court of Admiralty good, so to speak, in the Court of appeal, the bail-bond having been only given according to its language in the Court of Admiralty, and I believe some questions arose from time to time whether, in the Court of appeal, that bond could be acted upon; and the usual course I understand has been to remit the case to the High Court of Admiralty, and then the bail-bond taken there has been effectually enforced. I am therefore of opinion that this statute does not affect the question at present before me, and does not, in principle or according to the letter, introduce any variation in the familiar practice of the Court with respect to proceedings *in rem*, the foundation of those proceedings being, as I have already said, a maritime lien, or with respect to the practice of the Court to release a vessel when the full amount of her value has been tendered in Court, either in money or by bail.

Another objection, however, was taken, and it was urged on me that, at least in this case, the value of 1,037*l*., though admitted to be that of the ship at the time when she was arrested, is not the value at which she ought now to be released, and for this reason. It appears that since the *lis* has been pending on this matter application was made to the Court by the foreign owner of the "*St. Olaf*" to be allowed to make certain repairs in his vessel, and, as I understand, that application was assented to.

[*Pritchard*.—That is not so, my Lord; we knew nothing about it.]

I am misinformed, then. I will take it that these repairs were without the

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consent of the opposite party. I should still be very clearly of opinion that they could not prejudice any right which the owner of the "*St. Olaf*" possessed before they were made. I am clearly of that opinion myself, because the right of the owner of the "*Indiana*," who proceeds against the "*St. Olaf*," was to have the value of the vessel at the time she was brought into Court, as far as the proceedings *in rem* are concerned. His right was to have this *res* made responsible for the damage inflicted upon his ship so far as the value of it extended; and the repair of the vessel subsequent to the damage, for the purpose of preventing a deterioration of the property, could not in any way increase his right or the obligation of the other party. It left them, as I conceive, *in statu quo* in that respect. Therefore, on both grounds, with respect to the former practice of the Court being unaffected by the authority of the statutes to which I have referred, and also on the second ground, that the improved value by repairs since the collision and since the arrest, does not alter the rights of the parties, I must pronounce against this claim, and decree the vessel to be released; and as this is confessedly an experiment, and according to my judgment an unsuccessful one, I must condemn the maker of it in costs.

Leave to appeal was granted.

ADMIRALTY. May 25, June 18, July 1, 1869.

"THE THETIS."

38 L. J. Adm. 42; L. R. 2 A. & E. 365; 22 L. T. 276.

See, *Bayley* v. *Manchester, Sheffield and Lincoln Railway*, [1872] E. R. A.; 41 L. J. C.P. 278; L. R. 7 C.P. 415 (C.P.): affirmed, [1873] E. R. A.; 42 L. J. C.P. 78; L. R. 8 C.P. 148; 28 L. T. 366 (Ex. Ch.).

Damage—Attempted Salvage—Subsequent Damage—Liability for Acts of the Master.

SHIPPING.—*The policies of insurance upon a steam vessel (the "T.") and the bills of lading provided that she might "assist and tow vessels in all situations," and in the course of the voyage the "T.," in attempting to render salvage services to the "S.," damaged the latter so that she sank*:—Held, *that the owners of the "T." were liable for the damage to the "S."*

Semble—*that even if there had been no such provision in the policies and bills of lading the master would have been acting within the scope of his authority in rendering the salvage services, and that therefore his owners would be responsible for his negligence in performing them.*

This was a cause of damage in respect of a collision which occurred about 80 miles to the south-east of Cape St. Vincent, about three o'clock in the evening of December 30 last, between the steam vessels "*Sardis*" and "*Thetis*." The weather was fine, and the wind blowing fresh from the north.

The "*Sardis*" was a very long, four-masted, screw steamer, of 1,634 net and 1,800 gross tonnage, and had a crew of forty-one hands. She was bound from Smyrna to London, and in the prosecution of her voyage left Gibraltar, on December 29, at 8.50 in the evening. When she had passed the Gut, and was about 70 miles north-west of Cape Trafalgar, an accident happened to her engines which prevented them from working or being available, and she began to drift. It was found that she would not wear nor stay, and she was hove-to with her aft sails, and the next morning, upon its being discovered that the piston-rod of the low-pressure cylinder was broken, the shaft was disconnected, and she made sail with two jibs, fore staysail, foresail, fore topsail and main trysail. Between eleven and twelve o'clock the "*Thetis*" was d[redacted] signalled to take the "*Sardis*" in tow. The "*Thetis*" was a[redacted]

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of 548 tons, with engines of ninety horse power, carrying merchandise and passengers from Marseilles to London, navigated by a crew of twenty-one hands, and going at the rate of 7½ knots an hour. She came up with the "*Sardis*," and after some negotiation between the two captains, it was agreed that the "*Thetis*" should tow the "*Sardis*" back to Gibraltar for 400*l*. Hawsers from both the bows of the "*Sardis*" were got out by means of hauling lines, and made fast to both quarters of the "*Thetis*," with about fifty fathoms of hawser out. The "*Thetis*" went ahead full speed, half a point on the starboard bow of the "*Sardis*," when the "*Sardis*" fore-reached and brought the "*Thetis*" on her starboard beam, so that the stem of the "*Thetis*" was on the starboard broadside of the "*Sardis*," and the ships became what is called girted, and it was necessary to cut the hawsers to prevent a collision. After the hawsers had been cut the "*Thetis*" steamed away, and the "*Sardis*" took in all her sails except a close-reefed fore topsail, which was hauled close down, and about a quarter of an hour afterwards the "*Thetis*," after making a circuit away from the "*Sardis*," came round under a starboard helm and into collision with the "*Sardis*" abaft her starboard fore-rigging, and the "*Sardis*" at once began to settle down, and very soon sank, her crew getting on board the "*Thetis*."

The Court was of opinion that the "*Thetis*" was alone to blame for the collision.

Milward and *E. C. Clarkson*, for the owners of the "*Thetis*," contended that at the time of the collision the master of the "*Thetis*" was not acting within the scope of his authority from the owners, and that therefore the latter were not responsible.

Dr. Deane and *Cohen*, for the defendants.

The following cases were cited in the argument: *Croft* v. *Alison* (4 B. & Ald. 590); *Hawtayne* v. *Bourne* (7 Mee. & W. 595; 10 L. J. Ex. 224); *Mitchell* v. *Crassweller* (13 Com. B. Rep. 237; 22 L. J. C.P. 100); *Goff* v. *the Great Northern Railway Company* (3 El. & El. 672; 30 L. J. Q.B. 148); *Seymour* v. *Greenwood* (7 Hurls. & N. 355; 30 L. J. Ex. 327); *Limpus* v. *the London General Omnibus Company* (1 Hurls. & C. 526; 32 L. J. Ex. 34); *Tobin* v. *the Queen* (16 Com. B. Rep. N.S. 310; 33 L. J. C.P. 199); *Wilson* v. *Rankin* (6 Best & S. 208; 34 L. J. Q.B. 62); *The Queen* v. *Stephens* (35 L. J. Q.B. 251; L. R. 1 Q.B. 702); *Howard* v. *Sheward* (36 L. J. C.P. 42; L. R. 2 C.P. 148); *Barwick* v. *the English Joint-Stock Bank* (36 L. J. Ex. 147; L. R. 2 Ex. 259); "*The Robert Pow*" (1 Bro. & Lush. 99); "*The Julia*" (1 Lush. 224).

Sir R. J. Phillimore.—According to the pleadings of the "*Thetis*," this collision was caused by "the '*Sardis*' suddenly taking in her head-sails and falling across the course of the '*Thetis*.'" The Trinity Masters are of opinion that the "*Sardis*" was not to blame for taking in her head-sails after the hawsers were out, and that the collision was caused by the unskilful and unseamanlike manœuvre of the "*Thetis*" in running up alongside of the "*Sardis*" with too much way upon her. The second engineer of the "*Thetis*" deposes that the engines had been going ahead full speed for twenty-five minutes before they went full speed astern, which was only three or four minutes before the collision. The blow must have been most severe, and dealt by the stem of the "*Thetis*"; and there is no foundation for the averment that the "*Sardis*" fell a-top of the "*Thetis*." It is the opinion, therefore, of the Trinity Masters that the "*Thetis*," by careless and unseamanlike conduct, caused this collision, and in that opinion I concur.

It has been contended, however, that I ought not to condemn the owners of the "*Thetis*," or render them liable for the damages of this collision, because the master of the "*Thetis*" was not acting within the scope of his authority as their agent, or in the course of his employment as their servant, in attempting to assist the "*Sardis*," which attempt led to the collision in question.

In support of this contention a great number of cases were cited to the Court from reports of the decisions at common law, and the last case upon this subject is that of *Barwick* v. *the English Joint-Stock Bank* (36 L. J. Ex. 147;

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L. R. 2 Ex. 259), in 1867. Mr. Justice Willes delivered the judgment of the Exchequer Chamber in this case, and observed as follows: "The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. That principle is acted upon every day in running-down cases; it has been applied also to direct trespass to goods, as in the case of holding the owners of ships liable for the act of masters abroad, in improperly selling the cargo; it has been held applicable to actions of false imprisonment in cases where officers of railway companies intrusted with the execution of by-laws relating to imprisonment and intending to act in the cause of their duty improperly imprison persons who are supposed to come within the terms of the by-laws; it has been acted upon where persons employed by the owners of boats to navigate them and to take fares have committed an infringement of a ferry, or such like wrong. In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

It has been argued that, upon the principle of these cases, the owner of the "*Thetis*" was not responsible for the wrongful act of his master, inasmuch as the latter had no authority, express or implied, to perform a salvage service. I was referred to the case of the "*Rising Sun*" (Ware's Rep. 378), decided in the district Court of Maine, and I have perused the judgment in that case, but have not been able to extract from it any assistance for the decision of the point of law before me. According to the evidence of the master in the case before me, he had received no instructions from his owner with respect to performing salvage service; and the owner deposed, "I have neither authorized nor forbidden my ships to render salvage service; it has never come before me."

Now it is to be remembered, in the first place, that the master of a ship is an agent of a special kind; secondly, that the rendering of salvage services is an obligation required by the dictates of humanity, by the principles of public policy, and by the general interests of society, and has been recognized as such by the practice and jurisprudence of every civilized state. "It is the duty," Lord Stowell says, in the case of the "*Waterloo*" (2 Dodson, 437), "of all ships to give succour to others in distress; none but a freebooter would withhold it." It has been urged upon me that the act of the master in this case could not have been within the scope of his commission and was not for the benefit of the owners, because a deviation for the purpose of rendering salvage service to property would, upon general principles, avoid a policy of insurance; but that is an undecided and very doubtful proposition of English law, and certainly one to which I cannot give my assent. It was, at all events, pronounced by the Privy Council, in 1866, to be an undecided point of law—"*The True Blue*"[1]. I am aware that the American Courts appear to have made a distinction between a deviation for the purpose of saving life and for that of saving property; it is, perhaps, not quite so certain, however, as generally supposed, that such a distinction has been finally established (2 Parson's Marit. Law, 202; 3 Kent's Com. 313, and note); and here, if it be necessary that I should express my opinion whether, upon general principles of law, the owner of the "*Thetis*" was responsible for the act of the master in causing this collision, I should express it in the affirmative. I think, having regard to the principles of law respecting salvage service, the master, though not directly authorized to do the particular act, was, to borrow Mr. Justice Willes's expression, "the agent in his place to do that class of acts," and that by the negligent performance of an act of this class, the damage which is the subject of this suit was caused; and therefore that the owner "must be answerable for the manner in which the agent has conducted himself in doing the

(1) L. R. 1 P.C. 254; see also Maclachlan on Shipping, 364.

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business which it was the act of his master to place him in." But, in truth, when I find in the policy of insurance appertaining to his ship a clause giving her leave to be towed and to tow and assist vessels in all situations, and that it is provided in the bills of lading that she may " assist and tow vessels in all situations," I entertain little doubt that it is not competent to the owner to deny that the attempt to salve the " *Thetis* " was within the scope of the authority and in the course of the employment of the master.

There is one further argument which I must not omit to notice, namely, that the master of the " *Sardis* " took upon himself the risk of employing the " *Thetis*," and thereby exempted the owner from responsibility for the act of his agent; and for this proposition the case of *Fletcher* v. *Rylands* (35 L. J. Ex. 154; L. R. 1 Ex. 265) was cited as an authority; but I do not think that the circumstances of this case support the proposition of fact to which this law is to be applied. The " *Thetis* " must have known her own power, and she adopted her own measures for the performance of the service which, as the evidence shews, she voluntarily and deliberately undertook. She was perfectly aware of the size, character and condition of the vessel which she contracted to tow; no concealment or deception was practised. The damage was by no means in the category of a necessary or inevitable accident, but was caused, as I have already stated, by the negligence and unskilfulness with which the " *Thetis* " was navigated.

I therefore pronounce the " *Thetis* " alone to blame for this collision.

IN THE PRIVY COUNCIL. June 14, July 5, 1869.

LORD ROMILLY, M.R., SIR W. ERLE, SIR J. COLVILE and SIR J. NAPIER.

THOMAS STEPHENS, *appellant;* JOHN BROOMFIELD AND ANOTHER, *respondents.* " THE GREAT PACIFIC."

38 L. J. Adm. 45; L. R. 2 P.C. 516; 6 Moo. P.C. N.S. 151; 16 E. R. 683; 21 L. T. 38; 17 W. R. 933: affirming, [1869] E. R. A. 861; 38 L. J. Adm. 14; L. R. 2 A. & E. 381; 20 L. T. 44; 17 W. R. 473 (Adm.).

Followed, *Broomfield* v. *Southern Insurance Company*, [1870] E. R. A.; 39 L. J. Ex. 186; L. R. 5 Ex. 192; 22 L. T. 371; 18 W. R. 810 (Ex.).

Bottomry Bond, Condition of—Total Loss—Constructive Total Loss—General Average.

SHIPPING.—*The condition of a bottomry bond provided that the obligation should be void if the obligors should pay " in case of loss of the ship or vessel, such an average as by custom should have become due on the salvage, or if on the said voyage the said ship or vessel should be utterly lost, cast away or destroyed " in consequence of the perils of the seas, &c. The vessel during her voyage was obliged to put into port in a damaged state, and was there sold for a sum less than the amount of the bond, under circumstances which it was admitted would, as between assurers and assured, have constituted a constructive total loss:*—Held, *that, upon the true construction of this condition, the loss was not " a loss " within the meaning of the condition, and that the holders of the bond were entitled to the whole proceeds of the sale of the ship.*

This was an appeal from a judgment of the Judge of the High Court of Admiralty of England directing certain articles of the answer filed on behalf of the appellant in the cause in which the appeal was brought to be struck out.

The cause in the Court below was a cause of bottomry, promoted by the respondents, as the holders of the bottomry bond on the ship " *Great Pacific.*" The appellant was mortgagee of the ship, and intervened for the purpose of

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defending his interest in the proceeds against the claim of the respondents as such bondholders.

The petition filed by the respondents in the Court below stated that, before the making of the bottomry bond, the "*Great Pacific*," then being on a voyage from Callao to the Chincha Islands, and thence to the United Kingdom, put into the port of Sydney for certain necessary repairs, equipments, stores and outfit. That money being required for the purpose of such repairs, equipments, stores, and outfit, in order to enable the ship to proceed on her voyage, and William Baillie the master being without funds and being unable otherwise to obtain them, was obliged to and did take up and borrow from the respondents the sum of 5,037*l*. 13*s*. 5*d*. sterling on bottomry of the said ship and her freight. By the bottomry bond, dated March 29, 1867, the master hypothecated the ship, her tackle, apparel and furniture, and the freight to the respondents as security for the said sum of 5,037*l*. 13*s*. 5*d*., and the agreed premium or maritime interest thereon at the rate of 45*l*. per cent. for the said voyage, amounting together to the sum of 7,301*l*. 15*s*. 9*d*. The said sum of 5,037*l*. 13*s*. 5*d*. was applied to the purposes for which it was borrowed by the master, and the ship was enabled to proceed on her voyage. In the course of her voyage the ship was caught in a hurricane and had to put into Valparaiso, where she was sold, being unworthy of repairs, for the sum of 3,628*l*. 8*s*. The petition alleged that no portion of the money advanced by the respondents, or of the premium or maritime interest, was repaid to them, nor any money whatever under or by virtue of the said bond.

The answer to the said petition set out the bottomry bond, which contained the following condition: "Now the condition of the above-written bond is such that if the said ship or vessel shall with all reasonable speed sail from the port of Sydney aforesaid, and duly prosecute and complete the said intended voyage or voyages, and that without deviation except as aforesaid, and the perils, damages, casualties and accidents of the seas, rivers and navigation excepted, and if the above-bounden William Baillie, his executors or administrators, or some or one of them, or the owners of the said ship or vessel, do and shall well and truly pay or cause to be paid unto the said John Broomfield and Reginald Whitaker, or either of them, their or either of their administrators or assigns, or to their or either of their attorney or attorneys, agent or agents thereto lawfully constituted, the full and just sum of 7,301*l*. 15*s*. 9*d*. of sterling British money, being the principal money secured by this bond, together with the interest or premium of 45*l*. per cent. for the voyage, before the expiration of twelve hours after the safe arrival of the said ship or vessel at her port of discharge in the United Kingdom, or in case she shall proceed to Cork, in Ireland, then before the expiration of twelve hours after the safe arrival, or in case of loss of the ship or vessel, such an average as by custom should have become due on the salvage, or if on the said voyage the said ship or vessel shall be utterly lost, cast away or destroyed in consequence of fire, enemies, men-of-war, pirates, storms or other unavoidable perils, damages or casualties of the seas, rivers and navigation, to be sufficiently shewn and proved by the said William Baillie, his executors or administrators, or some or one of them, or by the owners of the said ship or vessel, then this bond or obligation to be void and of no effect, or otherwise to remain in full force and virtue."

The answer then stated that after the making of the bond the "*Great Pacific*" proceeded in the prosecution of her voyage to Callao and the Chinchas, and thence to the United Kingdom, and arrived at the Chinchas, where she loaded a cargo, with which she left for the United Kingdom, but whilst proceeding for the United Kingdom she met with bad weather and suffered great damage, and in consequence was compelled to put into Valparaiso, where she was surveyed and was found to be and was unworthy of repairs, and the said voyage was abandoned and the said ship was abandoned and sold. That the ship upon such sale realized the sum of 3,628*l*. 8*s*. That under these circumstances the bond never became payable, and that the respondents were not entitled to the proceeds of sale, nor to any part thereof.

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That even if the said bond had become payable, and anything was due thereon, yet that the respondents were not entitled to the whole of the said sum of 3,628*l.* 8*s.*, but to such an average only as by custom should have become due on the said sum, and to no more.

The respondents moved the Judge in Court to reject so much of the answer as set up that nothing was due on the bond in question; that the respondents were only entitled to an average on the sum of 3,628*l.* 8*s.*, the amount of the proceeds of the sale of the ship paid into Court. The learned Judge of the Court below, by an order made on November 17, 1868, directed the articles in question to be struck out of the answer, and condemned the appellant in the costs.

From this order the present appeal was brought.

The case in the Court below will be found reported *ante*, page 861.

Sir G. Honyman and *Clarkson*, for the appellant.—Upon the true construction of this bond and upon the alleged facts in the answer of the appellant in the Court below, the bond never became payable. According to the terms of the bond, the same is to be void if the vessel is utterly lost by reason of sea perils, and under the circumstances stated in the answer the vessel was a constructive total loss, and is therefore in law deemed to be wholly lost. But even if the bond became payable, the respondents are, upon the facts stated in the answer, not entitled to the whole proceeds of the sale of the ship, but only to the customary average on such proceeds. By the express terms of the bond, in the event of the loss of the ship the bond is to be void on payment of the customary average on the salvage. The respondents therefore cannot claim more than such customary average. This was the intention of the condition of the bond. The proceeds of the sale are clearly salvage. Therefore the circumstances fall precisely within the stipulation of the bond. When the vessel became a total loss, the holders of the bottomry bond became entitled to such a proportion of the proceeds of the sale as the sum of money advanced bore to the vessel at the time the money was advanced. This is the law as laid down by Valin (*Boulay-Paty, Cours de Droit Commercial Maritime*, vol. 3, p. 183). The ship was so much damaged that it became impossible to repair her. The commercial impossibility to repair her amounts, according to all the authorities, to an absolute impossibility to repair her—*Moss* v. *Smith* (9 Com. B. Rep. 94; 19 L. J. C.P. 225), *Rossetto* v. *Gurney* (11 Com. B. Rep. 176; 20 L. J. C.P. 257), and *Adams* v. *M'Kenzie* (13 Com. B. Rep. N.S. 442; 32 L. J. C.P. 92).

Butt and *Cohen*, for the respondents.—The general rule of maritime law is well established by a long course of decisions. It has been repeatedly laid down that if a ship is lost, and for the purpose of this argument it may be taken that the vessel in question was lost, because it is admitted that she became a constructive total loss, the holder of a bottomry bond hypothecating the whole ship is entitled to the whole proceeds of the ship. No doubt the lender's remedy is limited to the value of the property salved. This being the well-established law upon the subject, the question arises, is there any provision in this particular bottomry bond which takes the case out of the general law on the subject? Now, the fact is that this condition is to be found in almost all bottomry bonds, and is in all the forms given in the books on maritime law. It is the form given in the appendix to Abbott (*Abbott on Shipping*, 10th edit. App. 289). They referred to "*The Catherine*" (15 Jur. 231); *Thomson* v. *the Royal Exchange Assurance Company* (1 M. & S. 30); "*The Elephanta*" (15 Jur. 1185); "*The Dante*" (2 W. Rob. 427); *Barr* v. *Gibson* (3 Mee. & W. 390; 7 L. J. Ex. 124); "*The Draco*" (2 Sumner, 157); *Parson's Maritime Law*, edit. 1869, vol. 1, and *Kent's Commentaries*, vol. 3, p. 359.

Sir G. Honyman, in reply.

Cur. adv. vult.

Sir J. W. Colvile (July 5) delivered the judgment of their Lordships.—There is no contest concerning the facts out of which this appeal has arisen. The "*Great Pacific*," having taken an outward cargo from Liverpool to

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Brisbane, was, after its discharge, chartered from the latter port by the Guano Consignment Company of Great Britain to sail to Callao, and thence to the Chinchas, where she was to load a cargo of guano, and return therewith *via* Callao to such port or place within the United Kingdom as the charterers might select. Between Brisbane and Callao she was compelled to put into Sydney for repairs; and to defray the costs of these repairs the master raised the sum of 5,037*l*. 13*s*. 5*d*. on bottomry; and on March 29, 1867, executed a bottomry bond, hypothecating the ship and freight for that sum, with maritime interest at 45*l*. per cent.

The vessel then proceeded on her voyage, reached the Chinchas, took in her cargo there; but on her homeward voyage was obliged to put into Valparaiso in a damaged state, and was there sold for 3,628*l*. 8*s*., under circumstances which it is admitted would, as between assurers and assured, constitute a constructive total loss. The money was paid into the Admiralty Court, and the holders of the bottomry bond (the respondents on this appeal) brought their suit to enforce their claim against it. The suit was defended only by the appellant, who, claiming to be a mortgagee of the vessel, has intervened to protect his interest; and the sole question between the parties is, whether the respondents, as bondholders, are entitled to the whole, or to any, and what part of this sum of 3,628*l*. 8*s*.

The appellant, in his answer, set forth the bond, with its condition, which, amongst other things, provided that the obligation should be void if the obligors should pay, "in case of loss of the ship or vessel such an average as by custom should have become due on the salvage; or if, on the said voyage, the said ship or vessel should be utterly lost, cast away and destroyed," in consequence of the perils of the sea. And the appellant insisted that, under these provisions, and upon the facts above stated, the bond had never become payable, and that nothing was due thereon; or that if it had become payable, the respondents were not entitled to the whole of the sum of 3,628*l*. 8*s*., but only to such an average as by custom should have become due thereon, and to no more.

To these defences the respondents took a proceeding in the nature of a demurrer by moving that so much of the answer as set them up should be rejected. The learned Judge of the Admiralty Court granted that application, and this appeal is brought against his decision.

It is obvious that if either defence is to prevail, the constructive total loss involved in the sale of the vessel at Valparaiso must be treated as a "loss" within the meaning of that stipulation in the condition of the bond upon which the defence is founded. It was admitted at the bar, and could not have been disputed with effect, that the vessel cannot be said, by reason of what occurred at Valparaiso, to have been utterly lost, cast away or destroyed; and consequently that the appeal cannot be supported in so far as it impugns so much of the learned Judge's order as rejected the averment that nothing was due upon the bond. Therefore, the only question now to be decided is whether, on the true construction of the words "in case of loss of the ship or vessel such an average as by custom shall have become due on the salvage," and upon the admitted facts of the case, the respondents are entitled, not to the whole, but only to some undefined portion of the sum in Court.

The general law is succinctly stated in *Kent's Commentaries*, vol. 3, p. 359. Speaking of a loan on bottomry, he says: "There is not, in respect to the contract, any constructive total loss. Nothing but an utter annihilation of the subject hypothecated will discharge the borrower on bottomry. The property saved, whatever it may be in amount, continues subject to the hypothecation." In support of this he cites *Thomson* v. *the Royal Exchange Assurance Company* (1 M. & S. 30). And the doctrine is supported by the modern Admiralty cases of "*The Catherine*" and "*The Elephanta*" (15 Jur. 1185); "*The Dante*" (2 W. Rob. 427); the American case, before Mr. Justice Story, of "*The Draco*" (2 Sumner, 157); and by other authorities. The first proposition is, moreover, admitted in this case by that abandonment of the principal ground of appeal which has already been mentioned.

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The learned counsel for the appellant have, however, argued, on the authority of a passage in Valin, which is cited at page 183 of the third volume of *Boulay-Paty's Cours de Droit Commercial Maritime*, that when the vessel is lost, the lender on bottomry is entitled only to such a proportion of the value of the property salved as the sum lent bore to the value of the whole property hypothecated. Valin, it is to be remarked, is speaking of the hypothecation of a cargo; and it is not clear that his doctrine, if true, would apply to the proceeds arising from the sale of a ship or the debris of a ship. Boulay-Paty, however, goes on to shew that this opinion of Valin was contested by both Pothier and Emérigon; that it was not received in France under the old law, and is certainly not recognized by the Codes as part of the Maritime Law. The general rule undoubtedly is, that if the vessel is lost, the lender on bottomry, though his remedy is limited to the value of the property salved, is entitled to the whole of what is saved, provided it was included in his security. Therefore, that the bondholders in this case are as between themselves and the shipowners, or a mortgagee of the ship (whose rights are as much bound in bottomry as those of the owner of a ship not mortgaged) entitled to the whole of the proceeds of the sale of the vessel, then existing as a vessel in specie, unless there be some special provision in this particular contract which qualifies that right, is a proposition which, in their Lordships' opinion, does not admit of reasonable doubt.

It has, however, been argued that such a provision is to be found in the words now to be considered. It is contended that the "loss" of the vessel there spoken of, when contrasted with the words in the following sentence, which import its utter loss and destruction, must be taken to mean something short of such utter loss, and to include a constructive total loss; that the proceeds of the sale may be properly described as salvage; and consequently that the effect of this clause is to make those proceeds divisible between the bondholders and the shipowners in proportions to be ascertained according to some custom, of the existence and nature whereof nothing in the shape of proof has been suggested. It does not, however, follow that because the words, "the loss of the vessel," mean something short of utter loss and destruction, they, therefore, include "a constructive total loss," which, as has already been shewn, they would not include, upon the construction of ordinary bottomry bonds. It is obvious that a vessel may be so wrecked as to be no longer a vessel in specie, and so as to become a mere congeries of planks, and yet that there may be salvage of its materials to a considerable amount. In the case of "*The Catherine*" (15 Jur. 231), Dr. Lushington says, "If a ship was once bottomried, the bond attached to the very last plank, and the holder might have that sold for his benefit." The clause under consideration may have been intended to secure that right by making it a condition for the avoidance of the bond that the obligors should account for such salvage. Again, it seems to be a forced and unnecessary construction of the clause to hold that it necessarily implies any division or apportionment between the bondholders and shipowners. That the former, who were entitled to the security of the whole ship when in a seaworthy condition, should contract that in the event of the deterioration of their security, by a constructive total loss or otherwise, they should share the proceeds with their debtors, is so improbable an hypothesis, that the construction is only to be admitted if there is no escape from it. The clause, as Mr. Cohen shewed, is not a special one; it is to be found in the form of a bottomry bond given in the appendix to *Abbott on Shipping*. Whatever it means, their Lordships believe that it was intended to secure the payment to the bondholders of something which the obligors might become entitled to receive from third parties in respect of the ship, and not a division of the proceeds of the sale of the vessel between the bondholders and the shipowners. It would meet the case suggested at the bar, in which the vessel having been voluntarily stranded with a view to the preservation of the cargo, general average upon the cargo salved might become due from the owners of that cargo to the owners of the ship. That such average would become due if the ship, failing to get off, is totally lost, seems to

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be a question upon which jurists are not agreed—see *Abbott on Shipping*, 10th edit. pp. 373 to 375, and 2 *Phillips on Insurance*, 1315; but the clause may, nevertheless, have been designed to cover such average, if the right to it existed.

Their Lordships, however, think that they are not called upon to determine upon what particular subject the clause might operate, because it can have no operation in the present case unless there has been a loss of the vessel within the meaning of it.

For the reasons above given, they are of opinion that there has been no such loss; and, being of that opinion, they will humbly advise Her Majesty to affirm the order of the Admiralty Court, and to dismiss this appeal with costs.

IN THE PRIVY COUNCIL. June 14, 1869.

LORD ROMILLY, SIR W. ERLE, SIR J. COLVILE and SIR J. NAPIER.

THE OWNERS OF THE STEAMSHIP "BETA," *appellants;* TOUSSAINT ROLLANDO, *respondent.* "THE BETA."

38 L. J. Adm. 50; L. R. 2 P.C, 447; 6 Moo. P.C. N.S. 55; 16 E. R. 647; 20 L. T. 988; 17 W. R. 933.

See, "*The Nepoter*," [1869] E. R. A.; 38 L. J. Adm. 63; L. R. 2 A. & E. 375; 22 L. T. 177; 18 W. R. 49 (Adm.). Disapproved, *Smith* v. *Brown*, [1871] E. R. A.; 40 L. J. Q.B. 214; L. R. 6 Q.B. 729; 24 L. T. 808; 19 W. R. 1165 (Q.B.). Questioned, *Simpson* v. *Blues*, [1872] E. R. A.; 41 L. J. C.P. 121; L. R. 7 C.P. 290; 26 L. T. 697; 20 W. R. 680 (C.P.). See, "*The Franconia*," [1877] E. R. A.; 46 L. J. Adm. 33; 2 P. D. 163; 36 L. T. 640; 25 W. R. 796 (C. A.); "*The Veritas*," [1901] E. R. A.; 70 L. J. P. 75; [1901] P. 304; 85 L. T. 136; 50 W. R. 30 (P.D. & A.); "*The Normandy*," [1904] E. R. A.; 73 L. J. P. 55; [1904] P. 187; 90 L. T. 351; 52 W. R. 634 (P.D. & A.).

Admiralty Court Act (24 *Vict. c.* 10. *s.* 7)—*Construction—Personal Injury —Ship, Liability of.*

SHIPPING.—*The Admiralty Court Act*, 1861, *by section* 7, *provides* "*that the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship.*" *The respondent sued the appellants' ship for personal injury done to himself by a collision, alleged to be caused by the unskilful navigation of the appellants' ship*:—Held, *that the section of the Admiralty Act included personal injury.*

This was an appeal from a judgment of the Judge of the High Court of Admiralty of England.

The respondent sued the "*Beta*," a vessel belonging to the appellants, for compensation for personal injury done to the respondent by a collision between the "*Beta*" and a French brig called the "*Xiste*," on board of which the respondent was, as mate, at the time of the said collision.

The petition stated that, on the morning of September 18, 1866, the steamship or vessel "*Beta*," of which the appellants were the owners, came into collision with a French brig called the "*Xiste*," then lying at anchor off Broadstairs, on the coast of Kent. That the respondent, Toussaint Rollando, was, at the time of the said collision, the mate on board the "*Xiste*." That the said Toussaint Rollando sustained certain injuries to his person in and by reason of the collision, and that the collision and injury were occasioned by the "*Beta*," and the negligence of her master and crew, the servants of the appellants, in and about the navigation of the "*Beta*."

The owners of the steamship "*Beta*" filed a petition objecting to the jurisdiction of the Court.

On July 28, 1868, the Judge, having heard counsel on both sides, rejected

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the petition in objection to the jurisdiction of the Court, and condemned the appellants in the costs.

From this judgment the present appeal was brought.

Aspinall and *Clarkson*, for the appellants.—The Admiralty Act of 1861 gives no jurisdiction to the Admiralty Court in case of personal injuries. There can be no jurisdiction unless it is given by the act. They referred to "*The Sylph*" (37 L. J. Adm. 14) and the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104).

Butt and *Pritchard*, for the respondent, were not heard.

LORD ROMILLY delivered the judgment of their Lordships.—Their Lordships are of opinion that the judgment of the learned Judge of the Admiralty Court ought to be affirmed. The words of the Admiralty Court Act, 1861, include any possible damage. Section 7 provides, "That the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." It is clear that the legislature intended to give the largest jurisdiction to the High Court of Admiralty in all cases of damage done by any ship; and the act expressly meets a case of this description. Where the person injured is a foreigner, he might be deprived of any remedy unless he may proceed against the ship; but the legislature has interposed. There is therefore every reason for the enactment being to the effect contended for by the respondent, and for the construction which the words of the section certainly bear. The cases confirm this view. In the case of "*The Sylph*" (37 L. J. Adm. 14), the learned Judge of the Admiralty Court held the words of this section to include claims for personal damage. That judgment was never reversed, and, in fact, there has been no appeal from that judgment. Their Lordships will therefore humbly recommend Her Majesty that the judgment of the Court below be affirmed with costs.

IN THE PRIVY COUNCIL. July 15, 1869.

LORD ROMILLY, M.R., SIR W. ERLE, SIR J. COLVILE and SIR J. NAPIER.

THE OWNERS OF THE STEAMSHIP "LION," *appellants*; THE OWNERS OF THE SHIP "YORK-TOWN," *respondents*. "THE LION."

38 L. J. Adm. 51; L. R. 2 P.C. 525; 6 Moo. P.C. N.S. 163; 16 E. R. 688; 21 L. T. 41; 17 W. R. 993: affirming, [1868] E. R. A. 2267; 37 L. J. Adm. 39; L. R. 2 A. & E. 102; 18 L. T. 803; 17 W. R. 577 (Adm.).

Collision—Compulsory Pilotage—Passenger Ship—Merchant Shipping Act, 17 & 18 Vict. c. 104. ss. 379, 388.

SHIPPING.—*Owners are not exonerated from responsibility for the default of a pilot whom they have selected and placed in charge when there was no obligation imposed on them to take such pilot and put him in charge.*

In a cause of damage it appeared that at the time of the collision, the master of the damaging ship had on board his wife and his wife's father. They were on board by the invitation of the master and without the privity of the owners, and they paid no fare till after the collision:—Held, *that they were not passengers within the meaning of section 379. of the Merchant Shipping Act, 1854, which exempts certain ships when not carrying passengers from compulsory pilotage.*

This was an appeal from a decree of the Judge of the High Court of Admiralty of England. The cause in the Court below was one of damage arising out of a collision which occurred in the river Thames on December 8, 1867, between the English screw steamer "*Lion*" and the American ship "*York-Town.*" The owners of the "*York-Town*" were the plaintiffs, and the owners of the "*Lion*" the defendants.

The petition stated that the "*York-Town,*" a ship of 1,341 tons American

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register, belonging to the port of New York, and owned by the plaintiffs, left the Shadwell entrance of the London Docks about 10 a.m., of December 8, 1857, bound on a voyage to New York with a general cargo. That she was then in charge of a pilot, and had also a licensed waterman on board. That she proceeded down the river in tow of two steam-tugs. That when the "*York-Town*" was off the East India Dock buoy, being towed as above mentioned, the screw-steamer "*Lion*" was seen coming down the river round Blackwall Point, about 200 yards off, astern, and on the starboard quarter of the "*York-Town.*" That the "*Lion*" was overtaking the "*York-Town,*" and it was her duty to keep out of the way of the latter vessel, but instead of so doing she came on at great speed and struck the starboard quarter of the "*York-Town,*" doing her great damage. The petition then alleged that the said collision, and the damages consequent thereon were caused by the negligence and improper conduct of those on board the "*Lion*"; and that no blame was attributable to the "*York-Town*" or to any person or persons on board.

The defendants pleaded that their vessel was in charge of Richard West, a duly licensed pilot for home trade passenger steamships; that she had on board two passengers, and that the employment of the said Richard West was at the time and place of the said collision compulsory by law; that the "*Lion*" was at such time under the sole charge of the said Richard West, whose orders in reference to her navigation were promptly and implicitly obeyed; and that the said collision, if it was occasioned by the "*Lion*" or any one on board her, was exclusively occasioned by the said Richard West, and that neither the "*Lion*" nor her owners are liable in respect thereof.

It was admitted at the trial that the collision was caused by the improper navigation of the "*Lion,*" but her owners contended that they were exonerated from liability because the evidence shewed that a pilot was employed by them by compulsion of law, who was alone to blame in the matter.

The plaintiffs contended, 1, that the evidence failed to shew that the "*Lion*" was actually in charge of a duly licensed pilot for home trade passenger ships, acting at the time as such pilot, and that he alone was to blame for the collision; 2, that the defendants had failed to prove that the "*Lion*" was carrying two passengers, as alleged in the answer; 3, that the evidence adduced failed to establish that the employment of the pilot was at the time and under the circumstances in question compulsory on the defendants.

The learned Judge, being assisted by two of the Elder Brethren of the Trinity Corporation, and having heard counsel on both sides, pronounced the collision in question to have been occasioned by the fault or incapacity of the said Richard West, who was at the time of the collision acting in charge of the steam-vessel "*Lion,*" but that the employment of a pilot at the time and place of the said collision was not compulsory by law; and he pronounced for the damage proceeded for and condemned the appellants in costs.

From this judgment this appeal was brought.

The case in the Court below will be found reported in the 37 L. J. Adm. 39.

Milward and *Clarkson*, for the appellants.—It is admitted that the collision was occasioned wholly by the fault of the pilot. The questions, therefore, which arise upon this appeal are, first, whether the appellants' ship was under the charge of a licensed pilot at the time the collision took place; and secondly, whether the appellants' ship was carrying passengers at the time of the collision. There can be no doubt that the pilot was a duly licensed pilot. He was licensed to act as a pilot in the district within which the collision occurred. The Merchant Shipping Act exempts from compulsory pilotage ships not carrying passengers; but what constitutes a passenger within the meaning of the act? Why, any person who is not a member of the crew is a passenger. This is clear from section 303. The fact of a person being a passenger cannot depend on whether he pays a fare, or upon the fact that the owners know that such a person is on board. It must frequently happen that owners do not know who are passengers. It is difficult to draw a line between passenger and no passenger. The intention of the legislature was to afford a protectio

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persons who were not seafaring persons. Every person who was not one of the crew would be a passenger. But the owners are exempt from all liability whenever the ship is under the charge of a duly licensed pilot. This was expressly decided in the case of *Lucey* v. *Ingram* (6 Mee. & W. 302; 9 L. J. Ex. 196). The appeal, therefore, must be decided by your Lordships holding as to whether the pilot in charge of the " *Lion* " was a duly licensed pilot. They referred to *Milligan* v. *Wedge* (12 Ad. & E. 737; 10 L. J. Q.B. 19), and *The General Steam Navigation Company* v. *the British and Colonial Navigation Company* (37 L. J. Ex. 194).

Dr. Deane and *Butt*, for the respondents.—The first question is, was this man in charge of the ship a duly licensed pilot? It is submitted he was not. Upon the second question there can be no doubt that the owner is only exempted from liability when the pilot is on board by compulsion of law. This has been expressly held in the case of " *The Stettin* " (Bro. & Lush, 199). The law laid down in that case has also been distinctly recognized by the Court of Exchequer in the case of *The General Steam Navigation Company* v. *the British and Colonial Navigation Company* (37 L. J. Ex. 194). The case of *Lucey* v. *Ingram* (6 Mee. & W. 302; 9 L. J. Ex. 196) was decided under the Pilot Act (6 Geo. 4. c. 125. s. 55), which provided that the owners should not be liable so long as a duly qualified pilot was on board, but the provisions of the Merchant Shipping Act are different, exempting the owners only " where the employment of such pilot is compulsory by law." The provision in the Pilot Act is much larger, and more in favour of the owner. Then the question is, were the wife and the father-in-law passengers? They were on board at the invitation of the captain, and without the knowledge or permission of the owners. The evidence as to the payment of any fare is very unsatisfactory. It appears clear that no fare was paid till after the collision had occurred. At all events, we contend that the persons were not passengers within the meaning of that word as used in the 379th section of the Merchant Shipping Act, 1854. They referred to " *The Agricola* " (2 Wm. Rob. 10) and " *The Eden* " (2 Wm. Rob. 441).

The MASTER OF THE ROLLS delivered the judgment of their Lordships.—In this case the " Lion," a screw steamer, proceeding from London to Hull, ran into the " *York-Town*," in broad daylight, at eleven a.m., on December 8, 1867, at Blackwall Reach. The " *York-Town* " was being towed by two steam-tugs down the river, when the " *Lion*," without any excuse of following, ran into her astern, and did her considerable damage.

The question is, are the owners liable for this damage? In order to determine this it is necessary to decide, first, whether the " *Lion* " was under the charge of a duly licensed pilot at that time; and secondly, whether it was compulsory on the " *Lion* " to take a duly licensed pilot. If these questions are answered in the affirmative, then the owners are exonerated. If in the negative, they are liable. But if the first question be answered in the affirmative, and the second question in the negative, then it becomes necessary to ascertain whether a decision made as to the meaning and effect of the statute of 6 Geo. 4. c. 125. s. 55. is applicable to cases which come within the scope of the 388th section of the Merchant Shipping Act, the 17 & 18 Vict. c. 104.

As to the first question: West, the pilot, had two licences, one a waterman's licence, which would be of no avail, and the second a regular licence from the Trinity House authorizing him to act as pilot for home trade passenger ships within the limits in which the collision occurred; the consequence is, that he was a duly licensed pilot having charge of the vessel at that time. As to the second question, whether it was compulsory on the " *Lion* " to take a pilot, the answer depends on whether this was a passenger ship at the time of the collision; and this their Lordships are of opinion depends upon whether there were any passengers on board the " *Lion* " at the time of the collision.

The facts are these: they cannot be more correctly set forth than in the judgment of the learned Judge in the Court below: " Having been seven days in London, the captain wrote to his wife and to his father-in-law to come to London and go with him to Hull; he did not write to the owners, or tell their

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agents in London, or anybody, that he was going to take these persons with him; they paid nothing for their living on board the ship, but they paid for their fare, in the circumstances about to be mentioned, 7*s.* 6*d.* each, which he swore positively was the proper second-class fare, though Malcolm, the agent for the owners of the "*Lion*," as positively swore afterwards that it was the first-class fare. For this money no receipt was produced, though the captain swore that he had paid it, and Malcolm that he received it. The captain admitted that he had said nothing to either of these persons, previously to their coming on board, as to their payment of fare; that, he said, he arranged during the passage, but after the collision had happened; the father-in-law swore that the first time he ever spoke about his paying was when in Hull, and the ship alongside the quay. The captain admitted, on cross-examination and in answer to the Court, that he was aware that he was bound to pay light dues, unless he went in ballast without passengers on board; that he ought to have told the lighthouse authorities that he had passengers on board, and that he had not done so. He said that he paid the fares to his owners on his arrival in Hull; but Mr. Malcolm said that 'the settlement,' as he called it, was made about the middle of January, and after the correspondence with the Trinity House, or the Board of Trade, to which reference was made, and therefore, to be presumed, after he knew that the pilot had reported that there were no passengers on board. The captain also swore, and in this was confirmed by Malcolm, that his instructions were, never to take persons on board without payment as passengers, except with special permission."

In this state of things were the captain's wife and her father passengers? They were on board on the invitation of the captain without the privity of the owners, who had not contracted any obligation to have them carried in the vessel, and no duty was imposed on the owners in relation to these two persons. "The meaning of particular words in acts of parliament" (to use the words of Abbott, C.J., in "*The Queen*" v. *Hall* (1 B. & C. 136), "is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used." It is in this sense that the meaning of the word "passengers" is to be here considered, and, so considered, their Lordships are of opinion that the captain's wife and her father were not passengers within the meaning of the clause, as to the employment of pilots, in the 17 & 18 Vict. c. 104, and the exoneration of owners of ships. If the ship was not carrying passengers she was exempted from the compulsory pilotage by the 379th section of the Merchant Shipping Act. It becomes necessary, therefore, to decide what the position of the owners is when the vessel was in charge of a duly licensed pilot whom it was not incumbent on them to employ. The pilot must therefore be considered as having been voluntarily selected by the owners, who are responsible for his default whilst acting as pilot in charge of their ship, unless they can bring their case within the exoneration clause, section 388, which enacts that, "No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law." In the opinion of their Lordships this case is governed by the decision of "*The Stettin*" (Bro. & Lush, 199), the authority of which is recognized by Kelly, C.B., in the case of *The General Steam Navigation Company* v. *the British Colonial Steam Navigation Company* (37 L. J. Ex. 194), the ground of which decision is explained by Byles, J., in delivering the judgment of the Exchequer Chamber (38 L. J. Ex. p. 97). The learned Judge expounds the 388th section as requiring "that the pilot should be compulsorily employed within the district where the injury occurred," in order to exempt the owners from responsibility for his default. "This," he says, "obviates all the mischief which might be apprehended from captains of ships unnecessarily and improperly employing pilots to escape the responsibility of navigation, and preserves the sole responsibility of the pilot in the whole district for which he was employed." He adds that their decision "does not conflict with the case of

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"*The Stettin*" (Bro. & Lush. 199), where the pilot was taken on board where and when by law there was no necessity to take him." This explanation will be found to be strictly applicable to the present case. In answer to this it is strongly objected on the other side that the case of *Lucey* v. *Ingram* (6 Mee. & W. 302; 9 L. J. Ex. 196) is directly at variance with the case of "*The Stettin*" (Bro. & Lush. 199), and that as it was not cited in the case of "*The Stettin*" (Bro. & Lush. 199) the authority of that case is consequently thereby weakened.

Their Lordships are of opinion that there are two answers to this. In the first place it is to be observed that as the case of *Lucey* v. *Ingram* (6 Mee. & W. 302; 9 L. J. Ex. 196) had been under the notice and consideration of Dr. Lushington in several cases before he decided the case of "*The Stettin*" (Bro. & Lush. 199), it must be taken to have been present to his mind at that time; but, secondly (and which is more material, as it explains why Dr. Lushington did not think it necessary to refer to that case), upon a close examination, it does not appear to have any conclusive bearing upon the case of "*The Stettin*" (Bro. & Lush. 199), and, if so, it has not upon the present case. The case of *Lucey* v. *Ingram* (6 Mee. & W. 302; 9 L. J. Ex. 196) was decided upon the 6 Geo. 4. c. 125. ss. 55, 72, and though it was contended in argument that the sections are equivalent, or nearly so, to the 17 & 18 Vict. c. 104. s. 388, it does not so appear upon a minute examination. The 72nd section of 6 Geo. 4. c. 125. made it incumbent on the pilot to act, if he were required so to do by the master or owner of any ship wanting a pilot, and the former section (section 55.) exonerates the owners from responsibility "for any damage which should happen by reason of the neglect, default or incapacity of any licensed pilot acting in the charge of such ship under or in pursuance of any of the provisions of this act." This was held to include two cases: first, the case where the pilot was bound to act when required; and secondly, the case where the owners were bound to employ a pilot; and Baron Parke, in delivering the judgment, refers to its comprehensive terms as an "extended exemption," and he suggests the probable policy from which this extended exemption arose. That this decision is to be considered as properly to be referred to the special and extended exoneration enacted by the 6 Geo. 4. c. 125, is manifest as well from the judgment delivered by Baron Parke as from the observations of Dr. Lushington in the case of "*The Agricola*" (2 Wm. Rob. 10) and the case of "*The Eden*" (2 Wm. Rob. 441), and *per* Kelly, C.B., in *The General Steam Navigation Company* v. *the British Colonial Steam Navigation Company* (37 L. J. Ex. 194).

It was cited in argument in the case of "*The Annapolis*" (Lush. Rep. 295, 355), where Dr. Lushington refers to the ordinary principle of exemption as explained by him in the case of "*The Maria*" (1 W. Rob. 95), and in "*The Annapolis*" (Lush. Rep. 295, 355), and he states this principle to be in strict accordance with that of the 17 & 18 Vict. c. 104. s. 388. The distinction between the sections in the two statutes when compared is obvious. By the 6 Geo. 4. c. 125. s. 55. it is further enacted "that no owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person or persons whomsoever from or by reason or means of any neglect, default, incompetency, or incapacity of any licensed pilot acting in the charge of any such ship or vessel under or in pursuance of any of the provisions of this act, where and so long as such pilot shall be duly qualified to have the charge of such ship or vessel, or where and so long as no duly qualified pilot shall have offered to take charge thereof." The statute 17 & 18 Vict. c. 104. s. 388. enacts, "that no owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law." It is plain, therefore, that the first clause gives immunity to the owner whenever the vessel is in the charge of any licensed pilot, where he is qualified to have charge of the vessel, or where no duly qualified pilot has been appointed to take charge thereof; while the second

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clause, section 388, of the Merchant Shipping Act only applies to the case where the employment of the pilot is compulsory by law. Accordingly, contrasting the extended exoneration in 6 Geo. 4. c. 125. s. 55. with the more limited exoneration in 17 & 18 Vict. c. 104. s. 388, and the policy suggested by Parke, B., as the ground of the former with that suggested by Byles, J., with reference to the latter, their Lordships are of opinion that the true interpretation of the enactment by which the present case is governed depends on this, whether the employment of the pilot was compulsory, and that it cannot be affected by anything decided in *Lucey* v. *Ingram* (6 Mee. & W. 302; 9 L. J. Ex. 196), and that the authority or soundness of the decision in the case of "*The Stettin*" (Bro. & Lush. 199) is not in any way prejudiced by the omission to notice the case of *Lucey* v. *Ingram* (6 Mee. & W. 302; 9 L. J. Ex. 196).

The 17 & 18 Vict. c. 104. s. 388. has been acted on in the case of "*The Stettin*" (Bro. & Lush. 199), and has also been clearly expounded in the judgment of the Exchequer Chamber, in the case of *The General Steam Navigation Company* v. *the British Colonial Steam Navigation Company* (37 L. J. Ex. 194), and according to the principle of these decisions the owners are not exonerated from responsibility for the default of the pilot whom they have selected and placed in charge of their ship when by law there was no obligation imposed on them to take such pilot and put him in charge.

Having come to the conclusion that there were no passengers on board the "*Lion*" at the time of the collision, their Lordships are of opinion that the master was not under any compulsion to take a pilot; and, secondly, that having taken a pilot, even assuming that the pilot was bound to act, this does not in such circumstances exonerate the owner from responsibility for the errors committed by the pilot in a case where they were not compellable to take a pilot and put him in charge of the vessel. In the observations their Lordships have made, they have acted on the assumption that West was a duly licensed pilot, and that he had charge of the vessel; but it would be improper to part with this case without calling attention to the fact that West himself swears that he took charge of the ship as a waterman, and not as a pilot. He was not engaged by the captain, but was sent by another pilot; whether sent by the owners or not does not appear.

Their Lordships therefore concur with the learned Judge of the Court of Admiralty in opinion that the presence of the captain's wife and her father in the "*Lion*," in the circumstances of the case as detailed in the evidence, did not constitute them passengers; that no act done after the collision could convert them into the character of passengers if they did not previously fill that character; and also that the "*Lion*" had not on board of her at the time of the collision a pilot employed by them under compulsion of law; and that the owners of the "*Lion*" are liable to pay to the owners of the "*York-Town*" the damage done to her by the inexcusable collision of the "*Lion*"; and their Lordships will therefore humbly advise Her Majesty that the decision of the learned Judge of the Court of Admiralty be affirmed, with costs.

ADMIRALTY. May 4, 11, 1869.

"THE ROECLIFF."

38 L. J. Adm. 56; L. R. 2 A. & E. 363; 20 L. T. 586; 17 W. R. 745.

Damage—Arrest of Cargo—Lien for Freight.

SHIPPING.—*All the cargo on board of a vessel at the time of a collision belonged to the same owner, but only part of that cargo was on board when the vessel was arrested in the suit for the damage*:—Held, *that the lien for the whole freight extended to every part of the cargo on board at the time of the collision.*

This was a motion for release of cargo.

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The "*Roecliff*" had been arrested and subsequently sold in a cause of damage brought by the owners of a vessel called the "*Nethania.*" The value of freight upon the whole cargo was about 90*l.*; but a portion only of the cargo was on board the vessel at the time of the arrest, and freight upon that portion only had been paid into Court.

Bayford, for the owner of the cargo, moved for a release.—The cargo is not responsible for the damage—"*The Leo*" (31 L. J. Pr. M. & A. 78), "*The Victor*" (31 L. J. Pr. M. & A. 72)—and can only be arrested for the freight. In this case what was due upon the arrested cargo has been paid.

E. C. Clarkson, for the "*Nethania.*"—The same person was owner of ship and freight, and the lien for all the freight extends to every portion of the cargo.

SIR R. J. PHILLIMORE.—It is clear that the whole of the freight upon the cargo on board the vessel at the time of the collision was responsible for the damage; and the accident of some of that cargo not being on board at the time of the arrest cannot relieve it from that obligation which it is the duty of the Court, so far as its powers extend, to enforce. I shall not release the cargo until the whole freight be paid into Court.

Clarkson applied for costs.

SIR R. J. PHILLIMORE.—As there seems to have been some uncertainty as to the law upon this point, I shall make no order as to costs.

IN THE PRIVY COUNCIL. June 14, July 15, 1869.

LORD ROMILLY, M.R., SIR W. ERLE, SIR J. COLVILE and SIR J. NAPIER.

DROEGE & COMPANY, *appellants*; STUART AND ANOTHER, *respondents*.

"THE KARNAK."

38 L. J. Adm. 57; L. R. 2 P.C. 505; 6 Moo. P.C. N.S. 136; 16 E. R. 677; 21 L. T. 159; 17 W. R. 1028: varying, [1868] E. R. A.; 37 L. J. Adm. 41; L. R. 2 A. & E. 289; 18 L. T. 661; 17 W. R. 56 (Adm.).

Referred to, "*The Empire of Peace*," [1870] E. R. A.; 39 L. J. Adm. 12; 21 L. T. 763 (Adm.); *Currie* v. *Bombay Insurance Co.*, [1870] E. R. A.; 39 L. J. P.C. 1; L. R. 3 P.C. 72; 22 L. T. 317; 18 W. R. 296 (P.C.). See, "*The Ida*," [1872] E. R. A.; 41 L. J. Adm. 85; L. R. 3 A. & E. 542; 27 L. T. 457; 21 W. R. 39 (Adm.); "*The Limerick*," 1876, 1 P. D. 292; 34 L. T. 708 (C. A.); "*The Dora Forster*," [1900] E. R. A.; 69 L. J. Adm. 85; [1900] P. 241; 49 W. R. 271 (P.D. & A.).

Bottomry—Hypothecation of Cargo, Necessity for—Advances for by Charterer—Freight—Rights of Obligee.

SHIPPING.—*The existence of the "necessity" which validates the hypothecation of cargo by bottomry is to be ascertained by evidence in the usual manner; and the meaning of the term "necessity" in respect of hypothecation by the master is analogous to its meaning in other parts of the law.*

Any combination of events which would prevent the completion of the voyage with profit, unless money should be obtained by bottomry, would raise the question whether there was need for bottomry in such high degree as to create a necessity.

In a suit on a bottomry bond hypothecating "ship, cargo and freight" it appeared that the master had before bottomry obtained advances on account of freight from the charterers:—Held, *that the obligee in bottomry had no claim to freight so advanced by the charterers prior to bottomry, provided the advances were made* bonâ fide.

This was an appeal from a judgment of the High Court of Admiralty of

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England pronounced in a cause of bottomry instituted by the respondents, the holders of a bottomry bond upon the vessel "*Karnak*," her freight and the cargo lately laden on board of her, against the "*Karnak*," her said freight and cargo. The appellants were the owners of this cargo.

The "*Karnak*," a vessel of 267 tons register, was, in the year 1866, at Galveston, in the United States of America, where, on November 21, 1866, she was chartered to the appellants, there to load a cargo of cotton, and to carry the same to Liverpool for freight, and the vessel was to be consigned to the order of the appellants, Messrs. Droege & Co., of Manchester. In pursuance of the said charter-party, the "*Karnak*" took on board 720 bales of cotton (the cargo proceeded against), for which the master signed bills of lading; and on December 24, 1866, the vessel, with the cargo on board, sailed for Liverpool. On January 17, 1867, the "*Karnak*" having in the prosecution of her aforesaid voyage met with bad weather and suffered considerable damage, put into the port of St. George, in the island of Bermuda, in distress, and the master proceeded, shortly after his arrival, to have the vessel thoroughly repaired. In order to obtain a sum of 2,690*l*. 6*s*. 1*d*. for the payment of the repairs, as well as of other charges and expenses incurred by him at the port of St. George, the master executed a bottomry bond to one John Bluck, of that port, by which he hypothecated the vessel, her cargo and freight, to secure the repayment of 3,228*l*. 7*s*. 3*d*., being the said sum of 2,690*l*. 6*s*. 1*d*. and marine interest. The "*Karnak*" subsequently proceeded on, and completed her voyage to Liverpool. The bottomry bond, of which the respondents became the holders, was never paid. The respondents instituted a suit against the "*Karnak*," her cargo and freight, and the owners of the vessel having allowed judgment to go by default, the "*Karnak*" was sold by order of the Court of Admiralty. The proceeds of such sale were paid into Court, and the Court pronounced for the force and validity of the said bottomry bond, so far as related to the "*Karnak*" and her freight. The net proceeds of the sale of the "*Karnak*" available for payment of the said bond amounted to 512*l*. 11*s*. 9*d*. The whole of the freight originally payable under the charter-party in respect of the cargo proceeded against in the cause amounted to not less than 1,324*l*. 16*s*. The appellants, however, did not pay the whole of that sum into Court, but only the sum of 628*l*. 15*s*. 3*d*., contending that they had satisfied the residue by advances on account of freight made by the charterers at Galveston, together with costs of insurance, and interest and commission.

The cause came on for hearing in the Court below, and the appellants contended that the bottomry bond was invalid as against the cargo, and that they were entitled to insist on the part payment of freight.

The learned Judge of the Court below pronounced for the validity of the bottomry bond, so far as it affected the cargo, and directed the appellants to pay into Court the sum which they had retained out of the freight.

From this judgment the present appeal was brought.

The case in the Court below will be found reported 37 L. J. Adm. 41.

Sir G. Honyman and *Cohen*, for the appellants.—The bottomry bond is invalid as against the cargo. There was no urgent and immediate necessity for borrowing money on bottomry such as will justify the hypothecation of cargo. The master might reasonably have communicated, but did not communicate to the consignees of the cargo. Such communication was all the more obligatory on the master on account of the great value of the cargo as compared with the ship, and on account of the large amount of money borrowed as compared with the value of ship and freight. The appellants were entitled to make the deductions from the freight. The evidence was, that there was an agreement between the master and the charterers that the money advanced should be taken in part payment of freight, and it was so taken.—They referred to "*The Prince George*" (4 Moore P.C. 21); "*The Oriental*" (7 Moore P.C. 398); *Beldon* v. *Campbell* (6 Ex. 886; 20 L. J. Ex. 342); "*The Osmanli*" (3 W. Rob. 215); "*The Laurel*" (Bro. & Lush. 191); "*The North Star*" (Lush. 45); "*The Augusta*" (1 Dods. 282); "*The Aurora*" (1 Wheaton, 104); *Parson's Law of*

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Shipping, b. i. c. 6; *Boulay-Paty, Contrat à la Grosse*, vol. 3; " *The Bonaparte* " (8 Moore P.C. 459); *The Cargo ex Hamburg* (2 Moore P.C. N.S. 289); " *The Lizzie* " (2 Adm. 254); *Maclanchan on Merchant Shipping*, p. 442; *Peck* v. *the North Staffordshire Railway Company* (10 H.L. C. 473; 32 L. J. Q.B. 421); and *Hicks* v. *Sheils* (7 El. & B. 633; 26 L. J. Q.B. 205).

Sir J. Karslake and *Clarkson*, for the respondents.—The master was without funds or credit at Bermuda, and had no means of obtaining money to enable him to prosecute his voyage other than by resorting to a loan on bottomry of the ship, her cargo and freight. It was competent for the master to borrow upon bottomry of the ship, her cargo and freight, money for the purpose of paying persons, other than the bondholder, the amount of the advances previously made by them at the port of distress, for the necessities of the ship, to enable her to prosecute her voyage. The ship and her freight were, by the law of Bermuda, liable to arrest, at the suit of the persons to pay whose claims the money was borrowed of the bondholder. Under the circumstances, it was not incumbent on the master to communicate with the consignees or owners of the cargo before resorting to bottomry thereof. The master was not by law bound to tranship the cargo. As regards the sum of 727*l.* 19*s.* 3*d.*, the master had not authority to receive part of the freight in advance, and the charter-party does not contain any provision under the authority of which the appellants can justify their claim to make such deductions. The advance made by the appellants was an advance by way of loan on the security of the freight.—They referred to " *The Gratitudine* " (*Tudor's Lead. Cas. in Admiralty*, 30).

Sir G. Honyman, in reply.

Cur. adv. vult.

Sir William Erle (*July* 15) delivered the judgment of their Lordships.—Upon this appeal two questions have been raised; the first relating to the cargo, the second to a part of the freight. As to the cargo, the question is, whether the circumstances in which the ship is shewn to have been placed created a necessity for hypothecation? In the Court below the answer was in the affirmative; and, in his judgment there, the learned Judge carefully examined all the evidence and all the authorities in the Admiralty Courts relevant to the case, and their Lordships now agree in the conclusion which was there arrived at in respect of the cargo, and consider that any detailed examination of the arguments adduced here on behalf of the appellants is rendered unnecessary thereby; but they add a reference to some common law cases containing principles confirmatory of the decision in the Court below.

In *Lloyd* v. *Guibert* (6 Best & S. 100, 120; 33 L. J. Q.B. 241) the extent of the authority conferred on the captain by his appointment to bind the interest of the owner either of the ship or of the cargo, and the principles on which the limits of that authority are to be ascertained are laid down by Blackburn, J., in the Queen's Bench, and by Willes, J., in the Exchequer Chamber. There the captain of a French ship had hypothecated ship, freight and cargo, and the owner of the cargo sued the shipowner to indemnify him for the loss occasioned thereby: and it was decided that he could not recover, because, by the law of France, the captain cannot make the shipowner liable for more than the value of the ship and freight, and as the owner had abandoned both he was exempt from further liability. It was there laid down that the captain's authority is derived from and bounded by the municipal law of a country to which the ship belongs,—that is, by the law of the flag; and Willes, J., delivering the judgment of the Exchequer Chamber, answers an argument founded on the supposition of a general maritime law, contra-distinguished from the municipal law of this country, by refusing to recognize the existence of a maritime law in that sense. In accordance with the principle thereby laid down, their Lordships consider that the existence of the necessity which validates the hypothecation of cargo by bottomry is to be ascertained by evidence in the usual manner; and that the meaning of the term " necessity " in respect of hypothecation by the master is analogous to its meaning in other parts of the law. This meaning has been the

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subject of much discussion in Westminster Hall—see *The Queen* v. *Winsor* (35 L. R. M.C. 161); it has been described as a high degree of need—a need which arises when choice is to be made of one of several alternatives under the peril of severe loss if a wrong choice should be made. In the case of a voyage it is probably correct to say that any alternative for the captain is better than total loss of ship and cargo, and that he is under a necessity of choosing another alternative, if any should be possible; and in respect of bottomry, any combination of events which would prevent the completion of the voyage with profit, unless money should be obtained by bottomry, would raise the question whether there was need for bottomry in such high degree as to create a necessity. These remarks are made in answer to some arguments offered to us founded upon cases supposed to decide that a bottomry bond would in all cases be void on account of the absence of necessity if the repairs were completed before the bond to raise money to pay for them was given or contracted for, or if there was no communication with the owner of ship or cargo before the bottomry bond was given. The effect of any such fact cannot be appreciated without taking it in combination with the concomitant facts. If the repairs were complete, but the ship could not leave the port until they were paid for, the completion of repairs would be an immaterial fact in estimating the degree of need for bottomry. If the creditor could sell the ship in case of non-payment, the sale would be a total loss of the voyage for the ship; and the learned counsel for the appellant failed to shew either any duty on the captain in case of such sale to land, warehouse and tranship the cargo, or any possibility thereby to realize any profit for the freighter. So, in respect of communication with the owner either of ship or cargo, the possibility of so doing must be construed by estimating the cost and risk incidental to the delay from the attempt to make such communication, and the probability of failure after every exertion should have been made. The effect of any single fact upon the prospect of prosecuting the voyage with profit varies in endless permutation, according as some other fact forms a part of the combination of events which the captain has to consider in deciding whether there is a necessity for bottomry; and, as we before observed, we concur with the learned Judge in the Court below in thinking that such necessity was shewn to exist in this case, although the repairs were completed before any proposal for the bond was made by the captain, and although the attempts to communicate with the owner of ship or cargo were not carried further than appeared by the evidence.

Then, as to the second ground of appeal, relating to the sums borrowed by the captain from the charterer at the port of loading, viz., 632*l.* 14*s.* 2*d.* cash advanced, and 61*l.* 6*s.* 9*d.* interest and insurance thereon, the question between these parties is, whether the sums were to be repaid in any event, or only by deduction from the freight if freight was earned. The charterer, on signing the charter-party, incurs a liability for the chartered freight which becomes a debt in case of safe delivery of cargo, and the captain, for the shipowners, frequently obtains advances as well on account of this liability, whether stipulated for in the charter-party or not, as on the personal security of his owners. In either case they are loans; in the one case they are advances of freight, in the other case they are debts from the borrower. The distinction is at times material, because if they are advances of freight, the lender has an insurable interest in an advance which is to be lost if freight is not earned, but he has no such interest in an absolute debt. In the present case, advances are not stipulated for in the charter-party, but were obtained by the application of the captain to the charterer, and both he and the charterer state that they were advances of freight; and the receipts for the advances are so expressed as that, if effect is given to those parts of them relating to insurance, they are decisive to shew that the sums obtained were advances of freight, to be repaid by deductions from freight, if earned; and if not earned, then to be lost by the charterer, unless he should have used the stipulated premium in insuring. We consider *Hicks* v. *Sheils* (7 El. & B. 633; 26 L. J. Q.B. 205) to be an authority for this construction. On these grounds, as between the charterer and the shipowner, their

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Lordships came to the conclusion that the sums obtained, viz., 632*l.* 14*s.* 2*d.* cash advanced, and 61*l.* 6*s.* 9*d.* for interest and insurance thereon, together 694*l.* 0*s.* 11*d.*, were advances of freight.

Then, as between the holder of the bottomry bond and the charterer, is the nature of the transaction changed? Does the captain, by hypothecating the chartered freight to the obligee in bottomry, give a right to more freight than he, as obligor, had a right to demand from the charterer? The learned counsel for the respondent adduced no authority in support of the proposition that the assignee took by assignment what the assignor had no title to. The case of the last bottomry bond taking precedence of prior bottomry bonds, stands on the known incidents to a loan on bottomry; and no such incident has been shewn to be attached by known course of law to advances on account of chartered freight. But, on the contrary, in *Parson's Maritime Law, America*, 429, it is stated that a general hypothecation of freight includes freight whether earned or not, "provided it has not been paid to the master or owner." He refers to "*The John*" (3 W. Rob. 170), where the advance was stipulated for by the charter-party; but we consider that the same principle applies to any *bona fide* arrangement without fraud for forehand-payment or discharge before the bottomry is required.

The learned counsel also used as an argument the policy of the law in making bottomry a good security, but it must not be made a good security by violating the rights of others. It is a good security in this case, as the cargo must pay if the prepaid freight is exempt. The lender on bottomry had the opportunity for knowing what advances had been made on account of freight, as they were indorsed on the charter-party, which he might have seen, and there was no ground for imputing fraud.

For these reasons, their Lordships will recommend that the judgment in the Court below should be reversed, in so far as it relates to the sums claimed as advances of freight, and for interest and insurance thereon.

There remains the sum of 33*l.* 18*s.* 4*d.*, claimed as commission due by usage for obtaining the charter; and, according to such usage, to be paid by deduction from freight, if earned. But as to this sum, the statements in the evidence do not convince their Lordships that the appellant had the right to deduct it from the freight as against the holder of the bottomry bond; and they do not further examine into the right to this sum because as between these parties no interest depends upon the right thereto.

Their Lordships will therefore recommend to Her Majesty to affirm so much of the judgment of the Court below as affirms the liability of the appellants, as owners of the cargo, to the holder of a bottomry bond, and denies the right of the appellants to deduct the sum of 33*l.* 18*s.* 4*d.* from the freight for commission; and to reverse so much of the judgment as relates to the refusal to allow, as deductions from the freight to be paid to the respondent, the above-mentioned sums, which their Lordships consider to have been advances of freight. There will be no costs of appeal on either side.

ADMIRALTY. July 1, 20, 1869.

"THE GANGES."

38 L. J. Adm. 61; L. R. 2 A. & E. 370; 22 L. T. 72.

Considered, "*The Wilhelm Tell*," [1892] E. R. A.; 61 L. J. Adm. 127; [1892] P. 337; 69 L. T. 199; 41 W. R. 205 (P.D. & A.).

Salvage—Agreement as to Distribution.

SHIPPING.—*The plaintiff, as temporary master of a steam-tug, rendered important salvage service to a vessel in distress. At the time he became master he was aware of the custom of the owners of the steam-tug to distribute any*

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salvage according to a fixed rate of poundage, but the owners gave him no special notice of the custom:—Held, *that the legal effect of the* 182*nd section of the Merchant Shipping Act*, 1854, *and of the* 18*th section of the Merchant Shipping Act Amendment Act*, 1862, *is to leave agreements for distribution of salvage in the same condition in which they were prior to any legislation on the subject; and that, under the circumstances of the case, the custom was not inequitable, and that the plaintiff was bound by it.*

This was an application to the Court on behalf of a single salvor for salvage remuneration. He was the temporary master of a steam-tug, called the "*Sailor*," of Yarmouth, which rendered salvage services to a large steamer, called the "*Ganges*," whilst she was in distress near the Hasborough Sands, and instituted his suit for apportionment of salvage against the owners of the steam-tugs "*Sailor*" and "*Pilot*," who were also salvors of the said vessel. The "*Sailor*" was a steam-tug of twenty-five tons, and thirty-two horse power, belonged to the Great Yarmouth Standard Steam-Tug Company, and was manned by a crew of three men, viz., by the plaintiff as master, an engineer, and a stoker, and during the progress of the services in question she took on board two extra men. The services of the "*Sailor*" began at one o'clock p.m., of Friday, October 23, 1868, and lasted till four o'clock p.m., of the Sunday following, and it was admitted in the answer that the services were performed with much difficulty and some risk, and that by means of the said services, and those of other salvors, the "*Ganges*" was rescued from a position of great danger.

The other salvors were the tugs "*Pilot*" and "*Andrew Woodhouse*," and the "*Caistor*" lifeboat, also belonging to Yarmouth. A sum of 2,000*l*. was paid by the owners of the "*Ganges*" and her cargo, which was accepted as covering the claims of all the salvors, and the amount due to the "*Sailor*" was fixed at 410*l*. 10*s*., distributable among the owners, master and crew of that tug, and of this sum 3*l*. 15*s*. was set apart as the portion to be paid to the plaintiff, and was tendered to and refused by him.

Butt and *Pritchard* appeared for the plaintiff, and *Dr. Deane* and *E. C. Clarkson*, for the defendants.

The arguments of counsel, and the statutes and cases cited are fully set forth in the following judgment, delivered on July 20.

SIR R. J. PHILLIMORE.—This sum would certainly, upon the general principles upon which salvage is distributed, be a very inadequate remuneration to the plaintiff, who was the temporary master of the "*Sailor*." This particular allotment, however, is defended upon the ground of special custom and agreement. It appears from the defendants' pleadings and from the evidence that the Great Yarmouth Steam-Tug Company carries on a business with the steam-tugs the "*Sailor*" and the "*Pilot*," and two other tugs. This business consists in great part "of rendering salvage services and towage services in the nature of salvage services to vessels in distress; and their tugs are expressly provided and constantly kept up at a great cost with a view to rendering such services, and but for the remuneration obtained for such services they would be unable to work their tugs at a profit." The secretary of the company, Mr. Freeman, was examined: he explained that they had a business of towing and salvage; that there were many cases of towage of distressed vessels for which sums under 10*l*. were received; that the simple towage remuneration would not enable the company to keep up their tugs; the masters and crews are allowed by the company 5*l*. per cent. on all towage, and upon salvage where the sum earned was over 5*l*.; besides this they had their wages, and, when away from port, 1*s*. 6*d*. a day for victualling money. During the fishing season there was a towage of fourteen or fifteen boats a day; each tug had a crew of three men and one large rope on board; and the company had carried on this business since 1862, during which time only one man had demurred to the system of poundage. It appears, however, that the tugs were laid up for nine months in the year. It appears also from the evidence that the remuneration is the same to each of the crew,

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however different the degree of merit, and also that the tug or tugs not employed in the service share equally with those that are employed.

The plaintiff deposed that he had been master in the service of the defendants for about thirty months, and " for two fourteen months," as he expressed it, he had been master of the "*Sailor*"; that he was perfectly aware of the custom of poundage, and had always acquiesced in it; that when he took Butterfield's place as temporary master of the "*Sailor*" for a few days he was aware that this custom prevailed, and he gave no notice to the owners that he was not serving as master upon the ordinary terms of poundage-remuneration; he admitted that Butterfield had taken his place when he, the plaintiff, was in the service of the company on the same terms. Some evidence has also been offered to the Court tending to prove that the arrangement in question does operate, on the whole, beneficially for the seamen who are employed by this company.

Upon the general question as to whether any agreement of this kind shall be maintained, I have had considerable doubt. On the one hand, there is a tendency to set aside the principles on which salvage remuneration is awarded, to remove the stimulus which that principle affords to individual exertion, and to reduce the various degrees of merit which may arise to one dead level. On the other hand, I think I must infer from the evidence before me that one principal object of salvage remuneration is advanced by this agreement, namely, the having in readiness vessels peculiarly fitted for the preservation of life and property, and crews accustomed to the navigation of them.

I have considered various cases which have been decided by my predecessors on this subject, viz., "*The Red Rover*" (W. Rob. 150); "*The Margaret Kay*," referred to in "*The Zephyr*" (2 W. Rob. 48); and "*The Beulah*" (2 Notes of Cases, 64). In "*The Beulah*" the words of the Judge are remarkable: "I cannot consider myself bound by any arrangement that the owners might make with the mariners, because I apprehend that the latter are entitled to the judgment of this Court as to what it thinks equitable, and as to the principles which ought to govern each particular case. At the same time, I must confess that I should be exceedingly reluctant indeed to disturb an arrangement hitherto carried on with satisfaction to all parties, and which, as far as I find, has been productive of nothing but an harmonious result. I cannot lay out of my consideration an important fact which makes a material difference in a case of this kind, namely, that it has been sworn, and not contradicted, that the persons on board these steamers receive their wages whether in sickness or health, and they are therefore in a very different situation, in many important respects, from ordinary mariners. I wish it to be understood that if, unfortunately, any such case as this should occur again, I undoubtedly shall make an exception to any arrangement which has been formed between the parties, not only where there has been great risk, but also where there has been extraordinary labour; but these are the only cases in which I shall do it. Where there is no great risk or extraordinary labour, I shall think it my duty to adhere to the arrangements with respect to *quantum* which have hitherto been acted upon by the parties." These cases were decided before the enactment of the Merchant Shipping Act, to certain sections of which I will now refer.

The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), contained the following clause (section 182): "Every stipulation by which any seaman consents to abandon any right which he may have or obtain in the nature of salvage shall be wholly inoperative." "*The Enchantress*" (Lush. 93; 30 L. J. Adm. 16) was decided after the passing of this act. In that case the learned Judge said (p. 96, after quoting the 182nd section), "The Court has held, and must hold that not only all agreements barring salvage are wholly inoperative, but that agreements limiting the proportion of salvage money are to be maintained only so far as they are really equitable. I am of opinion that the alleged agreement in this case is open to the objection that it is inequitable, and that, even if made, it is not binding upon the plaintiffs."

Since this decision the Merchant Shipping Act Amendment Act, 1862 (25 &

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26 Vict. c. 63), has provided as follows, by section 18: "It is hereby declared that the 182nd section of the principal act does not apply to the case of any stipulation made by the seamen belonging to any ship which, according to the terms of the agreement, is to be employed on salvage service, with respect to the remuneration to be paid to them for salvage services to be rendered by such ship to any other ship or ships."

I do not construe these statutes as in any way fettering the discretion of the Court upon the subject of these agreements; the joint effect of the two clauses is simply to render such agreements not illegal, and to place them on the same footing on which they stood before any legislation on the subject. This I am glad to find was the opinion of my predecessor in the last case to which I shall refer,—"*The Pride of Canada*" (Bro. & Lush. 208), reported more fully in the *Maritime Law Cases*, vol. 1, p. 406. The circumstances of it were very similar to the present case.

Having regard to these circumstances, especially to the facts, that the salvor in this case was perfectly aware he was acting for a person bound by this arrangement, which I cannot pronounce, upon the evidence before me, to be inequitable; that no extraordinary exertion or peril accompanied the salvage service in this case, which was mainly effected by the vessel; I think I shall act in accordance with the principles which have guided my predecessors in this Court in pronouncing for the validity of the arrangement in the case now before me.

I have considered the argument which has been addressed to me with respect to the apportionment of salvage to this individual under the assumption of the agreement, and I have come to the conclusion that I ought not to interfere with that matter.

I pronounce, therefore, against the prayer of the plaintiff, but I shall give no costs.

ADMIRALTY. June 14, July 13, 16, 27, 1869.

"THE NEPOTER."

38 L. J. Adm. 63; L. R. 2 A. & E. 375; 22 L. T. 177; 18 W. R. 49.

See, *Simpson* v. *Blues*, [1872] E. R. A.; 41 L. J. C.P. 121; L. R. 7 C.P. 290; 26 L. T. 697; 20 W. R. 680 (C.P.). Considered, *Thrift* v. *Youle*, [1877] E. R. A.; 46 L. J. C.P. 402; 2 C.P. D. 432; 36 L. T. 114 (C.P. D.). See, *Sewell* v. *Burdick*, [1885] E. R. A.; 54 L. J. Q.B. 156; 10 A.C. 74; 52 L. T. 445; 33 W. R. 461 (H.L.).

Damage to Cargo—Leakage—Right to Sue—Consignees.

SHIPPING.—*N. was in the habit of consigning goods to the plaintiffs for sale, and the plaintiffs from time to time accepted their bills and accredited him with the proceeds of the sale of the goods. N. being at the time indebted to the plaintiffs upon the account current between them, consigned a cargo of sugar to the plaintiffs, which was delivered in a damaged state*:—Held, *that as consignees of the cargo and creditors of N. the plaintiffs were entitled to sue in the Admiralty Court for damage by reason of negligence or breach of duty; and* semble *also as mere consignees, even though no property in the goods passed to them.*

Held, *also, that the damage being caused by the insufficient drainage of the ship, and not by the usual leakage of the sugar, the plaintiffs were entitled to recover.*

This was a suit under the 6th section of the Admiralty Court Act, 1861, against the Norwegian barque "*Nepoter*" and her owners, and was instituted by Messrs. Cottam, Morten & Co., as consignees of various parcels of sugar which formed part of the cargo.

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The consignees had been in the habit of consigning goods for sale to the plaintiffs, who from time to time had accepted the consignee's bills, and credited him with the proceeds. On the account between them, the consignor was a debtor to the plaintiffs.

The bills of lading were not indorsed to the consignees, but they were named therein as the persons to whom the goods were to be delivered.

The bills of lading were in the following form:

"Shipped in good order and well conditioned, by James Harvey, in and upon the good ship called the "*Nepoter*," whereof is master for this present voyage Nielsen, and now in the port of Salt River, Jamaica, and bound for London, twenty hogsheads, forty-one tierces, forty-four barrels of sugar; fourteen puncheons of rum; seventy-eight tons of logwood: all on board, being marked and numbered as in the margin (*), and are to be delivered in the like good order and well conditioned at the aforesaid port of London (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted) unto Cottam, Morten & Co., or to their assigns. Freights for the said goods to be paid—three shillings and three pence per cwt. for sugar, five pence per gallon for rum, and twenty shillings per ton for wood; with primage and average accustomed.

"In witness whereof the master or purser of the said ship hath affirmed to three bills of lading all of this tenor and date; the one of which bills being accomplished, the others to stand void.

"Weight and contents unknown—Not liable for leakage.

"G. NIELSON.

"Dated in Salt River, Jamaica,
"April 17, 1868."

The petition alleged that the goods were not delivered "in good order and well conditioned"; that such non-delivery was "caused by the negligence or misconduct of the master and crew, or was otherwise a breach of contract or duty on the part of the master and of the defendants." And the answer alleged, 1, that the plaintiffs were not consignees of the goods to whom the property in them had passed; 2, that the goods were delivered in a proper state and condition to the plaintiffs; 3, that the non-delivery of the goods was not occasioned by negligence, breach of contract, or breach of duty on the part of the master or of the defendants; and 4, that the damage was occasioned by leakage, for which the defendants were not liable.

Keane and *R. G. Williams*, for the defendants.—The plaintiffs are not assignees for value; and it has been already held in this Court that a nude assignee cannot sue under the 6th section of the Admiralty Court Act, 1861—"*The St. Cloud*" (1 Bro. & Lush. 14). Upon the facts the evidence shews that the loss arose from leakage within the exceptions of the bill of lading.

Butt and *Cohen*, contra.—This Court has already held that an indorsee of a bill of lading consigned to him for sale may sue if he has made advances on the bill of lading—"*The Figlia Maggiore*" (37 L. J. Adm. 52; L. R. 2 Adm. 110). See also *Short* v. *Simpson* (35 L. J. C.P. 147). And in this case the goods were consigned to the plaintiffs, who were in the habit of accepting bills for the consignor, and between whom there was an account current, according to which the consignor was then a debtor to the plaintiffs. Upon the facts, the damage arose from insufficient drainage.

SIR R. J. PHILLIMORE.—With respect to the first defence, which is one of law, the validity of it must depend upon the true construction of the Admiralty Court Act, 1861, and upon the practice of this Court independently of that act. Upon both grounds I am of opinion that this defence fails. I adhere to the construction of the statute which I expressed in "*The Figlia Maggiore*" (37

(*) "$\frac{4}{EM}$ 1-20 hds. Sugar. 1-12 puns. Rum.—IB 1-16 tierces Sugar.—EP 1-25 tierces Sugar. 1-44 brls. ditto.—I H 702 puns. Rum. 78 tons Logwood: all on Board."

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L. J. Adm. 52; L. R. 2 Adm. 110), and I think that these plaintiffs have a right, under section 6 of 24 Vict. c. 10, to sue the defendants both for negligence and for breach of contract as "consignees of goods named in the bills of lading," even though the property did not pass; in other words, that it is not necessary to import into the Admiralty Court Act from the Bills of Lading Act (18 & 19 Vict. c. 111) the words "to whom the property in the goods shall pass."

I am aware that this construction differs from that which Dr. Lushington put upon the statute in his judgment in "*The St. Cloud*" (1 Bro. & Lush. 14), and that I am taking a step beyond that which I took in "*The Figlia Maggiore*" (37 L. J. Adm. 52; L. R. 2 Adm. 110); but, after much reflection, I have come to the conclusion that the Admiralty Court Act intended to give every consignee or assignee of a bill of lading a capacity to sue in this Court for damage done to the goods mentioned in the bill. I think this, which is certainly the obvious construction of the plain words of the statute, is consistent with the intention of the legislature to protect the absent owner. It must often happen, as in the present case, that an immediate proceeding, and one which would allow no time for communication with the owner, must be necessary for his protection. The evidence of damage caused by fermentation or the like process might and not unfrequently would be lost in consequence of the delay which the necessity of such a communication would create; and I agree with Dr. Lushington in his general view of the objects of this statute—"*The St. Cloud*" (1 Bro. & Lush. 14): "The general intention of the legislature cannot be doubtful. The statute is remedial. The short delivery of goods brought to this country in foreign ships, or their delivery in a damaged state, was frequently a grievous injury, for which there was no practical remedy, for the owners of such vessels being resident abroad no action could be successfully brought against them in a British tribunal. To send the merchant who had sustained a loss to commence a suit in a foreign tribunal, and probably in a distant country, could not be deemed a practical or effectual remedy. With a view to obviate a grievance so oppressive to British merchants, the enactment contained in the 6th section was passed. It was intended to operate by enabling the party aggrieved to arrest the ship in cases where, from the absence of the shipowner in foreign parts, the common law tribunals could not afford effectual redress." And by the 7th section of the same statute (24 Vict. c. 10) it has been enacted, "That the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." This Court (confirmed by the Judicial Committee of the Privy Council) has, in the case of "*The Beta*" (38 L. J. Adm. 50), put the largest construction on the words, "any claim," a fact which must be considered in weighing the reasons assigned by Dr. Lushington in his judgment in "*The St. Cloud*" (1 Bro. & Lush. 14).

The reasons which appear most to have weighed with my learned predecessor for importing the words of the Bills of Lading Act into the Admiralty Court Act, which he said "at first sight is rather a strong proposition," were as follows: "A nude assignee would if the owners of the ship were out of the country, have a right of action in the Admiralty Court, and in that alone; but if the owners of the ship were in this country such nude assignee would have no right of action either in the Admiralty Court or in one of the Courts of common law. Such a consequence is so inconsistent with reason, that I cannot believe it was the intention of the legislature." But it appears to me, as perhaps it would to that learned Judge if it had been brought a second time to his consideration, that this consequence is really not unreasonable, because if the owner of the ship were in this country, the owner of the goods would know where and how to bring his action against him, whereas, in the case of the owner being abroad, unless his agent could at once arrest the ship, no action could be brought at all either *in rem* or *in personam* in this country, although the cargo was discharged here, and all the evidence of the damage must necessarily be in this country. Another reason for putting this construction upon this statute is, that it would be in harmony with the usual practice of this Court, which has always put aside technical objections as to the parties who may

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institute or defend a suit, and allowed any person who has an interest to appear for the purpose of defending that interest, as in the common case of a bottomry bondholder defending a suit for wages. But if the construction of the statute in "*The St. Cloud*" (1 Bro. & Lush. 14) be right, and my present construction be wrong, I adhere to my opinion expressed in "*The Figlia Maggiore*" (37 L. J. Adm. 52; L. R. 2 Adm. 110), that the consignee would have a *persona standi* on the ground of negligence or breach of duty, if not on the ground of breach of contract, for I think that I must assign a distinct force to each of these grounds.

I think it right also to add, that after careful perusal of the judgment in the case of *Short* v. *Simpson* (35 L. J. C.P. 147), I incline to the opinion that a property did pass sufficient to entitle the consignee to sue in this Court under these bills of lading, in the particular circumstances of this case. It is true that bills were not drawn upon the cargo, but there was an arrangement between the consignor and the consignee, according to which the consignee accepted bills drawn upon his firm by the consignor, and credited him with the proceeds of the goods sold from time to time. There was an account current between them, and at the time of the institution of this suit the consignor was considerably in debt to the consignee. And the mention of this fact leads me to notice another criterion of a species of property having passed to the plaintiffs in this case. An indorsee of a bill of lading, to whom a general balance is due, and a consignee of goods, who is intrusted to sell them and has a general balance against the consignor, have an insurable interest in such goods (1 *Arnould*, pp. 246, 247). This is the position of the plaintiffs in this case; and therefore, I think, a sufficient property would have been vested in the plaintiffs to satisfy the Bills of Lading Act; and, moreover, they would have such an interest in the goods as would, according to all analogy derived from the practice of this Court, entitle them to sue.

Now with respect to the defence on the facts of the case: The cargo in this vessel was the usual if not the invariable cargo from Jamaica, namely, a cargo of sugar; and it is proved to my satisfaction, after due consideration of the evidence on the one side and the other, that the portion of the cargo which belongs to the plaintiffs, and it is to be observed that it was only a small portion of the cargo, was shipped in proper order and after proper precautions in the port of Salt River, Jamaica; and the condition in which the cargo generally was discharged at the port of London appears to have been as follows: The upper portion was in a very good condition, as was also the lower portion, with the exception of the casks on the ground tier, which were consigned to the plaintiffs. On this tier there was an accumulation of drainage in the nature of molasses, part liquid, part encrusted to the extent of two feet or rather more up the hogsheads; some of the casks were full, some about half full, some about one-third, and some entirely empty. Not any casks on the bottom tier were absolutely uninjured, according to the evidence of Mr. Jack, who superintended the discharge of the cargo, and who appeared to me a perfectly credible witness. The fact, therefore, that the goods were not discharged in the like good order and condition in which they were laden appears to me to be proved.

The next defence is, that this damage was not occasioned by negligence or breach of duty on the part of the master. This defence involves two considerations: first, whether any precaution ought to have been taken to prevent the accumulation of drainage. Secondly, if so, whether such precaution was taken. It appears from the evidence that all sugar cargoes drain, and that this sugar cargo drained, I think, rather less than the average, for I am not inclined to rely upon the evidence of Mr. Freeman. It appears that the drainage came out for the most part, if not entirely, from the head of the cask. It is admitted that this drainage should find its way through the ceiling in some way or other into the hold, and also that the drainage of this cargo did not so find its way. If this drainage does not escape, the lowest tier of casks must, as in the present case, receive injury. I have already adverted to the fact that these casks were imbedded more than half way up in molasses; and to this fact there can be no

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doubt, in my opinion, that the damage done to this cargo was owing. The master frankly admitted that this was the first cargo of sugar which he had ever carried, that there were four holes, about one-and-a-quarter inch in diameter, bored close to the after-part of the pumps, for the purpose only of draining the water when the hold was washed. Other witnesses also speak to these holes. The result of the evidence appears to me to be, that they were quite insufficient to afford the necessary means of egress for the liquid stuff to reach the pumps; and that means ought to have been provided, either by a greater number and a larger size of holes, or by keeping the timber-boards open by means of wedges, a precaution which appears to be generally taken before the vessel sails. It is clear that the skin of the ceiling of the "*Nepoter*" was too tight to allow the stuff to escape without some such precautions. I am therefore of opinion that precautions ought to have been taken by the master, and were not taken, which would have prevented the damage in this case.

The last defence remains to be considered, namely, that this drainage falls within the excepted perils mentioned in the bills of lading, that is, "not liable for leakage." But this defence appears to me also untenable. For it is not the leakage, properly speaking, which has done this injury to the cargo; but the accumulation of drainage upon the floor, to such an extent that the casks were half way immersed in it; and it was this mischief which, by keeping out the air, caused the sugar to heat, and thereby, as a natural consequence, produced the emptiness of the casks. The circumstances, therefore, of this case render the judgment of the Privy Council in "*The Hélène*" (1 Bro. & Lush. 429) inapplicable. Upon the whole, I am satisfied that the plaintiffs have established their case; and I must make the usual order of reference to the registrar, to ascertain the amount of the damage; and I must accompany this sentence with costs.

ADMIRALTY. July 20, 30, 1869.

"THE PANAMA."

38 L. J. Adm. 67; L. R. 2 A. & E. 390; 22 L. T. 73.

Affirmed, [1870] E. R. A.; 39 L. J. Adm. 37; L. R. 3 P.C. 199; 6 Moo. P.C. N.S. 484; 16 E. R. 808; 23 L. T. 12; 18 W. R. 1011 (P.C.).

Bottomry—Notice to Owner, an Insolvent.

SHIPPING.—*A vessel being in distress at Cuba, the agents of the charterers telegraphed to that effect to the charterers at Liverpool, who authorized their agents to advance the necessary funds on bottomry. The owner resided in the same town as the charterers, and the charterers knew where he lived, but the owner was insolvent*:—Held, *that the charterers should have communicated with the owner, and that in the absence of notice to him the bond was invalid.*

This was a petition in objection to the Registrar's report in a cause of bottomry, brought by Charles Barron and Thomas Harrison, the holders of two bottomry bonds, against the vessel "*Panama.*" The owner did not appear, but the validity of the bonds was opposed by Mr. Stewart, a mortgagee, and it was agreed by the plaintiff and defendant that the bonds should be referred to the Registrar, assisted by merchants, "to report the amount due thereon, but without prejudice to any question as to their validity." At the reference before the Registrar the first bond was abandoned, and as to the second, the Registrar reported that it was invalid, on the ground that the bondholder had not communicated with the owner, although he was in the same town, and might have conferred with him whenever he pleased, and was aware that the master had not communicated with him. The Registrar reported that all the charges were "quite proper," that the "bottomry premium was not excessive," and that "he was not aware that any of the items could have been struck out."

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The petition of appeal alleged the report to be erroneous, because the Registrar had no power to decide upon the validity of the bond, and because the facts did not warrant the report that the bond was invalid. It was subsequently agreed between the parties that the Court should be asked to decide the question as to the validity of the bond, as if the question were mooted before it in the first instance, and that the remainder of the report should be accepted.

Butt and *Pritchard*, for the bondholder, in objection to the report.—The necessity for the bond may be complete without notice to owners, and in such a case notice is unnecessary. If the owner had known of the requirements of the master he could not have satisfied them, as he was insolvent. Besides, the facts of this case shew that the owner was aware that before the vessel returned to this country she would require more money than he had supplied, and as he was without credit, either at Cardenas or elsewhere, the necessary funds could only be obtained by bottomry, and he must therefore be held to have sanctioned the bonds, which he knew would be inevitable before the vessel's return—"*The Bonaparte*" (3 W. Rob. 298; 7 Notes of Cases, Sup. 55).

Clarkson, contra.

On July 30 judgment was given as follows:—

SIR R. J. PHILLIMORE.—The first bond has been abandoned, and I have only to deal with the second bond, which is dated December 2, 1868. It was signed at Cardenas, in Cuba, and given to cover two sums respectively of 378*l.* 3*s.* and 250*l.*, and with a bottomry premium of 30 per cent. on the former sum, and amounts to the sum of 741*l.* 12*s.*; but the sum of 250*l.* has been withdrawn from the claim by the counsel for the bondholder, on the ground that it was originally advanced on the security of the freight; so that the claim of the bondholder in this Court is limited to the principal sum of 378*l.* 3*s.*, and the bottomry premium of 113*l.* 9*s.* The owner of the "*Panama*," Mr. Fincham, does not dispute the validity of the bond, but he has been examined as a witness by the defendant. The bond was entered into by the master, who was Fincham's son-in-law; the owner is insolvent, and was so at the time when the bond was given. A first mortgagee, Mr. Stewart, appears to contest the validity of the bond. And it is important to observe that the bondholders held a second mortgage on the vessel. The bond does not affect the cargo, and according to the finding of the Registrar, with which I agree, the expenses which the bond was given to cover were quite proper; the owner, as I have said, was insolvent, and the master had no credit, and the recourse to a bottomry bond appears to have been a matter of necessity: the time which it takes to write a letter from Cuba to Liverpool and obtain an answer is six weeks in the ordinary course of post. The master has not been produced as a witness by either party.

The facts which I have thus stated are not disputed; I will now consider more closely those which relate to the execution of the bond. On August 23, 1868, the "*Panama*" left Cardenas, and arrived at Trinidad de Cuba in September, and took on board a cargo of mahogany and cedar, the freight on which, it appears, would amount to 1,100*l.* or 1,200*l.* On October 12, 1868, the "*Panama*" left Trinidad de Cuba for London, but having suffered injury from tempestuous weather she put into Cardenas. She was surveyed on November 6; the master applied to the agents of Messrs. Finlay & Co., which latter gentlemen were the agents of Messrs. Barron & Harrison, for an advance of money, which was refused. He then went to Havannah and attempted to obtain the money from Messrs. Finlay & Co. themselves; he was again refused, and returned to Cardenas. It appears that he then applied to the owners of the cargo for money, and on their refusal, threatened to sell a portion of the cargo. The master had for some time been distrusted, both by Barron and Harrison, and it should also seem by Fincham, the owner; and Messrs. Finlay & Co. taking alarm at this threat to sell a portion of the cargo, resolved to get rid of him; and on November 24 telegraphed to Barron & Harrison in the following words: "'*Panama*' wants two hundred pounds to clear, also a hundred and sixty claimed by Mantle for wages; are ready to advance all, but he must leave vessel

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to captain appointed by consul. See owner, answer." To this Messrs. Barron & Harrison answer also by telegram, on the 25th of the same month: "Do best our interest, appoint new master, secure advance bottomry." On receipt of this telegram Messrs. Finlay & Co., with the assistance of the British consul at Havannah, remove the master, Captain Mantle, and put another master in his place; but before Captain Mantle leaves they get him to sign the bottomry bond which is the one in dispute in this case. At the time when Mr. Barron telegraphed back this answer, he was resident in Liverpool. Mr. Fincham, the owner, resided in that town or close to it, and continually attended at an office in the town. Of this fact Mr. Barron was perfectly aware; he was also perfectly aware that Mr. Stewart was first mortgagee of the vessel, and resided in Liverpool. Mr. Barron had no communication whatever with the owner upon the subject of this bottomry bond, and the question arises whether in all these circumstances he had a right to instruct the master, through his agents, to bottomry the ship as a security for his, the bondholder's, advance of money. It is not necessary to assert as a proposition of law, that in all cases the bondholder, or even the master, must communicate with his owner before a bottomry bond be entered into; or that it is necessary that the bondholder should communicate with the first mortgagee. Neither of these propositions is required to sustain the judgment which I am about to pronounce, and which is confined to the particular facts and circumstances of this case. Having regard to them, I think there was a duty incumbent upon the bondholder of communicating with the owner before the bond was entered into, and that this duty was not taken away by the fact that the owner was insolvent, a point which was much pressed upon me by the counsel for the bondholder. For the owner might have thought it expedient to endeavour to raise the money, either through his creditors, or from the first mortgagee, who was close at hand, or from some other source; and I cannot lay out of my consideration the fact that by this bond the second mortgagee, who is the lender, does practically render the vessel liable to pay a premium of 30*l.* per cent. before the first mortgagee can be satisfied.

I pronounce against the validity of this bond, with costs.

ADMIRALTY. July 24, 31, 1869.

"THE DUERO."

38 L. J. Adm. 69; L. R. 2 A. & E. 393; 22 L. T. 37.

Damage to Cargo—Exceptions in the Bill of Lading—Negligence of Master and Crew.

SHIPPING.—*A cargo of nuts, stowed before the bill of lading was signed, was subsequently damaged in the course of the voyage by the carelessness of the master and crew, and the bill of lading provided against liability for their negligence*:—Held, *that the shipowner was not liable for the damage.*

This was a SPECIAL CASE, the facts of which were as follows: On or about July 10, 1868, Messrs. Carey Brothers & Co., of Tarragona, in Spain, as agents for Samuel Hanson and Reginald Hanson, trading under the name or style of Samuel Hanson & Son, of No. 47, Botolph Lane, in the city of London, fruit-merchants, the plaintiffs in this cause, delivered to Messrs. P. M. Tintare, of Barcelona, in Spain, the owners of the steamship "*Duero*," 180 bags of Barcelona nuts, the property of the plaintiffs, to be carried from Tarragona to London on board the above-named steamship "*Duero*," then lying in the port of Tarragona, for reward to the defendants in that behalf, upon the terms of a bill of lading. The said goods were when shipped as aforesaid in good order and condition. The said steamship subsequently proceeded on her voyage to London, where she arrived on or about August 6, 1868, when the said goods were

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delivered to the plaintiffs. The said goods were delivered to the plaintiffs as aforesaid in a damaged condition, such damaged condition having been occasioned by the negligence and default of the master and mariners of the said vessel in and about stowing the goods on board of her.

The question for the opinion of the Court on this special case was, "whether the defendants are protected from liability by the terms of the bill of lading. If the Court should be of opinion that the defendants were protected from liability, then judgment should be entered for the defendants, and the plaintiffs condemned in the costs of all the proceedings in this cause. If the Court should be of the contrary opinion, then the defendants should be condemned in such amount of damages as may be agreed to by the parties, or shall be ascertained by the registrar and merchants in case the parties cannot agree together, with the costs of all the proceedings in the cause."

At the hearing, some little difficulty arose on the construction of the terms of the 4th and 5th articles of the agreement, and it was added to by the following paragraph:—"Admitted by both parties that in the ordinary course mate's receipts were given for goods on shipment, and subsequently the bill of lading substituted for it; that the goods were stowed before the bill of lading was given, but after mate's receipts; and that the damage occurred after delivery of the bill of lading, and in the course of the voyage. The action was for damage occasioned by the facts stated in the case."

Butt, for the plaintiffs.—The cause of the damage was the improper stowage, which took place before the bill of lading was signed, and therefore the exceptions in the bill of lading do not apply. If they do, the damage was caused by the negligence or default of the master and crew, and a contract that would supersede the necessity of due diligence on the part of carriers is in itself unlawful.

Cohen, for the defendants.—If this contract is good and binding the defendants are not liable; and a contract is valid unless it is tainted with fraud, or is illegal, or contrary to public policy, or self-repugnant. Even if the defendants were common carriers they would not be liable. Nothing but a statutory enactment would prevent a special contract with a common carrier from being binding, even where the special contract professes to exempt the carrier from liability for the negligence of his servants—*Peek* v. *the North Staffordshire Railway Company* (32 L. J. Q.B. 241; 10 H.L. C. 473); *Austen* v. *the Manchester Railway Company* (10 Com. B. Rep. 454; 21 L. J. C.P. 179; 16 Q.B. 600; 20 L. J. Q.B. 440); and *Carr* v. *the Lancashire Railway Company* (7 Ex. 707; 21 L. J. Ex. 261). Nor is there anything unreasonable in the condition, though it may be one requiring special words—*The Peninsular and Oriental Steam Navigation Company* v. *Shand* (3 Moore P.C. 272); *Grill* v. *the General Iron Screw Colliery Company* (37 L. J. C.P. 205). *Dixon* v. *Sadler* (5 Mee. & W. 405; 9 L. J. Ex. 48) is distinguishable from this case. But the defendants are not common carriers—*Parsons on Shipping*, 246, and the cases there cited; *Kay* v. *Wheeler* (37 L. J. C.P. 181).

Butt, in reply.

On July 30 judgment was given as follows:—

Sir R. J. Phillimore.—The true question appears to the Court to be in this case—what was the contract between the parties? Now, the contract between the parties was to deliver these nuts in proper condition. The bill of lading says, 180 regular bags of hazel nuts were to be delivered at the port of London, with the usual exceptions, in good condition by the vessel. It then says that "the vessel is not answerable for any discrepancy between the contents of the packages and description of the same in the bills of lading; the goods to be discharged from the ship twenty-four hours after she is ready to unload;" and, further, that "the shippers are to be accountable for any loss or damage which may arise from the contents of the packages being wrongly described," and so on. The usual perils are excepted—"the act of God, the Queen's enemies, pirates or robbers;" and then there is this peculiar exception—"and the ship not being liable to make good loss from any of the causes above

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excepted." The causes "above excepted" are "the act of God, the Queen's enemies, pirates or robbers, restraint of princes or rulers, fire at sea or on shore, accidents from machinery, boilers, steam, or from other goods by contact, sweating, leakage, or otherwise; barratry, negligence or default of master, pilot or mariners, or others performing their duties; vermin, jettison, and also accidents of navigation of every kind, excepted; and the ship not being liable to make good loss from any of the causes above excepted." That was the contract. It has been contended that the mischief done to this peculiar cargo was occasioned by the stowing, though the damage, it is admitted in the case, occurred after the vessel was in the course of navigation; and it has also been urged that this bill of lading being subsequent to the stowing, it could not relieve the shipowners from the obligations which they were under, as carriers, to repair the mischief done by improper stowage of the goods. It was not exactly contended that there were two contracts in this case, but it was insisted that the bill of lading did not cover the injury arising from the stowage, which act of stowage took place before the bill of lading was granted. In the opinion of the Court, the contract in this case is to be found in the bill of lading alone, and I must consider that as the written expression of the obligation of the parties.—[His Lordship then referred to the cases of *Redhead* v. *the Midland Railway Company* (8 B. & S. 377; 36 L. J. Q.B. 181) and *Kay* v. *Wheeler* (37 L. J. C.P. 181), and said:]—These two cases appear to me to strengthen the conclusion at which I have arrived, viz., that I have only to look at the bill of lading as the expression of the true contract existing between the parties, and to consider whether the delivery of these goods in a different condition from that in which they were originally placed on board does, or does not, fall within the excepted perils mentioned in that bill of lading. It has been contended, amongst other objections for the plaintiffs, that this contract was in itself unlawful, inasmuch as it professed to provide against due care being bestowed by the carrier upon the goods which he undertook to convey. I must observe that it has not been proved to me that a shipowner is in the category of a common carrier, and that he is bound as a common carrier would be bound, under the liability of an action being brought against him, to carry goods generally; but, even if it were so, according to the principles of the decisions affecting this part of the case, it appears to me it is competent to the common carrier to exempt himself from liability. Assuming, as I do for the sake of argument, that the shipowner was in the category of a common carrier, still it would be competent to him, under the authority of the decisions in *Philips* v. *Clark* (2 Com. B. Rep. N.S. 156; 9 L. J. C.P. 167) and *The Peninsular and Oriental Steam Navigation Company* v. *Shand* (3 Moore P.C. 272), to have protected himself from liability by such a bill of lading as this—at all events, if not to have protected himself from his own personal negligence, still to protect himself from the negligence of the servants whom he employed. It must also be observed, that it must be presumed that this bill of lading was accepted deliberately by the plaintiffs, though it was, of course, competent to them to have refused so to accept it. The contract does not appear to me in itself to have been unreasonable. I am not aware what the circumstances are relating to the carriage of these goods, but it is perfectly possible that, in return for the exemption from liability, there might have been a demand for less freight; and it is perfectly clear and well established, I think, by the argument of Mr. Cohen, that the consignor of these goods might protect himself by insuring against the liability which the shipowner declined, so that, in fact, there would, practically speaking, be a transfer of liability from the shipowner to the underwriter. That the underwriter can insure against the negligence of the master is, I think, placed beyond doubt by the case of *Dixon* v. *Sadler* (5 Mee. & W. 405; 9 L. J. Ex. 48). I merely refer to this case to shew, what perhaps there is no dispute about, that it was quite competent to the consignor to have insured himself against the negligence of the master. It was suggested that this was a case in which, possibly, the Spanish law might be applicable, because it appeared that the goods were shipped and the contract was entered into at Tarragona, and it

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had not been shewn by the plaintiffs that this was a contract which it was lawful to enter into according to Spanish law, which was the *lex loci contractus*. But, in answer to that, I think it is enough to say, that if the defendants had that defence to make, it was their duty to have established it, like any other fact, by proper evidence. I have no doubt whatever that those who rely upon the difference between the foreign law and the law of the *forum* in which the case is brought are bound to establish that difference by competent evidence; and no such evidence has been brought before me on the present occasion. I pronounce the defence to be sufficient; and the petition must be dismissed with costs, it having been established that the damage done to the goods came within the excepted perils of the bill of lading.

IN THE PRIVY COUNCIL. Nov. 17, 18, 19, 20, Dec. 23, 1868.

ARCHBISHOP OF YORK (Dr. Thomson), LORD CHELMSFORD, LORD WESTBURY, LORD CAIRNS, SIR W. ERLE and SIR J. COLVILE.

JOHN MARTIN, *appellant;* THE REV. ALEXANDER MACKONOCHIE, *respondent.*

38 L. J. Ecc. 1; L. R. 2 P.C. 365; 19 L. T. 503; 17 W. R. 187: partly reversing, [1868] E. R. A.; 37 L. J. Ecc. 17; L. R. 2 A. & E. 116; 18 L. T. 245; 16 W. R. 604 (Arches): P.C. decision confirmed, [1870] E. R. A.; 39 L. J. Ecc. 11; L. R. 3 P.C. 52; 24 L. T. 204; 18 W. R. 217 (P.C.): and, [1871] E. R. A.; 40 L. J. Ecc. 1; L. R. 3 P.C. 409; 24 L. T. 204; 19 W. R. 545 (P.C.).

See also, s.c. (2) 1875, L. R. 4 A. & E. 279; 32 L. T. 568 (Arches). Distinguished, *Sumner* v. *Wix*, [1870] E. R. A.; 39 L. J. Ecc. 25; L. R. 3 A. & E. 58; 21 L. T. 766 (Arches). See *Hebbert* v. *Purchas*, [1871] E. R. A.; 40 L. J. Ecc. 33; L. R. 3 P.C. 605; 19 W. R. 898 (P.C.). Discussed, *Sheppard* v. *Bennett*, [1872] E. R. A.; 41 L. J. Ecc. 1; L. R. 4 P.C. 371; 26 L. T. 923; 20 W. R. 804 (P.C.). Definition referred to, *White* v. *Bowron*, [1874] E. R. A.; 43 L. J. Ecc. 7; L. R. 4 A. & E. 207 (Cons.). Observed upon, *Clifton* v. *Ridsdale*, 1877, 2 P. D. 276 (P.C.). Referred to, *Hudson* v. *Tooth*, 1877, 2 P.D. 125; 35 L. T. 820 (Arches). See *Combe* v. *Edwards*, 1878, 3 P. D. 103; 39 L. T. 295 (Arches); *Martin* v. *Mackonochie*, [1880] E. R. A.; 49 L. J. Q.B. 9; 4 Q.B. D. 697; 41 L. T. 680 (C. A.): affirmed sub nom. *Mackonochie* v. *Lord Penzance*, [1881] E. R. A.; 50 L. J. Q.B. 611; 6 App. Cas. 424; 44 L. T. 479; 29 W. R. 633 (H.L.). Referred to, *Heywood* v. *Bishop of Manchester*, [1884] E. R. A.; 53 L. J. Q.B. 196; 50 L. T. 236; 32 W. R. 567 (Q.B. D.). See, *Read* v. *Bishop of Lincoln*, [1892] E. R. A.; 62 L. J. P.C. 1; [1892] A.C. 644; 67 L. T. 128 (P.C.). Referred to, *Kensit* v. *Rector of St. Ethelburga*, [1900] P. 80 (Cons.). *Davey* v. *Hinde*, [1903] P. 221 (Cons.).

Church Discipline Act — Rubric, Construction of — Holy Communion — Standing and Kneeling—Lighted Candles—Ceremonies—Ornaments.

ECCLESIASTICAL LAW.—*In a proceeding, under the Church Discipline Act, the respondent, a clerk in orders, was charged with having, during the Prayer of Consecration in the Order of the Administration of the Holy Communion, knelt or prostrated himself before the consecrated elements, and also with using lighted candles on the communion-table during the celebration of the Holy Communion, when such candles were not wanted for the purpose of giving light:* —Held, *first, that the priest is intended by the Rubric to continue in one posture during the Prayer of Consecration, and not to change from standing to kneeling, or vice versa; and that the priest is intended to stand, and not kneel; and that the respondent, by the change of posture during the prayer, violated the Rubric, and committed an offence within the meaning of the* 13 & 14 *Car.* 2, *c.* 4, *ss.* 2,

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17, 24, *taken in connexion with the* 1 *Eliz. c.* 2. *Secondly, that such use of lighted candles was unlawful; that the use of lighted candles, if a ceremony, is not amongst those retained in the Prayer Book, and is therefore amongst those that are abolished; and that the* 3rd *Injunction of* 1547, 1 *Edw.* 6, *which suffers two lights upon the high altar, before the sacrament, to remain, so far as it could be taken to authorize the use of lights as a ceremony, was abrogated and repealed by the* 1 *Eliz. c.* 2, *s.* 27, *and by the present Prayer Book and Act of Uniformity. Thirdly, that lighted candles are not ornaments within the meaning of the Rubric, not being prescribed in the first Prayer Book of Edward the Sixth.*

This was an appeal from certain portions of a decree or sentence of the Right Hon. Sir R. J. Phillimore, Official Principal of the Arches Court of Canterbury, delivered on May 28, 1868, in the case of the office of Judge promoted by the appellant.

The respondent, the Rev. Alexander Heriot Mackonochie, was a clerk in holy orders in the Church of England, and the incumbent of the parish of St. Alban's, Holborn, in the diocese of London.

The letters of request stated that the respondent was charged, on the complaint of the appellant, with having, within the diocese of London, and within two years last past, offended against the laws ecclesiastical—

1st, By the elevation of the paten during or after the Prayer of Consecration in the Order of the Administration of the Holy Communion in his said parish church, in a greater degree and otherwise than by merely taking the same into his hands, as prescribed by the Book of Common Prayer, and in a greater degree than is necessary in order to conform with the requirements of such book, and by permitting and sanctioning such elevation; and by taking into his hands and elevating the cup during or after the Prayer of Consecration aforesaid, contrary to the said Book of Common Prayer, and by permitting and sanctioning such taking and elevating; and by bowing, kneeling or prostrating himself before the consecrated elements during or after the Prayer of Consecration.

2nd, By using lighted candles on the communion-table of the said church of his said parish during the celebration of the Holy Communion, at times when such lighted candles were not wanted for the purpose of giving light, and by permitting and sanctioning such use of lighted candles.

The respondent was cited to appear to answer certain articles, &c., to be administered to him, for having, within two years then last past, offended against the laws ecclesiastical in the particulars set forth in the said letters of request.

The respondent appeared to the citation. The articles stated:—

1st. That, by an act of parliament passed in a session of parliament holden in the first year of the reign of Queen Elizabeth, c. 2; and by another act of parliament passed in a session of parliament holden in the 13th and 14th years of the reign of King Charles the Second, c. 4; and by another act of parliament passed in a session of parliament holden in the 28th and 29th years of the Queen, c. 122; and by the 14th, 36th, and 38th of the Constitutions and Canons Ecclesiastical treated upon by the Bishop of London, President of the Convocation for the province of Canterbury, and the rest of the bishops and clergy of the said province, and agreed upon with the licence of his Majesty King James the First, in their synod begun at London in the year of our Lord 1603, and ratified by his said Majesty's letters patent under the great seal of England—all clerks and ministers in holy orders are, among other things, bound to say and use the Book of Common Prayer, and Administration of the Sacraments and other Rites and Ceremonies of the Church, according to the use of the United Church of England and Ireland; that any clerk or minister in holy orders offending against the said statute, law, constitutions and canons ought to be punished according to the gravity of his offence and the exigency of the law.

2nd. That Alexander Heriot Mackonochie (the respondent) was and is now a clerk in holy orders of the United Church of England and Ireland, and was,

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during the entire of the year 1866, the lawful incumbent and perpetual curate of the said parish or ecclesiastical district.

3rd. That the said Alexander Heriot Mackonochie has, in his said church, and within two years last past (to wit, on Sunday, December 23, on Christmas Day last past, and on Sunday, December 30, all in the year of our Lord 1866), during the Prayer of Consecration in the Order of the Administration of the Holy Communion, elevated the paten above his head, and permitted and sanctioned such elevation, and taken into his hands the cup, and elevated it above his head during the Prayer of Consecration aforesaid, and permitted and sanctioned the cup to be so taken and elevated; and knelt or prostrated himself before the consecrated elements during the Prayer of Consecration, and permitted and sanctioned such kneeling or prostrating by other clerks in holy orders.

4th. That such elevation of the paten, and such taking and elevation of the cup, and such kneeling and prostrating, are severally unlawful additions to and variations from the form and order prescribed and appointed by the said statutes, and by the said Book of Common Prayer, and Administration of the Sacraments, and other Rites and Ceremonies of the Church, and contrary to the said statutes, and to the 14th, 36th and 38th of the said constitutions and canons, and also to an act of parliament passed in a session of parliament holden in the 13th year of Queen Elizabeth, c. 12, and to the 25th and 28th of the Articles of Religion therein referred to.

5th. That the said Alexander Heriot Mackonochie has, in his said church, and within two years last past, to wit, on Sunday, December 23, on Christmas Day last past, and on Sunday, December 30, all in the year of our Lord 1866, and on Sunday, January 13, in the year of our Lord 1867, used lighted candles on the communion-table during the celebration of the Holy Communion, at times when such lighted candles were not wanted for the purpose of giving light, and permitted and sanctioned such use of lighted candles.

6th. That the use of such lighted candles is an unlawful addition to and variation from the form and order prescribed and appointed by the said statutes, and by the said Book of Common Prayer, and Administration of the Sacraments, and other Rites and Ceremonies of the Church, and is contrary to the said statutes, and to the 14th, 36th and 38th of the said constitutions and canons.

The articles also alleged and propounded that the respondent had offended against the said statutes and constitutions and canons ecclesiastical in certain other particulars, specified in the said letters of request and decree or citation, namely, by the use of incense for censing persons and things, and by the unlawful use of incense in and during the celebration of the Holy Communion; and by mixing water with the wine during the administration of the Holy Communion. And the promoter prayed that on due proof of the premises the said Court of Arches would be pleased to pronounce that the respondent had offended against the statute law and the said constitutions and canons in the particular matters alleged, to admonish the respondent from so offending in future, and to condemn him in the costs.

On June 28, 1867, the respondent, by way of responsive plea, alleged, amongst other things, as follows:

3rd. To the said 3rd article, that the same is in part untruly pleaded; for the party proponent alleges that whilst he admits that the said Alexander Heriot Mackonochie did on the said two Sundays, and on Christmas Day, during the Prayer of Consecration, kneel, and sanction the kneeling by other clerks, before the Lord's Table, he denies that his said party did, on the said two Sundays, and on the said Christmas Day, kneel or prostrate himself before the consecrated elements, or permit and sanction such kneeling or prostration by other clerks in holy orders, as in the said article pleaded. And he further alleges that whilst he admits that he did on the said two Sundays and Christmas Day, in the said 3rd article mentioned, elevate, and sanction the elevation by other clerks, of the paten and cup above his head, as in the said 3rd article pleaded, yet that such elevation of the paten and cup has been wholly discontinued by the said

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Alexander Heriot Mackonochie during the administration of the Holy Communion ever since the said December 30, 1866, and long prior to the institution of this suit. That such practice was discontinued in consequence of legal advice, and in compliance with the expressed wish of the lord bishop of the diocese of London, and with a resolution of Convocation, as was well known to the promoter of this suit before he instituted the same.

4th. That he denies that the elevation of the paten, and the taking and elevation of the cup, so discontinued as aforesaid, and the kneeling and prostrating charged in the said 3rd article, are severally unlawful additions to and variations from the form and order prescribed and appointed by the said statutes, and by the said Book of Common Prayer, and Administration of the Sacraments and other Rites and Ceremonies of the Church, or that they are contrary to the said statutes, and to the 14th, 36th and 38th of the said constitutions and canons, and also to an act of parliament passed in the session of parliament holden in the 13th year of Queen Elizabeth, c. 12, and to the 25th and 28th Articles of Religion therein referred to, as in the fourth article alleged.

5th. That the 5th article is in part untruly pleaded; for the party proponent alleges that on the said three Sundays and Christmas Day, in the said 5th article mentioned, the said lighted candles were not placed on the communion-table, but upon a narrow movable ledge of wood resting on the said table, and that the said candles were so placed and kept lighted, not during the celebration of the Holy Communion only, as falsely suggested in the said 5th article, but also during the whole of the reading of the Communion service, including the Epistle and Gospel, and during the singing after the reading of the Nicene Creed, and during the delivery of the sermon.

6th. That he denies that the use of such lighted candles is an unlawful addition to and variation from the form and order prescribed and appointed by the said statutes, and by the said Book of Common Prayer, and Administration of the Sacraments, and other Rites and Ceremonies of the Church, and is contrary to the said statutes, and to the 14th, 36th and 38th of the said constitutions and canons, as in the 6th article alleged.

A similar denial was given by the responsive plea to the other alleged offences committed by the respondent. And further, it was alleged that as to the use of incense for censing persons and things, the respondent had desisted from and discontinued such usage, and had never since re-introduced the said ceremony.

The cause came on for hearing, and certain oral evidence was adduced on the part of the promoter, and the arguments of the counsel, both for the promoter and for the defendant were heard.

On March 28, 1868, the learned Judge pronounced and decreed that the respondent had, in certain of the particulars contained in the said articles, offended against the statutes, laws, constitutions and canons of the Church of England; and the learned Judge, by his interlocutory decree, monished the respondent to abstain for the future from the elevation of the cup and paten during the administration of the Holy Communion, and also from the use of incense, and from mixing water with the wine during the administration of the said Holy Communion, as pleaded in the said articles, but declined to monish him in respect of the practice of kneeling or prostration, or in respect of the use of lighted candles, and declined to give costs.

Against so much of the decree as declined to monish the respondent or to give costs, the promoter appealed.

The case in the Court below will be found reported in 37 L. J. Ecc. 17.

A. J. Stephens and *Archibald* (*Coleridge*, *Traill* and *Droop* with them), for the appellant.—The only questions raised by this appeal are, first, as to the officiating minister kneeling down or prostrating himself before the consecrated elements at particular periods in the Prayer of Consecration; secondly, as to the use of lighted candles on the communion-table at the celebration of the Holy Communion when not required for the purpose of giving light. Uniformity in

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the performance of divine worship has ever since the Reformation been one of the leading principles of the Church of England. The Acts of Uniformity, passed in the reigns of Edward the Sixth, Elizabeth, and Charles the Second, were all passed with this object. The principal statute is that of Charles the Second (13 & 14 Car. 2, c. 4). The 24th section of that act refers to "certain laws and statutes for the uniformity of prayer and the administration of the sacraments." Amongst these laws is the 14th of the Canons of 1603, which provides that all ministers shall observe the orders, rites and ceremonies prescribed in the Book of Common Prayer, without either diminishing or adding anything in matter or form. This Canon is as explicit against any addition as against any diminution. The statute 1 Eliz. c. 2, by section 3, enacts, that all ministers, &c., shall be bounden to say or use the Matins, Evensong and Celebration of the Lord's Supper, in such order and form as is mentioned in the book authorized by Parliament in the 5th and 6th years of Edward the Sixth; and section 4, enacts, that if any minister refuse to use such Common Prayer, or shall wilfully use any other rite, ceremony, order or form of celebrating the Lord's Supper, he shall be liable to certain penalties therein enacted. These are the principal statutory provisions as to uniformity. The first decision on this subject which we find in the Courts is the case of *Newbery* v. *Goodwin* (1 Phill. 282), which was a proceeding against a clergyman for omitting passages in the Lessons. In delivering judgment Sir J. Nichol says, "The law directs that a clergyman is not to diminish in any respect or to add to the prescribed form of worship. Uniformity in this respect is one of the leading and distinguishing principles of the Church of England. Nothing is left to the discretion and fancy of the individual. If every minister were to alter, omit, or add according to his own taste, this uniformity would soon be destroyed." In *Westerton* v. *Liddell* (Moore's Special Report, 187) the Judicial Committee said, "In the performance of the services, rites and ceremonies ordered by the Prayer Book, the directions contained in it must be strictly observed: that no omission and no addition can be permitted." Throughout the Communion Service there are at intervals directions as to the attitudes which are to be assumed by the officiating minister: first, when he is to stand; secondly, when he is to kneel; thirdly, when he is to turn to the people, and when to the communion-table. When the Rubric directs the minister to take one posture it is intended and assumed that he is to remain in that posture until he is ordered to change it. The standing and kneeling of the priest, and his turning to the people, and to the communion-table, constitute parts of the order and form of service, which is to be used without any addition, omission or alteration. This construction of the Rubrics in the Communion office agrees with what L'Estrange and Wheatley say upon the subject[1]. There can be no doubt as to what was intended by the prostration. In the Roman Liturgy (*Maskell's Ancient Liturgies*, 93), it is said, "Hostiam consecratam genuflexus adorat, surgit, ostendit populo." The Reformers by introducing the word "standing" did so for the express purpose of excluding adoration of any presence in the elements. The kneeling was accompanied by elevation: and what is the elevation for? Why, according to Lyndwood, "Ut populus illud adoret." Then, as elevation is accompanied with kneeling, may not the object of kneeling be shewn by the elevation?

[LORD WESTBURY.—You may say, "Res ipsa loquitur."]

Then it is said by the learned Judge in the Court below that if the respondent has committed any error in respect of excessive kneeling, it is a matter rather to be brought before the bishop than for a criminal prosecution. The Book of Common Prayer provides, that if doubts arise in the use of the service, for the resolution of such doubts, the parties who so doubt shall always resort to the bishop. The bishop's power under this Rubric is to remove doubts. It can therefore only refer to determining which of two possible ways the things prescribed by the Prayer Book are to be done. But the Prayer Book is quite

(1) *L'Estrange's Alliance of Divine Offices* (Anglo-Catholic Lib.), p. 311; *Wheatley's Common Prayer*, ed. 1720, p. 352.

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clear upon these directions. It is therefore not a matter of doubt referable to the bishop under the Rubric.

Then as to the use of lighted candles. No doubt, if they are used for the purpose of giving light they are lawful, and there can be no possible objection to their use for such purpose. But if they are used for a symbolical purpose, if they are to signify that "Christ is the very true light of the world," they are part of the service, and are an addition to it which is forbidden. Candles are not mentioned in any of Edward's Prayer Books. From the time of the first Act of Uniformity all the rubrics relating to uniformity have been construed to prohibit any addition to the Prayer Book. Bishop Ridley, in his Injunctions on the visitation of the diocese of London, directs as follows: "Finally, that the minister in time of the Holy Communion do use only the ceremonies and gestures appointed by the Book of Common Prayer, and none other" (1 Cardwell's Annals, 93). The Visitation Articles of Archbishops Parker, Grindal, Laud, Andrews, Bancroft and Abbott, are to the same effect (2nd Report of Ritual Commission, 59). The inquiry of Bishop Cosins, in 1662, agrees in this (2nd Report of Ritual Commission, 61). The same may be said of the letter of Archbishop Skelton, in 1670. In the Visitation Articles of Archbishop Sancroft, in the reign of James the Second, he puts the question, "Doth your parson, &c., perform all ministerial offices and duties in such manner and form as is prescribed by the Book of Common Prayer?" It was decided in the Court below that lighted candles are lawful by reason of a certain Injunction of 1547 in the reign of Edward the Sixth, which proceeds as follows: "and shall suffer from henceforth no torches nor candles, tapers or images of wax to be set afore any image or picture, but only two lights upon the high altar, which, for the signification that Christ is the very true light of the world, they shall suffer to remain thereon." The learned Judge identifies these two lights with the Constitution of Archbishop Reynolds: "Tempore quo missarum solennia peraguntur accendantur duæ candelæ, vel ad minus una" (Lyndwood, 236). This Canon dates from 1322. Neither the Injunction of Edward the Sixth nor the Canon are now of any force, because there is no such thing as an altar in the Church of England—*Faulkner* v. *Lichfield* (1 Robert. Ecc. C. 184). There is a fundamental distinction between a communion-table and an altar, between the Communion Service and the Mass. In *Westerton* v. *Liddell* (Moore's Special Report, 187) this Committee attach great importance to the difference between a communion-table and an altar. The same principles were applied in *Parker* v. *Leach* (4 Moore, N.S. 80; 36 L. J. P.C. 26). It is impossible to deduce from the Injunction of Edward the Sixth, as to how High Mass is to be celebrated, any conclusion as to the celebration of the Holy Communion in a Protestant church. The practice of using lighted candles was confined to the first four years of Elizabeth's reign (1 Zurich Letters, 122, 129). It is clear from the language of Dr. Donne, referred to in the Court below, that the Lutheran Church, which did use lights, differed from the English Church, which did not use them. The Injunction of Edward the Sixth as to lights is not within the Rubric respecting ornaments. The Rubric respecting ornaments refers only to those in use, which are prescribed by the first Prayer Book of Edward the Sixth. Even assuming that there was authority to issue the Injunction of Edward the Sixth, the Injunction is repealed by the Act of Uniformity of Elizabeth. If candles are lawful as an ornament of the church, that would not justify their use as a ceremony. There is no trace of candlesticks being left for the use of the Church in any of the Prayer Books issued in the reign of Edward the Sixth. It is said that Elizabeth had lights in her private chapel. If such lights were in use, they were not consistent with law. They referred to the Zurich Letters, vol. i. p. 63, and to *Strype's Memorials of the Reformation.*

Upon the question of "ornaments" effect must be given to every word in the Rubric, to the word "retained" as well as to the words "be in use." The Rubric speaks from its date, 1662, and consequently it sanctions no ornament which was not actually and generally in use in 1662, and which was not also in

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use in the second year of Edward the Sixth. It is clear that lights were not in general use. If the use of lights burning at the Communion be a ceremony then they would be prohibited by the Statute of Elizabeth, which prohibited the use of any other ceremony than those prescribed in the Prayer Book. So that, either as ornaments or as a ceremony, they are prohibited by the Act of Uniformity and by the Prayer Book.

W. M. James and *Deane* (*Prideaux*, *Tristram* and *Charles* with them), for the respondent.—No offence against the laws ecclesiastical is sufficiently alleged in the letters of request. This is a criminal proceeding, it is therefore one which must be laid with the utmost certainty and precision, in order that the jurisdiction of the Court, which is a limited jurisdiction, should be shewn. The defendant must be put in full possession of the facts upon which the charge depends. With respect to the charge of prostrating or kneeling, the charge is not laid with sufficient precision. The Arches Court had no jurisdiction in the matter, except by virtue of the letters of request.

[LORD CHELMSFORD.—Any objection to the jurisdiction must be taken at the earliest period possible. If the party submit, it is too late to take any objection.]

Now the letters of request charge "the bowing, kneeling or prostrating himself before the consecrated elements during the Prayer of Consecration." It is impossible to define the charge which the defendant has to meet from these words. It is not said that the respondent was the celebrant at the time. It does not even say that he was one of the officiating ministers. The charge is therefore not laid with sufficient precision—*Francis* v. *Steward* (5 Q.B. Rep. 984), *Breeks* v. *Woolfrey* (1 Curt. 880), and *The King* v. *Sparkes* (2 Showler, 447).

[LORD CAIRNS referred to *Flamank* v. *Simpson* (4 Moore's N.S. 385; 36 L. J. Ecc. 4).]

In that case we got into difficulties by not opposing the articles as we should have done. The officiating priest is directed to stand before the table. Is the word "standing" to be carried to the end of the Prayer of Consecration? The Rubric says, "Then shall the minister first receive the communion in both kinds himself." Is he to receive it standing or kneeling? In common usage he does receive it kneeling. The Rubric says "all meekly kneeling"; but the officiating clergy cannot administer kneeling. There is no direction throughout as to the attitude of the priest. It is said that the minister is to stand till he is told to kneel, but this is inconsistent with the letter of the Rubric. This charge was never meant to be simply a charge of kneeling, as is now alleged. It was a kneeling as part of the elevation. It is not a separate charge of kneeling; but a kneeling in aggravation of the elevation. There are difficulties as to the meaning of the Rubrics. There is sufficient doubt to render it unsafe to convict a clergyman for that which at most only amounts to a misunderstanding of the Rubric. There is no adoration in the mere act of kneeling. The Rubric is not exhaustive in its directions. There are many usages which are universal which are not directed by the Rubric. It is the practice to pause after the Prayer for all Sick Persons in the Litany, but there is no direction as to this in the Rubric. The kneeling has been said to be a ceremony, but it is distinctly no ceremony. The words "rite" and "ceremony" have a very technical meaning.

[SIR W. ERLE.—Is there any definition of a "rite" and a "ceremony"? I think not.]

It is said that the kneeling is taken from the Romish Missal, but this is not so. It is taken from the Black Rubric. The kneeling was a natural act, and it is an act which the Rubric has left ambiguous. The Rubric is silent; it is therefore a matter for the discretion of the minister.

With respect to lights it is contended that the words "retained" and "be in use" have a meaning which at first sight they do not bear. It is a very forced and strained argument. The words are "such ornaments of the church shall be retained and be in use as were in the Church of England." These

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words must mean, "you shall retain and you shall use that which was in the Church of England at a specified time." Then it is said that the question of ornaments depends on the Acts of Uniformity, Canons and Rubrics, and does not depend upon historical inquiry; but if we are to see what ornaments were in use at a specified time, it must result in an historical inquiry. If the argument for the appellant be sound, then all the Popish ornaments which had been restored in Mary's reign are to be retained. The historical argument is irresistible. This was the argument used in the Savoy Conference. Then it is said: What authority is there for the use of lighted candles on the communion-table? There is the authority of usage from the earliest time. Ever since the year 1100 two lighted candles were in use on the communion-table. The first mention however of these candles is in the fourteenth century in a constitution by Archbishop Reynolds (2nd Report of Ritual Commission, 59). It is as follows: "Tempore quo missarum solennia peraguntur accendantur duæ candelæ, vel ad minus una." Every word of this is material. "Dum" peraguntur "accendantur." The next mention of these two candles is in the Injunctions of the 1 Edw. 6. The 3rd of these Injunctions provides as follows: "That such images as they know in any of their cures to be or have been so abused with pilgrimage or offerings of anything made thereunto, or shall be hereafter censed unto, they (and none other private persons) shall, for the avoiding of idolatry, forthwith take down, or cause to be taken down, and destroy the same, and shall suffer from henceforth no torches nor candles, tapers or images of wax, to be set afore any image or picture, but only two lights upon the high altar before the sacrament, which for the signification that Christ is the very true light of the world they shall suffer to remain still." In the articles of inquiry at the visitation to be held in the diocese of Canterbury in 2 Edw. 6. the following item of inquiry appears: "Whether they suffer any torches, candles, tapers or other lights to be in your churches, but only two lights upon the high altar." It is to be observed that Cranmer was Archbishop of Canterbury at the time of this visitation of the diocese of Canterbury. Down to the year of the Act of Uniformity and to the publishing of the Prayer Book of Edward the Sixth, by tradition, by usage and by injunction, every minister of every church had been in the habit of using these two lights. The Prayer Book and the Act of Uniformity are silent as to these two lights. All which was not expressly abolished remains. But there is much upon which the Prayer Book is silent. How was the minister to act? Was he to suppose that everything which had existed by tradition, usage and injunction was abolished? The Rubric gives no direction as to the covering of the holy table at the time of the celebration of the Holy Communion. This can only be accounted for by reason that it was unncessary to prescribe that which was in general use, and consequently the Prayer Book is silent as to the use of candles. It has been said that Edward the Sixth had no power to issue these Injunctions. But the Act of Supremacy (26 Hen. 8. c. 1.) provides that the King shall be the head of the Church, and, as such, he and his successors would have power to issue injunctions for the government of the Church. But assuming the Injunctions of Edward the Sixth be not in operation then the Submission of Clergy Act (25 Hen. 8. c. 19.) provides for the use of all canons, statutes and ordinances which are not repugnant to the law of the realm. This point was considered in *Middleton* v. *Croft* (2 Atk. 650), *Cawdrie's case* (3 Rep. 15), and in *The Bishop of Exeter* v. *Marshall* (37 L. J. C.P. 331). The Constitution of Archbishop Reynolds has never been repealed; it is therefore in force, and is not opposed to the supremacy of the Crown. There is, therefore, authority for the use of lights, even if the Injunctions of Edward the Sixth be not in operation. The candles are mere ornaments. They are not used as ceremonies. They are not the objects of superstitious reverence, and they have been in use from the earliest times. He referred to *Westerton* v. *Liddell* (Moore's Special Report, 187). It is said that these two lights are the same as the two lights before the reserved Sacrament: but that cannot be so, because that was one light, usually a lamp. They referred to *Keelling, Liturgiæ Britannicæ* (Edit. 1850, pp. 216, 217).

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A. J. Stephens, in reply.—As to the charge of kneeling, the substance of the objection is that the pleadings are not sufficiently precise on this point. I would refer to *Prankard* v. *Deacle* (1 Hag. Ecc. 169). There is an essential distinction between the case of *Francis* v. *Steward* (5 Q.B. Rep. 984) and this case. In that case the respondent appeared under protest, whereas in the present case the respondent appeared absolutely. These proceedings are taken under the 23rd section of Elizabeth, not under the 4th section by indictment. The Injunctions of 1547 relate to the service of the Mass, not to the Holy Communion. There is no altar in a Protestant country. If the Injunction of 1547 ever had any authority, it is repealed by section 27. of the act of Elizabeth.

Lord Cairns delivered the judgment of their Lordships.—The case of *Martin* v. *Mackonochie*, commenced before the Bishop of London, was, under the provisions of the Clergy Discipline Act, sent by the bishop to the Court of the Archbishop of Canterbury for trial in the first instance; and, having been fully heard before the Judge of the Arches Court, resulted in a decree made on March 28, 1868.

Mr. Mackonochie, the clerk in holy orders against whom these proceedings were directed, was charged with four offences against the laws ecclesiastical, viz.:

1. The elevation, during or after the Prayer of Consecration in the Order of the Administration of the Holy Communion, of the paten and cup; and the kneeling or prostrating himself before the consecrated elements; 2. Using lighted candles on the communion-table during the celebration of the Holy Communion, when such candles were not wanted for the purpose of giving light; 3. Using incense in the celebration of the Holy Communion; 4. Mixing water with the wine used in the administration of the Holy Communion.

The learned Judge of the Arches Court by his decree sustained the 3rd and 4th of these charges, and admonished Mr. Mackonochie to abstain for the future from the use of incense, and from mixing water with the wine as pleaded in the articles. Against this part of the decree there is no appeal.

The second charge, as to lights, was not sustained, the learned Judge holding that it was lawful to place two lighted candles on the communion-table during the time of the Holy Communion. Against this the promoter has appealed.

As to the first charge Mr. Mackonochie, while admitting the elevation of the consecrated elements at the times and in the manner alleged, pleaded that he had discontinued the practice before the institution of the suit. The learned Judge therefore admonished Mr. Mackonochie not to recur to the practice: but as to the other part of the charge, namely, the kneeling and prostrating himself before the consecrated elements, the learned Judge held that if Mr. Mackonochie had committed any error in that respect, it was one which should not form the subject of a criminal prosecution, but should be referred to the bishop in order that he might exercise his discretion thereon.

The promoter appeals from the latter part of the decision of the learned Judge on this charge; and he also complains in his appeal that the defendant was not ordered to pay the costs of the suit.

The questions, thus raised by the appeal, were very fully and ably argued before this tribunal, and their Lordships have now to state their reasons for the advice which they propose humbly to offer to Her Majesty.

They will advert first to the charge of kneeling before the consecrated elements.

It is necessary to refer to the whole of the charge on this head as contained in the 3rd and 4th articles, although some of the acts charged are said to have been discontinued before the suit commenced.

These articles run thus.—[His Lordship read the 3rd article.]

Mr. Mackonochie's answer to these articles is as follows.—[His Lordship read the 3rd answer of the respondent.]

Before turning to the evidence in support of this charge, it will be proper to

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consider a preliminary objection which was taken to the articles, and to the letters of request and citation by which they were preceded.

It was said that although the articles alleged that the respondent "knelt or prostrated himself before the consecrated elements during the Prayer of Consecration," the letters of request and citation were for "bowing, kneeling or prostrating himself before the consecrated elements during or after the Prayer of Consecration." It was contended that the citation shewed no offence, for it might be taken, as in an indictment, in the sense most favourable to the accused, and as affirming nothing more than that he bowed after the Prayer of Consecration, which, it was said, would or might be innocent. And the articles, it was argued, by omitting this alternative, were a departure from the citation.

To this it might be sufficient to reply that the objection taken to this citation —a citation which, it is not disputed, does contain other charges cognizable by the Ecclesiastical Court—is an objection of a strictly technical character, and one which would be waived by the appearance of the respondent, as he did appear, without protest, and by praying for articles. But passing from this, it is to be observed that the supposed analogy between the citation and an indictment, on which this objection is founded, entirely fails. The Act of Uniformity, 1 Eliz. c. 2, contemplates two modes of procedure for enforcing its provisions: one by indictment, under section 4, and the other by process for admonition before the Ordinary under section 23; and it is under the latter and not the former section that the present proceedings are taken. Moreover, in the case of an indictment followed by judgment, the indictment and judgment become the record, and the judgment is read with reference to the indictment; and if the indictment is open to a construction which is innocent, and would not sustain a judgment, the judgment would be vicious, and must be arrested: whereas the citation is followed by articles, which in turn are met by a plea; and the Court, after hearing evidence, defines by its sentence how much of the charge it considers to be relevant, and to have been proved, and thereby corrects any excess of averment in the citation.

The preliminary objection, therefore, on this charge their Lordships feel themselves obliged to repel.

It is necessary now to examine the evidence adduced in support of the charge; and in doing this, and in considering the character of the charge itself, their Lordships will confine their attention to the conduct and acts of the respondent as the celebrating or consecrating minister. The allegations and proof as to "sanctioning and permitting other clerks" are so vague that no weight could be, and in the argument little weight was attempted to be, given to them.

The chief witness in support of the charge is Mr. Beames. He has not been cross-examined, and no evidence has been adduced for the respondent. The statement of Mr. Beames may therefore be taken to be uncontroverted. He speaks of December 23 and 25, 1866. On both of those occasions the respondent was the celebrant at the Communion Service. The effect of the answers of Mr. Beames may be stated to be, that the respondent commenced to read the Prayer of Consecration standing; that on reaching the words "the same night that He was betrayed," he elevated the paten above his head, returned it to its place on the communion-table, and then knelt on his knees towards the table, inclining or prostrating his head towards the ground; that he then rose and resumed the prayer; that when, in the further course of the prayer, he took the chalice, he elevated it above his head as he had done the paten, replaced it on the communion-table, and knelt or prostrated himself as before.

The elevation of the elements has, as already said, been discontinued, and as to the kneeling after the consecration of the chalice, it might possibly be suggested that it was a kneeling after finishing the Prayer of Consecration, and with reference to the next part of the service, in which the celebrant becomes himself the recipient. Omitting, therefore, for the present, the elevation and the second kneeling, the evidence remains that the respondent, after com-

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mencing the Prayer of Consecration standing, paused in the middle of the prayer, knelt down, inclining or prostrating his head towards the ground, and then, rising up again, continued the prayer standing.

In order to bring the conduct of the respondent on this head to the test of ecclesiastical law, it is proper now to turn to the Rubric of the Order of the Administration of the Holy Communion.

The Lord's Prayer and the Collect, with which the service commences, are to be said by the priest "standing at the north side of the table."

The priest is then to turn to the people and rehearse distinctly all the Ten Commandments, "the people still kneeling," implying that the priest is still to stand.

This is to be followed by one of the Collects for the Sovereign, "the priest standing as before," and by the Collect for the day.

The priest is then to read the Epistle and Gospel, and to say the Creed, during which no change of attitude is indicated.

After the sermon, when the priest has returned to the Lord's Table, the sentences of the offertory, the Prayer for the Church Militant, and the exhortations are to be "said" by the priest, without any direction as to change of posture; and then, at the confession, he, as well as all the people, is directed to kneel.

For the absolution and the sentences which follow the priest is directed to stand up, and to turn himself to the people. For the words "It is very meet," &c., and the Prefaces, he is to turn to the Lord's Table, and he is then to kneel down at the Lord's Table, and, in the name of all the recipients, say the prayer, "We do not presume," &c.

The Rubric before the Prayer of Consecration then follows, and is in these words:

"When the priest, standing before the table, hath so ordered the bread and wine that he may with the more readiness and decency break the bread before the people, and take the cup into his hands, he shall say the Prayer of Consecration, as follows."

Their Lordships entertain no doubt on the construction of this Rubric that the priest is intended to continue in one posture during the prayer, and not to change from standing to kneeling, or *vice versa;* and it appears to them equally certain that the priest is intended to stand and not to kneel. They think that the words "standing before the table" apply to the whole sentence; and they think this is made more apparent by the consideration that acts are to be done by the priest before the people as the prayer proceeds (such as taking the paten and chalice into his hands, breaking the bread, and laying his hand on the various vessels) which could only be done in the attitude of standing.

This being, in their Lordships' opinion, the proper construction of the Rubric, it is clear that the respondent, by the posture or change of posture which he has adopted during the prayer, has violated the Rubric, and committed an offence within the meaning of the 13 & 14 Car. 2. c. 4. ss. 2, 17, 24, taken in connexion with the 1 Eliz. c. 2, and punishable by admonition under section 23 of the latter statute.

It was contended, on behalf of the respondent, that the act complained of was one of those minute details which could not be taken to be covered by the provisions of the Rubric; that the Rubric could not be considered as exhaustive in its directions, for no order could be shewn in it requiring the celebrating minister to kneel while himself receiving the bread and wine; and that there was no charge or evidence against the respondent that in kneeling after the consecration any adoration of the sacrament was intended.

Their Lordships are of opinion that it is not open to a minister of the Church, or even to their Lordships in advising Her Majesty as the highest ecclesiastical tribunal of appeal, to draw a distinction, in acts which are a departure from or violation of the Rubric, between those which are important and those which appear to be trivial. The object of the Statute of Uniformity is, as its preamble expresses, to produce "an universal agreement in the public

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worship of Almighty God," an object which would be wholly frustrated if each minister, on his own view of the relative importance of the details of the service, were to be at liberty to omit, to add to, or to alter any of those details. The rule upon this subject has been already laid down by the Judicial Committee in *Westerton* v. *Liddell* (Moore's Special Reports, 187) (and their Lordships are disposed entirely to adhere to it): "In the performance of the services, rites and ceremonies ordered by the Prayer Book, the directions contained in it must be strictly observed; no omission and no addition can be permitted."

There would, indeed, be no difficulty in shewing that the posture of the celebrating minister during all the parts of the Communion Service was, and that for obvious reasons, deemed to be of no small importance in the changes introduced into the Prayer Book at and after the Reformation. The various stages of the service are, as has already been shewn, fenced and guarded by directions of the most exact kind, as to standing and kneeling, the former attitude being prescribed even for prayers, during which a direction to kneel might have been expected. And it is not immaterial to observe, that whereas in the first Prayer Book of King Edward the Sixth there was contained at the end a Rubric in these words—"As touching kneeling, crossing, holding up of hands, knocking upon the breast, and other gestures, they may be used or left, as every man's devotion serveth, without blame"—this Rubric was, in the second Prayer Book of Edward the Sixth, and in all the subsequent Prayer Books, omitted.

The argument against the completeness of the directions as to posture, derived from a supposed absence of any order that the celebrant shall kneel whilst himself receiving, does not appear to their Lordships to be well founded. In the Rubric as to the reception of the sacramental bread and wine, the words "all meekly kneeling" apply, as their Lordships think, to the celebrant, as well as to other clerks, and to the people. And this is made more clear by the Rubric termed the Black Rubric, added at the end of the service.

It is true, as was contended, that there is no charge against the respondent, that the kneeling complained of was intended as an act of adoration of the sacramental elements. Such a charge, involving as it would an inquiry into sentiments and feelings, of which no tribunal can adequately judge, would be difficult of proof; and the Rubrical enactments appear to have been wisely confined to prescribing an order of service free from those outward movements which had become more or less associated with errors in doctrine which, at the Reformation, were renounced. If this order is departed from, it is, as their Lordships think, unnecessary to inquire into the motive by which the departure has been occasioned.

Another argument urged on behalf of the respondent should also be noticed. Mr. James contended with great ability that the charge as to kneeling during the Prayer of Consecration was made in connexion with the charge as to the elevation of the sacrament, and that the charge of kneeling was only an aggravation of that of elevation, which had been discontinued. This, no doubt, is so; but the kneeling under the circumstances described, being itself, as their Lordships think it is, a violation of the Rubric, they do not think that the judgment of the Court should the less be passed upon it because the other part of the charge, namely, that as to the elevation, is no longer resisted.

It only remains, on this part of the case, to advert to the very learned and elaborate judgment of the Dean of the Arches. That learned Judge states that the Rubric does not give precise directions that the celebrant should kneel at the times when it appears that the respondent does kneel; that he is far from saying it is not legally competent to him to adopt this attitude of devotion; and that it cannot be contended that at some time or other he must not kneel during the celebration, although no directions as to his kneeling at all are given by the Rubric.

Their Lordships, however, think, as they read the Rubric, that directions as to the celebrant kneeling at a particular time of the celebration, namely, when he himself receives the sacrament, are given; and that at the time when it

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appears that the respondent kneels, namely, during the Prayer of Consecration, the directions in the Rubric are precise that he should stand and not kneel.

The learned Judge further observes that if Mr. Mackonochie has committed any error in this respect, it is one which should not form the subject of a criminal prosecution, but belongs to the category of cases which should be referred to the bishop. This category the learned Judge had previously defined to be—

"Things neither ordered nor prohibited expressly or by implication, but the doing or use of which must be governed by the living discretion of some person in authority."

And as to cases in this category, the learned Judge considered that, according to the Preface to the Prayer Book, "the parties that doubt or diversely take anything should always resort to the bishop of the diocese."

Their Lordships do not think it necessary to consider minutely the cases to which, or the manner in which, this direction in the Preface to the Prayer Book is applicable, inasmuch as in their opinion the charge against the respondent, with which they are now dealing, involves what is expressly ordered and prohibited by the Rubric, and is therefore a matter in which the bishop could have no jurisdiction to modify or dispense with the rubrical provisions.

On the whole, their Lordships are of opinion that the charge against the respondent of kneeling during the Prayer of Consecration has been sustained, and that he should be admonished, not only not to recur to the elevation of the paten and the cup as pleaded in the 3rd article, but also to abstain for the future from kneeling or prostrating himself before the consecrated elements during the Prayer of Consecration, as in the same article also pleaded.

The other charge involved in this appeal is that of using lighted candles on the communion-table during the celebration of the Holy Communion, when such candles are not wanted for the purpose of giving light.

This charge is contained in the 5th and 6th articles, which are as follows—[His Lordship read the 5th and 6th articles.]

The responsive plea of Mr. Mackonochie, on this head is as follows—[His Lordship read the 5th and 6th pleas.]

The facts, therefore, on this part of the case, appear to be that the respondent uses two lighted candles during, with reference to, and as an accompaniment of, the Communion Service, and not for the ordinary purpose of giving light, and that these candles are placed on a ledge of wood which is placed on the communion-table.

The Dean of the Arches seems to have considered that all the practices complained of before him, including this use of lighted candles, were ceremonies. The respondent, in the argument of his counsel at the bar, appeared to prefer to treat the question as one of ornament, and Mr. James said he considered the lighted candles "part of the symbolical decoration of the altar."

If it were necessary to decide which of these views is correct, their Lordships would feel disposed to agree with the Dean of the Arches, that however candles and candlesticks may *per se* be looked upon as a part of the furniture or ornaments of the church, taking the word "ornaments" in the larger sense assigned to it by this Committee in *Westerton* v. *Liddell* (Moore's Special Reports, 187), yet the lighting of the candles, and the consuming them by burning throughout, and with reference to a service in which they are to act as symbols and illustrations, is itself either a ceremony, or else a ceremonial act forming part of a ceremony, and making the whole ceremony a different one from what it would have been had the lights been omitted.

The Council of Trent (22nd Session, 5th chapter), *De Missæ Ceremoniis et Ritibus*, says, "Ceremonias item adhibuit ut mysticas benedictiones, lumina, thymiamata, vestes, aliaque multa."

Dr. Donne also in his *Sermons* (p. 80, fol. ed. 1640), writing in support of the use of these lights, calls it a ceremony. He says, "It is in this ceremony of lights as it is in other ceremonies."

There is a clear and obvious distinction between the presence in the church of things inert and unused, and the active use of the same things as a part of

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the administration of a sacrament or of a ceremony. Incense, water, a banner, a torch, a candle and candlestick may be parts of the furniture or ornaments of a church; but the censing of persons and things, or, as was said by the Dean of the Arches, the bringing in incense at the beginning or during the celebration, and removing it at the close of the celebration of the Eucharist, the symbolical use of water in baptism, or its ceremonial mixing with the sacramental wine; the waving or carrying the banner; the lighting, cremation and symbolical use of the torch or candle: these acts give a life and meaning to what is otherwise inexpressive, and the act must be justified, if at all, as part of a ceremonial law.

If the use of lighted candles in the manner complained of be a ceremony or ceremonial act, it might be sufficient to say that it is not—nor is any ceremony in which it forms a part—among those retained in the Prayer Book, and it must therefore be included among those that are abolished; for the Prayer Book, in the Preface, divides all ceremonies into these two classes: those which are retained are specified, whereas none are abolished specifically or by name; but it is assumed that all are abolished which are not expressly retained.

Passing however from this, the use of lighted candles, if a ceremonial act or part of a ceremony, would be prohibited by Queen Elizabeth's Act of Uniformity, section 4, which is now applicable to the present Prayer Book, and which makes it penal to use any other rite, ceremony, order, form or manner of celebrating the Lord's Supper than is mentioned and set forth in the said book: and any prior authority for the practice, from usage or otherwise, would be avoided by section 27, which enacts that "all laws, statutes and ordinances, whereby any other service, administration of sacraments or common prayer, is limited, established or set forth to be used within this realm, shall from henceforth be utterly void and of none effect."

As to the argument that the use complained of is at most only part of a ceremony, their Lordships are of opinion that when a part of a ceremony is changed the integrity of the ceremony is broken, and it ceases to be the same ceremony.

The learned Judge of the Arches Court was of opinion that these lights were ordered by injunctions having statutable authority, which injunctions had not been directly repealed; that they were primitive and catholic in their origin, evangelical in their proper symbolism, purged from all superstition and novelty by the very terms of the injunction which ordered their retention in the church, and that therefore it was lawful to place them on the holy table during the time of the Holy Communion "for the signification that Christ is the very true light of the world."

The authorities cited shew beyond all doubt the very ancient and general use in the Church of these symbolical lights; and the injunction to which the learned Judge refers is the third of those issued, A.D. 1547, in the first year of the reign of King Edward the Sixth. By this it was ordered that images should be taken down and destroyed, and that spiritual persons should suffer no torches or candles to be set afore any image or picture, but only two lights upon the high altar, before the sacrament, which, for the signification that Christ is the very true light of the world, they should suffer to remain.

It would deserve consideration how far under any circumstances this injunction could now be held operative, having regard to the words "upon the high altar, before the sacrament," and to the distinction pointed out by this Committee in *Westerton* v. *Liddell* (Moore's Special Reports, 187) and *Parker* v. *Leach* (2 Moore, N.S. 199) between the sacrificial altar and the communion-table. But, without dwelling on this, and without stopping at this place to inquire into the nature of the authority under which the Injunctions of 1547 were issued, their Lordships are clearly of opinion that the injunction in question, so far as it could be taken to authorize the use of lights as a ceremony or ceremonial act, was abrogated or repealed by the act 1 Eliz. c. 2, particularly by section 27, already mentioned, and by the present Prayer Book and Act of Uniformity, and that the use of lighted candles, viewed as a ceremony or ceremonial act, can derive no warrant from that injunction.

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Reference was made in the argument for the respondent to a constitution of the Council of Oxford, under Walter, Archbishop of Canterbury, A.D. 1322. That constitution is in these words: "Tempore quo missarum solennia peraguntur, accendantur duæ candelæ, vel ad minus una"; and is apparently a repetition of the earlier constitution of A.D. 1222—*Wilkins's Concilia*, vol. 1, p. 595: "Tempore quo missarum solennia peraguntur, accendantur duæ candelæ, vel ad minus una cum lampade." As to these constitutions it is sufficient to say that, in their Lordships' opinion, they must be taken, if of force at the time of the passing of any of the Acts of Uniformity, to have been repealed by those acts.

It remains to be considered whether the use of these two lighted candles can be justified as a question of "ornaments," according to the definition of that term already referred to. It was in this sense that the argument for the respondent appeared to prefer to regard them; and the learned Judge of the Arches Court also, although at the earlier part of his judgment he had stated that the matters complained of before him must be considered as "ceremonies," appears ultimately to have applied to the use of the lighted candles the law or Rubric as to ornaments.

The Rubric or note as to ornaments, in the commencement of the Prayer Book, is in these words: "And here it is to be noted that such ornaments of the Church, and of the ministers thereof, at all times of their ministration, shall be retained and be in use as were in this Church of England, by the authority of parliament, in the second year of the reign of King Edward the Sixth."

The construction of this Rubric was very fully considered by this Committee in the case of *Westerton* v. *Liddell* (Moore's Special Reports, 187), already referred to; and the propositions which their Lordships understand to have been established by the judgment in that case may thus be stated:

1. The words "authority of parliament" in the Rubric, refer to and mean the act of parliament 2 & 3 Edw. 6. c. 1, giving parliamentary effect to the first Prayer Book of Edward the Sixth, and do not refer to or mean canons or royal injunctions, having the authority of parliament, made at an earlier period—*Moore*, p. 160.

2. The term "ornaments" in the Rubric means those articles, the use of which, in the services and ministrations of the church, is prescribed by that Prayer Book—*Ibid*, p. 156.

3. The term "ornaments" is confined to those articles—*Ibid*, p. 156.

4. Though there may be articles not expressly mentioned in the Rubric, the use of which would not be restrained, they must be articles which are consistent with, and subsidiary to, the services: as an organ for the singing, a credence-table from which to take the sacramental bread and wine, cushions, hassocks, &c.—*Ibid*, p. 187.

In these conclusions, and in this construction of the Rubric, their Lordships entirely concur, and they go far, in their Lordships' opinion, to decide this part of the case.

The lighted candles are clearly not "ornaments" within the words of the Rubric, for they are not prescribed by the authority of parliament therein mentioned, namely, the first Prayer Book; nor is the Injunction of 1547 the authority of parliament within the meaning of the Rubric. They are not subsidiary to the service, for they do not aid or facilitate—much less are they necessary to—the service; nor can a separate and independent ornament, previously in use, be said to be consistent with a Rubric which is silent as to it, and which by necessary implication abolishes what it does not retain.

It was strongly pressed by the respondent's counsel that the use of lighted candles up to the time of the issue of the first Prayer Book was clearly legal; that the lighted candles were in use in the Church in the second year of Edward the Sixth; and that there was nothing in the Prayer Book of that year making it unlawful to continue them. All this may be conceded, but it is in reality beside the question. The Rubric of our Prayer Book might have said, those ornaments shall be retained which were lawful, or which were in use in the

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second year of Edward the Sixth, and the argument as to actual use at the time, and as to the weight of the Injunctions of 1547, might in that case have been material. But the Rubric, speaking in 1661, more than 100 years subsequently, has, for reasons which it is not the province of a judicial tribunal to criticize, defined the class of ornaments to be retained by a reference, not to what was in use *de facto*, or to what was lawful in 1549, but to what was in the Church by authority of parliament in that year; and in the parliamentary authority which this committee has held, and which their Lordships hold, to be indicated by these words, the ornaments in question are not found to be included.

Their Lordships have not referred to the usage as to lights during the last 300 years; but they are of opinion that the very general disuse of lights after the Reformation (whatever exceptional cases to the contrary might be produced), contrasted with their normal and prescribed use previously, affords a very strong contemporaneous and continuous exposition of the law upon the subject.

Their Lordships will, therefore, humbly advise Her Majesty that the charge as to lights also has been sustained, and that the respondent should be admonished for the future to abstain from the use of them, as pleaded in these articles.

All the charges against the respondent having been thus established, their Lordships see no reason why the usual consequence as to costs should not follow; and they will advise Her Majesty that the respondent should pay to the appellant the costs in the Court below, and of this appeal.

CONSISTORY COURT OF LONDON. July 27, Dec. 14, 1868.

LIDDELL AND OTHERS *v.* RAINSFORD.

38 L. J. Ecc. 15: see also, [1868] E. R. A. 2383; 37 L. J. Ecc. 83 (Cons. Court).

Proprietary Chapel—Sacramental Alms—District Chapelry—8 & 9 *Vict. c.* 70, *ss.* 6, 8, 17.

ECCLESIASTICAL LAW.—*An unconsecrated chapel was locally situated within the district of a chapel of ease with a district chapelry belonging thereto:*—Held, *that the incumbent and churchwardens of the chapel of ease, notwithstanding that the incumbent had sole and exclusive cure of souls within the district chapelry, were not entitled to claim the sacramental alms collected at such unconsecrated chapel.*

In this case a citation issued at the instance of the Hon. and Rev. Robert Liddell, clerk, the incumbent, and George Sheward and John Osborne, the churchwardens of the district chapelry of St. Paul, Knightsbridge, in the county of Middlesex, against the Rev. Marcus Rainsford, clerk, the minister of an unconsecrated chapel, called Belgrave Chapel, situate within the district chapelry of St. Paul, Knightsbridge, calling upon him to shew cause why he should not pay over to the incumbent and churchwardens of such district chapelry the money by him, or any other minister or person on his behalf, since his appointment to the said chapel, received at the offertory in Belgrave Chapel to be disposed of according to the Rubric.

This citation issued in the form suggested by the Chanceller of the Diocese (see 37 L. J. Ecc. 83).

The libel set out several Orders in Council, dated respectively November 23, 1843, April 26, 1845, and October 30, 1846, under which the district chapelry of St. Paul, Knightsbridge, was formed. By the first a district was taken out of the parish of St. George, Hanover Square, and assigned to the church of St. Paul; and baptisms and churchings (not marriages) were permitted to be solemnized in the church of St. Paul, Knightsbridge, the fees arising therefrom to be reserved for the rector of St. George, Hanover Square, but after the next

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avoidance of St. George, Hanover Square, to be received by and to belong to the minister of the Church of St. Paul. By the second Order, it was recited that in consequence of the death of the rector of St. George, Hanover Square, the district of St. Peter's, Pimlico, had become a district parish, and the church of St. Paul, in Wilton Place, a chapel of ease (with a district chapelry belonging thereto to the said district parish church of St. Peter, Pimlico; and ordered that banns of marriage should be published, and that marriages should be performed in the said church of St. Paul; and that until the next avoidance of the said district parish church of St. Peter, Pimlico, the fees and emoluments to be received and taken for and in respect of the publication of banns of marriage, and the performance of marriages in the said church of St. Paul should respectively belong to and be divided in equal moieties between the incumbent of the said district parish church of St. Peter, Pimlico, and the minister of the said church of St. Paul. By the Order in Council of October 30, 1846, the boundaries of the district assigned to the church of St. Paul, Knightsbridge, were altered with the consents, in writing, of the Bishop of London, the patron in right of his see of the church of the district parish of St. Peter, Pimlico, and of the Rev. Thomas Fuller, as the incumbent of the said district parish of St. Peter, Pimlico, the consents required by the Church Building Acts, which acts (3 & 4 Vict. c. 60, s. 6. and 8 & 9 Vict. c. 70. s. 16) require before boundaries can be altered the consents of the bishop of the diocese and the patron and incumbent of the parish church, signified under their respective hands and seals. The libel further stated, that Mr. Liddell had been duly licensed and admitted as perpetual curate or incumbent of the church or district chapelry of St. Paul, Wilton Place; and that George Sheward and John Osborne had been duly appointed churchwardens for the same district chapelry under 8 & 9 Vict. c. 70, s. 6. That Belgrave Chapel is locally situated within the district chapelry of St. Paul, Wilton Place, and that the defendant was licensed as the minister of Belgrave Chapel with the consent of Mr. Liddell in March, 1866, and still continues to officiate as such.

It further alleged that Mr. Liddell, as the perpetual curate or incumbent of the said church and district chapelry of St. Paul, Wilton Place, has within and over the whole of the said district chapelry the sole and exclusive cure of souls, and that by the ecclesiastical law the sacramental alms or money received and collected from time to time at the offertory in Belgrave Chapel aforesaid ought to be paid over to the perpetual curate or incumbent, or to the perpetual curate or incumbent and churchwardens for the time being of the said church and district chapelry of St. Paul, Wilton Place, to be disposed of according to the Rubric at the end of the Order of the Administration of the Holy Communion; but that although Mr. Rainsford had made collections in his chapel from time to time he had failed to hand the money over to the incumbent and churchwardens of St. Paul, Wilton Place, or to any or either of them. It finally set out a correspondence between the plaintiffs and the defendant, in which the plaintiffs made a formal claim to the alms received in Belgrave Chapel, and the defendant referred them to Mr. Robert Baxter, of 10, Queen Square, Westminster Abbey, and Mr. Henry Kingscote, 96, Eaton Place, as acting for the trustees of the chapel and as chapelwardens, and therefore the persons responsible in the matter.

In one letter Mr. Rainsford wrote as follows:

"Your demand on me for the sacramental offerings, and the unsettled state of the question, leaves me in considerable difficulty. I neither feel at liberty to use them for the poor I try to relieve, nor yet to inform my congregation that they must go over to the churchwardens of St. Paul's. Might I ask when the matter will be definitely settled? I need not tell you that the legal claim to the whole or any considerable part of the sacramental alms by the parish church will have the effect of diminishing our offerings to a mere nominal amount. Could the matter be compromised by my admitting the right, and handing 10*l.* per annum to the churchwardens, and, if they require it, sending in a rough account of the expenditure and receipts as disbursed by me? In

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referring you on former occasions to Messrs. Baxter and Kingscote I only acted by the direction of my trustees, and I trust you have so understood me."

The prayer of the libel was that the Court would order Mr. Rainsford to account for and pay over to the incumbent, or incumbent and churchwardens of St. Paul, Wilton Place, all the moneys received by him or other minister or person or persons on his behalf, since he became the minister of Belgrave Chapel, from the collections made at the offertory in the said chapel, to be disposed of according to the Rubric, and would condemn him in the costs of these proceedings.

An answer was filed, on behalf of the defendant, by which the claim of the incumbent and churchwardens of St. Paul, Wilton Place, to receive the moneys collected at the offertory in Belgrave Chapel was contested, and which alleged that the churchwardens of St. Paul, Wilton Place, had no duties except in relation to their own church; that they had no legal right to enter Belgrave Chapel in order to collect the alms of the congregation therein assembled, nor could they claim to receive such alms when collected by any other person. It further alleged that the alms in Belgrave Chapel were collected by Messrs. Baxter and Kingscote, or by some persons on their behalf, and after the service, and since the appointment of Mr. Rainsford as minister, on every occasion they have been paid into the bank of Messrs. Ransom & Co. to the credit of Messrs. Baxter and Kingscote, and still continue there.

Dr. Spinks and *Dr. Tristram*, for the plaintiffs, contended that as Mr. Liddell had the exclusive cure of souls over, and Messrs. Sheward and Osborne are the churchwardens of the district in which Belgrave Chapel is situated, they are entitled to the alms received in that chapel, and that, as far as regards such alms, Mr. Rainsford is a trustee for them. In the words of the Rubric, at the end of the Communion Service, they are "the minister and churchwardens of the parish." By the 8 & 9 Vict. c. 70. s. 6 the minister and churchwardens of St. Paul's are authorized to dispose of the money given at the offertory at such church, and for this purpose Belgrave Chapel must be taken to be identical with St. Paul's Church. They referred to *Ayliffe's Parergon*, 394, *Moysey* v. *Hillcoat* (2 Hag. Ecc. 56).

A. J. Stephens and *Dr. Middleton*, for Mr. Rainsford.—The plaintiffs are bound to shew a joint interest in these alms before they can enforce their claim against the defendant. Under the Order in Council, April 26, 1845, St. Paul's, Wilton Place, is described as a chapel of ease, with a district chapelry belonging thereto, to the district parish church of St. Peter, Pimlico. It can, therefore, have no independent rights but such as are given to the minister and churchwardens expressly by 8 & 9 Vict. c. 70. ss. 6, 8, 17. By that statute they have only authority to distribute the moneys collected at the offertory in their own church, and cannot enter Belgrave Chapel without the leave of the minister. They cited *Magee* v. *the Bishop of Cashel* (9 Ir. Eq. Rep. 319), *Dowdall* v. *the Rev. J. Hewett* (10 L. T. 823), and *Heath* v. *Bosanquet* (3 L. T. 290).

Cur. adv. vult.

The following judgment was given on December 14:

Sir T. Twiss.—This is a proceeding upon the part of the Hon. and Rev. Robert Liddell, clerk, the incumbent, and George Sheward and John Osborne, Esqs., the churchwardens of the church of the district chapelry of St. Paul, Wilton Place, in the diocese of London, against the Rev. Marcus Rainsford, clerk, the licensed minister of an unconsecrated chapel, commonly known and designated as Belgrave Chapel, situate on the north side of Halkin Street, and within the district chapelry of St. Paul aforesaid; and they pray the Court to order Mr. Rainsford to pay over to them, as the incumbent and churchwardens of the said church and district chapelry, all the moneys received by him, or any other person on his behalf, since he became minister of Belgrave Chapel, from the collections made at the offertory in the said chapel, to be disposed of according to the Rubric; and to condemn Mr. Rainsford in the costs of these proceedings. For the purpose of deciding this claim, it will be necessary to

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trace with some care the history of the church of which Mr. Liddell is incumbent, in order to ascertain the precise ecclesiastical *status* of the plaintiffs in relation to the minister of Belgrave Chapel.

It appears from the libel given in on behalf of the plaintiffs, and the various Orders of Her Majesty in Council exhibited in support of it, that a church or chapel, called St. Paul's Church, Wilton Place, had, some time prior to the year 1843, been erected and consecrated within that part of the parish of St. George, Hanover Square, which had been, by an Order in Council of June 28, 1830, assigned as an ecclesiastical district to St. Peter's Church, Pimlico; and that, by an Order in Council of October 2, 1843, a particular district was assigned to St. Paul's Church, to be called the chapelry district of St. Paul, Wilton Place, within which district Belgrave Chapel is situated. By the same Order in Council it was provided that baptisms and churchings might be solemnized and performed within St. Paul's Church, the fees being reserved to the rector of the parish of St. George, Hanover Square, during his incumbency; and after the next avoidance of the said parish, the said fees were to be received for and belong to the minister of St. Paul's Church. The rectory of St. George, Hanover Square, was avoided in the following year, when the minister of St. Paul's became entitled to all the fees for baptisms and churchings solemnized and performed in his church; and the district assigned to St. Peter's, Pimlico, having, at the same time, become a district parish, divided off, under the provisions of the Church Building Acts, from the parish of St. George, Hanover Square, the district chapelry of St. Paul ceased to be, for ecclesiastical purposes, dependent upon the parish church of St. George, Hanover Square, and the church or chapel itself became a chapel of ease to the district parish church of St. Peter, Pimlico. The church of St. Paul is accordingly described in an Order in Council of April 26, 1845, as a chapel of ease, with a district chapelry belonging thereto, to the said district parish church of St. Peter, Pimlico. Under this Order in Council banns were authorized to be published and marriages solemnized in St. Paul's Church, but a moiety of the fees resulting therefrom was reserved to the incumbent of St. Peter's, Pimlico, until the next avoidance of that church, after which they are to be received for and belong to the minister of St. Paul's. Meanwhile, the minister of St. Paul's, who had originally cure of souls within the chapelry district, subject to the superintendence and control of the incumbent of the parish church, had acquired, under the provisions of the 8 & 9 Vict. c. 70, s. 17, the *status* of a perpetual curate, with sole and exclusive cure of souls within his chapelry district, whilst the district parish of St. Peter, Pimlico, had also become, under the provisions of Lord Blandford's Act (19 & 20 Vict. c. 104), a separate and distinct parish from St. George, Hanover Square; and the inhabitants of the parish of St. Peter thereupon became, for all ecclesiastical purposes, parishioners of that parish, and of no other parish. Such being the various ecclesiastical phases through which the church of St. Paul has passed, it results that it is, at the present time, a chapel of ease to the parish church of St. Peter, Pimlico, with a chapelry district annexed to it, within which the incumbent of St. Paul's has exclusive cure of souls, and within which district Belgrave Chapel is locally situated. Under these circumstances, it remains to be considered whether the claim of the plaintiffs to have paid over to them the moneys collected at the offertory in Belgrave Chapel, to be disposed of according to the Rubric, can be sustained in law.

The Rubric which governs this case is amongst the Rubrics which are appended to the Order of the Administration of the Lord's Supper, and it is in the following words: "After the divine service ended, the money given at the offertory shall be disposed of to such pious and charitable uses as the minister and churchwardens shall think fit: wherein, if they disagree, it shall be disposed of as the Ordinary shall appoint." The counsel for the plaintiffs have contended that the incumbent of St. Paul's, having exclusive cure of souls throughout the chapelry district within which Belgrave Chapel is situated, and the churchwardens of St. Paul's being churchwardens of the said church and chapelry

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district, are entitled under this Rubric to the distribution of the moneys received at the offertory in Belgrave Chapel. The counsel for the defendant, on the other hand, maintain that the incumbent of St. Paul's is still subject to the control and interference of the incumbent of the parish of St. Peter, Pimlico, under section 17 of the 8 & 9 Vict. c. 70, so far as regards all fees, offerings and oblations as have not been granted to him by any Order in Council, and that the churchwardens appointed from time to time for the church of the district chapelry of St. Paul have no authority, nor can they perform any duties except in relation to their own church, and within the limitations contained in section 6 of the same statute. Both parties agree that the churchwardens of St. Paul's are appointed under the 8 & 9 Vict. c. 70. s. 6, which provides that two churchwardens shall be annually appointed for the church of every district chapelry at a meeting of the minister of such church and the householders of the district. one of whom shall be chosen by the incumbent or minister serving such church, and the other by the majority of such householders. The statute then goes on to define the duties of the churchwardens in the following words: "And the two persons, when so appointed and elected churchwardens, shall appear and be admitted according to law, and shall collect and receive the rents of the pews and seats in every such church, and pay the stipend or salary assigned by Her Majesty's said Commissioners to the minister and clerk of such church, if the said Commissioners have fixed the rents for the same or assigned such stipend or salary, and shall also do, perform and execute all lawful acts, matters and things necessary for and concerning the management, good order and decency of behaviour to be kept and observed in such church by the congregation thereof, and for the recovery of the pew-rents if in arrear; and the money given at the offertory at such church shall be disposed of by the minister and churchwardens of such church in the same manner as the money given at the offertory of any parish church is by law directed to be disposed of by the minister and churchwardens of such parish; and the persons so to be appointed and chosen churchwardens shall continue in their said office until others shall be appointed and chosen in like manner in their stead." Now there are two classes of churchwardens called into existence by the Church Building Acts,—churchwardens whose functions are confined to the particular church or chapel of which they are wardens, and churchwardens whose ecclesiastical duties extend over the district which has been assigned to the particular church or chapel of which they are wardens. To the former class belong churchwardens appointed under the 58 Geo. 3. c. 45. s. 73, for churches or chapels built or appropriated under that act, who are to be chosen at a meeting of the householders of the district to which the church or chapel belongs, and who are to sue and be sued under the name of "the churchwardens of the church or chapel." To the latter class belong churchwardens to be appointed under the provisions of the 6 & 7 Vict. c. 37. s. 17, for a Peel district, which after a church has been consecrated as the church or chapel of such district has become a new parish, and the wardens in such case are expressly authorized to do all things pertaining to the office of "churchwardens as to ecclesiastical matters in the new parish." The provisions of the 1 & 2 Will. 4. c. 38 afford an example of either class. With regard to churches or chapels built under that statute, it provides that churchwardens of such churches or chapels shall be appointed, whose duties are described in nearly the same language as in the case of churchwardens appointed under the 58 Geo. 3. c. 45. s. 73. But it also contains a power to separate from a parish an existing chapel of ease with a district attached to it, and to constitute the district a separate parish, and the statute in such a case authorizes the appointment of churchwardens, who are "to do all things pertaining to the office of churchwardens as to ecclesiastical matters in like manner as though the same had been of old time a separate and distinct parish." The statute 8 & 9 Vict. c. 70, which applies to the present case, enacts that two fit persons shall be appointed churchwardens for the church of every district chapelry, and it goes on to describe their duties in nearly the same words as the 58 Geo. 3. c. 45. s. 73, namely, after authorizing them to collect the pew-rents and pay

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the stipend or salary, if any has been assigned by Her Majesty's Commissioners, to the minister and clerk of such church, it enacts that "they shall also do, perform and execute all lawful acts, matters and things necessary for and concerning the management, good order and decency of behaviour to be kept and observed in such church by the congregation thereof, and for the recovery of such pew-rents if in arrear." It would so far appear from the description of the duties assigned to such churchwardens that they are confined to ecclesiastical matters pertaining to the church of the district chapelry as regards either the minister, clerk, or the congregation thereof, but there is an additional provision which must not be overlooked as regards the churchwardens of the church of a district chapelry, whereby powers in excess of the powers conferred upon the churchwardens of a church which has an ecclesiastical district annexed to it under the 58 Geo. 3. c. 45. s. 73, are conferred upon them, namely, the provision that the money given at the offertory at such church "shall be disposed of by the minister and churchwardens of such church in the same manner as the money given at the offertory in any parish church is by law directed to be disposed of by the minister and churchwardens of such parish."

Now this provision clearly withdraws the disposal of the money received at the offertory in St. Paul's Church from the control of the minister and churchwardens of St. Peter's parish, but in my judgment it does not place at the disposal of the minister and churchwardens of St. Paul's the offertory money received in any other chapel, either consecrated or unconsecrated, which may be locally situate within the chapelry district of St. Paul. For there is a further and most important provision in section 8 of the statute, which enacts, that "No churchwardens appointed under the provisions of this act shall be churchwardens for any other duties than those hereinbefore mentioned, but all other legal duties appertaining to the office of churchwardens shall be discharged within such district chapelry or consolidated chapelry, and in respect of the church thereof, and also in respect of such new church as aforesaid without a district, by the churchwardens who would have discharged the same if this act had not passed." The claim of the plaintiffs would therefore seem to derive no support from the statute under which the churchwardens of St. Paul's are appointed; on the contrary, that statute expressly reserves to the churchwardens of the parish all the duties which the general law imposes upon them, and of which they have not been relieved by the express provisions of the statute. The question, then, which remains to be considered is, whether the distribution of the money received at the offertory in an unconsecrated chapel is a duty which devolves upon the minister and churchwardens of the parish under the general law, and which will in the case of Belgrave Chapel have been reserved by the 8 & 9 Vict. c. 70. s. 8. to the minister and churchwardens of St. Peter's, Pimlico. The decision of Sir John Nicholl, in the case of *Moysey* v. *Hillcoat* (2 Hag. Ecc. 56) may be said to have settled the general law on the subject of the distribution of money received at the offertory in an unconsecrated chapel, which is private property. "The alms received during the reading of the offertory before the Communion are specially directed by the Rubric to be collected 'in a decent basin to be provided by the parish,' which shews that the collection, wherever made, is a parochial matter, with which persons connected with a private chapel have no concern. Again, 'after the divine service is ended, the money given at the offertory shall be disposed of to such pious and charitable uses as the minister and churchwardens shall think fit; wherein, if they disagree, it shall be disposed of as the Ordinary shall appoint.' These directions as to the 'parish' and the 'churchwardens,' who are officers of the parish and not of the chapel, lead me also to construe the 'minister' to mean 'the minister of the parish'; and they shew that the Rubric intended that all alms received at the Communion, as well at private chapels as in the parish church, should be at the disposal of the minister of the parish and of the churchwardens, and should not belong to the officiating minister, nor to the proprietors of such chapel." It may be said, however, that this judgment does not dispose directly of Mr. Liddell's claim, as the question in *Moysey* v. *Hillcoat* (2 Hag. Ecc. 56)

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was between the incumbent of a parish and the proprietors of an unconsecrated chapel, whereas the incumbent of St. Paul's as regards his relation to the minister of Belgrave Chapel is *quasi-parochus*, having by statute the exclusive cure of souls within the chapelry district. But the claim in this case is made not merely on behalf of the incumbent of St. Paul's, but on behalf of the churchwardens, whose duties, as already observed, are strictly limited by statute to matters which concern that church. When, therefore, I consider the language of the Rubric, which says, "Whilst these sentences are reading, the deacons, churchwardens or other fit persons appointed for that purpose shall receive the alms for the poor and other donations of the people in a decent basin to be provided by the parish for that purpose, and reverently bring it to the priest, who shall humbly present and place it upon the holy table," and bear in mind that the churchwardens upon whom those duties are by law imposed are the churchwardens of the parish; and that the incumbent of St. Paul's has no title of right to perform any ministerial function whatever in Belgrave Chapel, I arrive without hesitation at the conclusion that the circumstance of the incumbent of St. Paul's having the cure of souls throughout his chapelry district, however anomalous that fact may be, does not in any way affect the general law applicable to this case; and I may observe, further, that, if the contention of the plaintiffs were correct in point of law, the provision would have been unnecessary which has been introduced into the statute, whereby the disposal of the money received at the offertory at St. Paul's Church has been expressly withdrawn from the control of the minister and churchwardens of the parish church, and has been assigned to the minister and churchwardens of St. Paul's Church. It is my duty, therefore, to decide that the plaintiffs have failed to establish their claim.

Upon the question of costs I feel some difficulty. The plaintiffs have advanced a claim which they have failed to establish, and they have put the defendant to the expense of disproving their claim. At the same time the suit has been conducted in a fair spirit, and the object in view may be said to have been one of public interest. In strictness of proceeding, if I am pressed to give the defendant his costs, I am bound to allow them; but it would be more satisfactory to the Court if the defendant's counsel would consent to waive them.

IN THE COURT OF ARCHES. Feb. 3, 1869.

RIPPIN AND WILSON *v.* BASTIN, DALTON AND GOOSE.

38 L. J. Ecc. 22: further reported, [1869] E. R. A.; 38 L. J. Ecc. 33; L. R. 2 A. & E. 386; 20 L. T. 622 (Arches).

Church-Rates—31 *& 32 Vict. c.* 109.—*Letters of Request—Acceptance—Practice.*

ECCLESIASTICAL LAW.—*The Dean of the Arches will not accept letters of request in a suit for subtraction of church-rates, unless it appears on the letters of request, or by affidavit accompanying the letters of request, that the rate can be enforced notwithstanding the provisions of the statute* 31 *& 32 Vict. c.* 109.

In all future cases the Court must be moved by counsel to accept letters of request.

The plaintiffs, John Rippin and Benjamin John Wilson, the churchwardens of the parish of Harmston, in the county and diocese of Lincoln, desired to institute suits against the defendants, Messrs. Bastin, Dalton and Goose, inhabitants of the parish, for subtraction of church-rate under the following circumstances:—

In 1867, the inhabitants of the parish of Harmston, in vestry assembled, and after a poll had been duly taken, determined to borrow from the Public Works Commissioners, on the security of the rates, and under the provisions of

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the statute 5 Geo. 4. c. 36, a sum of 775*l.*, to be repaid by annual instalments within twenty years, and to be expended in the repair and alteration of the parish church. The churchwardens and overseers received the money, and gave the usual security for it, and it was expended in carrying out the repairs authorized by a faculty granted for that purpose. In May, 1868, an application was made to the churchwardens and overseers for the repayment of 38*l.* 15*s.* principal, and 30*l.* 4*s.* 8*d.* interest, making together 68*l.* 19*s.* 8*d.* On July 10, 1868, the churchwardens and overseers made a rate upon the parishioners and inhabitants to enable them to meet the demand. The above defendants, having refused to pay the rate, were summoned before Messrs. Jarvis and Ellison, Justices of the Peace, on November 6, 1868; and upon the defendants handing in a written notice that they intended to dispute the validity of the rate, the magistrates declined to proceed further. The plaintiffs then applied to and obtained from Sir Travers Twiss, the Vicar General and official principal of the Consistorial and Episcopal Court of Lincoln, letters of request directed to the Dean of Arches, requesting him to cite the defendants before him and to hear the cause. The letters of request were in the usual form, and commenced, "Whereas John Rippin and Benjamin John Wilson, the churchwardens, of the parish of Harmston, &c., intend to commence and prosecute a certain cause or business of subtraction of church-rates against, &c.; and for that purpose have requested us to grant these letters of request that they may commence and prosecute the said cause or business in the Arches Court of Canterbury. . . . Therefore we request you to issue a decree or citation, under the seal of the said Arches Court, against the said John Bastin, &c., in the aforesaid cause or business of subtraction of church-rate or church-rates, and to hear and finally determine the said cause according to law."

The Dean of the Arches having required that his acceptance should be moved for in open Court,

Dr. Middleton moved accordingly.—He submitted that the Court has no option, if the letters of request are granted by a proper Judge—*Butler* v. *Dolben* (2 Lee, 312).

Sir R. J. Phillimore.—I am entitled to know the nature of the suit. I have nothing before me to shew that I have jurisdiction over the subject-matter.

Dr. Middleton.—The letters of request state that the parties are desirous to institute a suit for subtraction of church-rate, which is clearly a subject over which the Ecclesiastical Courts have jurisdiction.

Sir R. J. Phillimore.—But the letters of request do not state the date on which the rate was made, or the circumstances which take the rate out of the operation of the Compulsory Church-Rate Abolition Act. I shall require you either to bring in fresh letters of request, or to file an affidavit as to those particulars. If the affidavit is satisfactory, I will then sign the letters of request without further motion.

For the future, I shall require that in every case my acceptance of letters of request shall be moved for by counsel.

IN THE PRIVY COUNCIL. Nov. 16, 17, Dec. 23, 1868.

Lord Hatherley, L.C., The Archbishop of York (Dr. Thomson), Lord Chelmsford, Lord Westbury, Sir W. Erle, and Sir J. Colvile.

THE REV. LEWIS RUGG, *appellant;* THE RIGHT REV. THE LORD BISHOP OF WINCHESTER, *respondent.*

38 L. J. Ecc. 23; L. R. 2 P.C. 223; 19 L. T. 578; 17 W. R. 235: affirming, [1868] E. R. A. 2385; 37 L. J. Ecc. 85; L. R. 2 A. & E. 247; 18 L. T. 486 (Arches).

See, *Martin* v. *Mackonochie,* [1868] E. R. A. 2313; 37 L. J. Ecc. 17; L. R. 2 A. & E. 116; 18 L. T. 245; 16 W. R. 604 (Arches): partly reversed, [1869]

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E. R. A. 922; 38 L. J. Ecc. 1; L. R. 2 P.C. 365; 19 L. T. 503; 17 W. R. 187 (P.C.).

Act of Uniformity, 13 & 14 Car. 2. c. 4.—One Benefice—Two Churches—Incumbent—Liability to perform Service in each Church—Church Discipline Act.

ECCLESIASTICAL LAW.—*The 13 & 14 Car. 2. c. 4, by section 2, provides that the Morning and Evening Prayer contained in the Prayer Book shall, upon every Lord's Day be openly read by every minister or curate, in every church, chapel or other place of public worship*:—Held, *that the words "every church, chapel or other place of public worship," must be read "in every church, &c. in or for which there is a distinct minister."*

The appellant became the incumbent of a benefice created under an Order in Council, in which there were two ancient churches or chapels. The appellant discontinued to perform divine service on the Lord's Day in one of such churches, and shut up the church although required by the bishop of the diocese to perform divine service in such church:—Held, *that although the 13 & 14 Car. 2. c. 4. s. 2. did not impose a duty upon the appellant to perform divine service in every church or chapel in his parish, yet that the appellant by shutting up the church and refusing to perform divine service therein, notwithstanding the mandate of the bishop, was guilty of an ecclesiastical offence, and was liable to be proceeded against under the Church Discipline Act.*

This was an appeal from a decree of the Right Hon. Sir R. J. Phillimore, the official principal of the Arches Court of Canterbury, pronounced on May 2, 1868.

The appellant, the Rev. Lewis Rugg, a clerk in holy orders of the United Church of England and Ireland, the incumbent of the benefice of Ecchinswell-with-Sydmonton, in the county of Southampton and diocese of Winchester, was charged with having, within two years then last past, offended against the laws ecclesiastical, "by having omitted to perform, or to provide for the performance of, public divine service as prescribed in the Book of Common Prayer, and Administration of the Sacraments, and other Rites and Ceremonies, according to the use of the Church of England, in the church or chapel of St. Mary, Sydmonton, on Sunday, May 12, on Sunday, May 19, on Sunday, May 26, and on Sunday, June 2, all in the year of our Lord, 1867."

The cause came before the Arches Court of Canterbury, by virtue of letters of request from the Bishop of Winchester, in accordance with the provisions of the Church Discipline Act (3 & 4 Vict. c. 86).

On July 2, 1867, a citation was served on the appellant.

The appellant appeared to the decree under protest, and prayed to be heard on his act on petition.

In his act on petition the appellant protested against the jurisdiction of the Court on the grounds,—that by reason of the provisions contained in the act of parliament, 1 & 2 Vict. c. 106, and more especially in sections 77 and 109 of that act, proceedings could not be taken against him, under the 3 & 4 Vict. c. 86, for the offence set forth in the decree; that the church of St. Mary, Sydmonton, was an unconsecrated building; and that on the Sundays on which he was charged with having omitted to perform divine service in the church of St. Mary, Sydmonton, he had performed two full services in the church of St. Lawrence, Ecchinswell.

On August 7 an answer to the act on petition was brought in on behalf of the respondent.

On February 5, 1868, the Judge of the Arches Court, having heard the appellant on his own behalf, overruled the protest and assigned him to appear absolutely. On February 6 articles were brought in and admitted on behalf of the respondent.

The articles pleaded,—that by the common ecclesiastical law of the realm, and by the statute 13 & 14 Car. 2. c. 4. s. 2, every clerk in holy orders of the

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United Church of England and Ireland, is bound on every Sunday to perform, or to provide for the performance of, public divine service in every consecrated church or chapel of the ecclesiastical parish or benefice of which he is the incumbent.

That the Rev. Lewis Rugg was a clerk in holy orders of the United Church of England and Ireland, and the perpetual curate and incumbent of the perpetual curacy and benefice of Ecchinswell-with-Sydmonton.

That such perpetual curacy and benefice consisted of two ancient parochial chapelries, now and for many years past known by the respective names of Ecchinswell and Sydmonton, in each of which has been from time out of mind a consecrated church or chapel, to wit, the church or chapel of St. Lawrence, Ecchinswell, and the church or chapel of St. Mary, Sydmonton. That such ancient parochial chapelries, up to August 18, 1852, belonged for all ecclesiastical purposes to the vicarage and parish church of Kingsclere, but were separated therefrom by an Order in Council bearing date August 18, 1852, and since that date have been and are a separate parish for ecclesiastical purposes, and a perpetual curacy and benefice by the name or style of the perpetual curacy of Ecchinswell-with-Sydmonton.

The omission on the part of the Rev. Lewis Rugg to perform divine service in the church of St. Mary, Sydmonton, on the days hereinbefore set forth.

To these articles a responsive plea was brought in on behalf of the appellant, by which the fact of the omission on the part of the appellant to perform, or to provide for the performance of, public divine service in the church of St. Mary, Sydmonton, on the days specified, was admitted; but a justification of such omission was alleged.

On May 2, 1868, the Judges of the Arches Court, having heard advocates on behalf of the respondent, and the appellant on his own behalf, pronounced, decreed and declared that the respondent had sufficiently proved the contents of the articles, and that the appellant had offended against the laws ecclesiastical, by not having regularly performed divine service in the church or chapel of St. Mary, Sydmonton, as required by the bishop of the diocese; and monished the appellant to resume and continue to perform or provide for the performance of public divine service, as prescribed in the Book of Common Prayer, in the said church or chapel of St. Mary, Sydmonton; and further condemned him in the costs (see 37 L. J. Ecc. 85).

This sentence was the subject of the present appeal.

The appellant appeared in person, and contended that the omission of duty alleged did not constitute an offence against the laws ecclesiastical, within the meaning of 13 & 14 Car. 2. c. 4; and that he (the appellant) having performed morning and evening services in the church of Ecchinswell on the days specified in the articles, had complied with the requisitions of the 13 & 14 Car. 2. c. 4. That assuming the non-performance on the Lord's Day of divine service in one of two churches or chapels, both being locally situate within one separate parish and benefice for ecclesiastical purposes, two full services had in fact been performed for the whole benefice. That the church of St. Mary, Sydmonton, was pulled down and rebuilt, and after such rebuilding the said church was not legally consecrated; and that it was not competent for the Ordinary to consecrate the new building as or for a parish church, because neither the patron nor the minister consented, and because no endowment was granted.—He referred to *Stillingfleet, Eccl. Cas.* 326; *Hooker's Eccl. Pol., Battiscombe* v. *Eve* (7 L. T. 697), 1 & 2 *Vict. c.* 106. *s.* 77.

Dr. Swabey (*Dr. Deane* with him), for the respondent.—The appellant is the incumbent of a benefice consisting of two distinct districts or chapelries, in each of which there is a consecrated church or chapel. The appellant is therefore bound by law to perform or provide for the performance of divine service in each of such churches or chapels. The appellant has no right to choose in which of the churches or chapels he will perform divine service, and to neglect to perform or provide for the performance of any divine service in the other of such churches or chapels. The reasons alleged by the appellant for not

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performing or providing for the performance of divine service in both of the said churches or chapels are insufficient. This duty is imposed upon the incumbent of every parish or benefice by section 2. of the Act of Uniformity (13 & 14 Car. 2. c. 4); but it is also the duty of any incumbent of a parish to provide for divine service in any church or chapel by the Common Ecclesiastical Law. By the Common Ecclesiastical Law the church service is to be regularly performed on every Sunday in the morning and evening—*Bennett* v. *Bennett* (2 Hag. Ecc. 27).

Lord Chelmsford delivered the judgment of their Lordships.—The appellant in this case is the incumbent of the benefice of Ecchinswell-with-Sydmonton, in the county of Southampton, and he appeals from a sentence of the Arches Court, pronounced in a cause instituted under the Clergy Discipline Act, by which sentence the Judge declared that the appellant had offended against the laws ecclesiastical by not having regularly performed divine service in the church or chapel of St. Mary, Sydmonton, as required by the lord bishop of the diocese, and monished him to resume and continue to perform, or to provide for the performance of, public divine service, as prescribed in the Book of Common Prayer, in the said church or chapel of St. Mary, Sydmonton, and further condemned him in costs.

It appears that Ecchinswell and Sydmonton were two ancient chapelries belonging to the vicarage of Kingsclere, with a church or chapel in each of the chapelries, each chapelry being also a separate parish for all civil purposes; and in the year 1852 a proposal or scheme for the union of the two chapelries into a separate parish and benefice, and for their separation from the vicarage of Kingsclere, was set on foot by the Bishop of Winchester, under the provisions of the 1 & 2 Vict. c. 106. and 2 & 3 Vict. c. 43. This scheme was certified by the Archbishop of Canterbury to the Queen in Council, and all necessary consents having been given, it was ultimately approved of by Her Majesty in Council, and became binding under the acts referred to. By this scheme it was provided that the two chapelries of Ecchinswell and Sydmonton should be separated from the vicarage of Kingsclere, and be united so as to form together a separate parish for ecclesiastical purposes, and a perpetual curacy and benefice, by the name or style of the perpetual curacy of Ecchinswell-with-Sydmonton. That the proposed separate parish and benefice should be subject to the same ecclesiastical jurisdiction as the said vicarage of Kingsclere, and the incumbent of such separate parish and benefice should have exclusive cure of souls within the limits of the same. That two churchwardens should be annually chosen in the customary manner, and at the time when churchwardens are usually appointed, in and for each of the said chapelries; and every person so chosen should be duly admitted, and should do all things pertaining to the office of churchwarden as to ecclesiastical matters within the said chapelries. That the freehold of the churches and churchyards of Ecchinswell and Sydmonton, so far as the same might be vested in or belong to the incumbent for the time being of the said vicarage, and also all the glebe lands of and belonging to the said vicarage situate in the said chapelries of Ecchinswell and Sydmonton, with the appurtenances; and also (except as thereinafter mentioned) all, so much and such part of the tithe-rentcharges or other payments or compositions for or in lieu of tithes belonging to the said vicarage as arose and accrued or were payable within or in respect of the said chapelries of Ecchinswell and Sydmonton, should belong and be attached to the said proposed separate benefice of Ecchinswell-with-Sydmonton for ever, and be held, received and enjoyed by the incumbent thereof for the time being accordingly. That the parishioners of Ecchinswell and Sydmonton should be liable as theretofore to the expenses of repairing and maintaining their respective churches, and the other expenses incidental to the due performance of divine service therein respectively, and should be exempt from all rates, charges and assessments to be made for or in respect of the parish church of Kingsclere aforesaid, or for or in respect of any other church or chapel situate elsewhere than within the limits of the said proposed separate parish. That the patronage or right of

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nomination of or to the said proposed separate benefice of Ecchinswell-with-Sydmonton should be and remain in the vicar of the said vicarage and parish church of Kingsclere for the time being and his successors for ever. That the parishioners of Ecchinswell and Sydmonton should be entitled, as theretofore, to accommodation in their said respective churches, but should not henceforth be entitled to any accommodation in the parish church of Kingsclere. It is enacted by the statutes already mentioned, that a scheme thus approved of, and made an Order in Council, shall come into operation forthwith, and be binding on all persons whatsoever, whether the benefice or benefices thereby affected be or be not vacant. Shortly after the date of the Order in Council, the appellant became the incumbent of the parish or benefice thus created. The church at Sydmonton was at this time pulled down for the purpose of being rebuilt, and it was rebuilt on the lines of the ancient structure in 1853. It appears that from the year in which the new church at Sydmonton was opened for divine worship, until 1863, service was performed in the church by the appellant. Some doubt then arose whether the new building required re-consecration; and the appellant, taking advantage of this doubt, closed the church, and refused his consent to its being re-consecrated. To such an extent was his perverse conduct carried, that on the day appointed for the consecration, August 17, 1865, he caused the door of the church to be locked, carried away the key, and refused to be present at the ceremony. There can be no justification or excuse for such conduct. If the new church required re-consecration (which, as it was built on the site of the old church, may well be doubted), it was the duty of the appellant to have promoted and assisted such re-consecration. The appellant has since contended that the consecration is invalid, as it took place without his consent, and even against his protest. But their Lordships entertain no doubt that even assuming re-consecration to have been necessary, the appellant having regard to the site of the building, the purpose for which it was erected, and the provisions of the Order in Council, was not in a position to have refused his assent to the consecration. In the consideration of this case, therefore, the church at Sydmonton must be taken to be a lawfully consecrated church.

On May 5, 1867, the appellant gave public notice in the church at Sydmonton that there would be no more service in that church; and for the two following Sundays divine service was not performed in it. Complaint having been made to the Bishop of Winchester, he, on May 23, 1867, by a letter from his secretary to the appellant, desired to know whether the information he had received was correct, and if so, on what ground he had suspended the service. To this letter the appellant, on May 27, 1867, replied in these terms: "In answer to your letter addressed to me at the request of the Bishop of Winchester, I have to inform you that I have discontinued the service at Sydmonton, and have returned to the two full services in the church at Ecchinswell as performed by me during the first four years of my charge of this parish. I think I shall best discharge my duty to my parishioners generally by the return to the two full services (morning and evening) here, and that this will be more strictly in accordance with the requirements of both the common and ecclesiastical law, than having only one service here in order that there may be one in a building which I cannot recognize as ever having been lawfully consecrated, and for the sake merely of one family (not much resident) and their immediate dependants, when the great bulk (more than nine-tenths) of my parishioners live nearer to Ecchinswell church, where they can better and more conveniently attend than by having to go out of their way a mile or two more distant to Sydmonton House." The following letter, dated May 30, 1867, was then written by the bishop's secretaries to the appellant: "We have laid your letter of the 27th before the Bishop of Winchester. We are desired to state that the bishop requires you to resume the service at Sydmonton church on Sunday next, and to continue the performance of such service in future; and we beg to add that we have forwarded a copy of this letter to the churchwarden, and requested him to inform the bishop whether his order is complied with."

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The following is the reply of the appellant to the order of the bishop: "Ecchinswell, May 31, 1867. In reply to your communication of yesterday from the Bishop of Winchester, I beg you to inform his Lordship that, with all due deference to his authority, I see neither the necessity nor the obligation, under existing circumstances, of performing divine service at Sydmonton, and it is not my intention to resume the service there until every impediment be removed and the church (so called) has been judicially decided to be lawfully consecrated. I have, moreover, to inform you that there is no churchwarden at Sydmonton, and therefore no need to wait for a reply to any copy of a letter or request to such to know whether his Lordship's order has been complied with or not."

The bishop, finding that the appellant had determined to continue to keep the church at Sydmonton closed, and to disregard his order that the service in it should be resumed, instituted a suit against the appellant in the Arches Court of Canterbury, under the provisions of the Clergy Discipline Act, 3 & 4 Vict. c. 86. The letters of request stated that the appellant was charged with having offended against the laws ecclesiastical by having omitted to perform or to provide for the performance of public divine service, as prescribed in the Book of Common Prayer, and Administration of the Sacraments and other Rites and Ceremonies, in the church of St. Mary, Sydmonton, on four successive Sundays in the months of May and June, 1867, and therefore prayed that a citation might be issued to him to appear to answer to certain articles, &c. to be administered. The appellant appeared under protest, and by an act or petition objected that by virtue of divers provisions contained in the 1 & 2 Vict. c. 106, and more particularly in sections 77. and 109, the Court had no jurisdiction to administer articles to him for the alleged offence of omitting to perform or provide for the performance of public divine service in the alleged church of St. Mary, Sydmonton; that the building called the Church of St. Mary, Sydmonton, is not a church, as falsely suggested; that an illegal ceremony of consecration had been performed within the building; that the appellant performed two full services in the parish church of Ecchinswell-with-Sydmonton on the Sundays mentioned in the letters of request, and that by reason of the premises the Court had no jurisdiction to entertain a suit to compel him to answer articles for not performing divine service in the building.

The Dean of the Arches overruled the protest, deciding that the offence charged was an ecclesiastical offence cognizable under the provisions of the 3 & 4 Vict. c. 86, and assigned the appellant to appear absolutely.

Articles were accordingly brought in, which charged the appellant with having offended against the Common Ecclesiastical Law of the realm, and the statute 13 & 14 Car. 2. c. 4. s. 2, by omitting to perform divine service in the church of St. Mary, Sydmonton, at the times mentioned, and copies of the before-mentioned letters between the bishop's secretaries and the appellant were annexed to and made part of the articles.

The answer to the articles principally consisted of a denial of any liability on the appellant to perform any divine service in St. Mary's, Sydmonton, on the ground of its being an unconsecrated building, and a justification for the omission charged, by reason of his having performed two full services in the church of Ecchinswell. The Dean of the Arches held that the bishop had rightly exercised his discretion in commanding the appellant to perform divine service in the church at Sydmonton, and admonished him to obey the directions of his ordinary.

Upon the hearing of the appeal from this judgment, the appellant in person urged various objections, some of which were of an extremely frivolous character. He insisted upon the illegality of the consecration of the church at Sydmonton, for which objection, as already shewn, there is no foundation. He also objected that an ancient footway or entrance to the church had been stopped up by the patron and a more circuitous road provided, and that it is by sufferance of the patron only that the former approach can be used. It is clear that no defence against the present charge can be rested upon this circum-

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stance. If there has been any improper obstruction of a right of way to the church, the appellant has his appropriate remedy. But the appellant principally rested his defence to the proceedings against him upon the ground that there being two churches or places of public worship in the parish of Ecchinswell-with-Sydmonton, he had a right to shut the church against the parishioners of Sydmonton if, in his discretion, he considered it more expedient to confine the public worship in the parish to the church at Ecchinswell.

The question is, whether by so acting and persevering in keeping the church at Sydmonton closed in disobedience to the order of the bishop he has committed an ecclesiastical offence. The duty of the appellant is thus stated in the first article: That by the Common Ecclesiastical Law of the realm, and by the statute 13 & 14 Car. 2. c. 4. s. 2, every clerk in holy orders of the United Church of England and Ireland is bound on every Sunday (otherwise called Lord's day) in the year to perform or to provide for the performance of public divine service, as prescribed in the Book of Common Prayer, and Administration of the Sacraments and other Rites and Ceremonies, according to the use in the Church of England, in every consecrated church or chapel of the ecclesiastical parish or benefice of which he is the incumbent. It appears to their Lordships that the Act of Uniformity, 13 & 14 Car. 2, does not apply to this case, and that it is not a duty imposed by that act upon an incumbent who has two churches or places of public worship within his parish to perform divine service in both of them. The words of the act, "Every church, chapel or other place of public worship within the realm of England," must be read in each church, &c. in and for which there is a distinct minister. The appellant cannot therefore be said to have offended against the Act of Uniformity by confining the performance of morning and evening service to one of the churches in his parish, and not providing for the same services in the other church, there being nothing in the act requiring him to employ a curate in order that the services may be duly performed in both churches.

But the question is, whether the appellant was not bound by the Common Ecclesiastical Law (to use the language of the articles) "to perform or to provide for the performance of public divine service in every consecrated church or chapel of the parish or benefice of which he is the incumbent." If so, the article which charges an offence against the Common Ecclesiastical Law, and also against the statute 13 & 14 Car. 2, will be good, although the offence is only against the common law, and not against the statute, as the latter allegation may be regarded as mere surplusage. There can be no doubt that the Order in Council which united the chapelries of Ecchinswell and Sydmonton into a separate parish or benefice, intended that there should be two churches (as they are called in the Order) within the parish in both of which public worship should be performed. This appears plainly from the provisions contained in the Order, "that the parishioners of Ecchinswell and Sydmonton should be liable, as theretofore, to the expenses of repairing and maintaining their respective churches and the other expenses incidental to the due performance of divine service therein respectively," and "that the parishioners of Ecchinswell and Sydmonton shall be entitled as heretofore to accommodation in their respective churches."

The appellant accepted the benefice with a full knowledge that there were two churches or chapels within the parish in which, by the instrument creating the benefice, the duty of using each as a place of religious worship, and performing some service therein, is laid upon him. If the question with the bishop had been as to the nature and extent of the services which the appellant was bound to perform in these churches respectively, the case might have been attended with more difficulty. But the appellant takes upon himself to shut up the church at Sydmonton, and positively to refuse to perform any divine service in it, assigning reasons for this wilful neglect of the duty which he has undertaken, every one of which is insufficient, and claiming the liberty of choosing which of the two churches in his parish he will keep open for divine worship, which, if it were conceded to him, would, of course, equally enable him

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to close the church at Ecchinswell, and perform the whole of the divine services in the parish in the church at Sydmonton. If, then, the appellant has neglected or refused to perform a spiritual duty which was imposed upon him by his induction into the benefice, has he not committed an offence against the Ecclesiastical Law? This in itself might render him liable to be proceeded against under the Church Discipline Act. But, beyond his neglect of duty, he has exposed himself to such a proceeding by his contumacious refusal to obey the lawful order of his bishop. The duty of performing some divine service in the church at Sydmonton having been imposed upon the appellant, and he having shewn his intention of violating it by shutting up the church and giving public notice that there would be no more service there, the bishop, in the exercise of the authority vested in him, made an order upon him to resume the services in that church. If the appellant had entertained a sincere wish to do his duty to the parishioners, he would have consulted the bishop as to the best mode of meeting their requirements and his own obligation; but instead of adopting this course he defied the bishop's authority under the semblance of deference to it, and, denying the necessity and the obligation of performing any divine service at Sydmonton, expressed his intention not to resume the service there "until the church (so called) had been judicially decided to be lawfully consecrated." The appellant, therefore, has committed an offence against the Common Ecclesiastical Law, by wilful neglect of duty, and by wilful disobedience to the order of the bishop directing him to perform that duty.

In his act or protest, the appellant objected to the jurisdiction of the Court, upon the ground that the proceedings should have been taken (if at all) under the 1 & 2 Vict. c. 106, referring to sections 77 and 109 of that act. It may be doubted whether the act referred to is applicable to this case. By the 77th section it is provided, that whenever the bishop shall see reason to believe that the ecclesiastical duties of any benefice are inadequately performed, it shall be lawful for him to issue a commission, to be constituted in the manner prescribed; and if the commissioners report to the bishop that in their opinion the duties of such benefice are inadequately performed, he may require the spiritual person holding the benefice to appoint a curate. And the 109th section enacts, that in every case in which jurisdiction is given to the bishop of the diocese, or to any archbishop, under the provisions of this act, and for the purposes thereof, and the enforcing the due execution of the provisions thereof, all other and concurrent jurisdictions in respect thereof shall wholly cease; and no other jurisdiction in relation to the provisions of this act shall be used, exercised or enforced, save and except such jurisdiction of the bishop and archbishop under this act.

It may be open to doubt whether the shutting up one of two churches in a parish where divine worship is required to be performed in both, comes within the meaning of the words "inadequate performance of ecclesiastical duties," and can be dealt with as falling under the 77th section. But assuming that it might, if the act done involves an ecclesiastical offence, does the 109th section of the 1 & 2 Vict. c. 106 compel the bishop to adopt the course pointed out by the statute, not for visiting the offence, but for enforcing the proper performance of the duties which, by reason of the offence, have been inadequately performed? The words of the 109th section are, that no other jurisdiction in relation to the provisions of the act shall be used. Therefore, if the bishop were proceeding to compel the appellant to appoint a curate, he must have pursued the course prescribed by the act, and have issued a preliminary commission of inquiry. But his proceeding being for an offence committed by the appellant against the Common Ecclesiastical Law, the jurisdiction of the Court is not taken away by the 109th section, and the suit is properly instituted under the Church Discipline Act.

Their Lordships are of opinion that the appellant by shutting up the church at Sydmonton, and refusing to perform divine service there, notwithstanding the mandate of the bishop, has committed an ecclesiastical offence, and they will, therefore, humbly recommend to Her Majesty that the judgment of the Arches Court should be affirmed, and the appeal dismissed, with costs.

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IN THE ARCHBISHOP OF YORK'S COURT. March 3, 6, 1869.

THE LORD ARCHBISHOP OF YORK, assisted by the RIGHT HON. LORD CHELMSFORD.

SEDGWICK *v.* THE BISHOP OF MANCHESTER.

38 L. J. Ecc. 30.

*Unconsecrated Chapel—Curate without Nomination or Stipend—Revocation of Licence by Bishop—Appeal—*36 *Geo.* 3. *c.* 83. *s.* 6—1 *&* 2 *Vict. c.* 106. *s.* 98.

ECCLESIASTICAL LAW.—*The Rev. J. E. Sedgwick, a duly ordained clergyman of the Church of England, was licensed by the Bishop of Manchester to perform divine service within an unconsecrated church, which was built by subscription, in the city and diocese of Manchester. Mr. Sedgwick had no nomination or stipend, and no district was assigned to the church. His licence having been revoked by the bishop, Mr. Sedgwick appealed to the archbishop of the province:*—Held, *by* Lord Chelmsford *(acting as assessor with the Archbishop of York), that the appellant was not a licensed curate within the meaning of the* 36 *Geo.* 3. *c.* 83. *s.* 6, *or* 1 *&* 2 *Vict. c.* 106. *s.* 98, *and that no appeal lay from the decision of the bishop.*

This was an appeal by the Rev. John Edmund Sedgwick, clerk, against the revocation of his licence to perform divine service in a certain unconsecrated church, by the Bishop of Manchester, under these circumstances:

In 1857 the appellant was authorized by licence, under the hand of the Lord Bishop of Manchester, to perform divine service in a certain school-room in Moulton Street, Manchester, according to the Rubric of the Church of England; and in 1864 the licence was transferred to a new building, which was built by subscription and intended for a church. The licence ran as follows:—"We, James Prince, by divine permission Lord Bishop of Manchester, in accordance with the prayer of two certain petitions this day presented to us, hereby give and grant our full leave, licence and authority unto the Rev. John Edmund Sedgwick, M.A., to perform divine service in the new church situate in the Waterloo Road, in the city of Manchester, in our diocese of Manchester, called or known by the name of 'St. Albans,' according to the Rubric of the Church of England, and not otherwise or in any other manner, and we being certified as to the consent of the dean and canons of the cathedral church of Manchester having been obtained hereto. And we hereby revoke and make void the licence heretofore granted by us for performance of divine service in a certain school-room or building in Moulton Street, Strangeways, in the city of Manchester. Given under our hand this 20th day of December, 1864."

The church was unconsecrated, and the cathedral was the parish church of the parish in which it was situate. The appellant had no nomination or stipend; no district was assigned to the church, and the disposition of the offertory was to be in accordance with the directions of the bishop as ordinary. Complaints having been made as to the manner in which the services were conducted at St. Albans, a long correspondence took place between the appellant and the bishop, who ultimately, on November 2, 1868, revoked his licence and prohibited him from officiating or performing any ecclesiastical duties within the church of St. Albans, or elsewhere within the diocese. From this decision Mr. Sedgwick appealed; and the appeal came on for hearing on March 3, before the Lord Archbishop of York, assisted by the Right Hon. Lord Chelmsford, at Westminster.

The Solicitor-General (Sir J. D. Coleridge) (with him *Charles*), for the appellant.

Dr. Deane (with him *Bayford*), for the Bishop of Manchester, took a preliminary objection to the jurisdiction of the archbishop to entertain the appeal, Mr. Sedgwick not being a licensed curate within the meaning of the 36 Geo. 3. c. 83. s. 6, or the 1 & 2 Vict. c. 106. s. 98. He was simply the minister of an unconsecrated chapel—*Hodgson* v. *Dillon* (2 Curt. 393).

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The Solicitor-General, contra, maintained that the appellant was a licensed curate within the meaning of the acts in question, and that the appeal lay to the archbishop of the province. He referred to *Poole* v. *the Bishop of London* (5 Jurist, N.S. 522).

Cur. adv. vult.

Lord Chelmsford (March 6) delivered the following judgment on behalf of the archbishop:

In this case the counsel for the Bishop of Manchester has taken a preliminary objection to my jurisdiction to entertain Mr. Sedgwick's appeal, and after hearing arguments on both sides, and carefully considering the question (with the assistance of Lord Chelmsford), I feel compelled to yield to the objection.

The following are shortly the facts connected with the grant of the licence from the revocation of which the appeal is made:

Mr. Sedgwick, on July 14, 1857, was licensed by the Bishop of Manchester to perform divine service in a room or building in Moulton Street, Manchester, according to the Rubric of the Church of England. Divine service was performed in this room or building under the licence until the month of December, 1864, when a building intended for a church to be called St. Albans Church, having been erected by subscription, upon a petition presented to the bishop by the subscribers, praying that this new building might be licensed for the performance of divine service therein, in the place and stead of the room in Moulton Street, the bishop, on December 20, 1864, granted his licence to Mr. Sedgwick, "to perform divine service in the new church situate in Waterloo Road, called or known by the name of St. Albans, according to the Rubric of the Church of England, and not otherwise or in any other manner." And the bishop thereby revoked and made void the licence theretofore granted for performance of divine service in the room or building in Moulton Street. This new church has never been consecrated, but Mr. Sedgwick commenced the performance of divine service therein at the date of the licence, and continued it down to November 2, 1868, when the bishop revoked the licence.

In support of the right to appeal from this revocation of the licence, the Solicitor-General, on behalf of Mr. Sedgwick, founded himself upon the statutes 36 Geo. 3. c. 83. s. 6, and the 1 & 2 Vict. c. 106. s. 98.

To consider these in their order. The title of the statute 36 Geo. 3. is "An act for the further support and maintenance of curates within the Church of England, and for making certain regulations respecting such curates." The 6th section begins with a recital that it is expedient that the authority of ordinaries to license curates and to remove licensed curates should be further explained, enlarged and confirmed, and then enacts, "That it shall be lawful for the ordinary to license any curate who is or shall be actually employed by the rector, vicar or other incumbent of any parish church or chapel although no express nomination of such curate shall have been made either in words or in writing to the ordinary by the said rector, vicar or other incumbent." No doubt can be entertained upon this part of the section that the authority conferred upon the bishop extends only to a particular description of curates, viz., those "employed by the rector, vicar or other incumbent of any parish church or chapel." Therefore, when the section goes on to empower the ordinary to revoke licences it might naturally be expected that this power would be confined to the revocation of licences of the kind previously mentioned. But the learned counsel for Mr. Sedgwick argued from the general expressions afterwards used that the legislature meant to confer upon the ordinary by this section a larger authority to revoke than to license. The words following those already mentioned are, "and that" (apparently continuing to deal with the same subject) "the ordinary shall have power to revoke summarily and without process any licence granted to any curate employed within his jurisdiction, and to remove such curate for such good and reasonable cause as he shall prove." Although the language of the section is here more general than in the preceding

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part of it, yet, having regard to the scope and object of its provisions, to the connexion of the latter part with that which precedes it, and to the word "employed," which can hardly have been intended to bear a different meaning in different parts of the same section, the only reasonable construction of the words "any curate employed within the ordinary's jurisdiction," appears to be not employed by any person and in any place, but employed by the incumbent of any parish church or chapel to assist him in performing divine service in such church or chapel.

The 36 Geo. 3, therefore, does not apply to Mr. Sedgwick's case, and there can be no appeal to me under that statute.

Turning to the 1 & 2 Vict. c. 106, it appears to have been passed, as the title expresses it, "to abridge the holding of benefices in plurality, and to make better provision for the residence of the clergy," and all its enactments with respect to curates must be considered with reference to this primary object of the statute. The 98th section relates to the licensing curates employed by non-resident incumbents. It enacts, "That it shall be lawful for the bishop to license any curate who is or shall be actually employed by any non-resident incumbent of any benefice within his diocese, although no express nomination of such curate shall have been made to such bishop by the incumbent." This part of the section clearly applies to one description of curates only, namely, a curate employed by a non-resident incumbent. The section then proceeds to give the bishop power to revoke licences in these words: "And that" (the same observation applying as to the connexion of the different parts of the section by these words as was made when considering the 36 Geo. 3.) "the bishop shall have power, after having given to the curate sufficient opportunity of shewing reason to the contrary, to revoke," &c. What is meant here by the words "the curate"? What can it mean but a curate of the only description previously mentioned? If, then, the introduction of the power to revoke licences necessarily applies to those licences only which there is a previous authority given to the bishop to grant, no words subsequently used, however large, can extend the limits of this power. The Solicitor-General contended, however, that the legislature by the words following the word "revoke" meant to extend the power of revocation to all licensed curates of whatever description. The words relied upon by him are, "to revoke summarily and without further process any licence granted to any curate, and to remove such curate for any cause which shall appear to such bishop to be good and reasonable." It is to be observed that the words are not any curate within the diocese, but merely "any curate," words which may fairly be construed to mean a curate of the particular description previously mentioned. This reference of the general words to the previous specific description renders the section consistent throughout, while, on the other hand, it is difficult, upon the construction contended for, to understand why the legislature, having proposed to deal with licences to be granted to a particular description of curates only, should have departed from that intention in the course of the same section, and have extended not the grant of licences, but the power of revoking them, to licensed curates of every description.

It appears to me that an appeal from the Bishop of Manchester is not open to Mr. Sedgwick under the 1 & 2 Vict. c. 106. any more than under the 36 Geo. 3. c. 83.

But assuming for the moment that the sections of the two statutes are not limited to curates employed by resident or non-resident incumbents, but that they are extended to every description of licensed curates within a diocese, it was necessary for Mr. Sedgwick to satisfy me that the licence granted to him by the bishop had the effect of constituting him a curate within the meaning of the acts by which the right of appeal is given.

The Solicitor-General insisted that the licence to Mr. Sedgwick to perform divine service in the unconsecrated church called St. Albans virtually gave him the cure of souls within a certain district in Manchester, and thereby made him a curate in the proper sense of the word.

It is to be observed, however, that no district has ever been assigned to the

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church of St. Albans, and that the supposed cure of souls merely amounts to this, that by the licensing of the building an opportunity is afforded to persons in the neighbourhood to resort to it for the purpose of divine worship.

The Solicitor General further argued that Mr. Sedgwick was, in fact, curate to the Dean of Manchester, within whose parish the new church is situate, but this argument overlooks the fact that the church is an unconsecrated building. If it had been consecrated there might have been some ground for contending, that it would have been the duty of the dean, as rector, to have provided for the performance of divine service in the church, as it would then have been a consecrated church or chapel within the parish. But there was no obligation on the rector to provide for divine service being performed in an unconsecrated, though licensed, building, and Mr. Sedgwick doing duty in the church solely under the authority of the licence can in no sense be considered as having acted as a curate to the Dean of Manchester.

The licence granted to Mr. Sedgwick is of an entirely different character from that which is ordinarily given to a licensed curate. By the ordinary form of licence to a curate the bishop gives and grants to him " licence and authority to perform the office of stipendiary curate in a certain parish or place within the diocese, in preaching the word of God and in reading the common prayers, and performing all other ecclesiastical duties belonging to the said office according to the form prescribed in the Book of Common Prayer and the Canons and Constitutions in that behalf lawfully established and promulgated." The licence to Mr. Sedgwick (as already stated) is merely to perform divine service in the new church of St. Albans according to the Rubric of the Church of England, and not otherwise or in any other manner. In the words of Dr. Lushington, in *Hodgson* v. *Dillon* (2 Curt. 393), slightly varied, " this is not an ordinary licence to a stipendiary curate, but it confers the nondescript title of minister of an unconsecrated church."

It was said that the Bishop of Manchester shewed by the terms in which he revoked the licence that he did not consider Mr. Sedgwick's duties to be confined to the church of St. Albans, because in revoking the licence he not only prohibited Mr. Sedgwick " from officiating or performing any ecclesiastical duties within the new church, but also elsewhere within his diocese."

These latter words, however, do not necessarily import that Mr. Sedgwick was at the time of the revocation of his licence performing any ecclesiastical duties elsewhere than in the church of St. Albans, but merely prohibit him for the future from performing any such duties within the diocese.

It is only necessary to add, that Mr. Sedgwick's position was different in one important respect from that of an ordinary licensed curate. Under the 1 & 2 Vict. c. 106, a curate is liable to a penalty if he quits the curacy to which he has been licensed without giving three months' notice to the incumbent and to the bishop of the diocese; but Mr. Sedgwick was under no obligation to act upon the licence granted to him, but he might at any time have discontinued the performance of divine service in the church of St. Albans without any previous notice, and without incurring any penal consequences.

For the above reasons, I have come to the conclusion that Mr. Sedgwick's appeal is incompetent, and I must decline to entertain it.

IN THE COURT OF ARCHES. April 23, 30, 1869.

RIPPIN AND WILSON *v.* BASTIN.

38 L. J. Ecc. 33; L. R. 2 A. & E. 386; 20 L. T. 622: also reported, [1869] E. R. A.; 38 L. J. Ecc. 22 (Arches).

See, *Edney* v. *Smallbones*, 1869, 21 L. T. 506 (Arches).

Church-Rate—Money advanced by Commissioners for Public Works for

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repairing and altering Parish Church—Money expended on Chancel—5 Geo. 4. c. 36. s. 1.

ECCLESIASTICAL LAW.—*In a suit for subtraction of church-rate made to repay a sum of money advanced by the Commissioners of Public Works, under the provisions of the 5 Geo. 4. c. 36, for the repair and alteration of the parish church, the defendant brought in a responsive allegation, to the effect that the burden of repairing the chancel of the parish church rested upon the impropriate rector thereof; that a considerable portion of the money advanced by the Commissioners was expended in the repair and alteration of the chancel, and that consequently the rate was null and void*:—Held, 1, *that the term "church" in the statute includes the chancel, and that therefore the expenditure on the chancel was a legal expenditure;* 2, *that, assuming the chancel not to be included in the word "church," the misappropriation of the loan in the manner alleged would not have a retroactive effect on the loan, so as to vitiate the rate. The Court accordingly declared the responsive allegation inadmissible, and ordered it to be reformed.*

This was a suit for subtraction of church-rate, brought by letters of request under the hands of the Vicar General and Official Principal of the Consistorial Court of Lincoln, and promoted by John Rippin and Benjamin John Wilson, the churchwardens of the parish of Harmston, in the diocese and county of Lincoln, against John Bastin, an inhabitant and ratepayer of such parish.

The libel stated that in the year 1867, the parish church of Harmston being in a very dilapidated state, on May 2 it was determined at a meeting in vestry of the parishioners and occupiers assessed to the relief of the poor of the said parish that the sum of money requisite for the purpose of repairing, re-seating, and otherwise extending the accommodation in such church, amounted to the sum of 1,076*l.* 10*s.*, and that the churchwardens and overseers of the poor of the parish should, with the consent of the bishop of the diocese and the incumbent of the parish, make application to the Commissioners for Public Works, under the provisions of the 5 Geo. 4. c. 36, for a loan of the sum of 775*l.*, being a part of the sum of money requisite for the purposes aforesaid. No amendment was moved to such resolution, and no poll was demanded. It further stated that the bishop of the diocese and the incumbent of the parish had, by a writing under their respective hands, consented to the application being so made for the purpose of repairing, re-seating and otherwise extending the accommodation of the parish church of Harmston. It then stated that the application was made to the Commissioners, that the money was advanced and expended for the purposes set out in the application, that the first instalment of the loan had become due and been demanded, and that a rate had been made to meet the demand, which the defendant, among others, had refused to pay.

An allegation was brought in on the part of the defendant to the following effect: 1, that by the laws now in force the duty of repairing the chancel of the parish church of Harmston lies upon the impropriate rector thereof, and that others the inhabitants and occupiers assessed to the relief of the poor of the parish of Harmston are not chargeable with or in any manner bound to contribute to the repairs of the chancel of the church of the said parish; 2, that the notice and resolution set out in the libel had reference to certain repairs and alterations intended to be done in and upon the chancel of the said church as well as to those in the said notice and resolution mentioned, and that the sum of 1,076*l.* 10*s.* in the said resolution mentioned included moneys requisite for the repairs and alterations so intended to be done in and upon the chancel; 3, that the said churchwardens and overseers did not expend the sum of 775*l.* in the manner alleged, but, on the contrary, expended some considerable portion thereof in repairs and alterations done in and upon the said chancel; 4, that the consent of the then Bishop of Lincoln and the advance made by the Commissioners were given and made respectively upon the footing and representation that the said sum of 1,076*l.* 10*s.* was required for the purposes set out in the said resolution, and did not include any moneys required for repairs and alterations

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in the chancel; 5, that by reason of the premises, the pretended rate was not duly made under the provisions of the act 5 Geo. 4. c. 36, but is null and void, and the respondent cannot be called upon to pay the same.

Prideaux and *Dr. Middleton*, opposed the admission of the allegation.—There is nothing to lead the Court to doubt that the word "church" in the statute does include the chancel, and that consequently the application of the money borrowed in part to repairs and alterations in the chancel was legal. Moreover, as the Commissioners had obtained the requisite consents before they advanced the money, they could not be deprived of their security for repayment by reason that subsequently the churchwardens misapplied a portion of the money advanced.

Dr. Deane and *Bayford*, for the defendant, contended that inasmuch as the parishioners are not liable for the repairs of the chancel, the statute could not have intended to charge the rates with the repayment of money to be expended on such repairs; that if the statute did not require the consent of the lay rector to an application to the Commissioners, it was by reason that the term "church" was not meant to include the chancel. If the churchwardens have misappropriated the loan, the Commissioners may have a remedy against them; they have none against the parish. They referred to *White* v. *Steele* (12 Com. B. Rep. N.S. 382; 31 L. J. C.P. 265).

Sir R. J. PHILLIMORE (April 30).—In this case a libel has been given in for the recovery of a church-rate made under the authority of 5 Geo. 4, c. 36, which empowers the churchwardens and overseers of the poor of any parish in England or Wales, with the consent of the major part of the inhabitants and occupiers assessed to the relief of the poor in vestry assembled, and with the consent of the bishop of the diocese and the incumbent of such parish, to make application to the Commissioners of Public Works for an advance of such sum of money as may be necessary for defraying the expense of rebuilding or repairing the parish church, and to make a rate or rates for the repayment of the sum so advanced, with interest.—[Having referred to the libel as already set out, the learned Judge continued:]—Such being in substance the libel or the statement on the part of those who are suing for the rate, a responsive plea has been given in by Bastin, the effect of which I have now to consider. It states that, by the law now in force within this realm, the duty of repairing the chancel of the parish church of Harmston aforesaid lies upon the impropriate rector thereof, and that others the inhabitants and occupiers assessed to the relief of the poor of the parish of Harmston are not chargeable with the repairs of the chancel. It states, secondly, that the notice and resolution set out in the libel had reference to certain repairs and alterations intended to be made in and upon the chancel of the said church of the parish of Harmston, as well as to those in the said notice and resolution mentioned, and that the sum of 1,076*l.* 10*s.* in the same resolution mentioned included moneys requisite for the repairs and alterations so intended to be done in and upon the chancel. Thirdly, that the churchwardens and overseers did not expend the sum of 775*l.* in the manner alleged, but, on the contrary, expended some considerable portion thereof in repairs and alterations done in and upon the chancel. Fourthly, that the consent of the Bishop of Lincoln and the advance made by the Commissioners were given and made respectively upon the footing and representation that the said sum of 1,076*l.* 10*s.* was required for the purposes set out in the resolution, and did not include any moneys required for repairs and alterations of the chancel; and, fifthly, that by reason of these premises the rate was null and void.

Now, it is to be observed that the responsive plea does not set up this kind of defence, namely, that the proceedings were irregularly had, or that the requisitions of the act were not duly complied with; and these observations bring me to the consideration of the case which was cited by counsel for the respondent—*White* v. *Steele* (12 Com. B. Rep. N.S. 382; 31 L. J. C.P. 265). In that case it was decided that the plain words of the statute (3 Geo. 4, c. 72) empower the Commissioners to act only in cases where the parish is desirous that they should act. "The desire of the parish," the Court said, "legally

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expressed, appears to us a condition precedent, without which any order on the part of the Commissioners is devoid of legal force. And surely this is a reasonable construction when it is considered that to hold the order of the Commissioners binding, without the desire of the parish, would be to invest them with arbitrary power of inflicting pecuniary burdens and imposing taxes." The marginal note gives a fair statement of the case: "A meeting of vestry was held for the purpose of considering the propriety of purchasing an additional burial-ground for the parish of P. A resolution to that effect having been put and agreed to by a majority of those present, a poll was demanded and refused. The resolution of the vestry was communicated to the Church Building Commissioners, who thereupon authorized the parish to purchase the land, and to levy rates to defray the expense, under 59 Geo. 3, c. 134, s. 25, and 3 Geo. 4, c. 72, s. 26. Money was accordingly borrowed by the churchwardens and a rate made. A parishioner declining to pay the rate, on the ground of invalidity, the churchwardens instituted against him a suit in the Consistory Court, in which suit the respondent tendered a responsive allegation, stating that at the vestry a poll had been duly demanded and refused. The Judge of the Consistory Court having declined to admit this responsive allegation, the respondent appealed to the Court of Arches, by which Court the decision of the Court below was affirmed. Upon application to this Court for a writ of prohibition, on the ground that the Judge of the Consistory Court had improperly refused to receive the responsive allegation, the applicant was directed to declare in prohibition; and he having done so, it was held that there had been no legal expression of the desire of the parish, and consequently that the responsive allegation ought to have been admitted to proof in the Ecclesiastical Court."

Now that case is only distinguished by that circumstance from the case which is now before me. There was no legal resolution of the parish, which is a necessary condition precedent to enable the churchwardens to borrow the money. A poll was demanded and refused. The Court of Common Pleas held that they had a right to examine whether the condition precedent specified in the statute had been complied with or not, which the Ecclesiastical Courts thought they could not examine into; and therefore that the party who set up as a defence for nonpayment of the rate the fact that this condition had not been complied with, had advanced a fair plea which ought to be admitted; consequently, they granted the prohibition. But in this case there is no statement whatever that the proceedings of the vestry had not been perfectly regular. There is no suggestion that a poll was demanded or refused, or that the usual, ordinary and regular proceedings were not had in the case. I therefore dismiss as an authority the case of *White* v. *Steele* (12 Com. B. Rep. N.S. 382; 31 L. J. C.P. 265) as having, properly speaking, no bearing on the present question.

The plea set up in the second paragraph of the allegation is a very singular one, and, so far as I know, unprecedented—that there was an unexpressed intention of making alterations in the chancel as well as in the church. Now, according to the usage and practice of this Court, reformed by recent orders, it is necessary, as in Courts of equity, that the principal facts relied on should be stated, and that rule of the Court is not complied with by the bare statement that something was intended to be done which is not expressed on the face of the resolution. The overt act, from which that intention is inferred, should be stated. If there were a writing to that effect, or a declaration to that effect, it should be properly pleaded. Here it is a statement of an inference rather than a fact, and the Court is asked to infer the intention from the subsequent application of the money borrowed from the Commissioners. Another objection relied on is, that, as a matter of fact, some of the money so advanced by the Commissioners was spent upon the repairs of the chancel; and the plea states also that the bishop would not have given his consent nor the Commissioners have advanced the money if they had known the true facts. But it is not denied that the bishop did consent, and it is not denied that the money was advanced, and no ground whatever is stated in the plea from which I can infer that the

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bishop did not give his consent or the Commissioners advance the money upon the knowledge of the true facts.

Setting aside, however, all technical matters, in reality and substance the plea raises two questions of law: first, whether the words in the statute which relate to the "rebuilding, repairing, enlarging, or otherwise extending the accommodation in any church," include the chancel or not? and secondly, whether, assuming that the statute does not provide for the repair or alteration of the chancel, an improper expenditure of the money properly raised in compliance with the provisions of the act can have a retroactive effect, so as to invalidate the original loan?

Now, with regard to the first question, the words of the statute are these: "From and after the passing of this act, it shall and may be lawful for the churchwardens or chapelwardens and overseers of the poor of any parish in England or Wales, with the consent of the major part of the inhabitants and occupiers assessed to the relief of the poor, in vestry assembled, &c., and with the consent of the bishop of the diocese and the incumbent of such parish, to make application to the Commissioners authorized and empowered to make advances for public works for any loan or advance of such sum or sums as shall be necessary for defraying the expense, or any part of the expense, of rebuilding, repairing, enlarging, or otherwise extending the accommodation in any church or chapel of any such parish." It is quite true that the word "chancel" is not mentioned, and the proposition of law is also correct, that, by the general usage and by the common law, subject to certain exceptions, the burden of repairing the nave of the church is cast upon the parishioners, and of repairing the chancel upon the rector. From these two premises I am asked to draw the conclusion that the rebuilding, repairing, or otherwise extending the accommodation of the church, which included the chancel, would not be one of the objects contemplated by the act; and it is said also that there would be an injustice to hold otherwise, because then the rector may be compelled to discharge a portion of the debt which is thrown exclusively upon the parishioners for the repairs of the church, and, *vice versa*, that the parishioners, who are now exempt from repairing the chancel, may be compelled to do so. Now, I think that no injustice would result from my holding that the word "church" included the "chancel" in this case, having regard to the fact that the previous consent both of the bishop and incumbent is required, as a necessary condition precedent to the expense being incurred. I am not prepared to hold that the term "incumbent" would necessarily include a "lay rector." No authority was cited which would warrant me in arriving at that conclusion; but, as to the word "church" in the statute, I think that the legislature used it in its usual and common sense of including the whole building, and that manifest inconvenience would result from any other construction. It might be almost impossible in many cases to repair the body of the church without at the same time making some alterations in the chancel; and certainly it would be an unseemly thing that the whole of the body of the church should be repaired, enlarged or extended for the accommodation of the parishioners, and the chancel left in a condition utterly at variance with that of the rest of the building. I do not dwell so very much upon the argument in favour of this construction which was urged by counsel by reference to the 3rd section of the statute. I think that that section refers to a separate class of cases altogether, and in some cases this difficulty of the chancel would not arise.

There remains the second question, whether, supposing I am wrong in holding that the legislature intended to include the chancel, and that a portion of the money was improperly applied to the repairs of the chancel, whether such improper expenditure could have a retroactive effect on the original loan, so as to vitiate the rate? I am clearly of opinion that it could not; and I think, therefore, that upon both grounds this responsive plea is inadmissible. The order that I will make is, that the plea be sent back for the purpose of being reformed in respect of those matters which have formed the subject of my judgment; and if the parties desire permission to appeal, I shall of course give it.

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CONSISTORY COURT OF LONDON. March 22, May 7, 1869.

EVANS v. SLACK AND SMITH.

38 L. J. Ecc. 38.

Faculty—Re-seating a Church—Opposition of the Parishioners—No Increased Accommodation offered.

ECCLESIASTICAL LAW.—*The rector of a parish church applied for a faculty to make certain alterations, at his own expense, in the furniture and fittings of the church, which were not in a dilapidated state. The churchwardens, acting on behalf of the parishioners, opposed the grant of the faculty. The applicant having failed to shew either that the existing arrangements in the fittings of the church were so inconvenient and uncomfortable as to deter the parishioners from attending divine service, or that the proposed alterations were so clearly for the increased comfort and advantage of the parishioners as to induce the Court to overrule their opposition, the faculty was refused.*

This was an application by the Rev. Alfred Bowen Evans, clerk, D.D., rector of the parish of St. Mary-le-Strand, in the county of Middlesex, for a faculty authorizing him to remove the whole of the present sittings in the chancel and nave of the church of such parish, also a portion of the flooring in the chancel and at the west end of the church, the communion-table, communion rails and gates, and for other purposes.

The defendants, John William Slack and George Smith, were the churchwardens of the parish.

In the original petition Dr. Evans, as the ground of his application, alleged that the present pews or seats are inconveniently arranged, and that the alterations are required in the church for the comfort and convenience of the inhabitants resorting thereto for the purpose of divine worship, and that by such alterations twenty-eight additional seats would be gained.

In the statement brought in on behalf of the defendants certain proceedings on the part of Dr. Evans in the celebration of divine worship were set out at some length, and the result stated to be that great dissatisfaction had been caused in the parish, and many parishioners had ceased to attend divine service in the church in consequence thereof; that in July, 1868, Dr. Evans had proposed at a vestry then assembled that the parish should consent to an application for a faculty for the re-pewing and other alterations he now applied for, but no person was willing to second the proposition. That, on August 3, 1868, the citation or decree in this suit was served upon the defendants, and at a meeting of the vestry, held on August 14, 1868, the parishioners thereat assembled unanimously authorized the churchwardens to enter an appearance to the citation, and to set forth that the opinion of the inhabitants is adverse to the proposed alterations. The statement further alleged that the pews and seats in the church are made of oak, as good as new, conveniently arranged, handsome in appearance and suitable in character to the architecture of the church; that the thirty-nine pews would each hold seven persons, and in addition there was room for twenty benches, capable of seating three persons each.

In the subsequent pleadings it was admitted on behalf of Dr. Evans that the number of sittings provided for under the amended plan would not be greater than that afforded in the church at present, and it was alleged and proved that, except as to height, the new seats would offer no advantages over the present ones.

Affidavits were filed on both sides. Only one parishioner, Mr. C. K. Watson, secretary to the Society of Antiquaries, supported Dr. Evans's averment that it is impossible to stand, sit or kneel in the present seats with comfort.

Dr. Deane and *Dr. Tristram* appeared for Dr. Evans.—They contended that as it was not intended to put the parish to any expense for the re-pewing the church, the Court, in exercising its discretion, would not be influenced by

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the opposition of the vestry and parishioners, such opposition being induced, not by any real objection to the alterations, but by entirely extraneous circumstances. They referred to *Groves* v. *the Rector, Parishioners and Inhabitants of Hornsey* (1 Cons. Rep. 189).

A. J. Stephens and Dr. Middleton, for the churchwardens.—The Court has no right to remove the fittings of the church, which are the property of the parishioners, without their consent and against their wishes, unless indeed they are in a dilapidated state or unsuited for the purposes for which they are intended. Such is not the case in this church. Moreover, if the Court sanctions these alterations the accommodation for the parishioners will be diminished, whilst opportunity will be given for objectionable ceremonies. They referred to *Jackson* v. *Singer* (37 L. J. Ecc. 9).

Cur. adv. vult.

Sir Travers Twiss (May 7).—This is an application on behalf of the Rev. Alfred Bowen Evans, rector of the parish church of St. Mary-le-Strand, for a faculty to authorize him to remove the whole of the furniture and fittings of the interior of the said parish church, including the chancel thereof, to raise the floor of the said chancel and re-pave the same together with the floor of the nave of the church, and to refit the nave and chancel with furniture of an altered character, the whole of the expense of the same to be defrayed by the said rector. Upon the application being lodged in the registry a citation was issued in due course, calling upon all persons to shew cause against the grant, and an appearance was given on behalf of the churchwardens of the parish, who prayed to be heard upon their petition against the grant of the faculty, and who gave in their act on petition.—[After stating the character of the pleadings the learned Judge continued]—The counsel who have appeared in support of the application of the rector have contended that the question for the Court to consider and determine in this case is, whether it would be for the benefit and advantage of the parishioners that the proposed alterations should be made, and that the Court ought to grant the faculty if it be in its judgment desirable, notwithstanding the whole parish should object to it; and in support of this position the Court has been referred to the case of *Groves* v. *the Rector, Parishioners and Inhabitants of Hornsey* (1 Cons. Rep. 189) in which Lord Stowell observed, "That the Court is not bound by the mere circumstance of a majority, for it may refuse the whole parish joined together, or may grant, if it appear necessary, a prayer on the application of one against all the rest." There can be no doubt that the Court has an absolute discretion in regard to such a faculty as was applied for in the case cited, namely, a faculty to erect a gallery in a parish church upon the application of the churchwardens. But even in such a case, Lord Stowell observed, that, although the Court is not "bound by the wish of the majority, it will pay great attention to it." The Court has also been referred to the case of *Butt* v. *Jones* (2 Hag. Ecc. 424). That was a case of appeal against the grant of a faculty by the Consistory Court of Gloucester for erecting and appropriating a pew to a messuage, and the faculty was revoked by the Court of Appeal. Sir John Nicholl, in the course of his judgment, observed that "faculties are to be granted at the discretion of the Ordinary, but it must be a sound discretion, having a due regard to times and circumstances and to the rights and interests of all parties concerned; if an unsound discretion be exercised, the party may appeal to a superior tribunal."

Neither of these cases is precisely in point, inasmuch as the present application is for a faculty to remove and alter the communion-table, the communion rails, the pulpit, the font, and the whole of the sittings in the nave of the church as well as in the chancel, none of which are stated to be in a dilapidated state, and the whole of which have been provided at the expense of the parishioners, being such furniture and fittings as they are bound by law to provide. It is not an application to add anything which may be for the greater convenience of divine service, but which the parishioners are not bound to provide, such as an organ, or which may be for the additional accommodation

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of the parishioners, as in the case of a gallery, inasmuch as the evidence fails altogether to make out the case set up by the rector in his original application, that by the proposed alterations additional sittings will be gained. It is an application, in fact, on the part of the rector to be allowed to make these alterations at his own expense, with a view to increase the comfort and convenience of the parishioners generally, and especially of the poorer inhabitants of the parish, who are deterred, as he alleges, from attending divine service by reason of the present insufficient accommodation.

The Court has therefore to consider, in the first place, whether the rector has established his position, that the present sittings are very inconvenient and ill adapted for public worship, and that the parishioners are deterred thereby from attending divine service, and that the proposed refitting of the church, if carried out, will not merely conduce to the comfort and convenience of the parishioners generally, but will be a great inducement to the poorer inhabitants of the parish, who have hitherto absented themselves from divine service, to attend the same.

Now, it has been observed by Lord Stowell, in the *Hornsey case* (1 Cons. Rep. 189), that "the parishioners in the first instance are the best judges of an inconvenience, and of a remedy for that inconvenience," and the Court in this instance would reasonably expect that the rector's statements would be supported by a considerable body of parishioners, who are sensible of the great inconvenience of the present arrangements of the church. But the rector's evidence on this part of the case is confined to three affidavits, two of which are from non-parishioners, who state that they have been regular attendants at his church for many years, and that the sittings are most inconvenient and uncomfortable; but neither of these witnesses deposes that any of the inhabitants of the parish are deterred from attending divine service by reason of the uncomfortable character of the accommodation.

The third witness on behalf of the rector is a resident in the parish, and he states that he has been a regular attendant at the parish church throughout Dr. Evans's incumbency, and his affidavit is to the effect that the sittings now in use in the church are as incommodious as they are unsightly. "I do not know," he says, "of any position of the human body available during divine service, in which they are not in the highest degree irksome." He further states, that "the pulpit is so high that in many parts of the church it is difficult to hear even a preacher as distinct as Dr. Evans. The pulpit cannot be lowered without diminishing the now excessive height of the pews." This witness does not say that any of the parishioners are deterred from attending divine service by the excessive discomfort of the accommodation.

Now, it lies upon the rector to establish the affirmative of his position, that the inhabitants of the parish are deterred by the uncomfortable character of the sittings from attending divine service, and I am bound to say that the affidavits brought in by the rector give no support to this averment. On the other hand, it appears from the affidavits of the churchwardens that they took measures to bring to the attention of the parishioners generally the substance of the allegation of the rector, by directing the beadle to deliver at every house printed questions as to whether the arrangement of the present sittings deterred any of the parishioners from attending divine service in their parish church, and whether they had absented themselves from the church by reason of the insufficiency of comfort in the sittings; and the churchwardens swear that such of the papers as were returned, amounting in all to 122, were all signed in the negative. They have further brought in affidavits from fifty-five parishioners stating that "they have not been deterred from attending divine service by the arrangement of the sittings, nor have they absented themselves from the church by reason of the insufficiency of comfort in the sittings." They have also brought in two affidavits from two resident parishioners, one of whom, Mr. James Tennant, states that he has been an inhabitant ratepayer of the parish for twenty-eight years, and that until the last five years he was a regular attendant at divine service in his parish church. He swears that the pews and seats are not

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inconveniently arranged, and that he has ceased to attend at the said church, and has been obliged to resort elsewhere, by reason of the rector insisting on having two candles on the communion-table lighted during communion service. He also swears that several of the parishioners who had attended divine service at the parish church for many years have ceased to attend for the same reason. The second affidavit is from Mr. Matthew Percival Paris, who is also a resident parishioner, and who states that he has been a regular attendant at the church for twenty-three years, and that latterly he has abstained from attending as heretofore in the parish church for the same reasons as those alleged by Mr. Tennant, and he confirms that witness in his statement, that several of the parishioners have also discontinued attending their church on account of the practice of the rector in lighting candles on the communion-table. This witness also swears that he does not consider the pews or seats in the said church to be inconveniently arranged, and that during the whole period of the deponent's attendance at the said church the accommodation in the seats and pews as arranged was always sufficient for the average number of the parishioners who attended divine service. The result of this evidence is to satisfy the Court that the present sittings, although they may not be comfortable to all, and may be actually uncomfortable to some of the persons who are in the habit of attending divine service in the church of St. Mary-le-Strand, have not by their positive discomfort deterred any of the parishioners from attending divine service, and that the rector has failed altogether in sustaining the burden of proof which the law imposes upon him on this part of his case.

It remains for me to consider whether the proposed alterations are so clearly to the increased comfort and advantage of the parishioners that I ought to overrule the opposition to this faculty, which the vestry has instructed the churchwardens to sustain. Now, both the witnesses on the part of the rector, who are non-parishioners, affirm their belief that the proposed alterations will greatly conduce to the comfort of the congregation; and Mr. Watson, the third witness, who is an inhabitant parishioner, says that he cannot understand "on what grounds any plea can be advanced for keeping up the present sittings by parties who have not got to pay for pulling them down." On the other hand, the churchwardens have produced evidence to shew that, looking to the measurements of the old and new sittings, the new sittings will not afford more space, either as regards the distance from style to style, or the sitting room allowed for each member of the congregation, assuming the number of persons to be accommodated under the present and proposed arrangement of the sittings to be the same, than the present sittings do; and further, that the substitution of the seats as proposed by the rector in lieu of the present seats will render the occupants thereof more exposed to cold draughts, the church being very draughty by means of its isolated position, and that in fact in former years it was found necessary to erect a screen to certain pews then existing in the said church as a defence from the draught. Upon such evidence as this the Court cannot arrive at the conclusion that it is its duty to overrule the opposition of the vestry on the ground of the proposed alterations being clearly for the increased comfort and advantage of the parishioners. If, indeed, the present sittings had been in a dilapidated state, the argument addressed to the Court by the leading counsel for the rector would have been entitled to great weight, namely, that as the law would no longer enable vestries to levy compulsory church-rates for the repairs of the parish churches, the Court should listen with greater readiness than heretofore to any proposals on the part of an individual to make improvements in the architecture and fittings at his private expense, and should not require the consent of the parishioners as strictly as when the funds to make and to maintain such improvements were to be furnished by the parishioners themselves. But in the present case it is not shewn by the rector that the fittings of the church are dilapidated. On the contrary, an affidavit has been produced by the churchwardens from Mr. George Frederick Fry, an architect and surveyor, who says that the pews are in good repair, that they are conveniently arranged, handsome in appearance and suitable in character to the

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architecture of the church, and that the space to each of the congregation, at present, is amply sufficient for the comfort and convenience of each person in the position of standing, sitting or kneeling. I must, therefore, reject the application of the rector in this case, and decline to grant the faculty as prayed for.

IN THE COURT OF ARCHES. April 23, 30, 1869.

The Office of the Judge promoted by SHEPPARD, *v.* BENNETT.

38 L. J. Ecc. 42; L. R. 2 A. & E. 335; 20 L. T. 623: reversed, [1869] E. R. A. 971; 38 L. J. Ecc. 49; L. R. 2 P.C. 450; 20 L. T. 762; 17 W. R. 897 (P.C.).

Office of the Judge promoted in a Case of Heresy—Case sent in first instance by Letters of Request to Court of Arches without reason assigned—Discretion— 3 *&* 4 *Vict. c.* 86. *ss.* 11, 13.

ECCLESIASTICAL LAW.—*The Rev. William James Early Bennett, a clerk in holy orders, vicar of Frome Selwood, in the diocese of Bath and Wells, published, in the diocese of London, a work containing alleged heretical doctrines. The Bishop of London issued a commission to certain persons to inquire into the grounds of the charge. The Commissioners reported that there was a case for further inquiry, and the report and the evidence upon which it was founded were afterwards filed in the registry of the diocese of Bath and Wells. The Bishop of Bath and Wells thereupon sent the case by letters of request to the Court of Arches, as the Court of appeal of the province, to be there heard and determined, but assigned no reason for so doing.*

The Court held that the discretion which it enjoyed previously to the passing of the Clergy Discipline Act of accepting or refusing letters of request was not affected by that act; that the case was one which the Ordinary might properly entertain; and declined to accept the letters until some reason was stated why it should do so.

This was an application to the Court of Arches to accept letters of request from the Bishop of Bath and Wells, under the provisions of the 13th section of the 3 & 4 Vict. c. 86, under these circumstances:

The Rev. William James Early Bennett, a clerk in holy orders, whose preferment was situated in the diocese of Bath and Wells, had published certain works within the diocese of London which were alleged to contain heretical doctrines. The then Bishop of London issued a commission to certain persons, to inquire into the grounds of the charge, and to report to him whether or no there was a case for further inquiry. The Commissioners reported that there was a case for further inquiry. The report and the evidence upon which it was founded were filed in the registry of the diocese of Bath and Wells, according to the requirements of the statute; but the Bishop of Bath and Wells, instead of hearing the matter himself in the first instance, now sent it by letters of request to the Court of Arches.

The letters of request were as follow: "Whereas we lately received from the Right Hon. and Right Rev. Father in God Archibald Campbell, then by divine permission Lord Bishop of London, but now by divine permission Lord Archbishop of Canterbury, &c., a copy of the report of the worshipful Sir Travers Twiss, Knight, D.C.L., the Chancellor of the diocese of London, the Ven. William Hale Hale, clerk, M.A., Archdeacon of London, the Ven. John Sinclair, clerk, M.A., Archdeacon of Middlesex, the Rev. John Edward Kemp, clerk, M.A., rural dean and rector of St. James's, Piccadilly, in the county of Middlesex and diocese of London, and the Rev. Frederick George Blomfield, clerk, M.A., rector of St. Andrew Undershaft, in the city and diocese of London, the Commissioners appointed in and by a certain commission under the hand and episcopal seal of the said then Lord Bishop of London, bearing date

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October 6, 1868, which said commission was issued by the said then Lord Bishop of London, by virtue of and in accordance with the provisions of an Act of Parliament made and passed in the session of Parliament holden in the third and fourth years of the reign of her present Majesty Queen Victoria, intituled, &c., and which said commission did enjoin, authorize and empower the said Commissioners, or any three of them, to make inquiry as to the grounds of a certain charge made by Thomas Byard Sheppard, of the parish of Frome Selwood, in the county of Somerset and our diocese of Bath and Wells, gentleman, a member of the United Church of England and Ireland, residing in the said parish, against the Rev. William James Early Bennett, a clerk in holy orders of the said United Church of England and Ireland, vicar of the said parish of Frome Selwood, the said charge being that he, the said William J. E. Bennett, had within the diocese of London committed an offence against the laws ecclesiastical of the realm, by having caused to be printed and published within the said diocese certain works in which he advisedly maintains or affirms doctrines directly contrary or repugnant to the articles and formularies of the United Church of England and Ireland, the said works being entitled respectively 'Some Results of the Tractarian Movement of 1835,' forming one of the essays contained in a volume entitled 'The Church and the World,' edited by the Rev. Orby Shipley, clerk, printed and published in London in 1867; 'A Plea for Toleration in the Church of England, in a letter to the Rev. E. B. Pusey, D.D., Regius Professor of Hebrew and Canon of Christ Church, Oxford,' second edition, printed and published in London in the year 1867; and the same book, third edition, printed and published in London in the year 1868, and containing the following, among other statements, in respect of which the said charge has been made, that is to say—[the extracts from the books were set out in detail.] And whereas it appears from the same report that the said Commissioners did assemble by virtue of the said commission in London House, St. James's Square, in the parish of St. James, Westminster, in the diocese of London, on Thursday, November 5, 1868, for the purpose of executing the said commission; that all the proceedings before the said Commissioners were public; that the said Commissioners did examine witnesses on oath in reference to the said charge, and did hear counsel on both sides (the said witnesses or some of them being cross-examined by counsel, alleging that he appeared on behalf of the said W. J. E. Bennett); that the said Commissioners did then adjourn to deliberate upon the case brought before them; that after due consideration the said Commissioners having returned into the room where the said inquiry was so publicly held as aforesaid, the said worshipful Chancellor of the diocese of London did, on behalf of the Commissioners, openly and publicly declare the opinion of the Commissioners in the following terms: "The Commissioners have very carefully considered the questions submitted to them under the commission, and hereby openly and publicly declare their unanimous opinion that there is a sufficient *primâ facie* ground for instituting further proceedings." And whereas the said Commissioners transmitted to the then Lord Bishop of London, under their hands and seals, the depositions of the said witnesses taken before them, together with the works put in evidence, and also a report of the unanimous opinion of the said Commissioners present at the said inquiry, that there was sufficient *primâ facie* ground for instituting further proceedings against the said William James Early Bennett for having within two years last past been guilty of offending against the laws ecclesiastical, as charged by the said Thomas Byard Sheppard. And whereas such report, together with the said depositions of the said witnesses and the works put in evidence, have been filed in the registry of the diocese of London. And whereas, together with the copy of such report transmitted to us by the said then Lord Bishop of London, there has been also transmitted a copy of the said depositions, in accordance with the provisions of the Act of Parliament, intituled 'An Act for the better enforcing Church Discipline.' And whereas no articles have been as yet filed in the registry of our diocese of Bath and Wells, either by us or by the said Thomas Byard Sheppard, against the said William James Early Bennett, in respect of the

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charge inquired into before the said Commissioners. And whereas we, acting under the provisions of the said act of parliament, have thought fit to send the case by letters of request to the Court of appeal of the Province: therefore we, Robert John Baron Auckland, by divine permission Lord Bishop of Bath and Wells, do request you, the Right. Hon. Sir Robert Joseph Phillimore, &c., to issue a citation or decree under seal of the said Court, citing the said W. J. E. Bennett to appear at a certain time and place therein to be specified and answer to certain articles, heads, positions or interrogatories touching and concerning his soul's health, and the lawful correction and reformation of his manners and excesses, and more especially for having offended against the laws ecclesiastical by having within two years last past caused to be printed and published within the said diocese of London certain works in which he advisedly maintains or affirms doctrines directly contrary or repugnant to the Articles and formularies of the United Church of England and Ireland, the said works being entitled respectively, &c., ... the said Articles to be administered to him, the said William James Early Bennett, at the voluntary promotion of the said Thomas Byard Sheppard, and finally to hear and determine the said cause according to the law and practice of the Court. Dated April 9, 1869."

On April 23—

A. J. Stephens (with him *Dr. Tristram*) moved the Court to accept the letters of request, in order that the charges made against the respondent might be heard and determined.

[SIR R. J. PHILLIMORE.—No reason is set forth in the letters of request why I should accept them, or why the case has been sent to the Superior Court in the first instance.]

It is not necessary to allege any reason. The Court has no discretion in the matter, but is bound to accept the letters. He referred to section 13. of the 3 & 4 Vict. c. 86, and *Butler* v. *Dolben* (2 Lee, 317).

Cur adv. vult

The following judgment was given on April 30:

SIR R. J. PHILLIMORE.—In this case an application has been made to the Court to accept letters of request from the Bishop of Bath and Wells, under the provisions of the 13th section of 3 & 4 Vict. c. 86, an Act for the Discipline of the Clergy.

It appears from the recital in these letters that the Rev. William James Early Bennett, a clerk in holy orders, vicar of Frome Selwood, has been charged with committing an offence against the laws ecclesiastical by the publication of a work containing heretical doctrines in the diocese of London. The preferment of the accused clerk was situated in the diocese of Bath and Wells; the alleged offence was committed in the diocese of London: therefore, if the accused clerk was to be criminally proceeded against in the Ecclesiastical Court the provisions of the statute to which I have referred rendered it necessary that these proceedings should be taken, in the first instance, under the authority of the bishop in whose diocese the alleged offence had been committed. The late Bishop of London issued a commission to certain persons to inquire into the grounds of the charge, and to report to him whether or no there was a case for further inquiry. They reported that there was a case for further inquiry. That report, and the evidence upon which it was founded, were afterwards filed in the registry of the diocese of Bath and Wells, according to the requirements of the statute; and it became necessary that any further proceedings in the matter should be carried on under the authority of that ordinary. The statute provides (section 11) that, after the report of the Commissioners, "The bishop shall proceed to hear the cause, with the assistance of three assessors. . . . And upon the hearing of such cause the bishop shall determine the same, and pronounce sentence thereupon according to the ecclesiastical law." The statute further provides (section 13) "That it shall be lawful for the bishop, ... if he shall think fit, either in the first instance or after the Commissioners shall have reported that there is sufficient *primâ facie* ground for instituting proceedings,

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and before the filing of the articles, but not afterwards, to send the case by letters of request to the Court of appeal of the province to be there heard and determined according to the law and practice of such Court." The Bishop of Bath and Wells has availed himself of this latter alternative, and has sent this case, by letters of request, to the Court of Arches.

It is to be here observed that the statute does not empower the bishop to send the case *simpliciter* to the Court of appeal, but to send it by letters of request to that Court. If these letters are accepted by me, and the request of the inferior Court complied with, a decree, which is equivalent to a citation, will issue from this Court, the accused clerk will be cited, and the trial will take place, in the first instance, before this Court. It has been argued that these letters of request are, in truth, letters of command, and that I have no option but to accept them. This argument is maintained both by reference to the express words of the statute of the Queen, and to the law and practice with respect to letters of request previously to the passing of that statute.

I am about to pronounce my opinion upon the soundness of this argument, and in order to make the conclusion at which I have arrived fully intelligible it will be necessary to state at some length the premises upon which it is founded. First of all, however, it may be well to consider the necessary consequences which flow from the position of law. It is the plain duty of every bishop, having regard both to the nature of his office and the obligations which at the time of his consecration he takes upon himself, to maintain, within his diocese, ecclesiastical discipline, and especially as to matters of heresy, such as are the subject of the present charge. But if the argument which has been addressed to me be sound, every bishop in the province of Canterbury may devolve at his own will and pleasure upon the Court of the archbishop the execution of the most arduous part of his duty as diocesan. It is not necessary that he should state any reason for so doing. The natural order of things is reversed, and the inferior sends a mandate to the superior Judge, which, without inquiry, he must obey. It is not too much to say that such an exposition of the law requires to be very clearly demonstrated before it can be accepted. Inasmuch as letters of request are the technical description of a proceeding appertaining to ecclesiastical law—words of art, so to speak, derived from that system of jurisprudence—the examination of the question naturally falls under the two following divisions: 1, the law which prevailed before the statute 3 & 4 Vict. c. 86; 2, the law introduced by that statute. Upon the first division of the subject the following observations have occurred to me. It is hardly necessary to state that the proposition that a bishop can order his metropolitan or archbishop to do a particular act—such as to entertain a suit—is not to be found in the general ecclesiastical law. That law, as well as the common law of England, has indeed been careful to protect the bishop from any undue assumption of jurisdiction by the archbishop over him; but I am not aware of any instance in which the law has thought it necessary to protect the archbishop from the usurpation of his suffragan.

"Letters of request"—"*literæ requisitoriales*," as they are called in *Oughton*—are a form of procedure peculiar to the canon law, and certainly do not, in their natural construction, imply a command. A very learned Judge, however—Sir George Lee, in the case of *Butler* v. *Dolben* (2 Lee, 317)—is reported to have said, "As to the discretion of this Court, whether it shall accept or refuse letters of request when granted by a proper Judge, the delegates held in the case of *Pelling* v. *Whiston* (1 Comyns, 190), that the Dean of the Arches was bound to receive them *ex debito justitiæ*, but it was not in the discretion of the inferior Judge whether he would grant them." As this is, I believe, the only authority which can be cited in support of the position that the acceptance of letters of request is obligatory on the superior Court, I have thought it right to examine very carefully the circumstances of this case: they are very remarkable. The case of *Pelling* v. *Whiston* (1 Comyns, 190), which was argued in the year 1712-1713, happened at a time of great political excitement, in which the Church was largely concerned, and which was not without

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its influence on the proceedings in that case. I remember that Lord Stowell said, as to a case decided in 1719, in which religious and political feelings were much mixed up, "I shall pass over a case which has been cited from the *State Trials*, as it was one of party heat that took place in times of party ferment, and is of smaller authority on that account"—*Hutchins* v. *Denziloe* (Cons. Rep. 174). The history of the proceedings of this extraordinary case is to be found partly in *Burnet's History of his own Times*, vol. 6, partly in an account Whiston published of his own case in 1715, and partly in the note of Chief Baron Comyns (who was one of the counsel in the cause) of the proceedings before the delegates —*Comyns's Rep.* p. 199. As the delegates never gave reasons for their judgment, but little information is to be extracted from the record of their proceedings Towards the close of the year 1710, Convocation had been summoned by the Queen for the transaction of business, mainly, if not exclusively, that it might pass a synodical judgment upon the writings of Whiston. Great doubt arose as to whether it was competent to that body to censure heretical doctrines and their maintainers. The opinion of the twelve Judges and of the law officers of the Crown was, in compliance with an address of Convocation, taken by the Crown in 1711. Convocation was authorized to pass a sentence upon his works, which they condemned, but from various reasons the condemnation seems to have had no practical result; and in 1712 a Dr. Pelling, as a voluntary promoter of the office of the Judge, filed articles of heresy against Whiston, who dwelt within the exempt and peculiar jurisdiction of the Dean and Chapter of St. Paul's. The Commissary of that Court, Dr. Harwood, sent the case by letters of request to the Court of Arches: the Judge of the Court of Arches, Dr. Bettesworth, alleging that there was "No suggestion of any reason why the cause should not be brought before the proper Ordinary," in February, 1712, Dr. Harwood sent new letters of request, alleging as grounds that, as Commissary, he had not authority to inflict a proper punishment for heresy, as he had no commission from a bishop; or, according to the minutes of the Delegates' Process Book, "On account of gravity of matter and doubt whether Commissary could inflict proper punishment, he humbly repeats his request." While the Court of Arches was considering the application of Dr. Harwood, it seems that Dr. Pelling prayed an original citation, not by letters of request, but under the statute of 23 Hen. 8, c. 9, to which I shall presently advert.

On Febuary 16, Dr. Pelling renewed his application; on February 25, the Judge of the Court of Arches, according to the report in *Comyns*, p. 200, decreed "that letters of request from Dr. Harwood lie not before him, because in a case of heresy the bishop of the diocese hath jurisdiction in places otherwise exempt within his diocese, and notwithstanding the Statute of Citation an heretick may be cited to appear before him upon letters of request from the Judge of the Peculiar, or by process *sub mutuo*, &c., and therefore he cannot decree a citation," &c. On March 2, Pelling appealed to the delegates, to which appeal Whiston was no party; but the Judge of the Arches seems to have been heard by counsel, who argued, according to the report, as follows: "That a superior Judge is not obliged to accept letters of request, for no law saith that he is so obliged, and it would be inconvenient, since the fees would all belong to the inferior Judge, and unreasonable, since the superior Judge cannot oblige the inferior Judge to grant such letters of request, and therefore ought not to be obliged to accept them; secondly, the inferior Judge in this case had no jurisdiction, for he cannot excommunicate, degrade or deprive. Statute 2 Hen. 4, c. 15, speaks of the bishop of the diocese, and so does 10 Hen. 7, c. 17; thirdly, the bishop of the diocese hath jurisdiction in cases of heresy in places exempt: fourthly, there was no cause depending before Dr. Harwood, and the Arches have jurisdiction only in case of appeals by patent." To this argument it was replied that the bishop was by express words of the 23 Hen. 8, c. 9 (the Bill of Citations) restrained from citing any person dwelling in a Peculiar before him, and that this case was not within the exceptions mentioned in the statute; that there was no appeal from the Commissary of St. Paul's to the Bishop, and, on the other hand, it was provided, by section 4 of the statute, "that it shall

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be lawful to every archbishop of this realm to cite any person inhabiting in any bishop's diocese within his province for causes of heresy, if the bishop or other ordinary immediate thereunto consent, or do not his duty in punishment of the same," and that, on the whole, the Judge of the Arches by refusing a citation, not letters of request, denied justice.

The delegates reversed the sentence of the Arches, but upon what grounds does not appear: whether because he ought to have issued an original citation under the 4th section of the Act, or because sufficient grounds were laid by the second letters of request for his acceptance of them (in the present case before me it will be remembered that no grounds are laid), and he had exercised his discretion improperly in not accepting them, or whether he was bound, without any grounds assigned, to have accepted them, though the latter suggestion, for a reason which I will presently state, seems to have been very improbable. Whiston always protested against the jurisdiction of the delegates, upon the ground that he was no party to the appeal, and that they were acting as a Court of original jurisdiction, which they had no power to do; and certainly they were acting in a most unusual manner in this respect. It appears that the delegates did not agree amongst themselves; there was a commission of adjuncts; they arrived at no conclusion; and it is believed that the whole affair was put an end to on the accession of George the First by a general act of amnesty, which included heresy. I have considered this case at so much length because it is the only one upon which Sir G. Lee founds his dictum in *Butler* v. *Dolben* (2 Lee, 317). *Whiston's case* (1 Comyns, 190) was in 1712 and *Butler* v. *Dolben* (2 Lee, 317) in 1756. Dr. Hay, the most eminent civilian of his day, argued in the latter case that the statute 23 Hen. 8, " authorizes the Court to judge of the reasons on which letters of request are granted. This is a new case, arising upon the late Statute of Marriage; the doubtfulness of the jurisdiction is good ground for receiving letters of request." And what is more remarkable, Dr. Bettesworth the younger, the son, I believe, of the Judge of the Arches, before whom *Whiston's case* (1 Comyns, 190), came, must have been familiar with it, but he argued that " the granting and receiving letters of request are discretionary." The reference of Sir George Lee to the supposed dictum of the delagates in *Whiston's case* (1 Comyns, 190) could not have been founded, as the dates shew, on personal knowledge. No note or report of any such dictum is to be found. The dictum, moreover, was unnecessary for the decision in *Whiston's case* (1 Comyns, 190), and was not necessary for the decision in *Butler* v. *Dolben* (2 Lee, 317) at which Sir G. Lee arrived, which was that the Arches Court had power of accepting letters of request in a matrimonial suit, and that where it was doubtful in which of two jurisdictions the party had his domicil, the Arches Court might accept joint letters of request. And this seems to have been considered by Sir Herbert Jenner, in the case of *Stewart* v. *Bateman* (3 Curt. 205), decided in 1842, as the only point which was decided by Sir George Lee. The statute of 23 Hen. 8, c. 9, s. 3, enacts that " the bishop may make request or instance to the archbishop, bishop or other superior ordinary or Judge, to take, treat, examine or determine the matter before him or his substitutes, and that to be done in cases only where the law civil or canon doth affirm execution of such request or instance of jurisdiction to be lawful or tolerable."

This very enactment surely implies a power in the Court of Arches to examine whether the law, civil or canon, does affirm the execution of such request to be lawful. Such, moreover, has been the invariable practice up to the time of passing the 3 & 4 Vict. c. 86, to assign grounds why the letters of request should be accepted. This practice was deemed proper and reasonable by the Courts in Westminster Hall; for in the case of *Jones* v. *Jones* (Hob. 185; 2 Brown. 27), it having been maintained by the civilians that it was absolutely in the power of the Ordinary to send any cause to the archbishop at his will without assigning any special reason, for which they cited the authority of divers canonists, Hobart (and as it seems the Court) said, " That to expound the statute thus, viz., that the Ordinary may at his will and pleasure send the subject from one end of the kingdom to another without cause, was both against

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the letter of the statute and did utterly elude it; that the purpose of the law was to provide for the ease of the subject more than for the jurisdiction of the Ordinary, which appears in that there is action given to the subject and penalty to the king for the vexation, but none to the Ordinary; and that this very clause says it is to be done in cases only, &c., which would be a vain restriction, if it left it as general as before, *i.e.*, if it were lawful or tolerable in all cases without cause."

My predecessor in this chair, Sir H. J. Fust, in 1842 decided, in a very elaborate judgment—*Stewart* v. *Bateman* (3 Curt. 205)—to refuse letters of request presented to him jointly by the Archdeacon and the Chancellor of Norwich, observing, indeed, "My object is not to withhold the jurisdiction of this Court, but to guard against any question arising in respect to the proper form of exercising it." The decision of Sir George Lee was much referred to by the counsel and by the Judge, but I do not find it to have been suggested by either that the acceptance of letters of request was compulsory on the Court of Arches. I do not mean to assert that the Court of Arches exercises a discretion from which there is no appeal as to accepting or refusing letters of request. There are various instances, such as that of granting or refusing a faculty, in which the Court exercises its discretion, but the exercise of such discretion may be controlled and modified on an appeal to the superior Court. So far, therefore, as the law and practice previously to the passing of the present Clergy Discipline Act are concerned, I think the Court of Arches had a right to refuse letters of request until proper grounds were assigned why they should be accepted. Secondly, I have to consider whether the enactments in 3 & 4 Vict. c. 86, have taken away such a discretion as previously existed. Now it is, in the first place, remarkable that this statute has given the bishop greater personal power than he ever previously possessed, and greater assistance in the exercise of that power. He may hear a cause of this kind, sitting in person with the aid of assessors, which he could not do previously to the passing of this statute; he may also send the case by letters of request to the Court of the province; but the statute does not enact that the Court of the province must accept them when sent, or that it may not require reasons why it should accept them.

Moreover, it has been ruled, in the case of *Regina* v. *the Bishop of Chichester* (2 El. & El. 209; 29 L. J. Q.B. 23), by the authority of Mr. Justice Wightman, Lord Campbell and Lord Chief Justice Erle,—for Mr. Justice Wightman expressly stated, in his judgment, that the two latter Judges concurred with him in opinion—that the bishop had such a discretion, while the remaining Judge (Mr. Justice Hill) agreed that the bishop had such a discretion in the particular case which was before the Court. And, in the case of *Sherwood* v. *Ray* (1 Moore, 397), the Judicial Committee of the Privy Council,—a member of which was Sir John Nicholl, the most experienced of all ecclesiastical Judges,—laid down the law as follows: "And it is to be recollected that this may be the only form in which any individual can question the marriage as a matter of right; for to promote the office of the Judge in a criminal suit requires the authority and consent of the Court, and, though this is obtained without difficulty in ordinary practice, it cannot be demanded *ex debito justitiæ*."

I have referred to the clause in the statute enabling the bishop to send the case without inquiry in the first instance by letters of request to the Court of appeal; surely, it would be a strange thing if a discretion as to allowing a suit to be instituted were vested in the bishop and denied to the archbishop represented by this Court. If any good grounds were stated, or if it appeared from the nature of the case that the interests of justice would be promoted by my acceptance of these letters of request, I should certainly exercise my discretion in favour of accepting them. I have done so in cases where clerks have been charged with immorality, because there was a manifest advantage both to the parties and the Church that a Court of law, accustomed to the oral examination of witnesses and to the investigation of evidence, and aided by the assistance of able counsel, should deal in the first instance with such cases.

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But the present letters of request are tendered to me in a matter of alleged heresy connected with some of the most awful mysteries of our religion. Surely such is a case, on which, above all others, the bishop ought to exercise his jurisdiction. No reason whatever is stated to me why he should not do so. Courts of appeal are in the habit of saying that they will not entertain grave questions in the first instance, because they have a right to the advantage of the judgment of the inferior Court. This doctrine has been frequently maintained by the Judicial Committee of the Privy Council, when attempts have been made to induce them to retain causes appealed to them upon some incidental point. Why should the Court of appeal of the province be deprived of this advantage in a matter which, I must repeat, is of all others fittest for the cognizance and decision of the bishop of the diocese?

I must decline to accept these letters of request until some reason, at least, is stated why I should do so.

IN THE PRIVY COUNCIL. June 19, 30, 1869.

LORD HATHERLEY, L.C., DR. THOMSON (ARCHBISHOP OF YORK), DR. JACKSON (BISHOP OF LONDON), SIR WILLIAM ERLE and SIR JOSEPH NAPIER.

THOMAS BYARD SHEPPARD, *appellant;* THE OFFICIAL PRINCIPAL OF THE ARCHES COURT OF CANTERBURY AND THE REV. W. J. E. BENNETT, *respondents.*

38 L. J. Ecc. 49; L. R. 2 P.C. 450; 20 L. T. 762; 17 W. R. 897: reversing, [1869] E. R. A. 964; 38 L. J. Ecc. 42; L. R. 2 A. & E. 335; 20 L. T. 623 (Arches).

Church Discipline Act (3 & 4 *Vict. c.* 86. *s.* 13.)—*Official Principal of the Arches Court; Power and Duty of—Letters of Request.*

ECCLESIASTICAL LAW.—*The Church Discipline Act* (3 & 4 *Vict. c.* 86. *s.* 13.) *enacts, "that it shall be lawful for the bishop of any diocese within which such clerk in orders shall hold any preferment," &c., in any case, "if he shall think fit," either in the first instance or after the Commissioners shall have reported that there was sufficient primâ facie ground for instituting proceedings, and before the filing of the articles, but not afterwards, to send the case by letters of request to the Court of appeal of the province, "to be there heard and determined according to the law and practice of such Court."*

In a proceeding against a clerk in orders for publishing certain heretical doctrine, a Commission issued and reported that there was sufficient primâ facie ground for instituting proceedings; the case was then sent by letters of request under the above section to the Official Principal of the Arches Court, who refused to hear the case on the ground that no reason was assigned for proceeding in the superior Court in the first instance:—Held, *that the Official Principal cannot refuse to deal with a case which has been sent to him by letters of request under the 13th section. That the words of the enactment, "to be there heard and determined according to the law and practice of such Court," are to be construed to secure the duty as well as the power of so hearing and determining the cases sent, and render it imperative upon the Arches Court "to hear and determine" the matter.*

Letters of request are no more than the process by which the cause is to be placed in a condition to be heard and determined by the superior Court.

This was an appeal from a decree of the Official Principal of the Arches Court of Canterbury.

By this decree the Official Principal declined to accept letters of request under the hand and seal of the Right Reverend Robert John, Lord Bishop of Bath and Wells, by which letters of request the Bishop did, by virtue of "An Act for better enforcing Church Discipline," request the Official Principal to

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issue a citation under the seal of the Arches Court, citing the respondent the Rev. William James Early Bennett, a clerk in holy orders of the United Church of England and Ireland, vicar of the parish of Frome Selwood, in the county of Somerset, diocese of Bath and Wells, and province of Canterbury, to appear at a certain time and place to be in the said citation specified, and answer certain articles for having offended against the laws ecclesiastical of the realm, by having caused to be printed and published within the diocese of London certain works, in which he advisedly maintained or affirmed doctrine directly contrary to the Articles and formularies of the United Church of England and Ireland. The said articles to be administered to the said William James Early Bennett, at the voluntary promotion of the appellant, Thomas Byard Sheppard, a parishioner and inhabitant of the parish of Frome Selwood; and finally, to hear and determine the cause according to the law and practice of the said Arches Court.

On April 30, 1869, the learned Judge, having heard counsel, and deliberated thereon, declined to accept the letters of request, on the ground that no reason was alleged by the bishop, in the letters of request, why the case had been sent to the superior Court in the first instance.

The letters of request will be found set out, and the case in the Court below reported in 38 L. J. Ecc. 42.

Their LORDSHIPS intimated that they desired to hear counsel first upon the question as to how the law stood since the passing of the Church Discipline Act.

Mr. A. J. Stephens, Dr. Tristram, Mr. Archibald, and *Mr. B. Shaw,* for the appellant.—The Judge of the Arches Court of Canterbury has refused to accept the letters of request in this case, on the ground that the letters of request do not assign any reason for proceeding in the superior Court of the province in the first instance. The letters of request were under the 13th section of the Church Discipline Act (3 & 4 Vict. c. 86). The Judge of the Arches Court contends that the law is not altered in this respect by the Church Discipline Act, and that by the law as is stood before the passing of that Act the Judge of the Arches Court was entitled to exercise a discretion as to admitting letters of request; and that the very term " letters of request " implies a discretion on the part of the Judge to whom the letters are addressed. The question, however, turns on the construction to be put on section 13. of the Church Discipline Act. The words are, that it shall be lawful for the bishop of any diocese, " if he shall think fit," to send the case by letters of request to the Court of appeal of the province, to be there heard and determined according to the law and practice of such Court. These words not only authorize a bishop to send the case by letters of request, but enable him to do so " if he shall think fit." The statute makes it imperative on the Judge of the superior Court to hear and determine the case according to the law and practice of the said Court. It imposes the duty as well as the power of hearing and determining all cases sent. The fallacy of the judgment of the learned Judge consists in treating the letters of request as implying a command rather than creating a jurisdiction. Nothing turns upon the letters of request or upon their form. The letters of request are only the process by which the case is taken in the first instance to the superior Court. The learned Judge has drawn a distinction between cases of heresy and cases of immorality. Doctrinal questions are, however, the very cases which ought to be settled by an authoritative Court. It has been the uniform practice since the passing of the Act to receive letters of request. This practice has prevailed without interruption from the time of Sir Herbert Jenner Fust to the resignation of Dr. Lushington. They referred to *The Bishop of Hereford* v. *T.* (2 Robert Ecc. Ca. 595); *The Queen* v. *the Justices of Kent* (14 East, 395); *Dwarris's Statutes,* p. 574; *Burn's Ecclesiastical Law,* vol. 3, p. 224; *Sanders* v. *Head* (3 Curt. 44); *Hawes* v. *Pellatt* (2 Curt. 472); *Butler* v. *Dolben* (2 Lee, 319); *Head* v. *Sanders* (4 Moo. P.C.C. 186); *Brookes* v. *Cresswell* (4 Notes of Cases, 429); *Golightly* v. *the Bishop of Chichester* (2 El. & El. 209); *Sherwood* v. *Ray* (1 Moore, 397); and *Steward* v. *Bateman* (3 Curt. 201).

Mr. W. Phillimore, for the Judge of the Arches Court.—The Judge of the

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Arches Court contends that he has a discretionary power in the matter of admitting letters of request. The very terms of the instrument by which the case is taken in the first instance to the Arches Court imply a discretion in the person who may be the Judge of that Court. The Judge may hear the case in the first instance, or leave it to the Court of the diocese in which the alleged offence is committed to deal with the case in the first instance. There can be no inconvenience in this course, because it must be assumed that the Judge will properly exercise his discretion. At all events, this Committee will not assume that the Judge will exercise his discretion improperly. The Judge of the Arches Court contends that the letters of request ought to have assigned some reason for asking him to hear and determine the case in the first instance; and in this respect the Church Discipline Act cannot have created any change in the law. Before the passing of the Church Discipline Act the Judge of the Arches Court had a discretion in this matter. The statute does not impose the duty upon the Judge to hear all cases sent by letters of request. The Judge is only to exercise his jurisdiction in the first instance in such cases as he may approve the reasons assigned for taking the case. The reason should therefore be assigned in the letters of request. The Judge of the Arches Court is the officer of the archbishop, acting for him. If this Committee holds that the officer of the archbishop has, under this statute, no discretion in the matter, then the statute confers a discretion on the bishop of a diocese which it withholds from the archbishop of the province. The argument that whenever letters of request are sent, the Judge of the Arches Court acquires a jurisdiction which he must exercise, is fallacious. He referred to *Rugg* v. *Kingsmill* (38 L. J. Ecc. 23); *Cross* v. *Cross* (Notulæ Diariæ, by Dr. Audley, MSS. 1725, 1730); *Heath* v. *Burder* (15 L. J. Ecc. 1); *Escott* v. *Mastin* (4 L. J. Ecc. 130); and *Hawkins* v. *Gathercole* (6 De Gex, M. & G. 28).

The other respondent did not appear.

Cur. adv. vult.

Their Lordships, without hearing a reply, delivered judgment (on June 30).

The Lord Chancellor.—Upon this appeal the question has been, whether the Official Principal of the Arches Court was right in declining to accept letters of request from the Bishop of Bath and Wells, at least in their present shape, upon the grounds set forth in his judgment in the Court below.

The letters of request appear to their Lordships to have been in all respects valid and sufficient under the provisions of the Church Discipline Act, 3 & 4 Vict. c. 86, to bring the case within the cognizance of the Official Principal, if he had chosen to accept them and to act upon them; and the case depends upon the construction of that part of the 13th section of the statute therein referred to, whereby it is enacted, in respect of the offences there named, that the bishop of the diocese wherein the party accused holds any preferment may, if he shall think fit, send the case by letters of request to the Court of appeal of the province, to be there heard and determined according to the law and practice of such Court.

This 13th clause contains one of several provisions made by the legislature for the purpose of establishing a course for the trial of offences under the statute, and appears to us to comprise both an enabling and an obligatory purpose.

There is no dispute about the enabling power conferred thereby; for all parties agree that it creates a power for the bishop to send by letters of request every case within his cognizance, under this statute, to the Judge of the Court of the province, if he shall think fit so to do; and further, that it creates a power for the Judge of that Court to accept such letters of request, and to hear and determine according to the law and practice of his Court every case which shall be so sent; but the parties differ in respect of the obligatory effect of the clause upon the Judge of the provincial Court; that is to say, whether it operates to create the duty alleged by this appeal to have been imposed thereby upon him

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of accepting the letters of request now in question, and of hearing and determining the case sent therewith.

The respondent contends that the clause does not impose that duty upon the Judge universally, but only in the cases in which he approves of the reason which induced the bishop to send them; and that in any other case he is under no obligation and under no duty to accept and act upon them.

The respondent, in the judgment delivered by him, has considered first the law as it prevailed before the Church Discipline Act with reference to procedure in the Court of Arches upon letters of request; secondly, the law introduced by that statute.

Upon the first point, he came to the conclusion that the Court of Arches, before the passing of the Act, was entitled to refuse letters of request, unless and until proper grounds were assigned why they should be accepted. Upon the second point, he has come to the conclusion that, though the statute authorized the bishop to send the letters of request to the Court of the province, it does not enact that the Court of Arches must accept them, or that it may not require reasons to be assigned why it should accept them.

Their Lordships desired the question on the effect of the statute to be first argued; and they are satisfied, notwithstanding the very able manner in which the contrary view of the case has been put before them, that, according to the true construction of the statute, the Judge of the Court of Arches cannot refuse to deal with this case according to the 13th section of the Church Discipline Act, pursuant to the letters of request.

Assuming, as their Lordships do, for the purpose only of explaining their opinion on the effect of the statute, that any bishop on transmitting a cause by letters of request to the Court of appeal of the province is bound to state some valid reason why he does not proceed in the first instance to hear and determine the matter in his own Court, yet they conceive that the 13th section of the statute supplies in itself a reason for his so doing, and renders it imperative upon the Court to "hear and determine the matter." The sections of the statute which precede the 13th give to the bishop (as has been observed by the respondent) greater powers, and greater assistance in the exercise of his powers, to hear and determine cases falling within the provisions of the Act; but the 13th section also expressly provides that it shall be lawful for him, either in the first instance or after a report by Commissioners, that there is sufficient *primâ facie* ground for instituting proceedings, and before the filing of articles, to send the case, by letters of request, to the Court of appeal.

On the part of the respondent, it has been ably contended that "letters of request" is a term of art with a known meaning, having been a known instrument for transmitting matters from one jurisdiction to another in ecclesiastical procedure, and that they are in effect a request which may be refused—and not a command which ought to be obeyed—and that the direction to the Judge to hear and determine a case according to the law and practice of his Court included the practice of rejecting letters of request which appeared to be sent without sufficient reason. He further concluded, on grounds of expediency, that such a case as the present ought to be first heard and determined by the bishop before it should come to the Court of appeal of the province.

But these arguments have failed to convince their Lordships that the respondent is entitled to their judgment, and they have come to the conclusion that the words of the enactment, "to be there heard and determined according to the law and practice of such Court," are to be construed according to their ordinary acceptation, and are clear to secure the duty, as well as the power of so hearing and determining the cases sent.

It appears to their Lordships that it would be a very unreasonable construction of the Act to hold that when it is expressly enacted that the bishop may send the letters of request in order "that the cause may be heard and determined," the Judge of the Court to whom such letters are addressed should first determine, not the cause, but the question whether or not he will hear it.

It is to be observed that the words of the statute do not merely authorize

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the bishop to send letters of request, requesting thereby that the cause may be heard and determined, but enable him to send the case itself by letters of request to the Court of appeal to be there heard and determined.

The letters of request constitute the vehicle by which the case is to be brought before the Court, but when brought thither the case is to be proceeded with as of right.

Their Lordships are of opinion that had it been intended to give the Court of appeal an option as to whether or not it would hear the case, words to that effect ought necessarily to have been introduced.

The case of *Golightly* v. *the Bishop of Chichester* (2 El. & El. 209) and the dictum in *Sherwood* v. *Ray* (1 Moore, 397), which were cited by the respondent, do not in any way affect the question before their Lordships. They refer to the commencement of proceedings at the instance of the private promoter. But, on the other hand, it has been decided that after a commission has been issued by the bishop, and a report has been made that there is sufficient *primâ facie* ground for instituting proceedings, these must be proceeded with—*Ex parte Denison* (4 El. & B. 310). Great inconvenience would arise from a construction of the statute which would arrest the course of justice after the case had been entertained by the bishop to the extent of issuing a commission and obtaining a report. If the Judge of the Court of appeal of the province can refuse to hear it under the letters of request, the bishop, in the event of a mandamus being applied for against him, may say that he was entitled to the option of sending it to the Court of appeal of the province, and that he had done so, and the case might, therefore, remain wholly unheard.

The learned Judge has said that it would be strange if the discretion as to allowing a suit to be instituted were vested in the bishop and denied to the archbishop; but the same might be said of a case heard by the bishop and afterwards on regular appeal brought before the archbishop. The question as to the propriety of the inquiry is not before the archbishop in either case, but the only question is, whether the bishop shall first hear it or send it at once for trial to the Court of appeal. The statute intended to give an opportunity, where the bishop thought such a course desirable, of sparing the litigant one hearing.

Their Lordships are further of opinion that letters of request ought not to be regarded as a compulsory command to perform an onerous service, seeing that all exercise of authority in administering justice according to law ought to be regarded as a privilege and an honour; and the bishop, in sending the case, by letters of request, to the cognizance of the Official Principal, ought to be regarded as seeking guidance from superior knowledge and judicial powers rather than imposing on another a burden which he should have supported himself, without resorting to extraneous aid.

The letters of request are no more than the process by which the cause is to be placed in a condition to be heard and determined by the superior Court.

Sir Herbert Jenner Fust appears, in the case of *Brookes* v. *Creswell* (4 Notes of Cases, 429), to have taken this view of the statute, and we conceive it to be the correct interpretation. In *Sanders* v. *Head* (3 Curt. 44) he appears to have entertained the same opinion, and the latter case came before the Judicial Committee, which approved of the decision. Their Lordships, therefore, will advise Her Majesty to remit the cause to the Court of Arches, to be there heard and determined according to the law and practice of the Court.

There will be no costs on either side.

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THE RIGHT HON. LORD CHELMSFORD, SIR J. W. COLVILE, SIR E. V. WILLIAMS and LORD JUSTICE PAGE WOOD, Dec. 1, 1868.

LAWRENCE M'DERMOTT, *appellant*; THE JUDGES OF BRITISH GUIANA, *respondents*.

38 L. J. P.C. 1; L. R. 2 P.C. 341; 20 L. T. 47; 17 W. R. 352.

See, *Surendranath Banerjea* v. *Judges of Bengal*, 1885, L. R. 10 Ind. App. 171 (P.C.).

Contempt of Court—Supreme Court of British Guiana—Court of Record—Power to punish for Contempt—Appeal.

COLONY.—*By an Order in Council of June* 20, 1831, *and by an ordinance of British Guiana of November* 26, 1855, *a new Supreme Court of Justice was established in British Guiana, and it was provided, that the Judges "shall have, possess, exercise and enjoy such and the same jurisdiction, powers and authority in every respect as the Judges of the said Courts have heretofore lawfully possessed, exercised or enjoyed; and that the decision of the majority of such Judges shall in all civil cases at any time depending in the said respective Courts, be taken and adjudged to be and shall be recorded as the judgment of the whole of such Court"*:—Held, *that this ordinance, by the words "that the decision of the majority of such Judges shall be taken and adjudged to be and shall be recorded as the judgment of the whole of such Court," in terms constituted the Supreme Court a Court of record.*

The Judicial Committee will not entertain an appeal from an order of a Court of record inflicting punishment by fine or imprisonment for contempt, if it appears upon the face of the order that the party has committed a contempt, that he has been duly summoned, and that the punishment awarded is an appropriate one.

This was an appeal from an order of the Supreme Court of Civil Justice of British Guiana, whereby it was adjudged that the appellant had committed a high contempt of the said Court, and it was ordered that, for such contempt, the appellant should be imprisoned for the term of six months, or until he should be sooner discharged by further order.

The contempt of Court, in respect of which the said order was made, consisted of the publication by the appellant of two articles in a newspaper called the *Colonist*, published at Georgetown, Demerara, on March 29 and on April 5, 1866.

On April 2, 1866, the appellant was summoned to attend the Supreme Court on April 4, to shew cause why an attachment should not issue against him for a contempt of the said Court, by the publication in a newspaper called the *Colonist*, published on March 29. On April 4, the appellant personally attended the said Court, when it was further ordered by the Court that he should attend the Court at its sitting on April 6, there to answer in respect of the contempt alleged against him. On April 6 the appellant again appeared, and counsel were heard, to shew cause on his behalf, when the Court, being informed that since April 4, that is to say, on April 5, the appellant had committed a further contempt of Court, by the publication of an article of that date in the said *Colonist* newspaper, it was ordered by the Court that the appellant should attend the Court at its sittings on April 10, and should then further answer, as well for the contempt first alleged against him as for such further contempt as was then alleged in respect of the article published on April 5.

On April 10, the appellant appeared personally in Court, in obedience to the order of the Court made on April 6, and being called on to shew cause, the appellant's counsel declined so to do, alleging that such order was irregular and ought not to be proceeded on, but that the Court ought, without reference thereto, to adjudicate on and dispose of the matters first alleged against the appellant, and as to which he was first called on to shew cause.

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The Court having considered the objection, overruled it, and considered that the order of April 6 was regular, and that the appellant was bound to shew cause as thereby directed.

The appellant's counsel declined to shew cause. The informant of the Court was heard in answer to what was alleged on behalf of the appellant on April 6.

The appellant's counsel declined to reply, and the Court reserved its decision, and ordered the appellant to appear personally at the sitting of the Court on April 13, and intimated that notwithstanding the appellant's previous refusal to shew cause, the Court would allow him to do so before pronouncing their decision. On April 13, the Court having asked the appellant's counsel whether he desired to shew cause in the matter, he declined to do so, and thereupon the Court adjudged and determined that the appellant had committed a high contempt of the Court in and by having printed and published in the said *Colonist* newspaper of March 29, and April 5, certain articles containing matters scandalously reflecting upon one of the Judges of the Supreme Court, unjustly reflecting upon the informant of the Court, and tending to defame and obstruct the administration of justice, and ordered that for such contempts the appellant should be imprisoned for a term of six calendar months, to be completed from the date of the said order of April 13, 1866, or until he should be sooner discharged by the further order of the Court.

The appellant was thereupon delivered into the custody of the keeper of Her Majesty's gaol at Georgetown, under a warrant of commitment dated April 13, 1866.

The appellant afterwards petitioned the Court for leave to appeal to Her Majesty in Council from the said order, but the Court decided that it could not grant the prayer of the said petition.

The appellant, on October 21, 1866, presented a petition to Her Majesty in Council, praying leave to appeal against the said order of April 13, 1866, and from the judgment of the Court refusing leave to appeal.

The Judicial Committee granted leave to appeal, but reserved the question as to the competency of their Lordships to entertain such appeal.

J. D. Coleridge, *Charles Pollock* and *Edmund Moore*, for the appellant.—It is the undoubted prerogative of Her Majesty to admit, and it has been the practice of the Committee to advise the allowance of an appeal from Orders of Colonial Courts where the liberty of the subject is involved. The Superior Courts in this country are by the statute 25 & 26 Vict. c. 20. s. 1. expressly prohibited from interfering in such cases by *habeas corpus*. The Supreme Court of Civil Justice of British Guiana is not a Court of record, and had no power to commit for the alleged contempt. The order of April 13, 1866, was wholly irregular and absolutely null and void. The English law does not apply. The Court is governed by the ancient Dutch law, and by such law the Court is not a Court of record. It is desirable to see what is the power to punish for contempt possessed by Courts in the Netherlands. Such Courts have no power to punish for a contempt. The Supreme Court had, therefore, no power to punish for a contempt of Court, unless such contempt was committed *in facie Curiæ*. There is nothing in any of the Acts or ordinances of British Guiana to constitute the Supreme Court a Court of record. They referred to *Ex parte Wallace* (4 Moore P.C. N.S. 140; 36 L. J. P.C. 9); *In re Downie* (3 Moore P.C. 414); *Clarke's Colonial Law*, 274, and *In re Pollard* (L. R. 2 P.C. 106).

The Solicitor-General (*Sir R. Baggallay*) and *Cracknall*.—It is not competent for Her Majesty in Council to entertain an appeal from an order of a Court of record inflicting punishment by fine or imprisonment for a contempt of Court. The Supreme Court of Bermuda is a Court of record. The Supreme Court had therefore power to punish any contempt of Court by fine or imprisonment; and the question as to whether any contempt was, in fact, committed is entirely a question for the Court itself to determine. The order of the Supreme Court of April 13, 1866, and all the proceedings in the Supreme Court in respect of the appellant, to which the said order and judgment relate, were perfectly

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legal and regular. No appeal will lie, except in three cases: first, if the party is condemned without having an opportunity of being heard; secondly, if the punishment is inappropriate to the contempt committed; thirdly, if it can be shewn that no contempt could possibly have been committed.—They referred to *Acts and Ordinances of British Guiana* and *Rainy* v. *the Justices of Sierra Leone* (not reported).

LORD CHELMSFORD delivered the judgment of their Lordships.—In this case an application was originally made *ex parte* for leave to permit the appellant to appeal from an order of the Supreme Court of Civil Justice of British Guiana, committing him for a contempt, and their Lordships upon that occasion advised Her Majesty to allow the appellant to enter and prosecute his appeal without prejudice to the question of the competency to entertain an appeal from an order of a Court of record, inflicting punishment by fine or imprisonment for a contempt of Court. It is quite clear that, upon that *ex parte* application, and upon the leave which was conditionally granted, the respondents might have come in, and have moved to discharge the order, upon the very ground which has been taken to-day, namely, that there can be no appeal against an order of a Court of record committing a person for contempt. The appellant, therefore, is exactly in the same condition now as if the application had been made to rescind that order, and he would be bound to support the propriety of the leave to appeal by shewing either that the Court was not a Court of record, or that, if it was a Court of record, yet there was something in the order committing the appellant for contempt which rendered it improper, and therefore the subject of appeal.

The first question, therefore, which the appellant had to establish was that the Supreme Court of Civil Justice of British Guiana was not a Court of record. For that purpose he has argued at very considerable length—not at too much length—that originally by the constitution of the Court, which in its origin was a Dutch Court, it was not, according to the Dutch law, a Court of record, and that, according to that law, it was a Court which did not possess the power of committing for contempt. In the year 1802, in the Articles of Capitulation, upon the conquest of Demerara, there was a stipulation that the laws in use in the colony should remain in force and be retained. The constitution of the Supreme Court at this time, and down to the period of the ordinances which established it on its present footing, by the account given of it in Mr. Clarke's book on *Colonial Law*, appears to have been that it consisted of a president and eight members, of whom four and the president were to be present to constitute a Court. The president was appointed by the King, and removable at his pleasure. The other members were planters or merchants of the colony, elected by the College of Keysers, who, when vacancies occurred, returned a double number, from which the Court of Justice made a selection. In the month of May of every second year one-third of these colonial members vacated their seats, beginning with the oldest member, and, as their number was eight, three and two would vacate every alternate second year. The constitution of this Court might be satisfactory to the colonists, but it does not appear to have been one very desirable to be continued. Accordingly, by ordinances passed in the years 1831 and 1855, an entirely new Supreme Court of Justice was established —by the former ordinance for Demerara and Essequibo, and by the latter this Court, which had been united with the Court of Civil Justice of Berbice, was "to be consolidated into one Court, styled the Supreme Court of Civil Justice of British Guiana, and to continue to have the same jurisdiction as each of the Supreme Courts of Civil Justice of Demerara and Essequibo and of Berbice, and as such consolidated Court then possessed;" and it provided "that the Judges of the said Supreme Court, and each of them should have, possess, exercise and enjoy such and the same jurisdiction, powers, and authority in every respect as the Judges of the said Supreme Courts had theretofore lawfully possessed, exercised or enjoyed."

Now, it is to be observed that this ordinance is, in fact, equivalent to an Act of Parliament. Therefore the question is whether this Act of Parliament, as it

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may correctly be styled, did not establish this new Court in the colony to be a Court of record. What then were the powers which the Supreme Court lawfully possessed, exercised or enjoyed at the time of the passing of this ordinance? For these we are referred to the Order in Council of June 20, 1831, which provided for altering the original constitution of the Court, and ordered "That henceforth the Court of Criminal and Civil Justice of Demerara and Essequibo, and the Court of Civil Justice and the Court of Criminal Justice of Berbice, shall be holden by and before three Justices, and no more, and that the first or presiding Judge of the said Court shall be called and bear the style and title of Chief Justice of British Guiana, and that the second and third of such Judges shall be called and bear the respective styles and titles of first Puisne Judge and second Puisne Judge of British Guiana." In the provision made for the jurisdiction of the Judges in civil cases, it is ordered, "That in each of the said Courts respectively the said three Judges of the respective colonies shall in all civil cases have, possess, exercise and enjoy such and the same jurisdiction, powers and authority in every respect as the Judges of the said Courts have heretofore lawfully possessed, exercised or enjoyed; and that the decision of the majority of such three Judges shall, in all civil cases at any time depending in the said respective Courts, be taken and adjudged to be, and shall be recorded as the judgment of the whole of such Court."

It might be said, without going further, that this provision in the ordinance of June, 1831, with respect to the powers and authority of the Judges (which are preserved to them by the ordinance of 1855), in terms constituted the Supreme Court a Court of record, for no other interpretation can be fairly put upon the words "that the decision of the majority of the Judges shall be taken and adjudged to be, and shall be recorded as the judgment of the whole of such Court."

But it was argued by Mr. Coleridge, that in the year 1846 a criminal Court was established in British Guiana, and that this criminal Court was expressly ordered to be a Court of record. For by the second article of that ordinance it is enacted "that the Supreme Courts of Criminal Justice in British Guiana shall be Courts of record, and shall have cognizance of all criminal pleas and jurisdiction in all criminal cases whatsoever as fully and amply, to all intents and purposes, in British Guiana, as Her Majesty's Courts of Queen's Bench, Common Pleas and Exchequer, at Westminster." From this ordinance he drew the following argument: here, he said, is an ordinance in the year 1846, which orders that the Court of Criminal Jurisdiction shall be a Court of record. It says nothing with regard to the Supreme Court of Civil Justice, and therefore impliedly it must be taken that that Court was not to be a Court of record. In other words, the ordinances of 1831 and 1855 having, according to the view of their Lordships, constituted the Supreme Court of Civil Justice a Court of record, an ordinance of 1846, referring solely to the establishment of a criminal Court, is to have the effect by force of the words making it a Court of record of proving that the Court of Civil Justice is not a Court of record. Their Lordships were referred by the Solicitor-General to an ordinance which immediately preceded that upon which Mr. Coleridge laid so much stress, which was the ordinance No. 19, of the year 1846, which provided that there might be a trial by jury in all issues in civil cases, and that the Supreme Court of Civil Justice might try at bar with a jury any cases which they thought it was right and proper should be so tried.

Now, in the case of *Rainy* v. *the Justices of Sierra Leone* (not reported), where a question arose whether the Recorder's Court of Sierra Leone was a Court of record or not, and whether the Court, being a Court of record, would have power to commit for contempt, their Lordships said: "The Recorder's Court is created by the Charter of Justice, dated October 17, 1821, and is authorized to hear and determine all civil suits, actions and pleas which may happen within the colony, and the charter directs that, in all cases where the action would, if the parties were resident in England, be tried by a jury, such action shall be tried before a jury in the Court of Recorder, according to the practice in England.

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That being the constitution of the Court, in regard to trial by jury, we are of opinion that it is a Court of record, and that the law must be considered the same there as in this country, and therefore that the orders made by the Court in the exercise of its discretion, imposing these fines for contempts, are conclusive, and cannot be questioned by another Court; and we do not consider that there is any remedy by petition to the Judicial Committee to review the propriety of such orders." If, therefore, it had been shewn to their Lordships in the clearest and most satisfactory manner that, according to the old Dutch law and the original constitution of this Court in the colony of British Guiana, it had no power whatever to commit for contempt, still, under the ordinances of 1831 and 1855, they would entertain no doubt that the old Dutch law was completely superseded, and that this Court was established as a Court of record by that which is equivalent to an Act of Parliament. Under these circumstances, the Supreme Court of Civil Justice, being a Court of record, it is only necessary to refer to cases in which appeals have been made to the Judicial Committee from orders committing parties for contempt by colonial Courts of record, to see whether this is a case in which their Lordships would think it proper, according to those authorities, that the appellants should have a right to appeal. Not a single case is to be found where there has been a committal by one of the colonial Courts for contempt, where it appeared clearly upon the face of the order that the party had committed a contempt, that he had been duly summoned, and that the punishment awarded for the contempt was an appropriate one, in which this Committee has ever entertained an appeal against an order of this description. The cases to which we have been referred are all cases very special in their circumstances, and in which leave was given owing to some peculiar objection to the committals for contempt. In the case of *Smith* (3 Moore P.C. 361) there was an order of the Recorder's Court of Sierra Leone, disbarring and striking off from the Rolls a practitioner of that Court for alleged contumelious conduct. But in addition to this order, there was a distinct and separate one, ordering Mr. Smith to be fined and imprisoned for the same alleged contempt. Now, the mode in which the committee dealt with these orders brings out the distinction as to the right to appeal in these cases in the clearest manner. Mr. Smith's petition was presented through the Secretary of State, and after considerable delay it was, by an Order in Council, referred to the Judicial Committee. Their Lordships, in that case, entertained the petition against the order for disbarring Mr. Smith and striking him off the roll, because they held that that was not an appropriate punishment for a contempt of Court. They took no notice of the order for imprisonment which they seemed to consider to be in the same category with the fine; but with regard to the fine imposed by the Court for contempt, they held that they had no jurisdiction over it, and that they could not entertain the appeal. In the case, in the same volume, of *In re Downie* (3 Moore P.C. 414) there was an application first of all, and special leave granted to appeal from two orders of the Supreme Court of British Guiana suspending the petitioners from practice for six months. The orders in this case were reversed upon the same ground as in the previous case to which we have referred. In *Rainy's case* (37 L. J. P.C. 94) both the cases previously referred to were cited, and therefore their Lordships had before them the consideration of the whole question as to the propriety of entertaining appeals of this description.

Under these circumstances, their Lordships entertain no doubt whatever as to the propriety of deciding that in this case the leave to appeal ought not to have been granted, that the Supreme Court of Civil Justice was a Court of record, and that as a Court of record it had power to commit for this particular contempt. As their Lordships do not enter into the merits of the case, they will say nothing as to the character of the libel upon which the Court thought it proper to commit the publisher for contempt; but their Lordships will humbly report to Her Majesty as their opinion that Her Majesty's Order in Council of November 10, 1866, whereby leave to appeal was conditionally granted, in this case ought to be rescinded, and this appeal dismissed with costs.

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LORD CHELMSFORD, SIR J. COLVILE, SIR E. V. WILLIAMS and SIR R. PHILLIMORE, Dec. 7, 23, 1868.

Ex parte THE REV. ALFRED JENKINS (*Clerk*).

38 L. J. P.C. 6; L. R. 2 P.C. 258; 19 L. T. 583; 17 W. R. 502.

Bermuda—Chancery Jurisdiction—Church of England—Benefice—Induction of Incumbent—Forcible Obstruction by Laity—Writ "De Vi Laica Removenda."

ECCLESIASTICAL LAW.—*By an Act of the colony of Bermuda a Court of Chancery was established in the islands, with authority to examine, hear, judge, determine and decree all matters, causes and things whatsoever as fully and amply as the High Court of Chancery may and can:*

The appellant, a clerk in orders, was presented by the Crown to the rectory of the parishes of H. and S. The appellant was duly inducted into the parish church of H., but his induction into the parish church of S. was obstructed by the laity. The appellant applied to the Court of Chancery in the colony for a writ de vi laica removenda, *to remove the obstruction. The Court refused the writ:*—Held, *affirming the judgment of the Court of Chancery in Bermuda, that the appellant was not entitled to such writ* ex debito justitiæ; *and that the writ* de vi laica removenda *is not a necessary incident of Chancery jurisdiction.*

This was an appeal from two orders of the Court of Chancery of the Islands of Bermuda, made respectively on February 23, 1867, and December 9, 1867, by which an application made by the appellant, Charles Alfred Jenkins, for a writ *de vi laica removenda*, to remove any opposition which might be offered to his being inducted into the parish church of Smith, in the said Islands, was refused.

The appointment to vacant benefices in Bermuda has, ever since the establishment of the government of the colony under a governor in the year 1685, been vested in the Crown, and has been from time to time exercised without dispute by the governors, who, by their commissions down to the year 1825, were empowered to collate any person to any ecclesiastical benefices in the islands of Bermuda as often as they should happen to be void.

In the year 1825, Bermuda was first attached to the see of Nova Scotia, then newly created. Since that time the governor's commissions, instead of authorizing them to collate to vacant benefices, have directed them to present clergymen to the Bishop of Nova Scotia from 1825 to 1839, and since then to the Bishop of Newfoundland for induction; and the governors have constantly acted in pursuance of these directions; and down to the time of the order of February 23, 1867, no doubt was ever raised as to the legality of filling vacant livings by presentation, institution and induction, instead of by collation, and in fact every beneficed clergyman of the said Islands has acquired in that mode the living now held by him.

The parochial and vestry system of the Church of England has existed in Bermuda, and has been recognized by various Acts of the Bermuda legislature since the year 1693 down to the present time.

In 1839 the bishopric of Newfoundland was created, and the Islands of Bermuda were disannexed from the see of Nova Scotia, and annexed to the see of Newfoundland, and by the letters patent creating the bishopric of Newfoundland, it was, amongst other things, declared that the bishop and his successors might exercise and enjoy full power and authority by himself or themselves, to give institution to benefices.

The bishoprics of Nova Scotia and Newfoundland were created by the authority of the letters patent alone, and the annexation thereto of the Islands of Bermuda, and of the ecclesiastical jurisdiction therein, was not made under the express authority of any Act of the Imperial or colonial legislatures. The episcopal authority conferred by the letters patent creating the bishopric of

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Newfoundland has, as respects the Islands of Bermuda, been recognized by many Acts of the legislature of that colony.

In January, 1867, the acting governor of the Islands of Bermuda, by a letter of presentation addressed to the Bishop of Newfoundland, presented the appellant for institution to the then vacant rectory of Smith and Hamilton, situate in the said Islands.

On January 17, 1867, the acting ecclesiastical commissary of the said Bishop of Newfoundland (the said bishop being then absent from the Islands) admitted and instituted the appellant to the said rectory, and addressed a mandate to the Rev. Joseph Frazer Lightbourn, authorizing and instructing him to induct the appellant to the said rectory.

On February 9, 1867, the Rev. Joseph Frazer Lightbourn inducted the appellant into the parish church of Hamilton, and was proceeding thence to the parish church of Smith for a similar purpose, but was met by a large body of laymen, who, by a display of physical force and actual violence, prevented the induction of the appellant to the church, and the appellant had ever since been excluded from the church of Smith, the doors of which have been closed against him whenever he hath presented himself there.

On February 23, 1867, the appellant moved the Court of Chancery of Bermuda for a writ *de vi laica removenda*, to remove any opposition by force of the laity which might be offered to his being inducted to the parish church of Smith.

The Attorney-General of Bermuda appeared and was heard on behalf of the Crown in support of the said motion.

The motion was refused by a majority of the Judges upon the ground—That since the decisions of the Privy Council in the cases of *Long* v. *The Bishop of Capetown* (1 Moore P.C. N.S. 411) and *In re the Bishop of Natal* (3 Moore P.C. N.S. 115), it was not competent to the Crown, in a colony having a settled constitution and representative form of government, to alter the constitution of the colony as to its church establishment by conferring by letters patent on a bishop any coercive or judicial powers, and that the institution by the bishop of the appellant was a judicial act *not authorized by law*, and consequently that the Court ought not to grant the writ moved for, the practical effect of which would be to authorize the employment of the civil force of the colony in aid of the Bishop's mandate.

On December 9, 1867, a second application was made on behalf of the appellant to the Court of Chancery at Bermuda, for such writ to remove the further opposition of the laity to his induction to the parish church of Smith, and was refused.

From these orders the present appeal was brought.

The Solicitor-General (*Sir R. Baggallay*) and *Archibald*, for the appellant.—The orders of the Court of Chancery in Bermuda were erroneous and ought to be reversed. The writ ought to have been issued. The matter should be remitted to the Court, with directions for the issue of the writ. The decisions of the Privy Council, relied upon by the Court of Chancery in Bermuda as a ground for refusing the issue of the writ prayed for, are inapplicable. The circumstances in reference to church establishment of the respective colonies of the Cape of Good Hope and of the Islands of Bermuda are totally different. Even if these decisions were otherwise applicable, institution and induction are not acts of either coercive or judicial jurisdiction. The episcopal authority conferred upon the Bishop of Newfoundland by the letters patent of 1839, and the validity of institution and induction as practised in the colony, have been recognized by repeated Acts of the colonial legislature. Under all the circumstances, the application should have been granted and the writ issued.—They referred to *Fitzherbert de Natura Brevium*, p. 55; *Dr. Warren's case* (reported separately); *Long* v. *the Bishop of Capetown* (1 Moore P.C. N.S. 411); *In re the Bishop of Natal* (3 Moore P.C. N.S. 115); *Burn's Ecclesiastical Law*, vol. i. p. 173; *Watson's Clergyman's Law*, c. 30; *Roberts* v. *Agmondesham* (Moore's

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Rep. fol. ed. 462); *Bird* v. *Smith* (Moore's Rep. fol. ed. 781); and *Mirehouse on Advowsons*, 191.

No counsel appeared on the other side.

LORD CHELMSFORD delivered the judgment of their Lordships.—This is an appeal from two orders of the Court of Chancery of the Islands of Bermuda, upon an application on behalf of the Rev. Charles Alfred Jenkins for a writ *de vi laica removenda* to remove any opposition which might be offered to his being inducted into Smith's parish church as the rector and incumbent thereof.

A majority of the Court refused the writ for the reasons assigned by the Chief Justice, one of the members of the Court. He said that the law relating to writs *de vi laica removenda* was very obscure, and that no instance was known of such a writ ever having been granted in Bermuda. And he conceived that since the decisions of the Judicial Committee of the Privy Council in the cases of *Long* v. *the Bishop of Capetown* (1 Moore P.C. N.S. 411) and *In re the Bishop of Natal* (3 Moore P.C. N.S. 115), it must be considered that it is not competent to the Crown in any colony having a settled constitution and representative form of government such as Bermuda had, to alter the constitution of the church in the colony, by conferring by patent upon a bishop any coercive or judicial powers not granted by the Imperial Parliament or the local legislature. That it appeared to him, that according to the effect of these decisions the bishop had not lawful authority, without legislative sanction, to grant institution and issue a mandate for induction into benefices in Bermuda.

The appeal was argued *ex parte*, no one appearing on the other side, although ample notice was given to a person who had been the foremost in resisting the induction of Mr. Jenkins, that leave to appeal had been granted. Under these circumstances their Lordships before delivering their judgment have very carefully considered the grounds which were assigned for refusing to grant the writ prayed for, and the arguments which were urged by the appellants against such refusal.

The Islands of Bermuda, which had previously been a proprietary colony, were transferred to the Crown in 1685. They then possessed, and have ever since enjoyed, an independent legislature. They were first attached to the colonial see of Nova Scotia in the year 1825, and were afterwards transferred, in 1839, to the newly-erected bishopric of Newfoundland.

By the letters patent of Dr. Inglis, who was appointed Bishop of Nova Scotia and its dependencies in 1825, authority was given to him to exercise jurisdiction, spiritual and ecclesiastical, and all and singular the functions and authorities within (amongst other places) Newfoundland and the Bermudas, which might be lawfully exercised within the province and diocese of Nova Scotia. By the letters patent of 1839, erecting the island of Newfoundland into a bishop's see, the former letters patent were revoked so far as they related to the islands of Newfoundland and the Bermudas; and power and authority were given to the bishop, by himself or by his sufficient commissary or commissaries to be by him substituted and appointed, to exercise jurisdiction, spiritual and ecclesiastical, and all and singular functions and authorities within the Islands of the Bermudas and their dependencies, which might, by virtue of the letters patent, be lawfully exercised by himself or his commissary or commissaries within the island and diocese of Newfoundland.

The Islands of Bermuda seem to have been divided into parishes at the time of their becoming a Crown colony, or very soon afterwards, for amongst the Acts of their legislature, there is one as early as the year 1693 for settling a yearly revenue upon the minister or incumbent of St. George's parish, and of the other parishes within the islands. That the parochial system was completely established towards the end of the last century appears from another Act of March 30, 1755, intituled 'An Act for the more regular payment of the clergy, the regulating the seats or pews in the several churches in these islands, and more effectual recovery of parish assessments.' And the church of Smith itself, to which these proceedings apply, has been the subject of legislative provision; for by an Act of March 17, 1820, it is enacted, " that the

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parishes of Smith and Hamilton, together with the annual interests, profits or issues payable by law for the glebe situate in the parish of Hamilton, and which has been sold in fee simple, conditional, under and by virtue of an Act of the legislature, shall constitute one living."

It must be borne in mind that during the whole of this long period, when the legislature of the Bermudas was constantly recognizing the establishment of parishes and their incumbents, the power of appointing clergymen to the different parishes was vested in the governors. This authority they possessed, by delegation from the Crown, conveyed to them by a clause in their commissions, directing them to collate to all vacant benefices within the islands. This form of commission continued down to the year 1831, when it was changed by substituting a clause directing the governor, upon the vacancy of a benefice, to present a clerk to the bishop (first of Nova Scotia and afterwards of Newfoundland) for institution. This clause continued to be inserted in the governor's commission down to the year 1861. Since that time it has been omitted from the commissions and introduced into the instructions to the governors.

In explaining the reasons for refusing the writ *de vi laica removenda*, the Chief Justice, after stating that it was not competent to the Crown to alter the constitution of the Church in the colony by conferring by patent upon a bishop any coercive or judicial powers not granted by the Imperial Parliament or the local legislature, added, "Although the institution of a clergyman to a benefice is not an act of coercive or contentious jurisdiction, yet it is not a mere ministerial act, but is of a judicial nature." Strictly speaking, however, it is not so much the institution which is judicial as the previous examination of the fitness of the clerk presented; for if the clerk be really *idonea persona*, the bishop would be bound to institute him. But whether institution is to be regarded as a judicial or ministerial act is wholly immaterial.

The question is, whether the Crown has conferred an authority which was not within its competency. Now it is a fact which cannot be disputed that for more than a century the Crown possessed the power of collating to all the vacant benefices in the Burmudas by direct nomination, a power which it exercised by delegation to the successive governors, who were usually described as ordinaries in their patents, and who to a certain extent exercised the powers of that ecclesiastical officer. But when a bishop or ecclesiastical ordinary was duly appointed, with spiritual oversight of the Church in the Bermudas, the Crown, as patron, thought proper to leave to the governor the power of nominating the clerk, but recognized by the letters patent granted to the bishop the power of institution belonging to his office. The bishop, as has been said, is bound if the clerk be *idonea persona* to institute him. It cannot be supposed that when the Crown gave a clergyman a title to a living by one act of collation, the appointment was made without previous inquiry as to his qualifications. The whole effect of the alteration of the system of conferring benefices in the Bermudas is to transfer this inquiry from the governor to the bishop. It seems to have been supposed, however, that the cases *Long* v. *the Bishop of Capetown* (Moore's Rep. fol. ed. 781) and *In re the Bishop of Natal* (1 Moore P.C. N.S. 411) are authorities for the proposition that the Bishop of Newfoundland has no legal *status*, and cannot lawfully exercise any episcopal function within the Bermudas. The first case certainly does not go the length of that proposition, for it decided only that the Crown cannot confer coercive authority on a bishop in a colony possessing a constitutional form of government without the consent of the legislature. The Judicial Committee in deciding the case of the *Bishop of Natal* has certainly used expressions which would restrain the power of the Crown in the creation of bishops within even narrower limits.

It has been argued that the Master of the Rolls, in his judgment in *Colenso* v. *Gladstone* (36 L. J. Ch. 2), has greatly qualified the effect of the former judgment in the Privy Council. Their Lordships think that in the present case they are not called upon to express an opinion whether these two decisions can be reconciled. For they are clearly of opinion that the question whether the Bishop of Newfoundland has any lawful *status*, or can exercise any episcopal

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function, and particularly that of institution in the Bermudas, has been set at rest conclusively by the repeated recognition of his *status* and functions by the colonial legislature. The Acts of 1843, of 1864, of 1865 and 1866, mentioned in the memorandum of the Attorney-General of the Bermudas, all recognize the legal *status* of the bishop of the diocese.

The Chief Justice doubted whether the institution of Mr. Jenkins to the church of Smith was valid. Upon this point he said, "Supposing the bishop had authority to institute, it did not seem clear under the instructions of the governor, that a presentation could properly be made during the bishop's absence from Bermuda to his commissary, or that the commissary could admit and institute a clergyman to a benefice without the special direction of the bishop in each particular case." Now, as already shewn, the Bishop of Newfoundland has authority by his letters patent to exercise all his functions and authorities by himself or his commissary. And that a general authority may be given to the commissary, and that a special direction upon each occasion is unnecessary appears from a clause in the letters patent, "that during the vacancy of the see by the demise of the bishop or his successors, or otherwise, institutions to benefices and licences to curates may be given by the commissary or commissaries who were so as aforesaid named and substituted by the last preceding bishop, and were in possession of that office under such substitution and appointment at the time when the see became vacant."

Mr. Jenkins was duly presented by the governor to the rectory of the parishes of Hamilton and Smith by a formal presentation to the bishop, or, in his absence, to Mr. Coombe, his acting ecclesiastical commissary. And Mr. Coombe, reciting his authority derived from the bishop as commissary and that he was acting by virtue of it, instituted Mr. Jenkins to the rectory and issued a mandate for his induction; upon which he was quietly inducted into the church of Hamilton, but resistance was made to his being put into possession of the church of Smith. There can be no doubt that Mr. Jenkins was duly presented to the rectory, and was instituted by lawful authority. The only remaining question is as to the remedy which Mr. Jenkins sought to obtain for the obstruction offered to his induction into the church of Smith.

The writ *de vi laica removenda* may be regarded at the present day as an obsolete proceeding. Very little is to be found in the books as to the nature of the procedure upon this writ. The short account which is given of it in Fitz. N.B., p. 55, furnishes very slight information. There is no doubt that the writ issued out of the Court of Chancery (as, indeed, all original writs formerly did), and of course from the common law side of that Court. It also was applicable only to the case of an incumbent of the Established Church who was hindered or disturbed in his possession of the church. It is very difficult to see how this remedy could be applied by the Court of Chancery in the Bermudas to the case of the disturbance of a church in those islands.

A Court of Chancery was established by an Act of the legislature of the islands in the year 1814. By section 29. of this Act, after enacting the mode in which the Court is to be constituted, power and authority is given to it to examine, hear, judge, determine and decree all matters, causes and things whatever, as fully and amply to all intents and purposes whatsoever as the High Court of Chancery may and can do, and also to make and establish such rules, regulations and orders respecting the practice merely of the said Court as may be necessary or expedient. The words of this Act are very large, and confer jurisdiction in very full terms, but it may be questioned whether they are intended to apply to the case of ordering a specific form of proceeding to be applied to a particular cause of action. It may be said that they give power to judge and determine whether the facts were such as to call for a writ *de vi laica removenda*; but that would be to beg the preliminary question whether such a writ is issuable. It is probable that under the power subsequently given to make rules and orders respecting the practice of the Court, this form of remedy might be introduced, as the forms of writs and remedies are matters of practice of a Court. No rule has been made by the Court of Chancery in the

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Bermudas with regard to this writ *de vi laica removenda;* and there is great doubt whether the Court would be disposed to make any rule or order on the subject. The forms of procedure in the English Courts may or may not be appropriate in a colony, or capable of being properly addressed and put in use. This writ is not an essential mode of preserving and quieting possession, and all that was practically wanted in the present case was to put a minister in possession and enjoyment of his temporalities. It is not, therefore, *ex debito justitiæ* that the appellants should have this particular form of remedy. It is not *universi juris* wherever an Established Church exists; for it can issue only out of a Court of Chancery, and there may be no Court of Chancery in this sense, viz., with full authority to frame and issue the writ. The authority in this case, therefore, if it exist at all, must be implied, for it has never been used before. But why should it be implied? Is it a necessary incident of Chancery jurisdiction? If not, it is not conferred by the words creating the Court of Chancery in the Bermudas, words which (as already observed) apply to jurisdiction over matters in dispute, and not to modes of procedure. And an injunction would, probably, have served all the necessary requirements in the present case, and have restrained all interference with the induction of Mr. Jenkins. It seems to their Lordships that it would be an inconvenient precedent to imply the existence of a writ not known to the Court itself, nor necessary to the enforcement of the legal right obstructed, merely from the creation of a Court, and a general grant in large words of general jurisdiction.

Their Lordships entertain no doubt whatever of the lawfulness of Mr. Jenkins's institution to the rectory of Hamilton and Smith, and of his right to be inducted into the church of Smith. But they cannot say that the Court of Chancery was wrong in refusing to grant him the writ *de vi laica removenda* to prevent the obstruction to his induction, and therefore, upon this ground, and this ground only, they must humbly recommend to Her Majesty that the appeal be dismissed.

LORD HATHERLEY, L.C., LORD CHELMSFORD, SIR J. W. COLVILE, and SELWYN, L.J., Dec. 23, 1868.

ALEXANDRE ÉDOUARD KIERZKOWSKI, *appellant;* JEAN BAPTISTE THÉOPHILE DORION AND ANOTHER, *respondents.*

38 L. J. P.C. 12; L. R. 2 P.C. 291; 20 L. T. 170.

Canada—Old French Law—Usurious Contract—Acts and Ordinances of Lower Canada, 17 *Geo.* 3. *c.* 3. *and* 16 *Vict. c.* 80.—*Construction of.*

COLONY.—*By the old French law, which prevailed in Canada, when upon a usurious contract the principal and legal interest have been fully paid, any money afterwards received by the lender beyond the legal amount may be recovered back, and such right of action is assignable.*

By an Act of Lower Canada, passed in the year 1777 (17 *Geo.* 3. *c.* 3), *it was provided that all bonds, contracts and assurances, whereupon or whereby a greater interest than* 6*l. per cent. should be reserved or taken, should be utterly void, and that every person who should either directly or indirectly take, accept or receive a higher rate of interest should forfeit and lose treble the value.*

By an Act of Lower Canada, passed in the year 1853 (16 *Vict. c.* 80), *it was provided, "That no contract to be hereafter made in any part of the province for the loan or forbearance of money at any rate of interest whatsoever, and no payment in pursuance of such contract shall make any party to such contract or payment liable to any loss, forfeiture, penalty or proceeding, civil or criminal, for usury, any law or statute to the contrary notwithstanding." And it was further provided, that every such contract and every security for the same should be void so far, and so far only, as relates to any excess of interest, thereby*

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made payable above the rate of 6l. for the forbearance of 100l. for a year, and the said rate of 6l. per cent. interest, or such lower rate of interest as may have been agreed upon, shall be allowed and recovered in all cases where it is the agreement of the parties that interest shall be paid.

The appellant, in the year 1845, received by way of loan from the respondents a sum of money at 6l. per cent. Payments were made on account of principal and interest up to the year 1855, when the appellant sued the respondents to recover back some of the interest paid on the ground that at the time the loan was contracted a sum of money was paid to the respondent as a bonus in addition to the interest:—Held, *first, that the Act of 1853 did not prevent the plaintiff recovering back, in the action, any usurious interest which had been paid, as such action was not a "civil proceeding for usury"; secondly, that the words "such contract or security shall be void so far, and as far only, as relates to any excess of interest," &c., could only mean that the lenders should not recover more than 6l. per cent., and not that the contract itself should be affected by the stipulation for more than legal interest.*

This was an appeal from two judgments of the Court of Queen's Bench of Lower Canada, dismissing an action commenced by the appellant against the respondents, to recover back payments made on the footing of a usurious contract, in excess of the sum actually advanced and lawful interest upon that sum.

The facts of the case were as follows:

On November 11, 1845, the appellant, on behalf of himself and of some other persons, entered into an obligation acknowledging that he owed to Dame Marie Louise Cousineau, represented in the deed by the respondent Jean Baptiste Théophile Dorion, her attorney, a sum of 4,875*l.* currency, for money lent by the said Dame Cousineau; and by the said obligation the sum of 1,500*l.*, part of the said 4,875*l.*, was acknowledged to have been then paid to the appellant, and the sum of 3,375*l.*, residue of the said 4,875*l.*, was to be paid by the said Dame Cousineau to the appellant so soon as that sum could be received. And by the said obligation the sum of 4,875*l.* was agreed to be payable to Dame Cousineau at the end of eight years, with interest at the rate of 6*l.* per cent. per annum, payable annually.

In respect of this and of another loan, the respondent Jean Baptiste Théophile Dorion admitted that he received a bonus of 1,500*l.* from the appellant; and it was in consequence of the receipt of this sum that the present litigation arose.

With respect to the 1,500*l.*, the appellant alleged that the sum of 1,500*l.* was never advanced or paid at all, but was retained by the respondent Jean Baptiste Théophile Dorion. The respondents alleged that the whole of the said sum of 1,500*l.* was *bonâ fide* paid to the appellant as stated in the obligation, but that the appellant and his co-borrowers afterwards paid to the respondent Jean Baptiste Théophile Dorion a sum of 1,500*l.* for his own sole use, and for his personal services in connection with the loan; and that he applied the said sum of 1,500*l.* accordingly, without accounting for any part thereof to the said Dame Cousineau.

Dame Cousineau died, leaving her three sons, the two respondents, Jean Baptiste Théophile Dorion and Zéphir Dorion and Eustache Dorion, her universal legatees. The said Eustache Dorion afterwards assigned his interest in the estate of Dame Cousineau to the respondent Jean Baptiste Théophile Dorion.

On October 21, 1862, the appellant brought an action against the respondent to recover back certain sums of money alleged to have been overpaid to them in respect of the obligation for 4,875*l.* so given to Dame Cousineau.

The respondents severed in their defence to the said action. The respondent J. B. T. Dorion admitted by his pleas that he had received 1,500*l.* from the appellant; but he stated that Dame Cousineau had never exacted any bonus on the said loan, and that she had never authorized her attorney to exact any

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bonus in respect of the said loan; but he stated that on his own behalf, without the knowledge of Dame Cousineau, as compensation for trouble taken by him, he had entered into an agreement for a bonus of 1,500*l.*; and that the bonus was his own, and that he had never accounted for the same to any one.

The other respondent, Zéphir Dorion, in his pleas, alleged in substance that Dame Cousineau never kept back, and never authorized Jean Baptiste Théophile Dorion as her attorney to keep back any part of the 4,875*l.*; that if he did so he did it without her knowledge and without her receiving any part of it.

To the plea of the respondent Jean Baptiste Théophile Dorion the appellant replied, in substance, that Dame Cousineau never in fact advanced or paid more than 3,375*l.*, and that it was consequently not only untrue but absurd to say that the transaction was really a payment of 4,875*l.* by her, and a repayment out of that sum, without her knowledge, to the respondent, her attorney, for his own benefit.

The replication to the plea of the respondent, Zéphir Dorion, was substantially similar to the replication to the plea of the other respondent. It pointed out that the 1,500*l.* retained out of the nominal loan, had, in fact, remained in the hands of Dame Cousineau; had not passed from her to the borrowers, and from them to Jean Baptiste Théophile Dorion; and that it was she who had the benefit of it, and no one else.

The cause came on for hearing before the Supreme Court of Lower Canada; and judgment was delivered on December 31, 1863, in favour of the appellant, and the respondents were condemned to pay the sum demanded by the appellant, with costs.

Both respondents presented separate appeals from the judgment of the Superior Court to the Court of Queen's Bench of Lower Canada. On June 9, 1866, the Court of Queen's Bench delivered judgment in both the appeals in favour of the respondents, and reversed the judgment of the superior Court. From this judgment the present appeal was brought.

At the time the contract was entered into for the loan the statute law as to usury which was in force in Lower Canada was contained in the following clause from the Revised Acts of Lower Canada, p. 312, section 5: "From and after the publication of this ordinance it shall not be lawful upon any contract to take directly or indirectly for loan of any moneys, wares, merchandises or other commodities whatsoever above the value of 6*l.* for the forbearance of 100*l.* for a year, and so after that rate for a greater or lesser sum in value, or for a longer or shorter time, and the said rate of interest shall be allowed and recovered in all cases where it is the agreement of the parties that interests shall be paid; and all bonds, contracts and assurances whatsoever whereupon or whereby a greater interest shall be reserved and taken shall be utterly void, and every person who shall either directly or indirectly take, accept and receive a higher rate of interest shall forfeit and lose for every such offence treble the value of the moneys, wares, merchandises and other things lent or bargained for, to be recovered by action of debt in any of the Courts of Common Pleas in this province, a moiety of which forfeiture shall be to His Majesty, and the other moiety to him or them that will sue for the same."

Certain changes took place in the usury laws of Lower Canada between 1845 and 1862. By the statutes of Canada for the year 1853 (16 Vict. c. 80), it was enacted as follows: "And be it enacted, that no contract to be hereafter made in any part of this province for the loan or forbearance of money or money's worth at any rate of interest whatsoever, and no payment in pursuance of such contract shall make any party to such contract or payment liable to any loss, forfeiture, penalty or proceeding, civil or criminal, for usury, any law or statute to the contrary notwithstanding." "Provided always nevertheless, and be it enacted, that every such contract, and every security for the same, shall be void so far, and so far only, as relates to any excess of interest thereby made payable above the rate of 6*l.* for the forbearance of 100*l.* for a year, and the said rate of 6*l.* per cent. interest, or such lower rate of interest as

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may have been agreed upon, shall be allowed and recovered in all cases where it is the agreement of the parties that interest shall be paid."

H. W. Cole and *Wickens*, for the appellant.—The contract of November 11, 1845, was usurious and void. The remedy of the obligors in respect of the usurious nature of the obligation is in no way prejudiced or affected by the subsequent change of the law. The remedy of the appellant is not waived or suspended by any of the proceedings which were taken against them for the purpose of enforcing the contract. The appellant represents all the obligors in the bond, and is entitled to claim whatever any or all could have claimed in respect of it. The appellant is entitled to recover back from the respondents every sum, with interest thereon, which the obligors paid beyond the sum actually advanced when the obligation was executed, and interest on that sum at 6*l.* per cent. per annum.—They referred to *Pothier* (Traité de l'Usure, art. 113, 704, 761, 795, 1485); *Civil Code of Canada* (Art. 1570); *Scurry* v. *Freeman* (2 Bos. & P. 381); *Fitzroy* v. *Gwillim* (1 Term Rep. 153); *M'Cade* (vol. 3, p. 213); *Bosanquet* v. *Dashwood* (Cas. temp. Talbot, 38); *Wilson* v. *Metcalfe* (1 Russ. 530); and *Montgomery* v. *Calland* (14 Sim. 79).

Sir Roundell Palmer and *Lindley*, for the respondents.—The original decree was erroneous and was properly reversed. There was no usurious contract within the meaning of the Act of 1777. The action was a civil proceeding in respect of usury. The loan was in no sense usurious. The whole sum was *bonâ fide* advanced. But, even if the loan was usurious, it would not be competent for the appellant to recover back money paid in respect of it. Even if the loan was usurious within the meaning of the Canadian Act of 17 Geo. 3. c. 3, that Act was repealed in 1853, before any of the sums sought to be recovered by the appellant were paid. No usurious payment was made to or taken by or on behalf of the respondents whilst the Act of 17 Geo. 3. was in force.—They referred to *Toullier* (Droit Civil).

The Lord Chancellor delivered the judgment of their Lordships.—This is an appeal from a judgment of the Court of Queen's Bench of Lower Canada, reversing a judgment of the Superior Court of that province in an action by the appellant against the respondents.

The action was brought to recover from the defendants, jointly and severally, as universal legatees of their mother, Marie Louise Cousineau, a sum of 5,329*l.* 10*s.*, alleged to have been paid to them by the plaintiff, in excess of the amount of legal interest payable under a contract for the loan of 4,875*l.* by Madame Cousineau to the plaintiff and his wife, Lewis Thomas Drummond and his wife, Samuel Cornwallis Monk and his wife, and Edward Silvester Count de Rottermund and his wife. The declaration in the action states, that, by an obligation dated November 11, 1845, the plaintiff, in his own name and in the names of the other borrowers, acknowledged to have received, by way of loan, from Madame Cousineau (represented by the defendant, Jean Baptiste Théophile Dorion), a sum of 4,875*l.*, which they bound themselves to repay to Madame Cousineau in manner mentioned in the obligation. That the plaintiff received from the defendant, Jean B. T. Dorion, acting as aforesaid, only 3,325*l.*, and that he retained the balance of 1,550*l.* as a bonus or premium, or illegal and usurious interest. The declaration states the death of Madame Cousineau, leaving the two defendants and their brother, Eustache Dorion, her universal legatees, and that the rights of Eustache Dorion having been ceded to Jean B. T. Dorion, the two defendants are the only representatives of their mother. It then states various payments made on account of principal and interest due on the obligation of November 11, 1845, which, on March 6, 1854, left a balance of 2,138*l.* 8*s.* 5*d.*; and that on that day Mr. and Mrs. Drummond, two of the debtors in the obligation, sold to the Honourable Judge Mondelet part of the property charged with the payment of the loan; and that, on September 1, 1855, by an arrangement between Judge Mondelet and the two defendants and divers other creditors of the vendors, he paid to the defendants a sum of 78*l.* 15*s.* 9*d.*, and afterwards another sum of 5,023*l.* 2*s.* 8*d.*, on account of principal and interest upon the obligation. That, as at this time

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there was due upon the said obligation only the sum of 2,138*l.* 8*s.* 5*d.*, the defendants received, beyond the principal and legal interest at 6*l.* per cent., a sum of 2,963*l.* 10*s.* That this sum, with interest, amounts to 5,329*l.* 10*s.*, which the borrowers are entitled to recover from the defendants with interest. The declaration then states an assignment to the plaintiff of all the interests and rights of action of the other debtors in the obligation of November 11, 1845, to demand and recover the usurious premium of 1,500*l.* and interest, and all other illegal and usurious interests paid in respect of the obligation, by which, as the plaintiff alleges, he is alone entitled to maintain the action.

The plea of the defendant Jean B. T. Dorion alleges that the loan in question was made by Madame Cousineau through his agency, and that she never stipulated for or required any bonus or usurious interest upon such loan. That, upon his own responsibility and for his own interest, unknown to Madame Cousineau, and to indemnify him for the steps and proceedings taken by him in the interest and for the profit of the borrowers, he entered into an agreement with them, by which they bound themselves to pay him a bonus of 1,500*l.* And that, on November 11, 1845, after having made the beforementioned loan of 4,875*l.* for Madame Cousineau, the borrowers paid him, on his own account, the said sum of 1,500*l.*

The plaintiff, in his answer to this plea, says that the sum of 1,500*l.* was exacted by Madame Cousineau, acting by the defendant as her agent, and was retained, not for himself, but for and in the name of Madame Cousineau.

The defendant Zéphir Dorion put in a separate plea, in which all that it is necessary to notice is that he repudiated all interest in the bonus paid to the other defendant, and renounced all claim to any part of it.

Upon the issues thus raised between the parties, and after hearing evidence on both sides, the superior Court was of opinion that the plaintiff had proved the facts alleged in his declaration. That the 1,500*l.* was exacted by Madame Cousineau as a bonus upon the loan made by her, and was deducted from the sum of 4,875*l.* which she agreed to advance; and the Court condemned the defendants, as her representatives, to pay to the plaintiff the sum of 3,958*l.* 6*s.*, the amount of excess of interest which they had exacted and received from him, together with interest and the costs of the action.

The defendants appealed separately to the Court of Queen's Bench from this judgment. The principal grounds of appeal alleged by Jean B. T. Dorion were: That the plaintiff had not proved the facts alleged in his declaration; that it was proved that if Jean B. T. Dorion received money from the plaintiff, it was paid to him on his own account and for his own benefit, and was not received by Madame Cousineau, and therefore her legatees could not be made liable for it; and that the plaintiff and the other borrowers of the moneys confirmed and ratified the obligation of November 11, 1845. The other defendant, Zéphir Dorion, in the *factum* upon his appeal, said that the only difference which existed between his defence and that of Jean B. T. Dorion was that his mother, Madame Cousineau, never stipulated for the premium of 1,500*l.*, nor authorized her agent, Jean B. T. Dorion, to require any such premium for himself; that she never received any part of the premium which was taken by Jean B. T. Dorion for his own benefit; that Madame Cousineau incurred no responsibility in respect of it; and that he (Zéphir Dorion) repudiated every agreement which might have been made by Jean B. T. Dorion as to the premium of 1,500*l.*

The Court of Queen's Bench gave judgment for Zéphir Dorion, on the ground that the plaintiff in the Court below had not proved, as to him, the material allegations of his declaration. And upon the appeal of Jean B. T. Dorion, they reversed the judgment of the superior Court, because (as they held) the evidence established that the money claimed by the plaintiff, under and by virtue of the transfer of March 18, 1862 (the assignment by the other debtors on the obligation of November 11, 1845, of all their claims and rights of action in respect of the alleged usury), was paid through and by Lewis T. Drummond and his wife, who alone could claim the amount if usuriously and

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illegally exacted, and that the other assignors, who had paid no part of the money, had no right of action against the defendants. The present appeal is from both these judgments.

Their Lordships cannot acquiesce in the reasons assigned by the Court of Queen's Bench for reversing the judgment of the superior Court in the case of Jean B. T. Dorion. It seems clear that, by the old French law, which prevailed in Canada, when, upon a usurious contract, the principal and legal interest have been fully paid, any money afterwards received by the lender beyond the legal amount due may be recovered back from him—4 *Pothier, Traité de l'Usure*, p. 114, art. 113. A right of action, therefore, is vested in the person so paying such usurious interest; and by the law of Canada such right of action is assignable. The Civil Code of Lower Canada, which, though not established till 1866, embodies all such provisions relative to civil matters as were in force at the time of the passing of the Act respecting the codification of the laws of that province, may properly be referred to for the law on this point. By article 1570, "The sale of debts and rights of action against third persons is perfected by the seller and buyer by the completion of the title, if authentic, or by the delivery of it, if under private signature." And the only exception to the right of dealing with these subjects is to be found in article 1485, which prohibits "Judges, advocates, attorneys, clerks, sheriffs, bailiffs and other officers, from becoming buyers of *litigious rights* which fall under the jurisdiction of the Court in which they exercise their functions."

Assuming that Mr. and Mrs. Drummond were entitled to recover back what they paid beyond the amount of principal and legal interest, they had by law an assignable right of action. This right of action by the instrument of March 18, 1862, they transferred and made over to the appellant, in the fullest and amplest manner. The other parties named in the obligation of November 11, 1845, joined in this assignment. Whether they were bound to repay to Mr. and Mrs. Drummond their shares of the money so paid is immaterial. The right of action to recover back the money was vested either in Mr. and Mrs. Drummond alone, or in all the parties to the obligation jointly. If all of them were entitled to maintain an action, the appellant has the assignment of all; and if the sole right of action was in Mr. and Mrs. Drummond, they have transferred that right to the appellant, and the joinder in the instrument of assignment of any number of persons who had nothing to assign, cannot affect, or in any way prejudice, the validity of the assignment by the persons who alone were interested. It has very properly not been attempted to maintain the judgment of the Court of Queen's Bench on the ground upon which it was placed in the case of the defendant, Jean B. T. Dorion.

The questions which their Lordships have been called upon to consider in this appeal are: First, whether the plaintiff has proved the allegation in his declaration that the contract between him and Madame Cousineau was a usurious contract by reason of her having stipulated for and received a sum of 1,500*l.* as a bonus or premium for the loan of 4,875*l.*, which was to be repaid with full legal interest of 6*l.* per cent. upon the whole sum lent; secondly, if the original contract was illegal and void by the usury laws of Lower Canada in force at the time of its being entered into, whether transactions which took place between the parties after a change of those laws either ratified and confirmed the contract itself, or substituted for it another contract founded upon good and valid consideration.

The first question is one entirely of fact. The plaintiff was bound to prove that the loan upon which the 1,500*l.* was retained was made by Madame Cousineau, and that the retention was for her benefit. If it were not, the respondents could not be liable in the character in which they were sued, that of her legatees. It was not necessary to shew that Madame Cousineau personally received or retained the 1,500*l.* for her own use. If she either authorized her agent, Jean B. T. Dorion, to retain it for himself out of the loan made by her, or, knowing that he had so retained it, ratified what he had done, her contract would have been usurious. The facts which appear to be clearly

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established are, that an advance of 10,000*l.* having been originally required, it was arranged that a sum of 1,500*l.* should be given by the borrowers for this advance, and that when it was afterwards found that no more than 7,000*l.* could be lent, no reduction was made in the sum to be paid in respect of the loan. These facts are quite independent of the question to whom and for what the 1,500*l.* was to be paid. The loan of 7,000*l.* was made in two sums, one of 4,875*l.* by Madame Cousineau, the other of 3,626*l.* by Jean B. T. Dorion out of an estate of which he was curator; but the 1,500*l.* was deducted and retained out of the sum advanced by Madame Cousineau. This is proved by the fact that obligations having been entered into for repayment to the lenders respectively of the sums each advanced, both dated November 11, 1845, that which was given to Madame Cousineau states that the 1,500*l.* was paid at the time of the execution of the deed, and received as part of the loan of 4,875*l.* This statement in the deed is directly opposed to the appellant's case. He is compelled, therefore, to rely upon witnesses to prove the essential fact upon which alone he can recover in this action, viz., that the usury which he alleges entered into the contract with Madame Cousineau.

The principal witness produced by him to prove his case was the notary Leblanc, who was employed by the appellant and the other proposed borrowers to negotiate for the loan. He went with the appellant to St.-Eustache, where Madame Cousineau was residing, and saw her in the presence of her son, Jean B. T. Dorion. He stated that, as well as he could recollect, the appellant addressed himself to Madame Cousineau, and that it was perfectly understood that the loan was to be made at a rate above the legal interest, and this by the payment of a premium of 1,500*l.* That on the occasion of the interview with Madame Cousineau, the appellant, to the best of the witness's recollection, remarked that the premium demanded was very high; to which Jean B. T. Dorion or Madame Cousineau—but he believed it was Jean B. T. Dorion—said they could place out their capital at a more advantageous rate; but, the witness added, this was said in the presence of Madame Cousineau. Upon his cross-examination, he said it was M. Kierzkowski who held the conversation about the premium, and with Jean B. T. Dorion, though in the presence of his mother, M. Leblanc spoke, as he was likely to do at the distance of eighteen years, very uncertainly as to the particulars of a conversation in which he did not take much part, and to which his attention had probably not been called in the intervening period. He stated that M. Kierzkowski took the principal part in whatever conversation took place, and that it passed between him, the appellant, and Jean B. T. Dorion. From the appellant, therefore, we should naturally expect the best information respecting this important interview with Madame Cousineau, but he spoke with even more uncertainty than M. Leblanc. He said, "I only saw Madame Cousineau once upon the subject of the loan in question, and I *believe* I spoke to her about the premium, and told her the premium was too much. I *think* she made the same remark as her son, that they could lay out their capital on more advantageous terms." This, at best, is but slight evidence to fix Madame Cousineau with the knowledge of, and make her a party to the alleged usurious transaction. But, weak as the evidence is, it is much more weakened by other witnesses produced by the appellant himself, and especially by the evidence given by M. Leblanc upon the subject of this loan in a suit of *Mitchell* v. *Jean B. T. Dorion* (not reported), in which he was a witness. Upon this occasion he never mentioned the name of Madame Cousineau in connexion with the loan, but stated that all the arrangements for the loan, and all the stipulations as to the premium, passed with Jean B. T. Dorion. Jean B. T. Dorion himself was called as a witness in that suit, and though he alleged that the sum of 1,500*l.* was actually deducted from the money advanced by Madame Cousineau, he admitted that it was retained as a premium in respect of the whole loan. It must be observed that in this other suit, if M. Leblanc had not kept Madame Cousineau's name out of the transaction, it would have prejudiced the plaintiff's case for whom he was called; and that if he had not proved in the present action that she took

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an active part in the negotiations for the loan and the premium, the appellant must have failed. The whole proof of Madame Cousineau's participation in the usurious agreement rests upon the appellant and his witness, M. Leblanc. He produced other witnesses, but their evidence either added nothing or was unfavourable to his case. M. Moreau, an advocate, stated that the transaction of the loan was conducted by Jean B. T. Dorion, Madame Cousineau not at all interfering in the matter; and Judge Monk, who was one of the borrowers named in the obligation, knew nothing of the transaction except what was reported to him by the appellant and M. Leblanc, but understood (of course, from them) that Jean B. T. Dorion agreed to lend the money, and exacted the bonus of 1,500*l*.

The appellant examined Jean B. T. Dorion, who swore in the most positive terms that the affair of the premium was his own personal affair. He said he required it to pay for all the time he had to occupy himself in the matter, and for the loss of his practice as a physician for twelve months while he was ascertaining the value of the property of the borrowers, searching the registers, remaining a great part of the time at Montreal, travelling a great deal, and incurring an infinite number of other expenses. He also said that his mother never spoke to M. Leblanc about a premium, that all she did was to consent to the loan, and that she died without knowing that he had received the premium. Of course, this evidence, if believed, was fatal to the appellant's case, but he probably thought that he might safely make Jean B. T. Dorion his witness, as in a former suit brought against him on behalf of the heirs of his brother Jacques Dorion, in which the question was on whose account he received the 1,500*l*. premium, he swore that it was not retained by him for the heirs of Jacques Dorion, but as agent to his mother, Madame Cousineau. He swore further that the affair was settled between the notary Leblanc and his mother, and that he remembered many and long conversations between them, which ended in her consenting to a certain loan at a certain premium, and, he added, it was only by the wish of his mother and upon what she told him, that he consented to act in the affair.

Upon comparing the evidence given by Jean B. T. Dorion with that which he gave in the present suit, it is impossible to place the slightest reliance upon his testimony, as he evidently swore just as it suited his interest upon the particular occasion. In the suit with the heirs of Jacques Dorion he could only protect himself from the claim made upon him by swearing that his mother exacted the premium and received it for her own benefit, and he swore accordingly. In the present suit, which alleged that the 1,500*l*. was exacted and retained by him for his mother, Madame Cousineau, if he had repeated this evidence, he would have established his liability as her legatee, and he therefore swore positively the other way. But by thus proving the contradictory evidence as to the transaction given by Jean B. T. Dorion, the appellant could not call upon the Court to believe what he had formerly sworn, and to discard his testimony in the present suit as worthless. There were no means of determining upon which occasion he had sworn truly or falsely. All that could properly be done was to regard his evidence as utterly unworthy of credit, and to dismiss it without further consideration.

The defendant Zéphir Dorion produced two witnesses to prove that, upon the occasion of the appellant and M. Leblanc going to the residence of Madame Cousineau at St.-Eustache, in 1845, she was unwell, and in her bedroom, and never came downstairs or spoke to them while they were there. It is unnecessary to dwell upon this evidence, which is certainly open to the objection that it refers to events which occurred many years before, and in which one of the witnesses (at least) had no interest to retain it in his memory.

In the opinion of their Lordships the appellant failed entirely to prove the allegation in his declaration that the contract with Madame Cousineau was tainted with usury. That she should have taken a prominent, or, indeed, any part in the transaction, after she had entrusted the management of it to Jean B. T. Dorion, and especially when he was present, seems, from the

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account given of her want of education and the state of her health, to be highly improbable. There is great reason to believe that Madame Cousineau gave Jean B. T. Dorion the sum she was to advance upon the execution of the deed, and that he either retained it or paid it over and received it back at that time. M. Leblanc, in his evidence in another suit, speaking of the transaction, said, "After the execution of the obligation, I saw Kierzkowski count the money, but I did not count it myself, nor did I know how much money was given upon the occasion."

The only money that could pass at that time is the 1,500*l.*; for by the obligation the sum of 1,500*l.* is stated to have been counted and delivered in the presence of the notaries to Kierzkowski, who thereby acknowledged the same. And the sum of 3,375*l.*, the remainder of the advance by Madame Cousineau, was only to be paid when she received it from the Corporation of Montreal, who were indebted to her in that amount. The appellant's case might be disposed of upon the ground of its having failed upon the facts, but their Lordships are unwilling to dismiss the appeal without considering the defence in point of law, which has been argued upon the assumption that the case of usury has been proved against the defendants. It was contended on their behalf that the contract was either subsequently ratified, or that a new contract was substituted for it, founded upon a sufficient consideration. At the time of the agreement for the loan, the Act respecting usury, which was in force in Lower Canada, was that of 1777, which provided that "all bonds, contracts and assurances whereupon or whereby a greater interest (than 6*l.* per cent.) should be reserved and taken, should be utterly void; and that every person who should either directly or indirectly take, accept and receive a higher rate of interest should forfeit and lose treble the value," &c.

There can be no doubt that if the 1,500*l.* had been retained on the loan by Madame Cousineau, that the moment 6*l.* per cent. was paid upon the entire sum, usury would have been committed, for which the lender would have been liable to the penalty; but no excess of interest could have been recovered back till the payments had amounted to a sum exceeding the principal and legal interest. In this case there was no excess of payment before March 24, 1853, when an Act was passed in Lower Canada which altered the law of usury. That Act enacted, "that no contract to be hereafter made in any part of this province, for the loan or forbearance of money at any rate of interest whatsoever, and no payment in pursuance of such contract shall make any party to such contract or payment liable to any loss, forfeiture, penalty or proceeding, civil or criminal, for usury, any law or statute to the contrary notwithstanding." And it provided "that every such contract, and every security for the same shall be void so far, and so far only, as relates to any excess of interest, thereby made payable above the rate of 6*l.* for the forbearance of 100*l.* for a year, and the said rate of 6*l.* per cent. interest, or such lower rate of interest as may have been agreed upon, shall be allowed and recovered in all cases where it is the agreement of the parties that interest shall be paid."

It was contended on the part of the respondents that this Act prevented the plaintiff from recovering back any usurious interest which was paid in excess of principal and legal interest under the contract. But an action to recover such excess could not properly be called "a civil proceeding for usury," though it would be brought on account of usury; the words of the Act evidently pointing to a proceeding upon the fact of usury itself, and not upon claims which resulted from it.

On the part of the appellant it was argued that the Act of 1853 leaves a usurious contract still a void contract, as it was before the passing of the Act. But the words "such contract or security shall be void so far, and as far only, as relates to any excess of interest, &c.," can only mean that the lender shall not recover more than 6*l.* per cent.; not that the contract itself shall be affected by the stipulation for more than legal interest. The whole effect of this Act is, that a usurious contract shall no longer subject a party to any penalty or

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forfeiture; but that it shall be invalid so far as it stipulates for more than 6*l.* per cent.

Upon the subject of the alleged ratification of the usurious contract, the appellant's counsel cited the authority of many eminent writers upon French law, to shew that any number of confirmations, or compromises made while the debtor was under the pressure of the usury, could not be urged as a defence to his action to recover back the money paid by him beyond the legal rate of interest. To which it was answered that the transactions which recognized and ratified the contract, all took place after the Act of 1853, which had made usurious contracts no longer unlawful. And Toulier, under the head of *Contrats et Obligations Conventionnelles*, vol. 4, article 561, was cited, where, upon the subject of the ratification of contracts, which are void from regard to public order or the general interests of society, after stating that "la ratification serait elle-même infectée des mêmes vices que l'acte ratifiée," he adds, "Cependant si les choses en étaient venues au point où la convention cesserait d'être illicite et pourrait prendre naissance, elle pourrait alors être ratifiée, soit expressément soit tacitement." But the contract of November 11, 1845, could not have had a legal existence, nor have been enforced in its entirety after the Act of 1853; it would only have been available to the extent of enabling the lender to recover the legal interest of 6*l.* per cent. Therefore, no subsequent confirmation or ratification of it, supposing it to have been originally usurious and void, could afterwards have given it complete validity.

But the case of the respondents does not rest upon mere ratification. They assert that the old contract has been entirely done away with, and a new one substituted for it upon a good and sufficient consideration, and that it was under the latter contract the payments sought to be recovered were made. No payment beyond the amount of principal and legal interest was made until the year 1855. But on May 7, 1853, a deed was executed by Mr. Fraser, as agent for Mr. and Mrs. Drummond, and for the Count and Countess Rottermund, and Jean B. T. Dorion, acting for the legatees of Madame Cousineau, by which the first-named parties became bound to pay the balance of interest due on November 11 then next, and in consideration of this the Dorions granted a delay of four years to pay the capital of the two obligations of 4,875*l.* and 3,626*l.* 8*s.* 6*d.*, and at the end of that time the capital of the two obligations was to be paid in one payment. And Mr. and Mrs. Drummond gave a new security for the debt by mortgaging to the Dorions property belonging to them in Montreal. This was not a ratification of the contract of November 11, 1845, but a new contract made upon totally different terms, and in consideration of forbearance, and with an additional security given for performance. It is not pretended, however, that there was any actual taking of usurious interest until after September 1, 1855, when Judge Mondelet purchased some property of Mr. and Mrs. Drummond, and a deed was executed whereby he agreed to pay the purchase-money in satisfaction of debts of the vendors, and amongst them what was due to the Dorions, who were parties to the deed. The transaction was to this effect: the Drummonds had contracted to sell their property to Judge Mondelet; the Dorions having a charge upon the property intervened with other creditors; the amount then due to them was settled and stated; they agreed to take payment in a certain way from Judge Mondelet out of the purchase-money. The deed expressly states that they entered into this engagement in order to take from Judge Mondelet any reasons he might have for abandoning the contract of purchase. By the deed also the Dorions give up to the Drummonds the additional security for the debt which they had given by the deed of May 7, 1853. These are new considerations moving from the Dorions sufficient to support the transaction of September 1, 1855, as a new contract. Under that deed the Dorions received a large sum of money from Judge Mondelet, which made the payments to them greatly exceed the amount of principal and legal interest due upon the loan from Madame Cousineau. But the payment by Judge Mondelet cannot be said

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to have been in respect of the obligation of November 11, 1845, but of the new contract of 1855, to which the Drummonds, on whose account the money was paid, were parties. This being so, there was not even a taking of illegal interest upon the usurious contract itself, and the case of the appellant must have failed upon this ground. After the execution of this deed the amount due to the Dorions, which was expressly stated in it, could not fairly be disputed. It is clear that the Drummonds were bound by the arrangement thus entered into, for the Dorions not only forbore to demand immediate payment of what was due to them, but relinquished a security which they held upon the lands of the Drummonds for their debt.

Their Lordships, therefore, are of opinion that if the appellant had proved a case of usury against the respondents, there would have been a good defence to the action upon the ground stated, and they will, therefore, humbly recommend to Her Majesty to affirm the judgment of the Court of Queen's Bench, and to dismiss the appeal with costs.

LORD CHELMSFORD, SIR J. W. COLVILE, SIR JOSEPH NAPIER and SIR LAWRENCE PEEL. Feb. 2, 6, 1869.

RANEE SURNO MOYEE, *appellant;* KISTO NAUTH ROY AND OTHERS, *respondents.*

38 L. J. P.C. 21; L. R. 2 P.C. 274; 20 L. T. 333.

Practice—Appeal—Entry of Appeal—Inaccurate Description—Hearing ex parte—Petition to Re-hear—Registrar, Duties of.

COLONY.—*The Judicial Committee will not re-hear an appeal which has been heard ex parte through a mistake, except under very special circumstances, and only when the ex parte hearing has not been occasioned by any default in the party applying for a re-hearing.*

On a petition to re-hear an appeal which had been heard ex parte and the decree of the Court below reversed, it appeared that the petitioner, one of several respondents in the appeal, had given instructions to his agents in England to enter an appearance for him, and to take all the necessary steps for maintaining the decree of the Court below; that the agents of the petitioner had no notice that the appeal had been entered; and that on inquiry at the Council Office the agents were informed that no such appeal had been entered; but that the misinformation was owing to an inaccurate description of the appeal given by the petitioner to his agents. Their Lordships refused to re-hear the appeal.

It is no part of the duty of the Registrar of the Judicial Committee to give notice to the parties to an appeal of the arrival of the record of the proceedings in the Court below. Parties to an appeal must examine for themselves at the Council Office.

This was a petition by one of the respondents in this appeal, praying that the Judicial Committee would recommend Her Majesty to cancel or amend an order made upon the *ex parte* hearing of the appeal. The petition stated that on or about August 19, 1864, the petitioner obtained a judgment in his favour in the High Court of Judicature in Bengal, in a suit brought by the appellant, Ranee Surno Moyee, against the petitioner and others. That the said Ranee Surno Moyee appealed to Her Majesty in Council from the said judgment; but that various proceedings were taken in India with a view to compromise the suit. That on or about the month of September, 1867, the petitioner instructed his agents in England to appear for him in the said appeal, and directed them to take all the necessary steps on his behalf, with a view of maintaining the judgment of the High Court. That on or about October 23, 1867, the petitioner's agents attended at the Council Office and made inquiry with reference to the said appeal, and were informed that the record in the

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said appeal had not arrived in England. That the petitioner's agents thereupon wrote a letter to the Registrar of the Judicial Committee in the following terms:

"Ranee Surno Moyee, appellant,
and
"Kisto Nauth Roy, respondent.
"In appeal from Bengal.

"We are instructed on behalf of the respondents in the above appeal, and shall be obliged by your giving us notice when the transcript of proceedings arrives in this country, and by your entering an appearance in due time in our names on behalf of the respondents."

That in the month of October, 1867, the petitioner, by his agents, retained counsel on his behalf; that the progress of the appeal was delayed by further attempts to compromise the same in India, but in the month of September, 1868, the petitioner again instructed his agents in England that negotiations for compromise were broken off, and that the case must be taken to a hearing; and the petitioner at the same time remitted funds to his agents for the purpose of having the appeal argued on his behalf.

That the petitioner's agents, in the month of October, 1868, again attended at the Council Office and made inquiry as to the said appeal, and were informed that the record had not arrived in England, and the petitioner's agents wrote to the petitioner to this effect.

That the said appeal was, notwithstanding the many inquiries and diligence on the part of the petitioner, heard *ex parte* in the absence of the petitioner, in the month of December, 1868, and judgment was given in favour of the appellant.

The petition then alleged that in the certificate of the Registrar of the High Court of Bengal, accompanying the record, the title of the appeal given was as follows: "*Mussumat Ranee Surno Moyee* v. *Shoshee Mokhee Burmonia*," without adding the words "*and others*"; and that the appeal was thus entered in the index at the Council Office, and that the appellants having many appeals, the officers at the Council Office were misled thereby.

The petition also stated that there were numerous other parties defendants in the suit, which suit was entitled in the original plaint, "*Ranee Surno Moyee* v. *Ausince Cooman Roy and others*," and the suit was continued under the same title, and in the memorandum of regular appeal to the High Court of Judicature from the judgment of the deputy-collector of Zillah Nuddea.

That the petitioner and one Shoshee Mokhee alone appealed from the said order of the Zillah Court to the High Court of Judicature, and in the proceedings in the High Court the petitioner's name sometimes stood first and sometimes the name of Shoshee Mokhee; and upon the judgment of the High Court being given in favour of the petitioner, and appeal being made thereupon, the petitioner alone, whose case differs in certain respects from those of the other parties, defendants to the original suit, instructed his agents in England to have the appeal argued on his behalf.

The petition concluded with a prayer that their Lordships would recommend Her Majesty to cancel or amend the order made upon the *ex parte* hearing of the said appeal, and give liberty to the petitioner to attend and argue the appeal by counsel on his behalf, and that Her Majesty would make a further or other order therein.

Manisty and *Doyne* appeared in support of the petition.—The hearing of this appeal took place under circumstances over which the petitioner had no control. He took every step with a view to an appearance at the hearing. It was only through the mistake of the officers of the Council Office that the petitioner was misinformed as to the arrival of the record in this country. The petitioner had retained counsel, and only waited till the appeal was likely to be heard to instruct his counsel to appear on the hearing. The recommendation of their Lordships to Her Majesty would have been to maintain the decree of the Court below if the case had been heard. If their Lordships

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refuse to re-hear the appeal it will be a great hardship on the petitioner. They referred to *Rajundernarain Rae and another* v. *Bijai Govind Sing* (1 Moore P.C. 117).

Cave, contra.

Lord Chelmsford delivered the judgment of their Lordships.—This is a petition for the re-hearing of an appeal from a decree of the High Court of Judicature at Fort William, in Bengal, which was heard *ex parte* on the appearance of the appellant alone, and in which their Lordships agreed to recommend to Her Majesty that the appeal should be allowed, and the decree of the Court below be reversed.

The petitioner, one of the respondents in the appeal, prays for a re-hearing on the grounds that he had fully intended to appear in support of the decree, and had given instructions to his agents in England to enter an appearance for him, and take all necessary steps for maintaining the decree, but that neither he nor his agents had any notice that the appeal had been entered, nor were they aware of its having been fixed for hearing until after the hearing had taken place and the report to be made to Her Majesty in Council had been agreed to.

In support of the petition the case of *Rajundernarain Rae and another* v. *Bijai Govind Sing* (1 Moore P.C. 117) was relied upon to shew that it is competent to their Lordships, even after a report to the King and the confirmation of the report, to recommend that there shall be a re-hearing. Such an unusual indulgence, however, ought never to be granted except under very special circumstances, and only where the *ex parte* hearing has not been occasioned by any default in the party applying for a re-hearing. The case referred to was one of this exceptional character. The hearing was *ex parte* upon the appearance of the respondent alone, and the Committee, adopting a form of order which had been used on previous occasions, affirmed the decree of the Court below, and dismissed the appeal with costs upon a petition by the appellants praying to have the order for dismissing the appeal and affirmance of the judgment recalled, and for leave to prosecute their original petition of appeal. Their Lordships considered that a simple dismissal was to be regarded as the order which must have been in their contemplation, and that no more could have been intended in substance, although the objectionable form importing affirmance was followed, and upon the application for a re-hearing, Lord Brougham, in delivering the opinion of the Committee, stated that the case for indulgence was a strong one, provided there was power to grant the application. The parties were infants under the Court of Wards in Calcutta, and appeared by a public functionary through the appointment of that Court as their guardian *ad litem;* this person neglected the case altogether, and not only did not provide funds for carrying it on, but absconded with funds in his hands which had been allowed for the expense of the suit, and he was not to be found when the agent here desired to communicate with him, nor had he since returned. Their Lordships therefore thought, "in the particular circumstances of the case," His Majesty should be advised to amend the order, and to let in the appellants to be heard notwithstanding the dismissal, that is to say, "to restore the appeal," but the conditions were imposed of payment of the respondent's costs occasioned by the default at the time of the *ex parte* report, and also by the application for a re-hearing.

In the present case it cannot be truly alleged that the *ex parte* hearing took place without any default on the part of the petitioner or his agents. The appeal was from a decision of the High Court of Judicature at Fort William, in Bengal, in favour of the defendants, in a suit in which Mussumat Ranee Surno Moyee was plaintiff, and Shoshee Mokhee Burmonia, the petitioner Kisto Nauth Roy and several others, were defendants.

In the certificate of the Registrar of the Court, accompanying the transmission of the record, the only defendant named in the title of the appeal was Shoshee Mokhee Burmonia, without the addition of the words "and others"; but in the record itself the words "and others" were added to the name of the defendant. The petitioner's instructions to his agents probably named only

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himself as the respondent in the appeal, because a letter dated October 23, 1867, was written by them to the Registrar of the Privy Council in these words—

"Ranee Surno Moyee, appellant,
and
"Kisto Nauth Roy, respondent.
"In appeal from Bengal.

"We are instructed on behalf of the respondent in the above appeal, and shall be obliged by your giving us notice when the transcript of proceedings arrives in this country, and by your entering an appearance in due time in our names on behalf of the respondents."

The agents made inquiries at the Council Office on the day this letter was written, and also subsequently in the same month of October, whether the record in the appeal had arrived. As there was no appeal with the title named in the letter, they were of course answered in the negative. The misinformation as to the non-arrival of the proceedings in this country was owing to the inaccurate description of the appeal given by the petitioner to his agents. This inaccuracy is inexcusable, because he knew perfectly well that there were many other respondents besides himself, and that his name did not stand the first amongst the defendants in the title of the suit. All the ignorance of the proceedings taken on the part of the appellant resulted from the petitioner having thus originally misled his agents in his instructions to them. The agents themselves, too, are not wholly free from blame. They should not have been satisfied with having requested the Registrar to give them notice of the arrival of the proceedings, which it was no part of the duty of his office to do; but they should have examined for themselves at the Council Office, and, having the name of the appellant accurately given, they would have ascertained that there was an appeal by him, and upon the production of the proceedings, they would have found that to the name of the respondent there were added the words "and others," which would have led to a further examination, and to the discovery that it was the appeal in which the petitioner was interested, and in which they were instructed to appear for him. Under these circumstances, to grant the indulgence of a re-hearing to the petitioner would be to give him the benefit of his own and his agents' default.

It is necessary to distinguish this case from that of *Macleary* v. *Hill and others* (not reported), which was heard by this Committee on June 30, 1868, and in which their Lordships intimated their opinion that the decree appealed from ought to be varied and amended, and directed minutes of the proposed report to be prepared by the counsel for the appellant. This was accordingly done; and on July 2 the minutes were approved and adopted by their Lordships, and were afterwards, on July 7, submitted to Her Majesty for approval. Immediately after the Order in Council had been made, the Registrar, in drawing the final order, discovered that the appellant's solicitor had omitted to take out and issue the usual process, requiring four out of the five respondents to appear to the appeal, although he had issued the regular process against the fifth respondent. The Registrar reported this fact to their Lordships, and, on July 10, their Lordships reported to Her Majesty that the order of July 7 ought to be revoked. The appeal then stood over for further directions, and the appellant was ordered to serve a personal notice of the appeal on each of the four respondents who had not appeared.

The distinction between that case and the present is that, in *Macleary* v. *Hill and others* (not reported), the appellant had neglected to take an essential step in the appeal, and was therefore not entitled to set down the case *ex parte* as against the respondents. In the present case, although no appearance had been entered on behalf of the respondents, or either of them, the appellant had done all he was required to do by the practice and rules of the Judicial Committee, and the omission and neglect is that of the petitioner, who now asks for a re-hearing of the appeal.

The petition must be dismissed with costs.

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LORD CHELMSFORD, SIR JAMES W. COLVILE and SIR JOSEPH NAPIER,
Feb. 2, 3, 19, 1869.

THOMAS GIBLIN AND OTHERS, *Executors of* RICHARD LEWIS, *appellants;* JOHN FRANKLIN M'MULLEN, *respondent.*

38 L. J. P.C. 25; L. R. 2 P.C. 317; 21 L. T. 214; 17 W. R. 445.

Distinguished, *In re United Service Company*, [1871] E. R. A.; 40 L. J. Ch. 286; L. R. 6 Ch. 212; 24 L. T. 115; 19 W. R. 457 (L. JJ.). See, *Leese* v. *Martin*, [1874] E. R. A.; 43 L. J. Ch. 193; L. R. 17 Eq. 224; 29 L. T. 742; 22 W. R. 230 (V.C.); *Lagunas Nitrate Company* v. *Lagunas Syndicate*, [1899] E. R. A.; 68 L. J. Ch. 699; [1899] 2 Ch. 392; 81 L. T. 334; 48 W. R. 74 (C. A.); *In re National Bank of Wales*, [1899] E.R.A.; 68 L. J. Ch. 634; [1899] 2 Ch. 629; 81 L. T. 363; 48 W. R. 99 (C. A.).

Banker — Securities, Deposit of — Gratuitous Bailee, Liability of — Negligence, Evidence of.

BAILMENT. BANKER AND BANKING COMPANY.—*A customer deposited with his bankers securities for safe keeping. The securities were stolen by a clerk in the employ of the bankers:*—Held, *that the bankers were not liable unless the loss was occasioned by their gross negligence.*

The appellant deposited with his bankers a box containing securities, of which he kept the key. The box was kept in a strong room of the bank, where was the manager's box containing the securities of the bank. Access to the strong room was only obtained by passing through a compartment where a cashier sat by day and a messenger slept by night. In this compartment was a door leading to the strong room, which room had two iron doors opened by separate keys, which during the day were kept by the cashier who occupied the compartment. This cashier stole the appellant's securities. The bank received no consideration for taking care of the securities of their customers:—Held, *under the circumstances, that there was no evidence of negligence to render the bank liable to the appellant for the loss of his securities.*

This was an appeal from a judgment of the Supreme Court of the colony of Victoria.

The action was brought by Richard Lewis, since deceased, against the respondent as inspector of the Union Bank of Australia, to recover damages from the Union Bank of Australia.

The first count of the declaration charged the bank with negligence as bailees for reward, and the second count as gratuitous bailees in keeping certain debentures of the said Richard Lewis, whereby the same were lost. To this declaration the respondent, as such inspector, pleaded a traverse of the delivering to, and receipt by, the bank of the debentures, and also not guilty, upon which pleas issue was joined.

The issues came on to be tried on November 8, 1865, before the Chief Justice of the Supreme Court, and evidence, both oral and documentary, was given, and the jury found that the bankers were not bailees for reward, and gave a verdict for the said Richard Lewis for 10,450*l.* The Supreme Court subsequently granted a rule *nisi* to set aside the verdict and enter a nonsuit, which rule was made absolute, and on May 18, 1867, final judgment was signed for the respondent.

Richard Lewis petitioned the Supreme Court for leave to appeal, and such leave was granted. Richard Lewis died at Hobart Town, on November 8, 1867, having made his will, whereby he appointed the appellants his executors.

The facts of the case are stated in the judgment of their Lordships.

The Solicitor-General (Sir J. Coleridge), Watkin Williams and *Beresford*, for the appellants.—The evidence given at the trial was sufficient to support the verdict of the jury. The question of negligence is one of fact for the jury,

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and the finding of the jury in favour of the appellants should not have been disturbed. The rule to set aside the verdict and enter a nonsuit ought to have been discharged. The appellants are entitled to judgment for the amount of the damages found by the jury.—They referred to *Shiells* v. *Blackburn* (H. Black. 158); *Foster* v. *the Essex Bank* (17 Mass. Rep. 479); *Doorman* v. *Jenkins* (2 Ad. & E. 256; 4 L. J. K.B. 29); *Wilson* v. *Brett* (11 Mee. & W. 113; 12 L. J. Ex. 264); *Beal* v. *the South Devon Railway Company* (3 Hurls. & C. 337); *The Peninsular and Oriental Company* v. *Shand* (3 Moo. P. C.C. 272); *Grill* v. *the Iron Screw Collier Company* (37 L. J. C.P. 205); and *Dansey* v. *Richardson* (3 El. & B. 144; 23 L. J. Q.B. 217).

Mellish, *J. Brown* and *W. Murray*, for the respondent.—There was no sufficient evidence that the debentures were in the custody of the bank at the time they were stolen. There was no evidence of a bailment of the debentures to the bank on the terms alleged in the second count. There was no sufficient evidence that the bank kept the debentures in a negligent manner, as alleged in the second count of the declaration. If the debentures were stolen by a clerk from the bank whilst in the custody of the bank, the bank is not liable for the loss without negligence; and there was no evidence of negligence.—They referred to *Coggs* v. *Bernard* (1 Smith's Lead. Cas. 171); *Finucane* v. *Small* (1 Esp. 313); *Toomey* v. *the London, Brighton and South Coast Railway Company* (3 Com. B. Rep. N.S. 146; 29 L. J. C.P. 39); *Cornman* v. *the Eastern Counties Railway Company* (4 Hurls. & N. 781; 29 L. J. Ex. 94); *Cotton* v. *Wood* (29 L. J. C.P. 333); and *Crafter* v. *the Metropolitan Railway Company* (35 L. J. C.P. 132).

Cur. adv. vult.

Lord Chelmsford now (Feb. 19) delivered the judgment of their Lordships.—This is an appeal from a judgment of nonsuit of the Supreme Court of the colony of Victoria, in an action by the appellant's testator against the respondent. The action was brought against the defendant, as inspector of the Union Bank of Australia, to recover damages for the negligent keeping of certain railway debentures delivered to the bank to be safely kept and taken care of. The plaintiff, who resided at Hobart Town, in Tasmania, had an account with the Union Bank of Australia from the year 1857. From the earliest period of his becoming a customer of the bank he had placed in their care a box, of which he kept the key, containing securities, deeds and debentures. The bank received no consideration for taking care of the deposits of their customers. In the month of January, 1862, the plaintiff purchased the railway debentures in question and put them in his box. The box appears always to have been kept in a strong room underground, in which the boxes of other customers of the bank were placed. There were also in this strong room the manager's box, containing bills for discount and collection, worth from 1,500,000*l.* to 2,500,000*l.*, teller's boxes, worth 50,000*l.* and securities of the Royal, Central and Agra banks, in which the Union Bank was interested. The access to this room could only be obtained by passing through a compartment of the office which was separated from the part where the clerks were employed by a partition about five feet high. In this compartment Fletcher, the cashier, always sat during bank hours, and a messenger slept there during the night. There was a wooden door in this compartment, which opened upon a flight of steps leading to the room where the plaintiff's box was deposited. This room had two iron doors, which were opened by separate keys. Fletcher always kept the key of the wooden door, and also, during the day, the keys of the two iron doors, but at the time the debentures in question were placed in the box one of the keys of the iron doors only was kept by him at night, the other being taken care of by another officer of the bank. Beyond the room where the box was there were two other rooms; in the outer of the two uncoined gold was kept, in the inner, bullion and unsigned notes of the bank. The manager kept the key of the outer of these two rooms, and one of the directors of the bank that of the inner one. The plaintiff had frequent opportunities of seeing how and where his box with the debentures was kept. The customers were permitted to have access to their boxes during

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the bank hours, but always in the presence of a bank clerk. The plaintiff occasionally went down to the strong room to take the coupons from his debentures for collection, but generally the box was brought up to him. The coupons, when taken from the debentures, were always given by the plaintiff to Fletcher to collect for him.

On April 19, 1864, the plaintiff went to the bank and asked for his box; Fletcher brought it to him. The plaintiff opened the box, took out his debentures and carried them away. He then cut off the coupons, took back the debentures, replaced them in the box, locked it, and gave the coupons to Fletcher to collect for him as usual. Before the plaintiff's next visit to the bank, Fletcher had abstracted the debentures. The exact time at which this act of dishonesty was committed cannot be ascertained, but it must have been before the month of July, 1864, as Fletcher then left the bank on leave of absence and never returned. Up to the time of his leaving he had always maintained a good character. The plaintiff did not come again to the bank till July 3, 1865. He then went into the strong room and took out of his box some gas shares. On the following day he returned to the bank and had his box brought up to him, when he discovered that the debentures were gone. All the material facts above stated were proved in the course of the plaintiff's case—that the bank were gratuitous bailees, that the plaintiff had known for years the manner in which the bank kept the property of their customers deposited with them, and the means which they employed for its protection, and that the debentures were dishonestly taken away by Fletcher.

At the close of the plaintiff's case, the counsel for the defendant applied for a nonsuit, on the ground that the bank being gratuitous bailees no evidence had been given of such negligence as would render them liable for the loss of the debentures. The Judge refused to stop the case, but reserved leave to the defendant to move to enter a nonsuit. The defendant thereupon went into his case and called witnesses. The only material additions which he made to the facts proved by the plaintiff's witnesses were the keeping in the strong room in which the plaintiff's box with the debentures was placed, not only of the boxes of other customers, but also of the before-mentioned valuable property belonging to the bank; the good character of Fletcher, and his leaving the bank in the end of the month of July, 1864; and that after Fletcher left, but before the loss of the plaintiff's debentures was discovered, a rule was made in the bank that two clerks instead of one (as formerly) should go with a customer wishing to examine his box in the strong room. The jury found a verdict for the plaintiff upon an issue as to the delivery of the debentures to be kept by the bank without reward, and also upon the plea of not guilty (which raised the question of negligence); and they assessed the damages at 10,450*l*.

The defendant, upon the leave reserved at the trial, moved for and obtained a rule from the Supreme Court to set aside the verdict, and to enter a verdict for the defendant or a judgment of nonsuit. That rule was afterwards made absolute, the Chief Justice stating that, "in the opinion of the Court, the defendant was entitled to a verdict; but that as at the trial, when leave to enter a verdict was reserved, there was an understanding that the rule, if absolute, should be for a nonsuit, and not to enter a verdict, the rule would be absolute accordingly." In the argument of the appeal, the counsel for the appellants, admitting that the bank were gratuitous bailees, and therefore not responsible except for the highest degree of negligence, usually styled "gross negligence," insisted that it was a question of fact for the jury whether the bank had been guilty of this species of negligence, and that the Judge would not have been justified, at the close of the plaintiff's case, in withdrawing the question from the jury and directing a nonsuit; and that after the defendant's case had been gone into, and the jury had pronounced a verdict upon all the evidence on both sides, it was not competent to the Court to give a judgment of nonsuit, or to do more than to direct a new trial upon the question of negligence. The learned counsel contended that the bank had been guilty of negligence, because, there being two iron doors with protecting locks to the strong room where the plaintiff's

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debentures were, the cashier was permitted to keep both keys. And they urged that the bank by their own act admitted that they had not been sufficiently careful, as, after Fletcher left, they made a rule that two clerks should always accompany the customers to the strong room instead of only one, as had previously been the practice.

The first question to be considered is, whether the Supreme Court was right in directing a nonsuit to be entered. It was the duty of the Court to do what the Judge ought to have done at the trial; and if, at the close of the plaintiff's case, there was not evidence upon which the jury could reasonably and properly find a verdict for him, the Judge ought to have directed a nonsuit. Formerly it used to be held that, if there were what was called a scintilla of evidence in support of a case, the Judge was bound to leave it to the jury. But a course of recent decisions—most of which are referred to in the case of *Ryder* v. *Wombwell* (38 L. J. Ex. 8)—has established a more reasonable rule, viz., that, in every case, before the evidence is left to the jury there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed. If, therefore, the plaintiff's evidence in this case was such that the Judge ought to have considered that it fell short of proving the bank to have been guilty of that species of negligence which would render them liable to an action, he ought to have withdrawn the case from the jury, and directed a nonsuit. But the appellants' counsel insisted that, as the defendant at the trial did not rest upon his objection to the sufficiency of the plaintiff's case, but went into evidence of his own, he did it at his peril; and that if he proved any facts which were favourable to the plaintiff, they might be used in answer to the application to the Court for a nonsuit, upon the leave reserved at the close of the plaintiff's case. It is unnecessary to determine whether this position is correct or not, because the counsel for the respondent agreed that the appellants' counsel might be at liberty to use in argument any facts which they could extract from the defendant's evidence in support of their case. But it may be convenient to see how the plaintiff's case stood upon his own evidence, before considering whether it was at all improved by any facts obtained from the defendant's witnesses. Did the plaintiff, then, give any evidence of the bank having been guilty of that degree of negligence which renders a gratuitous bailee liable for the loss of property deposited with him? From the time of Lord Holt's celebrated judgment in *Coggs* v. *Bernard* (1 Smith's Lead. Cas. 171), in which he classified and distinguished the different degrees of negligence for which the different kinds of bailees are answerable, the negligence which must be established against a gratuitous bailee has been called "gross negligence." This term had been used from that period, without objection, as a short and convenient mode of describing the degree of responsibility which attaches upon a bailee of this class. At last, Lord Cranworth (then Baron Rolfe), in the case of *Wilson* v. *Brett* (11 Mee. & W. 113; 12 L. J. Ex. 264), objected to it, saying that he "could see no difference between negligence and gross negligence; that it was the same thing, with the addition of a vituperative epithet." And this critical observation has been since approved of by other eminent Judges. Of course, if intended as a definition, the expression "gross negligence" wholly fails of its object. But as there is a practical difference between the degrees of negligence for which different classes of bailees are responsible, the term may be usefully retained as descriptive of that difference, more especially as it has been so long in familiar use, and has been sanctioned by such high authority as Lord Holt, and Sir William Jones in his *Essay on the Law of Bailments*. In the case of *Grill* v. *the General Iron Screw Collier Company* (37 L. J. C.P. 205), Mr. Justice Willes, after agreeing with the dictum of Lord Cranworth, and stating that the same view of the term "gross negligence" was held by the Exchequer Chamber in *Beal* v. *the South Devon Railway Company* (3 Hurls. & C. 337), said: "Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use." It is hardly

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correct to say that the Court of Exchequer Chamber, in the case referred to, adopted the view of Lord Cranworth as to the impropriety of the term "gross negligence." Mr. Justice Crompton, in delivering the opinion of the Court, said: "It is said that there may be difficulty in defining what gross negligence is; but I agree in the remark of the Lord Chief Baron in the Court below, where he says, 'There is a certain degree of negligence to which everyone attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them;'" and he added, "For all practical purposes the rule may be stated to be, that the failure to exercise reasonable care, skill and diligence is gross negligence." Mr. Justice Montague Smith, in the case in which the above-mentioned observations of Mr. Justice Willes were made, said: "The use of the term 'gross negligence' is only one way of stating that less care is required in some cases than in others, as in the case of gratuitous bailees, and it is more correct and scientific to define the degrees of care than the degrees of negligence." The epithet "gross" is certainly not without its significance. The negligence for which, according to Lord Holt, a gratuitous bailee incurs liability is such as to involve a breach of confidence or trust, not arising merely from some want of foresight or mistake of judgment, but from some culpable default. No advantage would be gained by substituting a positive for a negative phrase, because the degree of care and diligence which a bailee must exercise corresponds with the degree of negligence for which he is responsible, and there would be the same difficulty in defining the extent of the positive duty in each case as the degree of neglect of it which incurs responsibility. In truth, this difficulty is inherent in the nature of the subject, and, though degrees of care are not definable, they are with some approach to certainty distinguishable; and in every case of this description in which the evidence is left to the jury, they must be led by a cautious and discriminating direction of the Judge to distinguish, as well as they can, degrees of things which run more or less into each other.

It is clear, according to the authorities, that the bank in this case were not bound to more than ordinary care of the deposit entrusted to them, and that the negligence for which alone they could be made liable would have been the want of that ordinary diligence which men of common prudence generally exercise about their own affairs.

The case resembles very closely one that was mentioned by the counsel for the respondent, which was decided in the Supreme Judicial Court of Massachusetts, the case of *Foster* v. *the Essex Bank* (17 Mass. Rep. 479). The plaintiff in that case deposited with the bank, for safe custody, a cask containing a quantity of gold doubloons. This was placed with other deposits in a vault in the bank, and the agent of the plaintiff was in the habit of coming to the bank to see that his deposit was safe. There was no evidence how the vault was secured. Whenever the plaintiff gave orders to the bank (which he frequently did) to deliver some of the gold doubloons deposited, the cask was opened by the cashier or chief clerk, who delivered the doubloons pursuant to the orders. The cashier and chief clerk, both of whom had previously sustained a fair reputation, fraudulently took from the cask doubloons to the amount of 32,000 dollars, with which they absconded. The action was tried upon the general issue, and the jury found a special verdict. The Court, after argument, gave judgment for the defendants. The Chief Justice, who delivered the opinion of the Court, entered fully into the law of bailments applicable to the case, holding that "as far as the bank was concerned, the deposit of the gold was a mere naked bailment for the accommodation of the depositor, and without any advantage to the bank which could tend to increase its liability beyond the effect of such a contract." "That the bank was answerable only for gross negligence or for fraud, which will make a bailee of any character answerable, and that gross negligence certainly could not be inferred from anything found by the verdict, as the same care was taken of the plaintiff's property as of other deposits, and of the property belonging to the bank itself." And the Court held that the bank was not responsible for the fraud or felony of the cashier and

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clerk, as when they abstracted the plaintiff's gold from the cask they were not acting within the scope of their employment; "and the bank was no more answerable for their act than it would have been if they had stolen the pocket-book of any person who might have laid it upon the desk while he was transacting some business at the bank."

Their Lordships entertain no doubt that it was the duty of the Judge at the close of the plaintiff's case, upon the application of the counsel for the defendant, to have ordered a nonsuit, or, if the plaintiff refused to be nonsuited, to have directed the jury to find a verdict for the defendant, as there was an entire failure of evidence of the want of that ordinary care which the bank was bound to bestow upon the plaintiff's deposit.

But the Judge having refused to nonsuit, the defendant thereupon went into his case, and called witnesses, and having done so the counsel for the appellants contend that there being evidence on both sides, the question could not be withdrawn from the jury, and that as the Judge could not have nonsuited at that stage of the trial it was not competent to the Supreme Court to give a judgment of nonsuit. It is not, however, correct to say that the Judge could not have nonsuited the plaintiff after the defendant had entered upon his case, as it was decided in the case of *Davis* v. *Hardy* (6 B. & C. 225) that the evidence given by a defendant may be used for the purpose of a nonsuit.

The defendant's evidence added to the plaintiff's case the important fact that in the strong room in which the plaintiff's debentures were kept, there were, besides the boxes of other customers, bills, securities and specie, the property of the bank, to a very considerable amount. It may be admitted not to be sufficient to exempt a gratuitous bailee from liability that he keeps goods deposited with him in the same manner as he keeps his own, though this degree of care will ordinarily repel the presumption of gross negligence. But there is no case which puts the duty of a bailee of this kind higher than this, that he is bound to take the same care of the property entrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description. This was in effect the question left to the jury in *Doorman* v. *Jenkins* (2 Ad. & E. 256; 4 L. J. K.B. 29), where Lord Denman told them that "it did not follow from the defendant's having lost his own money at the same time as the plaintiff's that he had taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own, and that the fact relied upon was no answer to the action if they believed that the loss occurred from gross negligence."

No one can fairly say that the means employed for the protection of the property of the bank and of the plaintiff were not such as any reasonable man might properly have considered amply sufficient. But the appellants' counsel insisted that the fact appearing for the first time in the defendant's case, that the bank, after Fletcher had abused the confidence reposed in him, had introduced additional precautions to prevent the recurrence of a similar act of dishonesty, amounted to an admission that their former safeguards were not such as prudent men ought to have been satisfied with. This argument goes the length of contending that if a gratuitous depositary does not multiply his precautions so as not to omit anything which can make the loss of property entrusted to him next to impossible, he is guilty of gross negligence.

Their Lordships are clearly of opinion that the plaintiff failed upon his own evidence to prove a case of negligence against the bank, and that the evidence produced by the defendant shewed more strongly the absence of any such negligence for which they would have been liable. They will, therefore, recommend to Her Majesty that the judgment appealed from be affirmed, and the appeal be dismissed with costs.

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LORD CHELMSFORD, SIR J. COLVILE and SIR JOSEPH NAPIER, Feb. 4, 5, 19, 1869.

ALEXANDER RODGER AND OTHERS, *appellants;* COMPTOIR D'ESCOMPTE DE PARIS AND THE CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA, *respondents.*

38 L. J. P.C. 30; L. R. 2 P.C. 393; 21 L. T. 33; 17 W. R. 468.

Distinguished, *Chartered Bank of India* v. *Henderson,* 1874, L. R. 5 P.C. 501; 30 L. T. 578 (P.C.). Approved, "*The Emilien Marie,*" [1875] E. R. A.; 44 L. J. Adm. 9; 32 L. T. 435 (Adm.). Applied, *Ex parte Watson,* [1877] E. R. A.; 46 L. J. Bk. 97; 5 Ch. D. 35; 36 L. T. 75; 25 W. R. 489 (C. A.). Disapproved, *Leask* v. *Scott,* [1877] E. R. A.; 46 L. J. Q.B. 576; 2 Q.B. D. 376; 36 L. T. 784; 25 W. R. 654 (C. A.). Distinguished, *Kendall* v. *Marshall,* [1883] E. R. A.; 52 L. J. Q.B. 313; 11 Q.B. D. 356; 48 L. T. 951; 31 W. R. 597 (C. A.).

Stoppage in transitu—*Bills of Lading—Indorsement of—Consideration for.*

SALE OF GOODS. SHIPPING.—*L. & Co., merchants, carrying on business at Hong Kong, purchased goods of a merchant in Manchester, to be shipped to their firm at Hong Kong, to be paid for at certain credit. The goods were shipped deliverable to the order of L. & Co., and bills of lading signed. Before the goods arrived at Hong Kong, L. & Co. being insolvent, and being indebted to the respondents, the agent of L. & Co. at Hong Kong agreed to assign to the respondents all the estate of L. & Co., including the bills of lading in respect of the said goods, and such bills of lading were in pursuance of the said agreement afterwards indorsed to the respondents. At the time the bills of lading were so transferred, no money was advanced or benefit conferred on L. & Co. by the respondents:*—Held, *that there was no sufficient transfer of the bills of lading for a valuable consideration so as to defeat the right of an unpaid vendor to stop the goods* in transitu.

This was an appeal from a judgment of the Supreme Court of Judicature at Hong Kong.

The respondents sued the appellants for having converted to their own use 305 bales of merchandise, laden on board the ship "*Min.*"

The appellants pleaded, first, not guilty; secondly, a denial of the goods being the goods of the respondents.

Upon these pleas issues were joined.

The cause came on to be tried, on June 3, 1867, before the Hon. John Smale, her Majesty's Chief Justice at Hong Kong, when the jury found a verdict for the respondents.

On June 25, 1867, the appellants moved to set aside the verdict, and instead thereof that a nonsuit should be entered, or a new trial had.

The Supreme Court of Hong Kong, on June 29, 1867, refused the motion with costs.

The facts of the case were as follows: The appellants were owners of the said ship "*Min.*"

The respondents, the Comptoir d'Escompte de Paris, were a banking corporation, of which Herman Kaiser was manager at Hong Kong, and the other respondents, the Chartered Bank of India, Australia and China, were also a banking corporation, of which William Kaye was the manager at Hong Kong.

The 305 bales of merchandise laden on board the ship "*Min*" were purchased for the London firm of Messrs. George Lyall & C. Frederick Still, of which London firm as well as of the Hong Kong firm of Lyall, Still & Co. the said George Lyall and C. F. Still were members, and were shipped to the said Hong Kong firm through Killick, Martin & Co., general shipbrokers, of London.

The remaining facts are stated in the judgment of their Lordships.

Sir R. Palmer, Manisty and *Baylis.*—There was no valuable consideration

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for the transfer of the three bills of lading so as to defeat the right of stoppage *in transitu* by the unpaid vendors. The respondents could only acquire the same rights which belonged to Lyall & Co., whose title to the goods was subject to the right of stoppage *in transitu* by an unpaid vendor. No consideration passed from the respondents to Lyall & Co. at the time of the transfer. The bills of lading were transferred to secure an antecedent debt, and the transfer was therefore invalid. The bills of lading did not come to the hands of Lyall & Co. as absolute owners, but subject to certain trusts for sales and for the specific appropriation of the proceeds thereof. They had no power to transfer the same to the respondents as a security for an antecedent debt.—They referred to *Mangles* v. *Dixon* (3 H.L. C. 702); *Whitworth* v. *Gaugain* (3 Hare, 416); *Cuming* v. *Brown* (9 East, 506); *Virtue* v. *Jewell* (4 Campb. 31); *Haille* v. *Smith* (1 Bos. & P. 563); *Spalding* v. *Ruding* (6 Beav. 376); *Gurney* v. *Behrend* (23 L. J. Q.B. 265); *Evans* v. *Trueman* (1 Moo. & R. 12); *Gobind Chunder Sein* v. *Ryan* (9 Moo. Ind. App. 140); *Shep. Touch.* 88.

Mellish, *Kaye* and *Holl*, for the respondents.—At the time when the attempt was made by the vendors to stop the goods they were not *in transitu*. The respondents became *bonâ fide* and without notice transferees for valuable consideration of the bills of lading; the vendor's right to stop the goods *in transitu* was thereby defeated. Lyall, Still & Co. were not factors, but owners of the goods. The stipulation as to the remission of the proceeds of the goods to meet the drafts accepted for the price thereof, was a mere term of the contract for those goods, but did not under the circumstances affect the goods with any trust or equitable lien. The respondents became assignees of the goods and indorsees of the bills of lading *bonâ fide* for valuable consideration, and without notice of any trust or equitable lien affecting the goods, and therefore such trust or equitable lien (if any) could not overreach the title of the respondents. If it were intended to affect the transferees of the bills of lading with any trust it should have appeared on the face of the bills of lading. Lyall, Still & Co. had a first charge on the goods, which they were in a position to, and did by the assignment transfer to the respondents. The mere fact of a man being insolvent does not make a transfer fraudulent. There must be notice that there is an unpaid vendor. They referred to "*The Marie Joseph*" (3 Moo. P.C.C. N.S. 556); *Lickbarrow* v. *Mason* (1 Smith, L.C. 398); *Jones* v. *Smith* (1 Hare, 43); *Raphael* v. *the Bank of England* (17 Com. B. Rep. 161; 25 L. J. C.P. 33); *Jones* v. *Jones* (6 Mee. & W. 84; 9 L. J. Ex. 178).

Sir R. Palmer, in reply.

SIR J. NAPIER (Feb. 19) now delivered the judgment of their Lordships.—This was an action of trover, brought by the respondents against the appellants, in the Supreme Court of Hong Kong, for 305 bales of merchandise which were shipped at London for Hong Kong on board a vessel called the "*Min*," by the direction of George Lyall and Charles Frederick Still, of London, deliverable to Lyall, Still & Co., or their assigns, according to the bills of lading, of which the respondents became the transferees. The appellants were the owners of the "*Min*." They pleaded a denial of the conversion, and also a denial that the goods were the goods of the plaintiffs (the respondents) as alleged. The case was tried at Hong Kong, before the Chief Justice and a special jury, and a verdict was found for the plaintiffs for the amount of the value of the goods. A motion was afterwards made to have this verdict set aside and a nonsuit entered, pursuant to leave reserved at the trial, on the ground that the plaintiffs had not proved that they were indorsees of the bills of lading for valuable consideration without notice, so as to pass property, or that a new trial should be directed on this and other grounds of objection. An order was made that the motion be refused with costs.

This appeal has been brought for the purpose of having this order and the verdict found for the plaintiffs set aside and judgment of nonsuit entered, or a new trial directed.

It appears on the Chief Justice's notes of the evidence of the plaintiffs that the goods in question were purchased from merchants at Manchester, in the

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autumn of 1866, by George Lyall and Charles Frederick Still, of London, for their firm at Hong Kong, which traded there under the style of Lyall, Still & Co. Mr. George Frederick Maclean was the resident partner and manager at Hong Kong. One parcel of these goods was purchased from B. Liebert & Co., on a ten months' credit, which was the usual course in such transactions as between Manchester and Hong Kong merchants. It was part of the contract that remittances of proceeds of sales should be made from Hong Kong to meet the acceptances of George Lyall and Charles Frederick Still, given for the price of the goods, on receipt of the bills of lading. The second parcel was purchased from Samuel Mendel, on a nine months' credit, with a stipulation of a similar character as to remittances. The third parcel was purchased from Calvert & Co. on a six months' credit, without any special stipulation. The object of the long credit was to give ample time for realizing proceeds, so as to make remittances according to agreement. When the time arrived for forwarding the goods from Manchester, Lyall & Still, of London, employed Killick, Martin & Co. as shipping agents there, to secure tonnage in the "*Min*," which was then in the berth for Hong Kong. When this was secured, Lyall & Still directed the vendors at Manchester to forward the goods to Killick, Martin & Co. for shipment in the "*Min*"; and they also directed Killick, Martin & Co. to receive the goods so as to be forwarded to them simply for the purpose of the shipment. In accordance with these instructions the goods were packed and marked at Manchester ready for shipment, and were sent up to Killick, Martin & Co., with whom Lyall & Still had contracted for the carriage from Manchester to Hong Kong. All the charges were included in one through freight. The goods were shipped on board the "*Min*"; bills of lading for them, deliverable to Lyall, Still & Co. or their assigns, were signed by the master, and were handed over to Lyall & Still, who accepted the draft of the vendors for the price in each case. Before this period the firm at Hong Kong was in a failing condition; their deficit was about 4 lacs of dollars, and in November their condition had not improved. At the end of November and beginning of December, Maclean had bill transactions with the respondents (two banking firms at Hong Kong), by which he got large advances on the undertaking to furnish shipping documents for silk cargoes, to be ready for the mail of December 15, from Hong Kong.

On December 13, the transactions of the firm were at a stand; they had ceased to make purchases or shipments of tea or silk as theretofore; they were under the necessity of returning bills of their correspondents, and had refused payment of their acceptances to the amount of 150,000 dollars. This was well known at the time at Hong Kong. On December 14, Mr. Kaiser, the manager of one of the two banks, addressed a letter to Lyall, Still & Co., requiring them to furnish, in the course of the day, the shipping documents according to their undertaking; to which Mr. Maclean replied, that they were unfortunately unable to comply with this request. On the 17th, Mr. Kaiser wrote another letter, insisting on getting the documents or a return of the advance made on the faith of the undertaking to furnish them, and he concludes his letter in these words: "I must ask your immediate attention to this matter and beg to warn you that my now offering to receive back the money obtained by you must not be looked upon as in any way binding me to treat the matter as one of debt, as I shall hold myself perfectly at liberty to deal with the matter as one of a much more serious character than a mere debt, if it be not at once satisfactorily arranged."

Mr. Kaye, the resident manager of the other bank, had had a conversation with Mr. Maclean, in reference to the refusal of Lyall, Still & Co. to pay their acceptances. He also became impatient and urgent for an arrangement, on account of the advance made by his bank. The two banks then combined, and Maclean was pressed, as he could not give them the documents he promised, *to give them all he had*. He was asked, "What can you give us?" He made out a memorandum, which he handed to Mr. Pollard, the counsel for the banks, in order that he might prepare a formal assignment. This was prepared, and was executed, on December 22, by Mr. Maclean in the name of the firm, which

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was at this time insolvent, with liabilities uncovered to the amount of 8 lacs of dollars.

The assignment states the consideration of it to be, first, a debt of 85,714 dollars 28 cents, owing by Lyall, Still & Co. to one of the banks, and of 50,000 dollars to the other; next, the agreement to furnish bills and shipping documents, upon the faith of which the advances were made, which constituted the debts to the banks and the release of all claim upon the part of the banks in respect of this agreement. It then proceeds to make over to the banks, "the whole of the property, premises and chattels specified in the schedule at the foot, with all the estate, right, title, interest, claim or demand of Lyall, Still & Co. therein or thereto, or arising thereout or therefrom. It further provides for doing all acts that might be required to give full and formal effect for securing and perfecting the assignment. In the schedule, the first item is a share in the Hong Kong Club. There are other items of shares in various insurance companies; an equity of redemption, and two items in these words: "All goods and bills of lading or other documents for all goods now on the way hither to arrive in December, 1866, or January, 1867." "All goods or documents for goods alluded to in a telegram dated November 9, 1866, from London partners to Hong Kong firm, received by steamer "*Clan Alpine*," via Calcutta, in the words, 'are shipping more goods; shirtings thirteen six, shipment remitted'; and all goods or documents for goods purchased and shipped and now on the way hither."

The documents arrived on December 27, 1866, and January 1, 1867, including the bills of lading for the goods shipped in the "*Min*." These were indorsed, and handed over by Mr. Maclean (together with the policies on the goods) to Mr. Kaiser, *in performance of the agreement in the assignment*. After the arrival of the "*Min*" at Hong Kong, a demand was made on the part of the unpaid vendors, by persons authorized on their behalf, to claim possession of the goods, and this demand was acceded to on behalf of the owners of the "*Min*." Subsequently the respondents, as transferees and holders of the bills of lading, made a like demand, which was refused.

In order to decide between the rival claimants, two questions have to be answered: first, did the *transitus* terminate before the demand was made on behalf of the appellants? secondly, was the transfer of the bills of lading made to the respondents for valuable consideration, and without notice of such circumstances as rendered them not fairly and honestly assignable, and so as to transfer to the respondents a property in the goods freed and discharged from the proprietary lien of the unpaid vendors? The general rule is, that where goods are sold to be sent to a particular destination named by the vendee, the right of the unpaid vendor to stop them continues until they arrive and are delivered there according to the bills of lading. The *transitus* continues whilst they are in the charge of some third party contracted with as carrier for the purpose of forwarding them, and who has them in charge simply for this purpose. It may suffice to refer to the recent case of *Berndston* v. *Strong* (L. R. 4 Eq. 481). The documents in evidence as well as the oral testimony in the present case, establish beyond doubt that Hong Kong was the destination agreed upon between vendors and vendee; and the other parties who intervened, for the purpose of having the goods forwarded to their destination, had them in charge for this purpose only. Their Lordships, therefore, entertain no doubt that the *transitus* had not ended before the arrival at Hong Kong. The second is the real question in the case. The respondents contend that they gave value for the bills of lading; that they had no notice of any special terms of agreement between the vendors and vendees of which they say that they were not informed, and as to which they also say that they were not bound to make inquiry.

The managers of the banks (Messrs. Kaiser and Kaye) were not examined as witnesses at the trial; but it plainly appears on the evidence adduced by the plaintiffs (the respondents) that the insolvency of Lyall, Still & Co. was known to the banks at the time of the assignment, and it is but reasonable to suppose that they were quite familiar with what also, on the same evidence, appears to

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be the usage of trade as between Manchester and Hong Kong—see *Newsome* v. *Thornton* (6 East, 19). At the time the bills of lading were handed over to them no money was advanced, no benefit was conferred or promised on the faith of these securities. They were transferred simply (as stated in the evidence of the plaintiffs) *in performance of the agreement in the assignment*. We have, therefore, to refer to the assignment itself to see what was the interest in these bills of lading that was agreed to be transferred, as part of what was assigned for the consideration expressed. The general rule so clearly stated and explained by Lord St. Leonards in the case of *Mangles* v. *Dixon* (3 H.L. C. 702) is, that the assignee of any security stands in the same position as the assignor as to the equities arising upon it. This as a general rule was not disputed, but it was contended that the case of a bill of lading is exceptional, and must be dealt with on special grounds. Doubtless, the holder of an indorsed bill of lading may in the course of commercial dealing transfer a greater right than he himself has; the exception is founded on the negotiable quality of the document. It is confined to the case where the person who transfers the right is himself in actual and authorized possession of the document, and the transferee gives value on the faith of it, without having notice of any circumstance which would render the transaction neither fair nor honest. In such a case, if the vendor is unpaid, one of two innocent parties must suffer by the act of a third; and it is reasonable that he who by misplaced confidence has enabled such third person to occasion the loss should sustain it—*Lickbarrow* v. *Mason* (2 Term Rep. 70). But in this case, at the time of the assignment, Maclean had not possession of the documents; nothing was advanced on the faith of them. There is merely a general description of documents expected to arrive, without knowing their contents or how far they might be limited or qualified. The property of the firm in the goods expected was not only subject to special stipulations in the contracts of sale in the case of two of the three parcels, but was also subject in all the three to the lien of the unpaid vendors. And can it be contended that before Maclean got possession of the documents when his firm was in a condition of undoubted insolvency, and the terms of the documents were not disclosed, there was conveyed to the respondents by this assignment the benefit of a prospective breach of trust and violation of contract? There is not a word in the instrument that could be held to convey a greater interest than the assignors had. The power they might afterwards acquire of committing a fraud upon the vendors is not "property, estate, interest, claim or demand, legal or equitable." "It is," says Sir Edward Coke, "a general rule that whensoever the words of a deed or of the parties without deed may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken." *Co. Lit.* 42, a, *Constructio legis non facit injuriam;* as it is pithily said in the passage from *Sheppard's Touchstone*, referred to by Sir Roundell Palmer in his able argument: "The law in its genuine construction prefers a less estate by right to a larger estate by wrong." The rule that words shall be construed most strongly against him who uses them gives place to a higher rule; higher because it has a moral element—that the construction shall not be such as to work a wrong. The lien of the unpaid vendor is allowed by law for the very purpose of protecting him against the insolvency of the vendee; and the assignment in this case, which left the assignors in insolvency, even if it could be said that it did not find them so, would be sufficient to originate the very right which, according to the argument for the respondents, it is also sufficient to extinguish. In the case of *Spalding* v. *Ruding* (6 Beav. 376) the vendor's right was asserted as against property which had so far passed into the hands of the consignee that he was enabled, by mortgage of the bills of lading, to pass the interest in the goods to the extent of that mortgage; but the right of stoppage *in transitu* was upheld as against the surplus, in preference to a claim of the mortgagee to apply it to liquidate the balance of a general account. This (as Vice-Chancellor Wood observes in the case already referred to on the question of *transitus*) was, in some degree, an extension of what was supposed to be the right of the consignor,

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and it shews the desire to give this right a full and equitable protection. Doubtless the vendor's claim cannot prevail against the claim of a transferee for value given on the faith of a negotiable security fairly and honestly taken; to the extent to which he has so given value, he has a prior claim. But the rule is founded on the reason of it, as already explained; *cessante ratione, cessat ipsa lex.* Where there is no advance made or value given upon the faith of the documents; where the object is simply, by a sweeping clause, to gather in whatever may be got to recoup the creditor of a debtor who had become insolvent for an improvident advance made upon the faith of a totally different security; where, upon the true construction of the assignment, no interest passed that would place the assignee in a better position than the assignor, and the bills of lading which subsequently came to hand were transferred expressly in performance of the agreement in this assignment, and without other consideration whatsoever; it appears to their Lordships that such a transfer, so made and under such circumstances, cannot be held sufficient to defeat the vendor's claim. Their Lordships, therefore, are of opinion that the Chief Justice ought to have nonsuited the plaintiffs, inasmuch as, upon their evidence, it did not appear that they had acquired a property in the goods sufficient to sustain the action of trover for the conversion alleged, which took place after the assertion of the right of stoppage. They will therefore recommend Her Majesty that the order appealed against should be set aside, together with the verdict found for the respondents, and that a judgment of nonsuit should be entered.

The appellants to have their costs of this appeal.

LORD CHELMSFORD, SIR J. W. COLVILE, SELWYN and GIFFARD, L. JJ., March 15, 1869.

BELISLE DU BOULAY AND OTHERS, *appellants;* JULES RÉNÉ HERMÉNÉGILDE DU BOULAY, *respondent.*

38 L. J. P.C. 35; L. R. 2 P.C. 430; 17 W. R. 594.

St. Lucia—Old French Law—Family Name—Property in.

COLONY.—*By the old French law, which prevails in St. Lucia, a family has no property in their family name, and no action will lie to restrain a stranger from assuming the patronymic of a family.*

The ordinance of April 11, 1803[1], *prohibiting a change of name without certain formalities, never became part of the law of St. Lucia.*

This was an appeal from a decree of the Court of Appeal for the Windward Islands, reversing a decree of the Royal Court of St. Lucia.

The appellants were a father and brothers, members of an ancient family, in the Island of St. Lucia, which family had for many generations used and been called by the name of Du Boulay, and to whom, it was contended, the name as of right belonged.

The respondent was the illegitimate son of a Mulatto woman named Rose, who was formerly a slave of the Du Boulay family.

(1) That ordinance enacted—Art. 4. "Toute personne qui aura quelque raison de changer de nom en addressera la demande motivée au gouvernement.

Art. 5. "Le gouvernement prononcera dans la forme presente pour les règlements d'administration publique.

Art. 6. "S'il admet la demande il autorisera le changement de nom par un arrêt rendu dans la même forme, mais qui n'aura son exécution qu'après la révolution d'une année, à compter du jour de son insertion au bulletin des lois.

Art. 7. "Pendant le cours de cette année toute personne y ayant droit sera admis à présenter requête au gouvernement pour obtenir la révocation de l'arrêté autorisant le changement de nom, et cette révocation sera prononcée par le gouvernement s'il juge l'opposition fondée, &c. (Merlin, verbo Nom,) *Dictionnaire du Notariat*, s. 2. "Des Changements de Noms."

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The said Rose was manumitted on June 25, 1831, and was in the "Acte d'Affranchissement" registered in respect of such manumission described as "Rose" only, by which name she had always been called and known. In the "Acte de Naissance" of the respondent, dated March 26, 1835, the said Rose was referred to by the name of "Rose," and the respondent by the names of "Jules Réné Herménégilde," without surname in either case. On February 22, 1844, the respondent, being then nine years old, stood godfather upon the baptism of one Françoise. In the certificate of such baptism he was referred to as "Jules Réné," and signed the register of the parish, on the same occasion, in such names only. The respondent alleged that, at the age of sixteen, he assumed the name of Du Boulay, which had in the mean time been assumed by his mother, Rose, and he claimed to bear and use such name; but he did not claim to be in any way related to the family of Du Boulay. The appellants, on April 21, 1865, filed their bill of complaint against the respondent in the Royal Court of St. Lucia, praying that the respondent might be prohibited from taking or bearing the name of Du Boulay.

On July 20, 1865, the Royal Court pronounced judgment in favour of the appellants, and ordered "That the name of Du Boulay belonged to the appellants, with defence and prohibition to the said Jules Réné Herménégilde, to take, bear and sign in future the said name of Du Boulay under all the pains and penalties of the law." The respondent appealed against this decree to the Court of Appeal for the Windward Islands, which Court delivered the judgment in the following terms: "The present appellant is the issue of a manumitted slave, and has assumed and for some time borne the name of Du Boulay, and the present suit is instituted to deprive the appellant of this patronymic, and the Court is to inquire whether there be any law in force in St. Lucia by which the object of such a suit can be attained. It was stated from authority at the bar that there was a time when in France names were changed without any solemnity, but such a latitude was prohibited by an ordinance of April 11, 1803. That ordinance is not in force in St. Lucia. No ordinance in France was deemed to be in force in her colonies unless registered there or extended to the colonies by the order of the parent State. The Coutume de Paris was the law of the French colonies. The 33rd article of the Arrêt of the "Conseil d'État du Roi" of May, 1664, establishing the West India Company, expressly declares its obligatory effect in the West India colonies as it had been established in the French colonies in the East. The Coutume de Paris is still continued as the law of St. Lucia. It does not appear that the ordinance of April, 1803, was extended by its terms, or by any other edict of the French government, to the colonies, and it has not been registered in St. Lucia. The history of St. Lucia throws some further light on this subject. About two months after the ordinance of 1803, that is to say, on June 22, 1803, St. Lucia capitulated to the British arms under General Greenfield, and it has remained a British colony ever since. Now regard being had to the unsettled condition of France in its state of transition at the time of the passing of this ordinance, to the existence of war, by which the irregularity in the communication then existing between Europe and the Antilles was necessarily increased, to the length of time consumed in a voyage across the Atlantic in those days, and to the slowness that attends on all government action, it is not too much to presume, in the absence of any evidence to the contrary, that this edict was unheard of in St. Lucia at the time of its conquest in 1803. The judgment of the Court below must be reversed, with the costs of the suit there and in this Court.

The Chief Justice of St. Lucia, however, dissented from this judgment, and assigned his reasons, as follows: "1. That Du Boulay is clearly shewn to be, and to have been for centuries past, the patronymic name of the appellants. 2, That by both the ancient and modern law of France, a family name is a property that belongs to that family, and can never be taken by persons who have no right to it either by descent or inheritance. 3, That the last-mentioned rule is *ex necessitate* applicable to the courts of St. Lucia, which are still governed by the ancient laws of France in all matters of property and inheri-

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tance. 4, That the ordinance of April 11, 1803, prohibiting the change of names without certain specified formalities, was and is still in force in the colony of St. Lucia."

From this judgment the present appeal was brought.

Field and *A. J. Lewis*, for the appellants.—The decree in the Court of Appeal for the Windward Islands is erroneous. The question depends on the law of France as it existed prior to the ordinance of 1803. According to the law of France, as it existed prior to April 11, 1803, the name of Du Boulay was, as between the appellants and the respondent, the property of the appellants and their family, and ought therefore to be protected by law from usurpation by the respondent. By the law of France prior to the date aforesaid, no person could change or add to his name without an express authority from the ruling power so to do. Coloured persons, free or manumitted, were forbidden to take the surnames either of their reputed fathers or of their masters of white complexion. But if this be not so, the ordinance of April 11, 1803, became part of the law of St. Lucia, and prohibited the assumption of the name by the respondent. Further, the appellants are entitled to restrain the respondent from using the name Du Boulay, notwithstanding the lapse of time during which the appellants have allowed the respondent to use the name of Du Boulay in the island of St. Lucia.—They referred to *Dictionnaire du Notariat*[2], *De Lacarelle* v. *De Lacarelle*[3], and *Lawless* v. *Pierre*[4].

No counsel appeared for the respondent.

Lord Chelmsford delivered the judgment of their Lordships.—This is an appeal from a decree of the Court of Appeal for the Windward Islands, reversing a decree of the Royal Court of St. Lucia in favour of the appellants. The suit was instituted in the Royal Court of St. Lucia, for the purpose of having it ordered and decided that the name of Du Boulay belongs to the appellants and their family, with defence and prohibition to the respondent to take, bear and sign in future the said name of Du Boulay.

The question to be determined upon this appeal is, whether an action of this description is maintainable under the French law, which at the present time is the governing law in the island of St. Lucia. When a Judge is called upon to decide a question depending upon foreign law, there is always some danger of his being influenced by notions derived from that law which he is in the daily habit of administering. In this country we do not recognize the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a stranger. The right to the exclusive use of a name in connexion with a trade or business is familiar to our law; and any person using that name, after a relative right of this description has been acquired by another, is considered to have been guilty of fraud, or at least of an invasion of another's right, and renders himself liable to an action; or he may be restrained from the use of the name by injunction. But the mere assumption of a name, which is the patronymic of a family, by a stranger who had never before been called by that name, whatever cause of annoyance it may be to the family, is a grievance for which our law affords no redress. The appellants, however, say that by the French law, which is in force in St. Lucia, they have a right to maintain a civil action against the respondent for assuming their family name of Du Boulay.

The following are the facts admitted in the case: The name Du Boulay had been the family name of the appellants for a very long period. The respondent is the illegitimate son of an emancipated female slave, named Rose, and was born at Martinque on February 17, 1835. Before his birth his mother had assumed the name of Du Boulay, and was so called in a judicial proceeding of the Tribunal of First Instance of St. Pierre, Martinque, on August 20, 1831. In 1840 she left Martinque and took up her abode in St. Lucia, where she was

(2) Sect. 3. Tit. De la Propriété des Noms.
(3) Bulletin judiciaire, Paris, June, 1859.
(4) Moniteur de la Martinique, 1860.

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publicly called and known by the name of Rose Du Boulay down to the time of her death in 1854. The respondent continued in Martinque till after the death of his mother, when he removed to St. Lucia, being at that time about the age of nineteen. It does not appear when he first took the name of Du Boulay. He certainly had not done so in the early part of the year 1844, for on February 22 in that year (though only nine years old), he stood godfather to a child, and signed the register by the name of Jules Réné. In the year 1852, he had a passport granted to him, and registered in the registry of passports for the interior of the island of Martinque, in which he is described as "Mr. Du Boulay Jules Réné Herménégilde, seventeen years old." In the year 1855, having then fixed his residence in St. Lucia, he advertised in an island newspaper his intention to commence business under the firm of "Du Boulay Brothers & Co.," and in the following year he advertised the dissolution of this firm, and his intention to continue the business in his own name. In 1856, the respondent's brother died, and he was nominated administrator of his brother's succession. Public notice of this nomination was given by the Royal Court by advertisement in the official gazette, in which the respondent was called "Jules Réné Herménégilde Du Boulay, *alias* Herman Du Boulay." From the time of his use of the name of Du Boulay, in St. Lucia, down to the time of the institution of the suit by the appellants on April 21, 1865, his right to use it was never questioned. During this period he carried on business publicly and notoriously under the name of Du Boulay, and the fact must have been well known to all the Du Boulay family resident in St. Lucia. The appellants describe themselves in their plaint as dwelling in the Quarter of Souffrière, in the second district of the island. The reason given by their advocate for their not having proceeded against the respondent sooner, as stated by him upon their authority, is, "that during the period mentioned by the respondent, those of the members of the Du Boulay family who could have protected their family name were in Europe for their education, or for other purposes." And "the head of the family, Mr. Belisle Du Boulay, was then affected with a chronical disease which deterred him from attending to any kind of business."

It was necessary for the appellants, in order to establish their case against the respondent, to shew,—first, that the existing law of St. Lucia entitled them to maintain their action; and, secondly, that delay in asserting their right, or acquiescence in the use of the name of Du Boulay, by the respondent, did not prevent their proceeding against him.

Upon the first question, the learned counsel for the appellant undertook to prove that by the old French law, which prevails in St. Lucia, a family had a property in their patronymic, and might prevent any person calling himself by their name who had no right or title to do so. For this purpose he quoted a modern work, the *Dictionnaire du Notariat*, s. 3, tit. 'De la Propriété des Noms,' where it is said, "Le nom que chaque individu porte est pour lui une propriété. Il a le droit de s'opposer à ce qu'il soit pris par un autre. L'usurpation d'un nom donne lieu à une action devant les tribunaux. Cette action est purement civile." The learned counsel, upon being pressed for some instance of an action of this description having been brought under the old French law, confessed that he had no early precedent to produce. The only cases which he mentioned were two, which are to be found in the record of the proceedings. One of them is the case of *De Lacarelle* v. *De Lacarelle*, before the Tribunal of Villefranche, in the year 1859, respecting which nothing is stated except the opinion of the tribunal, that a person who has the right to bear a name is entitled to prevent another from usurping it, without being compelled to account for the motive of his proceeding; and the other, *Lawless* v. *Pierre*, before the Tribunals of Martinique, in the year 1860, which, like the present, was the case of the assumption of a name after emancipation from slavery. It is extremely doubtful whether, prior to the ordinance of 1555 (to be presently mentioned), the assumption of a name by a person who had originally no right to call himself by it, was the subject of any proceeding, penal

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or civil. Merlin, in his *Répertoire de Jurisprudence*, tit. ' Nom,' s. 3, after stating that by the Roman law changes of names were absolutely free, says: " Il fut un temps en France où conformément à cette loi on changeait de nom sans aucune solennité." He then gives a variety of instances prior to 1555, in which changes of name had been made without authority, and without any solemnity. He then proceeds, " Mais comme cette licence de changer ainsi de nom et d'armes produisait les plus grands abus, le Roi Henri II. y remédia par une ordonnance donnée à Amboise le 26 mars, avant Pâques, 1555, art. 9." The right, therefore, to bring a civil action in St. Lucia for the usurpation of a family name must be founded either upon this ordinance of 1555 or upon some law subsequently passed, and introduced into the island. The ordinance of 1555 gives no right of civil action for an unauthorized change of name; and according to Merlin, in the passages just cited, such an action could hardly have been previously maintained. The ordinance subjects the person changing his name without authority to penal consequences only. It says, " Pour éviter la supposition des noms et des armes, défenses sont faites à toutes personnes de changer leurs noms, et leurs armes, sans avoir obtenu des lettres de dispense et permission, à peine de 1000 livres d'amende, d'être punis comme faussaires et être exautorés et privés de tout degré et privilége de noblesse." There seems to be great doubt whether this ordinance of 1555 ever had any practical operation, even in France. Merlin, in his *Répertoire*, tit. ' Promesse de changer de Nom,' says the ordinance, not having been registered, never became law in France. But Dalloz, in his *Dictionnaire*, tit. ' Nom et Prénom,' after mentioning this opinion of Merlin, says, " Mais la Jurisprudence est contraire à cette opinion." At all events, it is not shewn that this unregistered ordinance ever formed part of the law of St. Lucia. It is to be observed that the Chief Justice of St. Lucia founds his judgment in favour of the appellants upon a different ordinance, never referring to the ordinance of 1555 as having any existence, or at least, as having any bearing upon his decision. He says, " In France, under the law ' De Mutatione Nominis,' names were changed according to the whim or caprice of individuals without any solemnity or formality, but such an unrestrained licence brought forth great confusion; names of living families were arbitrarily taken, and towards the commencement of the 19th century, to wit, on April 11, 1803, a law was made to check that dangerous system." And he adds, " It is not amiss to observe that that law is not only still in force in this colony, but has been retained entire by the modern legislators of France, and now forms part of the existing law of that country."

Notwithstanding the opinion of the Chief Justice that the ordinance of 1803 is in force in St. Lucia, it may fairly be questioned whether it ever became part of the law of the island before it was taken by this country, on June 23, 1803. On that day a proclamation was issued which " assured and guaranteed to the inhabitants the full enjoyment of their property under the laws which existed in the island at the time immediately prior to the last session." It is not very probable that the ordinance of 1803 was one of these laws. It was passed in France a little more than two months before St. Lucia was brought under British dominion, and not being of any peculiar local importance, it was not likely, in the critical position of the French West Indian colonies at this juncture, that any care would be taken to transmit it, in order that it might form part of the law of the island. If the Chief Justice is right in saying that this law was made to prevent persons arbitrarily taking the names of living families, it would seem to shew that before 1803 no civil action could be brought, or at all events, that none was ever brought to protect a family name from usurpation. If the law of 1803 is out of the question, it is difficult to see upon what other foundation the appellants can rest their right to maintain the action. The old French law, on which their learned counsel mainly relied, has already been considered. The ordinance of 1555, or one of a similar description made in 1629, was the only law upon the subject of changes of name at the time of the French Revolution. That ordinance fell with the kingly authority. In

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1794, during the revolutionary government, an ordinance was passed which absolutely prohibited any change of name, but the learned counsel was unable to shew that this ordinance, any more than that of 1803, ever had the force of law in St. Lucia. He failed altogether in his endeavour to prove that the existing law of the island entitled the appellants to maintain their action, whether he relied upon the old French law independently of the ordinances, or upon proof that the ordinances ever formed part of the law of St. Lucia, or even if they did, that they gave a family a right to proceed by civil action against a person calling himself by the family name without authority, and to compel him to discontinue to use it.

Their Lordships are unwilling to dispose of the case without adverting to the question arising from the delay of the appellants in instituting their suit. Supposing an action of this kind to be maintainable, there must be some reasonable limit within which a family ought to be bound to proceed. In the present case, the family of Du Boulay, resident in St. Lucia, could not have been ignorant that for ten years the respondent had been carrying on business openly under the name of Du Boulay, that he had been recognized by that name in public acts, and that he had undoubtedly acquired the name by reputation. At what time some of the appellants were absent from St. Lucia, and when they returned, is left in uncertainty; but the head of the family appears to have been continually resident in the island, and no sufficient reason is assigned for his not taking earlier steps to protect the family name from the respondent's alleged unauthorized assumption of it. Under these circumstances, whether any other member of the family might have questioned the title of the respondent to call himself by the family name is unnecessary to be considered, but all the appellants have placed themselves under a personal exception by standing by (as it is called) and permitting the respondent to become known to the world by the name of Du Boulay. After their long acquiescence, it would be unreasonable and unjust to sanction the attempt of the appellants to deprive the respondent of his right to use a name which he had acquired by reputation, and by which alone he had been known in the island during the whole period of his residence there.

Their Lordships will recommend to Her Majesty that the decree appealed from be affirmed.

Right Hon. Sir J. W. Colvile, Sir Robert Phillimore, Selwyn and Giffard, L. JJ., March 4, 15, 1869.

EMILIE MALVINA EVANTUREL AND ANOTHER, *appellants;* FRANÇOIS EVANTUREL, *respondent.*

38 L. J. P.C. 41; L. R. 2 P.C. 462; 21 L. T. 4; 17 W. R. 541.

See, *Hamel* v. *Panet*, [1877] E. R. A.; 46 L. J. P.C. 5; 2 A.C. 121; 35 L. T. 741 (P.C.).

Will—Execution of—Validity of—Lower Canada—French Law—Coutume de Paris, Art. 289.

Colony.—*The Coutume de Paris, by art.* 289, *provides—*"*Pour réputer un testament solennel, il est nécessaire qu'il soit écrit et signé du testateur, ou qu'il soit passé pardevant deux notaires, ou pardevant le curé de la paroisse du testateur, ou son vicaire-général, et un notaire; ou du dit curé ou vicaire et trois témoins; ou d'un notaire et deux témoins, iceux témoins idoines, suffisans, mâles et agés de vingt ans accomplis, et non légataires; et qu'il ait été dicté et nommé par le testateur aux dits notaires, curé ou vicaire-général et depuis à lui relu en présence d'iceux notaires, curé ou vicaire-général et témoins; et qu'il soit fait mention au dit testament qu'il a été ainsi dicté, nommé et relu; et qu'il soit signé par le dit testateur, et par les témoins; ou que mention soit fait de la cause pour laquelle ils n'ont pu signer.*"

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A testatrix, who was unable to write, directed a notary to prepare her will. The notary drew up a will in accordance with the direction of the testatrix and delivered it to the testatrix. The testatrix afterwards attended before two notaries (one being the notary who had drawn up her will), and she repeated in their presence all the dispositions contained in the testament, though not in the exact terms of the testament, and the will was executed:—Held, *that the words of art.* 289, " dicté et nommé par le testateur aux dits notaires " *do not require in express terms that the will should be written by a notary at the time of dictation, and that the provisions of art.* 289. *had been sufficiently complied with.*

This was an appeal from two judgments of the Court of Queen's Bench of Lower Canada, the one dated June 20, 1865, reversing a judgment of the Superior Court of the Province of Canada, district of Quebec; and the other, dated March 18, 1867, affirming a judgment of the Superior Court, in an action *en pétition d'hérédité* instituted by the appellants against the respondent. The judgments appealed from dismissed the appellants' action and established a testament of Dame Marie Anne Evanturel, late of Quebec, widow, deceased, dated May 18, 1861, as valid by the law of Lower Canada.

The validity of this testament was the only question to be decided on the appeal.

The respondent was the only son and sole executor and residuary legatee in usufruct of Madame M. Evanturel.

The appellant Emilie Malvina Evanturel was a married daughter of Madame Evanturel, and sued with her husband, the other appellant.

The suit was begun by a claim to the succession of the late Madame Evanturel (pétition d'hérédité) filed by the appellants in the Superior Court of Lower Canada, on December 7, 1863. The petition alleged in substance that Madame Evanturel died on November 10, 1863, leaving five children surviving her, namely, the respondent, Marie Marguerite Evanturel, wife of Alfred Paré; Sophie Evanturel, wife of Louis Timothé Suzor; the appellant Emilie Malvina Evanturel, wife of the appellant Édouard Rémillard, and Elmire Aglaé Evanturel, unmarried; that such five children constituted the sole heirs of Marie Evanturel, and that each of them was entitled to one-fifth share of her property; that nevertheless the respondent had unlawfully possessed himself of the whole of the property of the deceased, to the exclusion of his sisters; and the petition concluded with a prayer that the respondent should be ordered to deliver up to the appellants one-fifth share of such property, with all profits accrued thereon, and to pay the costs of the suit.

To this petition the respondent replied by a peremptory and perpetual exception in law (exception péremptoire en droit perpétuelle), in which he pleaded a will made by his late mother, dated May 18, 1861, being the will the validity of which was in question in the suit.

This will, after ordering payment of the testatrix's debts, and giving directions as to her funeral, and after making certain bequests to her other children, gave all the residue of her property, real and personal, to her son the respondent, for the enjoyment and usufruct thereof, with remainder to his children, charged, however, with annuities of 15*l.* a-piece to three of the sisters of the testatrix, and of 25*l.* a-piece to the four daughters of the testatrix, but any one of these last legacies was to be at once annulled and destroyed in the case of any daughter who should attempt to dispute the validity of her will. The testatrix discharged her son from all accounts and claims against him as her agent or attorney during her lifetime, and appointed him sole executor of her will. The testatrix was unable to write. The manner in which the will was executed was stated on the face of it as follows:

" These presents were made, dictated and expressed (' fait, dicté et nommé ') by the widow of François Evanturel, the testatrix, to the undersigned notaries. And her present will having been read and re-read to her by M. Joseph Petitclerc, one of the said notaries, in presence of M. Phillippe Huot, his colleague, summoned for that purpose, the said Dame Evanturel said that she

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well understood and comprehended it, and gave a formal adhesion to it at Quebec, in the study of M. Joseph Petitclerc, one of the said notaries, in the year 1861, the 18th day of the month of May, afternoon, under the number 11,686. And that the said widow of François Evanturel declared herself unable to write or sign, whence arose the necessity that it should be read and re-read.

" Sixty-three words erased are null. Three marginal additions approved are good.

" PHILIPPE HUOT, N.P.
" JH. PETITCLERC, N.P."

On January 9, 1864, the appellants replied to the respondent's exception by general answers, traversing the exception of the respondent; and by a special answer, in which they denied the validity of the will propounded by the respondents, on the grounds of incapacity and undue influence, and also on the ground of insufficient and informal execution. On the same day the appellants moved the Superior Court of Lower Canada that they might be at liberty " *de s'inscrire en faux* " against the will pleaded by the respondent, to take proceedings for the purpose of shewing that the will was not duly executed as a testamentary instrument; and on February 4, 1864, they applied for and obtained an order that the will should be lodged in the office of the Prothonotary of that Court.

On February 9, 1864, the appellants filed a statement of their objections to the due execution of the will, " *moyens de faux.*" The objections so pleaded were as follows: " First, that the pretended will of the said late Dame Marie Anne Bédard, under date May 18, 1861, was not ' dicté et nommé ' by the said lady to M. Jh. Petitclerc and his colleague, notaries public, as falsely alleged in the pretended will. Secondly, that the said pretended will was not ' dicté et nommé ' by the said late lady to M. Jh. Petitclerc and his colleague, notaries public, on May 18, 1861, as falsely alleged by the said pretended will. Thirdly, that important parts of the said pretended will (other than the preamble) appeared to be manuscript written or altered in a strange hand, other than that of either of the said two notaries, who passed the said will."

On the objections so pleaded issue was joined.

In order to support their objections the appellants called as witnesses the two notaries before whom the will was passed, Joseph Petitclerc and Phillippe Huot, and the testatrix's legal adviser, Napoléon Casault. The statements of these three witnesses as to the execution of the will agreed in every material point, and were to the following effect: M. Petitclerc, the family notary, was summoned by the testatrix on May 16, 1861, and went to her in the afternoon of that day. He found her alone, and she said at once that she wanted to make her will, and then and there dictated her wishes, of which he made a memorandum. This memorandum contained, in an abbreviated form, all the dispositions and bequests which appear in the will. The testatrix then told him to draw up her will according to these instructions, and to send it to her that she might have it examined by her counsel. He drew up the will according to these instructions the same day or the day following and sent it back to Madame Evanturel. On the afternoon of the 18th Madame Evanturel came to his office to execute her will, bringing with her the draft which had been sent to her. M. Petitclerc took it, and examined it, and finding some words on the fifth page in a strange hand he scratched them out at once. He then sent for his colleague, M. Huot, to assist at the execution. On M. Huot's entrance M. Petitclerc requested the testatrix to say what her last wishes were, and she repeated in brief all the bequests and dispositions contained in the will. M. Petitclerc took the will, read it, and having done so asked Madame Evanturel if she wished to add or alter anything. Madame Evanturel then made some trifling emendations, and then desired him to add the words which he had already found in the margin, written in a strange hand, to the effect that if any of her daughters tried to dispute her will, the legacy to such daughter or daughters should be void and fall into residue. At her request he added these

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words in his own handwriting, and he and his colleague verified the addition by affixing to it their initials.

The law which governed the execution of wills at the time when Madame Evanturel's will was made was composed of the 289th article of the *Coutume de Paris*, and of an imperial statute, 14 Geo. 3. c. 83, which extended to the people of Canada the power of making wills in English form. The provisions of the *Coutume de Paris* are as follows:

" Art. 219.—Pour réputer un testament solennel, il est nécessaire qu'il soit écrit et signé du testateur; ou qu'il soit passé pardevant deux notaires, ou pardevant le curé de la paroisse du testateur, ou son vicaire-général, et un notaire; ou du dit curé ou vicaire et trois témoins; ou d'un notaire et deux témoins: iceux témoins idoines, suffisans, mâles et agés de vingt ans accomplis, et non légataires; et qu'il ait été dicté et nommé par le testateur aux dits notaires, curé ou vicaire-général, et depuis à lui relu en présence d'iceux notaires, curé ou vicaire-général, et témoins; et qu'il soit fait mention au dit testament qu'il a été ainsi dicté, nommé et relu; et qu'il soit signé par le dit testateur, et par les témoins; ou que mention soit faite de la cause pour laquelle ils n'ont pu signer."

The cause came on to be heard, on June 10, 1864, in the Superior Court of Lower Canada.

At the trial the respondent, in order to shew how the law had been construed in Lower Canada in practice, called one of the principal notaries of Montreal and ten of the most distinguished and respectable notaries of Quebec, who all confirmed the practice of M. Petitclerc, stating that they had seldom, if ever, except in the case of illness or immediate necessity, made wills in any other way.

The appellants, on the other hand, produced eight notaries from various country districts, who stated that they were in the habit when they made a will of writing it down once at the dictation of the testator in the presence of another notary or of two witnesses. But it did not appear that they adopted this practice from an idea of its being the only lawful one, but on grounds of convenience, their clients being generally people from the country round, who came into town for the day, and who could not wait or come again when a will had been put into proper form.

Of three notaries in Quebec whom the appellants called in support of their view, two had but seldom practised as notaries, and had never had a will of any importance to draw, and the third, M. Pruneau, admitted that he had quite recently drawn up several wills in the very way in which Madame Evanturel's will was drawn, and his admission was confirmed by the respondent's witnesses.

The superior Court maintained the objection to the validity (*inscription en faux*) made by the plaintiffs *en faux* against the will, as being illegally executed, —that is to say, as not having been dictated and expressed by the testatrix to the notaries public who drew the said will,—with costs against the defendant, and declared such will null for all legal purposes.

Against this decision the respondent appealed to the Court of Queen's Bench of Lower Canada. The appellants also appealed to the Court of Queen's Bench against a part of it, which amounted to a decision against them on the merits.

The Court of Queen's Bench, on June 20, 1865, delivered judgment on the appeal of the present respondent. This judgment reversed the decision of the Court below.

From this judgment the present appeal was brought.

Bowring, for the appellants.—The question in this appeal depends entirely on the construction to be put on the 289th article of the *Coutume de Paris*, as declared by the Parliament of Paris in 1580. The provisions of this article have not been complied with by the testatrix. The testament of May 18, 1861, was not validly " dicté et nommé " by the testatrix to two notaries, as required by article 289. The testatrix ought to have declared the disposition she desired to make, and both the notaries, or at all events one, ought to have taken down the

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will at the time. Unless these formalities are observed the testament is invalid. The formalities are essential. They are intended to prevent fraud and for the greater protection of ignorant testators who cannot write. This testament may have been obtained by undue influence (*fraude, suggestion, captation et ménaces*). A testament executed in the manner in which this was may not be the expression of the free will of the testatrix. To permit testaments to be so executed would tend to defeat the policy of the law as provided for by the article.—He referred to *Merlin Rep.* 'Testament,' vol. 5. s. 2, *Toulier*, 'Don. et Test,' vol. 5, No. 410, *Burge*, 'Colonial Law,' vol. 4, p. 426, *Ancien Denizart*, p. 698, *Duranton*, vol. 5. No. 66, *Troplong*, 'Donations et Testaments,' vol. 3. No. 1552, and *Mercadée*, 'Commentaries sur l'Article 972.'

Wickens, for the respondent.—No doubt article 289. of the *Coutume de Paris*, is the law on the subject, but the language of the article does not in express terms require that the will should be written by a notary at the time of dictation. There is no declaration that the will must be executed in the manner prescribed under pain of nullity. It is said that the testament was not "dicté et nommé" by the testatrix as required by the article 289, and it is said that the provision can only be satisfied by one or perhaps both notaries taking down the dispositions of the testator. But the language of the article does not require that the instrument should be taken down by a notary at the time of dictation. The provision of the Code Napoléon may serve to shew that when the formalities there prescribed are to be enforced, they will be required under pain of nullity. There is no such provision in the *Coutume de Paris*. He referred to *Ordinance des Testaments*, 1735, art. 23, *Code Napoléon*, arts. 972, 1001, *Ferrière, Coutume de Paris*, vol. 4. p. 133; *Dalloz*, vol. 16, tit. 4, c. 2, 'De l'Ecriture par le Notaire.'

Cur. adv. vult.

Sir R. Phillimore (March 15) delivered the judgment of their Lordships. —This is an appeal against two judgments of the Court of Queen's Bench of Lower Canada, one of June 20, 1865, which reversed the judgment of the Superior Court of September 5, 1864, and the other of March 18, 1867, which affirmed the judgment of the Superior Court of May 16, 1866.

The subject of these judgments and of the present appeal is the validity of the testament of the late Marie Anne Evanturel, widow, of Quebec. She died on November 10, 1863, leaving five children surviving her, among whom were the appellant, Emilie Malvina, wife of Édouard Rémillard, and the respondent, the Hon. François Evanturel. These five children, if she had died intestate, would have been entitled in equal shares to her property.

The suit was begun by a claim to the succession of Madame Evanturel, entitled "pétition d'hérédité," filed by the present appellants in the Superior Court of Lower Canada, on December 7, 1863.

In answer to this petition the present respondent, on January 5, 1864, replied by a peremptory and perpetual exception in law (*exception péremptoire en droit perpétuelle*), by which he pleaded a testament made by his late mother, dated May 18, 1861. To this exception the appellants replied by a general answer and by a special replication, in which they impugned the validity of the testament, on the ground of incapacity or undue influence (*fraude, suggestion, captation ménaces employés par le défendeur*).

It may be convenient here to state that this allegation was disproved in the opinion of all the Judges in the Canadian Courts, and has not been insisted upon before their Lordships.

The appellants in their special replication also relied on the invalidity of the execution of the testament. The mode of raising this latter issue is, according to the law of France and Lower Canada, to enter, by permission of the Court, a process which is called "*inscription en faux.*" The appellants having duly obtained this leave filed their "*moyens de faux,*" which were as follows:

"1. That the pretended testament of May 18, 1861, was not dicté et

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nommé by the deceased to two public notaries, as falsely asserted in the pretended testament. 2. That it was not dicté et nommé by her to two public notaries on May 18, 1861, as falsely asserted in the pretended testament. 3. That an important part of the alleged testament other than the preamble, was written and altered by some stranger's hand, other than that of the two notaries who passed the testament."

It appears from the evidence that M. Petitclerc, a notary, went to the testatrix, in obedience to a summons, on May 16, 1861; he found her alone: she told him that she desired to make her testament; she then and there expressed the dispositions and bequests which it was to contain. M. Petitclerc drew up a memorandum in which they were concisely stated. The testatrix then told him to prepare her testament in conformity therewith, and to send it to her in order to its being examined by her counsel. He drew up the testament on the same or on the following day. Madame Evanturel, on the 17th, had an interview with her counsel, M. Casault, whom it appears that she had consulted on the subject of her will on May 15 and 16: he wrote in the margin of the will an alteration, subsequently cancelled and re-written by the notary; and on the afternoon of May 18 Madame Evanturel went to the office of M. Petitclerc, bringing with her the draft testament, which he opened, and on perceiving M. Casault's alterations, drew his pen through them. He then sent for a brother notary, M. Huot, who arrived. There was also present M. Casault. M. Petitclerc then asked the testatrix what were the dispositions which she desired to make, and she repeated in brief ("*en raccourcis*"), as M. Huot says, "as if she had known them by heart," all the dispositions which are contained in the testament, though not exactly, it would appear, in the same terms and in the same order. M. Petitclerc then read the testament: she suggested certain corrections, and the addition of the following condition attendant on the bequests to her daughters: "Et que quant à celle ou celles qui voudront contester mon dit testament, le legs à elles fait de la dite rente soit non avenu et caduc." It appears that M. Petitclerc then re-read the testament with the corrections and addition which have been mentioned. The testatrix then declared that she could not write; and what Mr. Justice Taschereau calls the "*énonce sacramental*," the essential formula, was put in the following words:

"Ce fut ainsi fait, dicté et nommé par la dite Dame veuve François Eventurel, testatrice, aux dits notaires soussignés, et son présent testament lui ayant été lu et relu par Maître Joseph Petitclerc, l'un des dits notaires, en présence de Maître Philippe Huot, son confrère, pour ce mandé, la dite Dame Evanturel a dit le bien entendre et comprendre, et y a persisté, a Quebec, en l'étude de Maître Joseph Petitclerc, l'un des notaires, l'an 1861, le 18me jour du mois de Mai, après-midi, sous le numéro 11,686. Et la dite Dame veuve François Evanturel a déclaré ne savoir ni écrire ni signer de ce requise, lecture faite et refaite.

"Signé sur la minute, demeurée en la dite étude.

"PHI. HUOT, N.P.
"JH. PETITCLERC, N.P."

It may be convenient here to dispose of the two "*moyens de faux*" which relate respectively to the date of the testament and to the alterations in a strange hand. It has scarcely been contended before this Court that the testament was "dicté et nommé" on May 16, and such a contention, in their Lordships' opinion, cannot be sustained. The question of the execution of testament must be confined to the date of May 18. With respect to the alterations in a strange hand, they are fully accounted for by the testimony of the witnesses, and can in no way affect the decision in this case. In the evidence given by the witnesses, MM. Petitclerc, Casault and Huot, some discrepancies occur, and also in the two depositions of M. Petitclerc, made at different times; but their Lordships entirely concur with the remarks of Mr. Justice Taschereau upon this subject, and are of opinion with him that their discrepancies are insignificant, and do not affect the real and only question

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in this case, namely, the true construction of the law which governs the execution of this testament. There is no controversy as to what the law is. It is the 289th article of the *Coutume de Paris*, as declared by the parliament of Paris in 1580, and is in these words—(his Lordship read the article).—It is contended by the appellants that the provisions of this regulation have not been complied with, and that the testament is therefore invalid. They maintain that, according to the true construction of that regulation, and especially of the words " dicté et nommé par leur testateur aux dits notaires," the testator must declare the dispositions which he desires to make, and that one notary at least, if not the two, must then and there write down these dispositions, and that unless this requisition of the law be obeyed, the testament is null. This construction of the *Coutume* was adopted by Mr. Justice Taschereau in the Superior Court of Lower Canada; and, accordingly, he sustained the *inscription en faux*, and pronounced against the validity of the testament. From this sentence an appeal was prosecuted to the Court of Queen's Bench of Lower Canada. That Court reversed this decision, holding that the testament was duly executed. The Court was composed of five Judges; of these, three, Chief Justice Duval, Mr. Justice Aylwin and Mr. Justice Meredith, delivered their judgments in favour of the validity of the testament; while two, Mr. Justice Drummond and Mr. Justice Mondelet, dissented, and agreed with Mr. Justice Taschereau. From this sentence the present appeal has been prosecuted. The case has been fully argued before their Lordships, and we have now to deliver our opinion upon the true construction of the 289th article of the *Coutume de Paris*, in its application to the testament which is the subject of this litigation.

Some preliminary observations occur which it will be well to mention in this place. First, that the language of this *Coutume* does not require in express terms that the will should be written by a notary at the time of dictation; though it does require that the will should be read over in the presence of the notaries and of the testator; and, secondly, that there is no declaration like that which is to be found in the Code Napoléon, that the formalities enjoined shall be observed on pain of nullity. In respect to these particular words, " dicté et nommé," it appears to their Lordships that they must be considered as conveying one idea, the latter word being only used to strengthen the former; and in this opinion their Lordships are justified by the opinion of the learned editor of *Ferrière*, and of the decision to which he refers: " La première chose à observer est qu'il faut que le testament soit dicté et nommé par le testateur, sur quoy on a demandé autrefois, si des mots équivalents suffisoient, comme *proferez de sa propre bouche*, il a été décidé qu'ils ne suffisoient pas, la *Coutume* disant ' dicté et nommé '; mais que si un notaire ne mettoit que l'un des deux, ou dicté ou nommé, comme ils sont synonimes, qu'il n'y auroit point de nullité." (Vol. 4, page 133.)

It was admitted by the counsel for the appellants that it was not necessary that the notary should write " *mot à mot* " the dispositions of the testament as dictated by the testatrix, that he might put them in proper language and in proper order, and with whatever amplifications were necessary to give them due legal force and effect, and that the testatrix might dictate from a written and previously prepared instrument. And their Lordships are clear that this view is correct, having regard both to the reason of the thing and to the decisions which have been given upon the particular *Coutume*, as well as those which have been delivered upon the far more rigorous language of the article in the Code Napoléon, which are collected in *Dalloz*, vol. 16, tit. 4, c. 2. s. 4, article 2, s. 2. (' De l'Écriture par le Notaire.') In forming our judgment upon the general construction of the *Coutume*, one of the primary considerations has necessarily been to ascertain what was the mischief which this law was framed to remedy, and upon this point there is really no room for doubt. The authority of the commentator Claude de Ferrière has been much relied upon by both parties, and it is entitled to considerable weight in the explication of this law. After mentioning the various ways in which a *testament solennel*

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may be made under this *Coutume*, he adds: " Notre *Coutume* outre cela requiert dans les testamens plusieurs solemnitez, pour empêcher les fraudes et les suggestions. La première formalité est, qu'il ait été dicté et nommé par le testateur à celuy qui l'a reçu. La deuxième, qu'il soit relu au testateur, et qu'il soit fait mention qu'il a été *dicté, et nommé, et relu*. La troisième, qu'il soit signé par le testateur et par les témoins." (*Ferrière, Coutume de Paris*, vol. 4, p. 18, ed. 1714.) And, again, the same author, speaking of a will made *ad interrogationem alterius*, says: " La validité d'un testament ainsi fait, dépend beaucoup des circonstances, car les formalitez ne sont pas requises dans les testamens pour empêcher de tester, mais pour empêcher qu'ils ne fassent contre la volonté et l'intention des hommes, ainsi il paroît par les circonstances, que la disposition faite *ad interrogationem alterius* a été l'esprit de celuy qui l'a faite, elle doit être confirmée, ainsi cela dépend de la prudence des Juges " (pp. 105, 106).

The mischief of a fraudulent, or false, or extorted, or even suggested, disposition, instead of the genuine expression of the testator's wishes, is certainly not incurred where, as in this instance, the testator is asked what his wishes are, where he deliberately expresses them, and where the instrument which contains them, though previously written, is read over to and approved by him. Their Lordships agree with the opinion of Mr. Justice Taschereau on this point: " Il y a peu de doute que dans le cas présent, le testament argué de faux en cette cause présenterait à mon esprit une idée très forte de l'expression vraie et complète des volontés de Madame Evanturel." The execution of this testament not having sinned against the mischief which the law was intended to prevent, the consideration next in order appears to be, what interpretation did this law receive from contemporaneous exposition? This exposition is derived from the " *arrêts*," or judicial decisions on the question, and is evidenced by the usage and practice of notaries public.

1. In considering the various *arrêts* cited both in the Courts below and at the bar before us, we must distinguish those in which the testament was merely acknowledged in the presence of two notaries, though twice read in their presence and approved by the testator, from the present case, in which there was an actual dictation by the testatrix of the whole of her testamentary dispositions, though the writing did not follow that dictation. Even with respect to *arrêts* of the former description, there are three reported by Ferrière: that of Machéco, in 1597; that of Pisany, in 1602; and that of Claude Pollaët, in 1616, which latter *arrêt* was also confirmed by the Appellate Court, in which the testaments, acknowledged indeed and in the last case also signed by the testator in the presence of two notaries, but not dictated, were pronounced to be valid. It will be borne in mind that the date of the declaration of the *Coutume* is 1580; these *arrêts*, therefore, so far as their authority extends, have the force of a contemporaneous exposition.

There are, it is true, on the other hand, various *arrêts* to be found in the books, in which testaments acknowledged and approved by the testator in the presence of two notaries, and twice read over, have been pronounced null, on the ground of their not having been " dictés et nommés," according to the *Coutume*; but there does not appear to be one in which a testament, " dicté " as this testament was, has been set aside on the ground, either that the dictation was insufficient, or that the writing ought to have followed the dictation. And lastly, upon this point it is to be observed, that in the cases of *Robitaille* v. *Bonneville* and *Routier* v. *Robitaille* (Stuart's Lower Canada Rep. 440), decided by the Court of Queen's Bench for the district of Quebec, by Chief Justice Sewell and Mr. Justice Ker in the year 1829, in which cases the testament was " inscrit en faux," on the ground that it was not legally executed as a " *testament solennel*," that is, not " dicté et nommé " according to the law and as certified by the notary, Mr. Justice Meredith says, and no doubt with perfect accuracy: " The evidence adduced in that case has been placed before us, and from the depositions of the two notaries and other evidence it appears that the second notary was not present when the will was written. And yet the will was

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held to be a good will. The case went to appeal and was disposed of, as the gentlemen of the bar are aware, upon a different ground, and all that is said in the report respecting the point now under consideration is, the Court below, however, considered that the will had been regularly made, and rejected the '*inscription en faux.*'" There is no doubt that jurists, both in Canada and in France, have differed upon the construction of this article of the *Coutume*. Their discordant opinions are more or less reflected by the conflicting decisions above referred to, and also by the difference in the practice of notaries in Canada. The interpretation put by the usage of these officers, who perform a public duty in the preparation of wills, is by no means unimportant; and the result of the evidence upon this head is, that the practice of the leading notaries in the principal Canadian towns of Montreal and Quebec greatly preponderates in favour of the mode of executing a testament adopted in the case before us. It appears, therefore, to their Lordships that, even if the French authority were admitted to be in favour of the stricter construction of the article in question, the latter interpretation has, both by decision and by long usage, acquired the force of law in Lower Canada.

The 23rd article of the *Ordonnance des Testaments* of 1735 and the 972nd article of the Code Napoléon have been referred to, and the decisions with respect to them were considered by the Judges of the Court below, whose opinions were adverse to the validity of this testament. Their Lordships do not think it necessary or expedient to enter into an examination of these decisions. There is, however, an observation arising from the consideration of these two later acts of French legislation, which is, perhaps, not irrelevant to the question before us. The Ordonnance requires that the notaries, or one of them, "écriront les dernières volontés du testateur telles qu'il les dictera," and the article of the Code Napoléon, that the testament "doit être écrit par l'un des notaires *tel qu'il est dicté;* and a subsequent article provides that the prescribed formalities shall be observed *under pain of nullity*. The inference from the insertion of these additional formalities, and of the penalty by which they are guarded in this later legislation, is certainly not unfavourable to the liberal construction of the *Coutume* declared in 1580, under the authority of which the testament before us was made.

After a careful consideration of the law, and of the authorities applicable to this case, inasmuch as it appears to their Lordships that the mode in which this testament has been executed is not obnoxious to the mischief which the *Coutume* intended to guard against, the testament being the expression of the undoubted wishes of the testatrix; and, inasmuch as the force of contemporaneous exposition embodied and continued in the practice of notaries down to the present time is in favour of the validity of such an execution—an exposition in itself reasonable and sound—and having regard to the principle of the comparatively recent decisions of the Canadian Courts in *Robitaille* v. *Bonneville* their Lordships will humbly advise Her Majesty that the judgments appealed from ought to be affirmed, the validity of this testament pronounced for, and the costs of this appeal paid by the appellants.

SIR J. COLVILE, SIR J. NAPIER and LORD JUSTICE GIFFARD, July 7, 19, 1869.

THOMAS CHERRY AND ANOTHER, *appellants;* THE COLONIAL BANK OF AUSTRALASIA, *respondents.*

38 L. J. P.C. 49; L. R. 3 P.C. 24; 21 L. T. 356; 17 W. R. 1031.

See, *Weeks* v. *Propert*, [1873] E. R. A.; 42 L. J. C.P. 129; L. R. 8 C.P. 427; 21 W. R. 676 (C.P.). Distinguished, *Colonial Bank of Australasia* v. *Willan*, [1874] E. R. A.; 43 L. J. P.C. 39; L. R. 5 P.C. 417; 30 L. T. 237; 22 W. R. 516 (P.C.). See, *Lakeman* v. *Mount-Stephen*, [1874] E. R. A.; 43 L. J. Q.B.

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188; L. R. 7 H.L. 17; 30 L. T. 437; 22 W. R. 617 (H.L.). Distinguished, *Beattie* v. *Lord Ebury*, [1875] E. R. A.; 44 L. J. Ch. 20; L. R. 7 H.L. 102; 30 L. T. 581; 22 W. R. 897 (H.L.). See, *Starkey* v. *Bank of England*, [1903] E. R. A.; 72 L. J. Ch. 402; [1903] A.C. 114 (H.L.).

Principal and Agent— Acts of Principal—Implied Warranty of Authority of Agent.

COMPANY. PRINCIPAL AND AGENT.—*The appellants, two directors of a public company, wrote to the respondents, their bankers, informing them that one C. had been appointed manager of the company, and had authority to draw cheques on the account of the company. At the date of the letter the account was, to the knowledge of the appellants, overdrawn, and C. further overdrew the account. The appellants, as such directors, had no authority to overdraw*:—Held, *that there was evidence of an implied warranty on the part of the appellants that C. had authority to bind the company, and that the appellants were personally liable.*

This was an appeal from a judgment of the Supreme Court of the Colony of Victoria.

The appellants were two of the directors of the Loch Fyne Quartz Mining Company, engaged in mining for gold at the Loch Fyne Quartz.

The respondents were a banking corporation carrying on business at Melbourne, and had branch banks at Matlock and Wood's Point, in the colony of Victoria.

The action was commenced by the respondents against the appellants in February, 1867, to recover 4,127*l.* 18*s.* 5*d.*, being the amount paid by the bank on cheques drawn by one Charles Ernest Clarke.

The declaration stated that in consideration that the plaintiffs, at the request of the defendants, would honour and pay on account of the company the cheques of Charles Ernest Clarke, the defendants promised that he was duly authorized by the company to make cheques for them as their agent; and the plaintiffs alleged that, relying on such promise, they did honour such cheques on account of the company, but that the said Charles Ernest Clarke was not authorized by the company to make the same.

Amongst other pleas the defendants pleaded, fourthly, that the promise was in the words and figures following:

"The Manager of the Colonial Bank of Australasia, Matlock.

"Wood's Point, Dec. 4, 1865.

"Sir,—We have to inform you that we, as directors of the Loch Fyne Quartz Mining Company, have appointed Mr. Charles Ernest Clarke to be legal manager of the company, and have authorized him to draw cheques upon the account of the said company.—We remain, Sir, yours truly,

"THOMAS CHERRY, } Directors, Loch Fyne
JOHN M'DOUGALL. } Q.M. Co., Regd."

And that the said Thomas Cherry and John M'Dougall therein mentioned were the defendants, and the Colonial Bank of Australasia therein mentioned were the plaintiffs, and the said Charles Ernest Clarke was the person of the same name in the declaration mentioned. Sixthly, that as to 4,000*l.*, parcel of the money claimed, cheques of the said Charles Ernest Clarke to that amount were drawn by him on the bank by way of overdraft, and there was not at the time of their being drawn any money standing to the credit of the company in the bank, out of which the same were payable.

The plaintiffs demurred to these pleas, and joined issue on the other pleas. The defendants joined in demurrer.

The cause was tried, on June 4, 1867, when the following facts were proved: That the appellants were directors of the Loch Fyne Gold Mining Company. That previous to the month of December, 1865, the company had opened an account with the respondents' branch bank at Matlock. That at the commence-

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ment and before the 4th of that month, the account of the company with the branch bank was overdrawn, of which the appellants had notice. That on the 4th of that month the appellants wrote and signed the letter set forth in the fourth plea, and sent it to the respondents. That thereupon Clarke drew cheques, which were honoured by the bank, which increased the overdraft. That the account was then, by consent of the appellants and respondents, transferred to the branch bank at Wood's Point. That Clarke drew a cheque for 2,336*l.* 19*s.* 3*d.* on the Wood's Point branch of the respondents' bank, in order to pay off the overdraft of the Loch Fyne Gold Mining Company at the Matlock branch. That the pass-book was regularly furnished to Clarke; that he subsequently drew several cheques, which were all honoured, the amount of the overdraft being the amount claimed in the action. It was further proved that the appellants did not form a quorum of the directors of the Loch Fyne Gold Mining Company, and were not empowered to give Clarke the authority mentioned in their letter to the respondents, or to authorize him to draw cheques on account of the company.

Upon these facts the jury found a verdict for the plaintiffs for the full amount of their claim.

On June 27, 1867, a rule *nisi* was obtained by the appellants to set aside the verdict, and to enter a nonsuit on these grounds: That the authority given to Clarke was a limited one, and that he was not justified in exceeding such authority. That there was no evidence of any authority to Clarke to pledge the credit of the company or overdraw, but only to draw on the funds of the company in the bank. That the authority given to Charles Ernest Clarke was not as stated in the declaration, but limited to drawing cheques on the plaintiffs' branch bank at Matlock, and that there was no evidence of any personal responsibility on the part of the defendants. That there was no such promise as that declared on, and that the letter signed by the defendants varied from the allegation in the declaration. That there was no evidence of any promise by the defendants that Clarke was authorized and empowered by the company to make drafts or cheques for them as their agent. That there was no evidence of any consideration as stated in the declaration.

On September 6, 1867, the Supreme Court gave judgment in favour of the respondents, on the points raised by the rule, but ordered the damages to be reduced by 2,245*l.* 8*s.* 9*d.*, on the ground that cheques to that amount were drawn in respect of a balance incurred before the date of the letter, the judgment being that the verdict should stand, and that the damages be reduced by the amount of 2,245*l.* 8*s.* 9*d.*; and on the demurrers the judgment was for the respondents.

From this judgment the present appeal was brought.

Mellish and *Griffits*.—The action is founded on contract, but no contract was proved. The letter relied on contains no words of contract and stipulates for no consideration, and there was no intention on either side to make a contract. There is no contract that the manager had power to draw cheques for the purpose of borrowing money. The reasons for implying a warrant of authority in the case of contracts made by one person on behalf of another do not extend to notifications of acts done by the directors of a public company in the exercise of their powers as directors. The letter does not purport to authorize Clarke to overdraw. There was no evidence that the loss was consequent upon any contract contained in the letter. The respondents would have sustained the same loss if the letter had been accurate. There was no evidence of any warranty to draw on the respondents, except at the Matlock branch. The appellants only acted as directors of the company.—They referred to *Rashdall* v. *Ford* (35 L. J. Ch. 769); *Wilson* v. *Goodman* (4 Hare, 54); *Ricketts* v. *Bennett* (4 Com. B. Rep. N.S. 686); *Fuller* v. *Wilson* (3 Q.B. Rep. 58; 11 L. J. Q.B. 251); *Collin* v. *Wright* (8 El. & B. 647; 27 L. J. Q.B. 215).

Sir J. Karslake and *Macnamara, contra*.—The appellants represented Clarke to be the duly authorized agent of the company. The appellants are therefore

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liable to the bank for such damage as accrued to the bank through such representation. The sum for which the verdict stands was, in fact, money paid by the respondents for the appellants at their request and for their benefit. At all events, upon the facts proved there was evidence to maintain the action. It was very probable that the appellants should have intended to give Clarke authority to overdraw, and that the respondents should suppose that Clarke had such authority. If a person holds out another person as his agent there is an implied warranty for all the acts of such person. Even if the appellants had no authority to overdraw, this letter gave Clarke power to overdraw, and there was no limit to such power. They referred to *Hughes* v. *Græme* (33 L. J. Q.B. 335); *Thompson* v. *Davenport* (2 Smith's Lead. Cas. 340); *Marzetti* v. *Williams* (1 B. & Ad. 415; 9 L. J. K.B. 42); *Taylor on Evidence*, vol. 1, p. 57; *Lewis* v. *Nicholson* (18 Q.B. Rep. 503; 21 L. J. Q.B. 311).

Mellish, in reply.

Cur. adv. vult.

SIR J. NAPIER (on July 19) delivered the judgment of their Lordships.—This was an action of assumpsit brought by the Colonial Bank of Australasia against the defendants, who were two of the directors of the Loch Fyne Quartz Mining Company (Registered).

The declaration states that in consideration that the plaintiffs, at the request of the defendants, would honour and pay on account of the Loch Fyne Quartz Mining Company, &c., the drafts or cheques of one Charles Ernest Clarke, to be directed to the plaintiffs, the defendants promised the plaintiffs that the said Charles Ernest Clarke was duly authorized and empowered by the said company to make drafts or cheques for them as their agent; and that the plaintiffs, relying on the promise of the defendants, did honour and pay on account of the said company divers drafts or cheques of the said Charles Ernest Clarke, directed as aforesaid. It also states that Clarke was not authorized by the company to make the said drafts or cheques as their agent, by reason whereof the plaintiffs lost the amount advanced upon them. To this declaration defences were pleaded, in which the making of the promise by the defendants, the drawing of the cheques, and the payment on account of the company as alleged were respectively denied, and issues were joined thereon.

The statement of the consideration was not expressly traversed, nor the allegation that Clarke was not authorized by the company to make the drafts or cheques as their agent. There were other pleas pleaded by the defendants, which were demurred to on the part of the plaintiff, but it was conceded that it was not necessary to notice these more particularly.

It appears from the evidence given at the trial that, before the month of December, 1865, the company had opened an account with the branch bank of the defendants at Matlock, and that cheques were from time to time drawn upon the bank by the then manager of the company, which were duly honoured and paid by the bank on account of the company. The account was overdrawn to the knowledge of the defendants at the time when they signed the following letter, and handed it to Clarke, who gave it to the manager of the bank:

"The Manager of the Colonial Bank of Australasia, Matlock.

"Wood's Point, Dec. 4, 1865.

"Sir,—We have to inform you that we, as directors of the Loch Fyne Quartz Mining Company, have appointed Mr. Charles Ernest Clarke to be legal manager of the company, and have authorized him to draw cheques upon the account of the said company.—We remain, &c.

"THOMAS CHERRY, } Directors, Loch Fyne
"JOHN M'DOUGALL, } Q. M. Co., Regd."

After this letter was deposited by Clarke with the manager of the bank, advances were continued by the bank on cheques drawn by Clarke, purporting to bind the company. These cheques were duly honoured by the bank on the faith of this letter. Under the 21st section of the Colonial Act the credit of

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the company could have been pledged for advances on overdrafts, provided the borrowing had been authorized by a majority of the shareholders, but not otherwise. No evidence was offered to prove that such authority was given. The case proceeded on the assumption that Clarke had not authority to bind the company by the cheques which he drew. There was no imputation of fraud in the transaction.

It was contended by Mr. Mellish that, on the face of the letter, it appears that the defendants acted merely as directors of the company, and never meant to bind themselves otherwise than as directors; that, therefore, they cannot be made personally liable. If the question was, whether the defendants, in fact, intended to bind themselves personally, it might be admitted that such was not their intention. But it remains to be considered whether, upon the view which the jury were entitled to take of the evidence, the law does not imply a warranty to the bank, on the part of the defendants, that Clarke had authority to bind the company so as to make them responsible to the bank for the advances on the cheques.

In the case of *Downman* v. *Williams* (7 Q.B. Rep. 112; 14 L. J. Q.B. 226), Tindal, C.J., in delivering the judgment of the Court of Exchequer Chamber, states, that where a contract appears, upon its legal construction, to have been entered into by an agent on behalf of his principal, the only ground on which the agent could become personally liable thereon is that which has been stated by Mr. Justice Story in his Commentaries on the Law of Agency. The ground therein stated is said to be "a plain principle of justice; for every person so acting for another, by a natural if not by a necessary implication, holds himself out as having competent authority to do the act, and thereby draws the other party into his reciprocal engagement." According to the opinion of that eminent jurist, if a person represents himself as having authority to do an act when he has not, and the other side is drawn into a contract with him, and the contract becomes void for want of such authority, he is liable for the damage which may result to the party who confided in the representation, whether the party making it acted with a knowledge of its falsity or not. "In short," says Mr. Justice Story, "he undertakes for the truth of his representation." This doctrine of an implied warranty in such cases seems to have met with the approval of the learned Judges who decided the case of *Lewis* v. *Nicholson* (18 Q.B. Rep. 503; 21 L. J. Q.B. 311), although expressed with some reserve, as it was not necessary for them to decide the question. It became necessary to decide it in the case of *Collin* v. *Wright* (8 El. & B. 647; 27 L. J. Q.B. 215), and the decision of the Court of Exchequer Chamber in that case must be considered to have settled the law upon the subject, in conformity with the view of Mr. Justice Story. The remedy by a special action, where there is fraud or deceit, is a distinct matter upon which no question is made.

It appears to their Lordships that there was evidence upon which it was open to the jury to find that the defendants, professing to act on behalf of the company, had led the plaintiffs to believe that Clarke had authority to draw cheques as the agent of the company, and thereby induced the bank to make advances on the cheques on the supposition that, as between the bank and the company, the latter was bound. It can make no difference that the engagement into which the plaintiffs were thus drawn by the defendants has to be collected by inference from the evidence laid before the jury. When it has been ascertained as a matter of fact, the legal effect is the same as if it had been express. The warranty which the law implies depends on the position of the parties and on the nature and effect of the representation. The representation in this case was admitted on the record to be untrue.

Their Lordships agree with the Judges of the Supreme Court in thinking that, in this state of things, the law implies the warranty or undertaking on the part of the defendants, as stated in the declaration, and that there was no ground for entering a nonsuit.

Their Lordships will therefore humbly recommend to Her Majesty that the judgment of the Supreme Court should be affirmed with costs.

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SIR W. ERLE, THE LORD CHIEF BARON (SIR F. KELLY), SIR R. PHILLIMORE and SIR J. NAPIER, June 22, July 17, 1869.

THE QUEEN, *appellant;* MICHAEL MURPHY, *respondent.*

38 L. J. P.C. 53; L. R. 2 P.C. 535; 21 L. T. 598; 17 W. R. 1047.

See, *R.* v. *Martin,* [1872] E. R. A.; 41 L. J. M.C. 113; L. R. 1 C.C. 378; 26 L. T. 778; 20 W. R. 1016 (C.C.R.).

Felony—" Venire de Novo."

CRIMINAL LAW.—*In a charge of felony where the indictment is good and the prisoner has been given in charge to a jury in due form of law empanelled, chosen and sworn, and a verdict has been returned and judgment given, the proceedings are final, and a* venire de novo *will not lie.*

COLONY.—*The respondent was tried for murder at a sessions of oyer and terminer and gaol delivery in New South Wales, and convicted and sentenced to death. Afterwards the Supreme Court of that colony made a rule absolute for a* venire de novo, *on the ground that the jury had before giving their verdict been allowed access to newspapers containing reports of the case:*—Held, *that the Supreme Court had no power to order a* venire de novo *in such a case.*

This was an appeal from a judgment of the Supreme Court of New South Wales.

An information was filed in the Supreme Court of New South Wales, at the sittings of the Court held at Darlinghurst, as a Court of oyer and terminer and gaol delivery, by Her Majesty's Attorney-General for the colony, charging that Michael Murphy, the respondent, did, on November 22, 1865, at South Creek, in the colony, feloniously and wilfully, and of his malice aforethought, kill and murder one Samuel Hassen.

The said Michael Murphy pleaded " not guilty," and issue was joined thereon. On September 10, 1867, the said Michael Murphy was brought up for trial before the said Court, and was there on September 11, 12, 13 and 14, 1867, tried before one of the Judges of the said Court, and a jury of twelve persons duly empanelled and sworn to try the issue so joined upon the said information as aforesaid, and thereupon the jury found a verdict of " guilty," and the Court sentenced the prisoner to death.

On September 19 the Supreme Court of the said colony, sitting in banco, upon the motion of the counsel for the prisoner, and upon reading the affidavit of the attorney for the prisoner, granted a rule *nisi,* calling upon the Attorney-General of the colony to shew cause why a *venire de novo* should not issue, for the trial of the said Michael Murphy, upon the issue so joined on the information as aforesaid, upon the ground that after the jury had been empanelled to try the said issue, on the said September 10, and before they delivered their verdict, they were allowed the free use of the newspapers of the day, which contained the reports of the trial, so far as it had gone.

The rule *nisi* came on for argument on September 24, 1867, when upon reading the said affidavit, and also upon reading the several affidavits sworn and filed in opposition to the said rule, and upon hearing counsel on the part of the Attorney-General and also on the part of the said Michael Murphy, the Court gave judgment to the effect that the rule *nisi* should be made absolute, and that a *venire facias de novo* should issue for the trial of the prisoner upon the aforesaid charge.

On February 29, 1868, leave was given to appeal from this judgment.

Sir R. Palmer and *Cohen,* for the appellant.—The order of a writ of *venire facias de novo* is in effect the granting of a new trial. The Court has no power to grant a new trial in a case of felony—*The Queen* v. *Bertrand* (36 L. J. P.C. 51). In all the cases in which a *venire de novo* has been granted, there has been some error apparent on the record. The matters complained of did not amount

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to a mis-trial. The Court had no jurisdiction in any way to set aside the verdict of the jury, or vacate, quash or avoid the judgment thereon. The Court had no power to order the issue of a *venire de novo* in any case of felony where the verdict has been given by a jury duly empanelled. But if the Court had the power to order the issue of a *venire de novo* in a case of felony where a verdict has been given by a jury duly empanelled, the matters relied upon in the present case did not warrant the exercise of such power.—They referred to *Witham* v. *Lewis* (1 Wils. 48); *Davis* v. *Pierce* (2 Term Rep. 126); *The Queen* v. *Fowler* (4 B. & Ald. 273); *Winsor* v. *the Queen* (35 L. J. M.C. 161; L. R. 1 Q.B. 313); *The Queen* v. *Scaife* (20 L. J. M.C. 229); *Tidd's Practice* (9th edit.), 922; *Hale's Pleas of the Crown*, c. 42, p. 306.

The Solicitor-General (Sir J. D. Coleridge) and *Archibald*, for the respondent.—No doubt *The Queen* v. *Bertrand* (36 L. J. P.C. 51) is an authority to shew that there can be no new trial in a case of felony; but there is a distinction between a new trial and a *venire de novo*. This is recognized in all the text-books, and the whole question turns on this difference—*Chitty's Crim. Law*, vol. 1, 654; *Deacon's Crim. Law*, 1341; *Archbold's Crim. Pleading*, 164. There was a substantial miscarriage of justice in the course of the trial in allowing the jury the use of newspapers. This amounts to a mis-trial. The jury ought only to be instructed by the strength of the evidence and the arguments of counsel in open court. The reading newspaper reports of the trial as it proceeds has a tendency to interfere with the due and orderly administration of justice. They referred to *Campbell* v. *the Queen* (11 Q.B. 799; 17 L. J. M.C. 89); *The Queen* v. *Yeadon* (31 L. J. M.C. 70); *The Queen* v. *Mansell* (27 L. J. M.C. 4); *The Queen* v. *Mellor* (1 Dears. & B. 468); and *The Queen* v. *Higgins* (Cox's Crim. Cas. 585).

Sir R. Palmer, in reply.

Cur. adv. vult.

Sir William Erle (July 17) delivered the judgment of their Lordships.—Upon this appeal it appears, by the proceedings returned to this Court, that the prisoner Murphy was tried for murder at a session of oyer and terminer and gaol delivery for the month of September, before Mr. Justice Fawcett, and was convicted and sentenced; and all the proceedings, as far as appeared, were regular and in due form of law. Afterwards, an application on behalf of the prisoner, upon an affidavit, was made to the Supreme Court sitting in banco, in term, for a rule to shew cause why a *venire de novo* should not issue for the trial of the said prisoner; and, upon further affidavits, the said rule was made absolute; and therein it was also ordered that a suggestion should be made on the record to the effect that, after the jury had been empanelled and before the verdict, the jurors were allowed, during certain adjournments of the Court for the night, by the officers of the sheriff having charge of them, to have access to and free perusal of certain newspapers containing reports of the evidence from day to day; and that the last-mentioned trial, by reason of the matters so suggested, was not according to law, but was irregular and void. This suggestion was followed by an entry, purporting to be an order, that, for the cause aforesaid, the judgment on the said verdict be vacated, and that the sheriff cause a jury anew to come. It further appears, by the same proceedings above referred to, that the only affidavit giving judicial knowledge to the Supreme Court of the alleged irregularity in keeping the jurors was that of the attorney for the prisoner, who deposed, " That he was informed by one of the jurors who acted on the said trial, and he verily believed, that after they had been empanelled to try the said case, and during their confinement at the hotel (where they were kept during adjournments), and before verdict, the jurors were allowed the free use of the newspapers of the day, which contained reports of the aforesaid trial as far as it had gone, in one of which newspapers the heading given was, the ' South Creek Murder Case.' " These are the proceedings in the Courts below, to which we think it necessary to advert as relevant to this appeal.

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Upon the argument in this Court the question has been, whether the above-mentioned order for vacating the judgment upon the verdict and for a *venire de novo* in order for another trial was valid; and their Lordships have come to the conclusion that the answer should be in the negative, both on the ground which their Lordships relied upon in the case of *The Queen* v. *Bertrand* (36 L. J. P.C. 51), and also on the further grounds stated below: First, their Lordships consider that the present case is, in substance, an attempt, by the exercise of a discretion, to grant a new trial on the ground that the conviction was considered to be unsatisfactory by reason of some irregularity in the conduct of the trial. In *Bertrand's Case* (36 L. J. P.C. 51) the irregularity was, that the evidence of the witnesses was read to the jury from the notes of the evidence on a former trial. Here the irregularity was in so keeping the jury during the course of the trial, as that the jurymen may have had access to some newspapers during that time; but the law is clear that the discretional power vested in certain Courts and cases to grant new trials does not extend to cases of felony. The law on this subject was declared by their Lordships in that case, and we consider that the law so declared governs the present case.

Each of these cases falls within the rule that no person ought to be put in peril twice on the same charge. The application of the rule is shewn in detail by Blackburn, J., in *Winsor* v. *the Queen* (35 L. J. M.C. 161; L. R. 1 Q.B. 313), who there states, " When the jury have been brought together, and the prisoner has been given in charge, and the trial has commenced, the right course, if practicable, is, that the jury should give their verdict convicting or acquitting the prisoner. When the jury have once found a verdict of conviction or acquittal, the matter has become *res judicata*, and after that there can be no further trial." He further shews that a *venire de novo* on the same indictment would be erroneous and a new indictment on the same charge would be defeated by a plea of *autrefois acquit* or *convict*. These remarks relate to a verdict returned upon a good indictment for felony before a competent tribunal. Their Lordships cite this statement of the law to shew the finality of a verdict upon a charge of felony when the indictment is good and the prisoner has been given in charge to a jury, in due form of law empanelled, chosen and sworn, and a verdict of conviction or acquittal has been returned.

In the present case, if the prisoner should have been tried and convicted upon the *venire de novo* ordered to issue by the rule here appealed against, according to the passage just cited, a judgment thereon would be erroneous. The cases in which a verdict upon a charge of felony has been held to be a nullity and a *venire de novo* awarded have not been classified in the Digests; there are cases of defect of jurisdiction in respect of time, place or person,—cases of verdicts so insufficiently expressed or so ambiguous that a judgment could not be founded thereon: but we have not discovered any valid authority for holding a verdict of conviction or acquittal in a case of felony delivered by a competent jury before a competent tribunal in due form of law to be a nullity by reason of some conduct on the part of the jury which the Court considers unsatisfactory. As to the two supposed exceptions to this rule against new trial in cases of felony, *The Queen* v. *Scaife* (20 L. J. M.C. 229) was noticed in *The Queen* v. *Bertrand* (36 L. J. P.C. 51), and the other case of *The Queen* v. *Fowler* (4 B. & Ald. 273) was explained to be no decision in the course of the argument on this appeal. Secondly, the further grounds for sustaining the present appeal beyond those expressed in the judgment in *Bertrand's case* (36 L. J. P.C. 51) relate both to the form of the proceeding in the Supreme Court when exercising appellate jurisdiction under which the rule appealed against was granted, and also to the sufficiency of the evidence on which that Court acted in granting that rule. Their Lordships are not aware of any principle either of the law of England or of this colony by virtue whereof the Supreme Court sitting in banco, in term, could take cognizance as a Court of appeal of the judgment pronounced by Mr. Justice Fawcett at the session of oyer and terminer, which had come to an end before the session in banco began; and although the relation of the Courts to each other in respect of

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appellate jurisdiction has not been ascertained by us with precision, still, whatever be that relation, we find no form of proceeding analogous to that which is required by the common law in proceedings when the aid of a Court of error or appeal is invoked, but the form is the form adapted to an application to the discretion of the Court for a new trial. Then as to the sufficiency of the evidence of the facts on which the Court acted in granting the rule appealed against, their Lordships do not find any strictly legal evidence of any fact; they find nothing beyond an affidavit of mere hearsay information, obtained from a person who had been on the jury, but was then discharged, and this information, if admitted to judicial notice at all, shewed possible access to newspapers, without shewing that they contained matter which tended to influence the jury improperly, or that the jury ever did, as a matter of fact, read the newspapers. There is also the further objection, that the supposed informant had been one of the jurymen, and the Courts here have at times expressed a reluctance which we consider salutary against receiving the separate statements of any of the individuals who had in combination formed a jury, in order to impeach the verdict. The whole of the proceedings in the Supreme Court are referred to the Judicial Committee, and as their Lordships consider that the rule *nisi* for a new trial, and the rule absolute founded thereon, were each granted on insufficient grounds, both rules fail to produce any effect, and the conviction stands unimpeached thereby.

We do not examine the authorities cited for the respondent, because none of them appear to us to sanction the notion that a verdict even in a civil case could be set aside upon an imagination of some wrong without any proof of reality. The suggestions upon which verdicts have been so set aside in civil cases have alleged traversable facts, material and relevant, to shew that the verdict had actually resulted from improper influence, and we refer to the special verdict reported in 11 Hen. 4. f. 17, as affording an example of such facts as would, if stated in a suggestion on the record, have had the effect of setting aside the verdict.

The case in the *Year Book*, 11 H. 4, f. 17, we translate as follows (the original is transcribed below, in the note[1]: "The plaintiff in an assize had delivered an escrowment [writing to be used in case of need?] to a juryman on the panel, for evidence of his matter; and after the same juror, with others, had been sworn, and put into a house to agree on their verdict, he shewed the writing to his companions, and the officer who kept the inquest shewed this matter to the Court, through which the Justices took the writing from the jurors, and took their verdict; and by the examining (*per l'apposaile*) of the jurors the time of the delivery of the writing was inquired into, and it was found (*i.e.*, by the jurors) to be as above stated; and as the verdict was for the plaintiff, now he prayed judgment. Gascoigne and Hull said that the jury, after that they were sworn, ought not to see or carry with them any evidence, except that which was delivered to them by the Court, and by the party put in Court as the evidence shewn; and inasmuch as they did the contrary, the plaintiff ought not to have judgment."

This case, with the words of Gascoigne and Hull, has been frequently referred to in abridgments and treatises, by Brooke, Rolle, Hale, Viner and others; but the general words of those Judges, as well as of Judges in general, are to be limited in some degree by reference to the facts of the case in respect

(1) "Le plaintiff en assise livera un escrowmt. a un juror empanell' pur evidence de son matter: Et puis mesme le juror ove auters fuit jururs et mis et un meason d'accord de leur verdit, il monstr' m' l'escrowmt. a les comp'. et le ministr' q' gard l'enq'st monstra cest matter al Court per que les Justices pristr' le scrowm't. des jurorset pristeront lour verdit, et per l'apposaile des jurors le temps de livere del escrowment fuit enquis, et fuit trove ut supra et pur ceo q' le verdit passa pur le plaintiffe, ove il pria son judgement. Gasc. et Hulls disoient, que le jury apres ceo q' ils fuerent jur', ne devient veier, ne porter ovesqz eux nul autre evidence, sinon ceo que a eux fuit livere per le Court, et per le party mis en Court sur l'evidence monstre, et entant que ils fier' le contrary, ceo fuit suspicious per que il ne duist judgement aver. Et puis le plaintiffe dit, que escrowement prova mesme l'evidence, que il mesme dona a eux al. barre, per que il ne fuit cy male, come s'il nust parle en evidence et non allocatur," &c.

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of which they were spoken, and the issue of this case is not altered by transcription. We take one reference to this case, as an example, from *Bro. Abr.*, tit. 'General Issue,' p. 85, thus: "After stating that an inquest must not take evidence privily, he adds, 'Et par Gascoigne et Hull, s'ils preignent escrowe extra curiam et passent pur le plaintiff, si ceo appiert sur examination par le Court, ceo est cause d'arrester le jugement."—(11 H. 4, f. 17.) So that the result of the examination, viz., that the verdict was not "according to the evidence," but upon evidence taken out of Court, from one party without the assent of the other, appeared by the finding of the jury, and was upon the record, as Brooke understands the case, or the judgment could not have been arrested. The special verdict here reported may be contrasted with the suggestion in the present case. In the case of 11 H. 4, 17, the Court which had jurisdiction both to try the suit and to arrest the judgment ascertained the fact of the misconduct of the plaintiff by examining the jurors, while acting as jurors and by their verdict. Judicial knowledge from this source is in contrast with the affidavit above described. Also the interest of a plaintiff as a party may be contrasted with the supposed interest of the Queen (referred to in the judgment of the Chief Justice in the Court below) in an indictment in which, although it runs in her name, she has no interest beyond that of truth and right. Neither is the sheriff her agent, as also there suggested: he emanates from the people, and is neither appointed by, nor can be dismissed by, nor is he paid by the Queen; furthermore, the mere omission of his bailiffs to clear a room in an inn where jurors are confined of the newspapers coming there by the course of the inn, is in contrast with the culpable craft of the plaintiff who prepared a statement of his case, and sought out a juryman into whom he probably infused a prejudice in his favour, and so influenced the verdict.

In conclusion, their Lordships desire to add that they are sensible of the importance of guarding the channels for information through which the minds of the jury are led to their verdict, and concur with the learned Judges of the Court below in their zeal for the prevention of any such misconduct in future; but they think that the Court was wrong in granting a new trial, as a remedy for this misconduct, and that the mischief would be greater if uncertainty was introduced respecting the course to be pursued in administering the law relating to charges of felony. If irregularity occurs in the conduct of a trial not constituting a ground for treating the verdict as a nullity, the remedy to prevent a failure of justice is by application to the authority, with whom rests the discretion either of executing the law or commuting the sentence. As there was, in the opinion of the Court below, irregularity in the trial of the respondent sufficient to vacate the judgment, their Lordships have no doubt that, upon proper application on behalf of the respondent, which they recommend to be made, such weight will be given to these remarks as they may appear to deserve. But, as between the appellant and respondent, their Lordships will advise Her Majesty that the appeal should be sustained without costs, and that the order for a new trial should be reversed.

SIR W. ERLE, SIR J. COLVILE, SIR J. NAPIER and LORD JUSTICE GIFFARD, July 1, 5, 6, 20, 1869.

THE BISHOP OF CAPETOWN, *appellant;* THE BISHOP OF NATAL, *respondent.*

38 L. J. P.C. 58; 17 W. R. 1050.

Natal—Crown Grant—Ecclesiastical Purpose—Form and Effect of Grant.

ECCLESIASTICAL LAW.—*In the year* 1850, *a piece of land in the colony of Natal was granted by the Crown "in freehold to the appellant, the Bishop of Capetown and his successors in the said see, in trust for the English Church at Pietermaritzburg," in the colony of Natal, and a church was erected on the land.*

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At the time of the grant Natal was part of the diocese of Capetown, but was subsequently created a separate see, of which the respondent was appointed bishop, and the church so erected became the cathedral church of the diocese of Natal. In the year 1863, *the appellant took possession of the said church and excluded the respondent from the use of the same*:—Held, *in an action of ejectment by the respondent to recover possession of the said land, first, that the appellant had no estate or title in the land so granted either as a trustee or otherwise; secondly, that the respondent had a right as against the appellant to use and have access to the said church; thirdly, that, in an action of ejectment, the Supreme Court had no power to deal with the actual estate in the land.*

This was an appeal from a judgment of the Supreme Court of the colony of Natal, in a suit wherein the Right Rev. John William Colenso, in his capacity of Lord Bishop of Natal, was plaintiff, and the Right Rev. Robert Gray, of Capetown, in his capacity of Lord Bishop of Capetown, was defendant.

The declaration in the suit stated that, on March 19, 1850, the then administrator of the government of the district of Natal granted in freehold to the defendant and his successors in the see of Capetown, in trust for the English Church at Pietermaritzburg, a certain piece of ground in the town of Pietermaritzburg, with full power and authority thenceforward to possess the same in perpetuity; that thereafter the defendant, in his capacity as Lord Bishop of Capetown, caused the said piece of ground to be taken possession of for the use of the English Church in Natal, in the terms of the said deed, and occupied the same and continued in possession until October, 1853, when the defendant resigned his said see of Capetown, which was dissolved by Her Majesty, and thereout various sees were created, viz., the sees of Capetown, Grahamstown and Natal; that the said newly-created see of Capetown, to which the defendant was appointed bishop, was totally distinct from the former see of Capetown and entirely excluded the colony of Natal, and that from the date of his resignation the defendant ceased to have any right to hold the said property under the said trust; that, by letters patent of Her Majesty, dated November 23, 1853, the colony of Natal was created into an independent and separate bishopric, to which the plaintiff was appointed bishop and became the successor in office of the defendant with reference to the said trust so far as relates to the colony of Natal; and that the defendant by force and violence continued to keep partial and adverse possession of the said piece of ground and the buildings and premises erected thereon, to wit, the cathedral church known as St. Peter's, to the damage of the plaintiff, &c., to the value of one farthing. The declaration then prayed that the defendant be ejected from all or any possession he might have of the said piece of ground or the said buildings erected thereon as aforesaid, and that the said deed of grant be reduced or altered or amended by substituting the plaintiff's name and his successors in office in the said deed as the holders or trustees of the said property for the said purpose in the colony of Natal, with full costs of suit.

The defendant by his pleas denied every allegation of fact in the declaration contained, and the plaintiff joined issue on the defendant's pleas.

The facts of the case were as follows: By letters patent, under the great seal of the United Kingdom, bearing date at Westminster, September 25, 1847, the colony or settlement of the Cape of Good Hope, with its dependencies and the Island of St. Helena, was erected into a bishop's see and diocese, called the "Bishopric of Capetown"; and by the same letters patent it was signified to the then Archbishop of Canterbury that Her Majesty had appointed Robert Gray, doctor in divinity, the appellant, to be the bishop of the said see and diocese, and the said archbishop was thereby commanded to consecrate, and did consecrate the appellant as such bishop, and the appellant thereupon entered into and possessed and became the bishop of the said see. The appellant was by the said letters patent granted to be a body corporate, and was constituted to be a perpetual corporation and to have perpetual sucession; and upon him and his successors was conferred the title of Lord Bishop of Capetown; and the appellant and his successors were, by the title aforesaid, empowered to hold

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and enjoy lands and hereditaments of what nature or kind whatsoever. At the date of the said letters patent the district of Natal was a dependency of the colony or settlement of the Cape of Good Hope, and was within the see or diocese created by the said letters patent. On March 19, 1850, the administrator of the government of the district of Natal granted a piece of land situate in the said district to the appellant, by a deed which was in the words following: "I do hereby grant in freehold unto the Right Reverend Father in God Robert Lord Bishop of Capetown and his successors of the said see, in trust for the English Church at Pietermaritzburg, a certain piece of ground containing one acre, two roods and thirty-two perches, situated in the town of Pietermaritzburg, in the district of Natal, being that marked No. 17, in Longmarket Street on the general plan of that town, and bounded north-east by lot 18, south-east by Longmarket Street, south-west by lot 16, and north-west by Church Street (as will more fully appear by the diagram framed by the surveyor and hereunto annexed), and with full power and authority henceforth to possess the same in perpetuity, subject, however, to all such duties and regulations as are either already or shall in future be established with regard to such lands." The appellant afterwards took possession of the land under the terms of this deed.

By the letters patent dated September 25, 1847, whereby the appellant in manner aforesaid appointed and consecrated to be bishop of the see and diocese therein constituted and described, it was declared that if the appellant or any of his successors should by instrument under his hand and seal delivered and sent to the Archbishop of Canterbury for the time being, and by him accepted and registered in the office of faculties of the said Archbishop, resign the office and dignity of Bishop of Capetown, such bishop should from the time of such acceptance and registration cease to be Bishop of Capetown to all intents and purposes, but without prejudice to any responsibility to which he might be liable in law or equity in respect of his conduct in his said office.

In October, 1853, the appellant duly exercised the right of resignation, and by an instrument under his hand and seal resigned the office and dignity of Bishop of Capetown.

On November 23, 1853, letters patent were issued under the great seal for the purpose of erecting the district of Natal into a separate see or diocese. The letters patent, after reciting amongst other thangs that the said see or diocese of Capetown was vacant, that it was of inconvenient size, and that it was expedient that the same should be divided into three bishoprics or sees, to be styled the Bishoprics of Capetown, Grahamstown and Natal, the bishops of the said sees of Grahamstown and Natal and their successors to be subject and subordinate to the see of Capetown and the bishop thereof and his successors in the same manner as any bishop of any see within the province of Canterbury was under the authority of the archiepiscopal see of that province, named and appointed the respondent to be ordained and consecrated bishop of the said separate see and diocese of Natal, and further ordered that the respondent and every bishop of Natal should within six months after the date of their respective letters patent take an oath of due obedience to the Bishop of Capetown for the time being as his metropolitan. The respondent and his successors were by the letters patent granted to be a body corporate, and he was constituted a perpetual corporation, and upon him and his successors was conferred the said name or title of "Lord Bishop of Natal," and the city of Pietermaritzburg within the colony or settlement of the Cape of Good Hope was ordained and constituted to be a bishop's see and the seat of the respondent.

By letters patent under the great seal, dated at Westminster on December 8, 1853, the appellant was appointed bishop of the see or diocese therein particularly described, and ordered thenceforth to be called the Bishopric of Capetown and also metropolitan bishop in the colony of the Cape of Good Hope and its dependencies, and the Island of St. Helena, and the said appointment was signified to the then Archbishop of Canterbury. By the letters patent the appellant was granted to be a body corporate, and he was constituted to be a perpetual corporation, and to have perpetual succession, and upon him and his

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successors was conferred the name and title of "Lord Bishop of Capetown"; and they were thereby empowered under the said name and title to hold and enjoy lands and hereditaments of what nature or kind whatsoever.

The appellant entered into, and possessed the said bishop's see as bishop thereof, and was in possession of the same and in the enjoyment of the title and dignity of Lord Bishop of Capetown; and to him, as Lord Bishop of Capetown and Metropolitan, the respondent took an oath of due obedience. After the consecration of the respondent, as Bishop of Natal, he applied to, and procured from the appellant a certain power of attorney to act for and represent the appellant as trustee of certain lands and churches in the colony and see of Natal, which said lands and churches were vested in the see of Capetown, and were enregistered in the name of the appellant, and the said land particularly described in the deed of grant dated March 19, 1850, together with a church erected thereon, formed a portion of the "lands and churches" in respect of which the appellant gave to the respondent a power of attorney to act for and to represent him as trustee.

On April 13, 1864, the said power of attorney was cancelled by the appellant. The respondent from that time ceased to be empowered to act for or to represent the appellant as trustee, and the appellant resumed possession of the said land particularly described in the said deed of grant, and of the church erected thereon.

In the month of November, 1865, the dean and incumbent and the churchwardens of the said cathedral church, acting on the advice and by the direction of the appellant, forcibly obstructed the use of the said cathedral by the respondent and the members of the English Church at Pietermaritzburg.

The cause was heard on January 10, 1867, before the Supreme Court of the Colony of Natal; and on January 31, 1867, the Court gave judgment for the plaintiff for one farthing damages, and decreed that the land in question and the buildings thereon at law should stand vested in the plaintiff in his corporate capacity and his successors as Bishop of Natal, with costs.

From this judgment the present appeal was brought.

Sir R. Palmer and *Charles*, for the appellant.—The respondent is not the successor of the appellant in the see of Capetown within the meaning of the grant dated March 19, 1850. He is not, therefore, entitled to have the land and buildings thereon vested in him and his successors as Bishop of Natal. The appellant is the person designated as trustee in the grant. Nothing has ever been done to divest the appellant of his estate in the land. The appellant is the successor in the see of Capetown of the said Robert, Lord Bishop of Capetown, and is as such successor trustee of the said land and buildings thereon, and the same are vested in him as trustee. The action in the Supreme Court was an action of ejectment. The appellant can, therefore, only recover by the strength of his own title; but he has no title to the legal estate. This is a legal proceeding. There can, therefore, be no power to vest the estate in the land in the respondent. The Court below must, therefore, have been wrong in attempting, as they do by their judgment, to vest the estate in the land in the respondent. They referred to *Long* v. *the Bishop of Capetown* (1 Moo. P.C. N.S. 411; Brod. & Fre. Ecc. Cas. 309); *The Bishop of Natal* v. *Gladstone* (3 L. R. Eq. 1); *The Queen* v. *Eton College* (27 L. J. Q.B. 132); *Dr. Warren's case*[1]; and *In re the Bishop of Natal* (3 Moo. P.C. N.S. 115).

Wickens and *Westlake*, for the respondent.—The grant of March 19, 1850, nominally made to the bishop of the then see of Capetown and his successors, must be read according to the true meaning thereof, viz., that the piece of land thereby granted should be held in trust by the bishop of the diocese for the time being. The respondent and his successors in the see of Natal became, and are, the successors in office of the appellant within the true intent and effect of the grant. Even if the trust of the land became vacant in the year 1853, through the resignation of the appellant and the extinction of the corporation sole to

(1) *Grindrod's Compendium of the Laws and Regulations of Methodism*, 8th edit. p. 371.

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which the grant was made, the respondent and his successors in the see of Natal became trustees of the vacant trust, by virtue of the letters patent of November 23, 1853; even if no appointment or grant was made, yet the respondent and his successors in the see of Natal were the persons entitled to the trust, as constituting the corporation sole for the purpose of the trust for which the grant was made. If the trust was filled by the appellant, it is right that such substitution should be made in the trust as is made by the decree. The grant is no longer in the appellant and his successors in the see of Capetown, but in the respondent and his successors in the see of Natal. The appellant was a mere conduit-pipe to keep the land for the benefit and for the purpose of the see of Natal. They referred to *Mühlenbruch*[2]. Land vested in any person for pious use is not vested in any particular person, but in the use itself.

Charles, in reply.

Cur. adv. vult.

Lord Justice Giffard (on July 20) delivered the judgment of their Lordships.—The appeal in this case is from a judgment or order of the Supreme Court of the colony of Natal. That judgment or order, after setting forth certain proceedings in which the Right Rev. John William Colenso, in his capacity of Lord Bishop of Natal, was plaintiff, and the Right Rev. Robert Gray, of Capetown, in his capacity as the Lord Bishop of the diocese of Capetown, was the defendant, and shewing that these proceedings referred to land, buildings and premises comprised in a grant from the Crown, dated March 19, 1850, gave judgment for the plaintiff for one farthing damage, and "did decree that the land in question, and the buildings thereon, at law, do now stand vested in the plaintiff, in his corporate capacity, and his successors in office, as Bishop of Natal, with costs." The grant was in the name and on behalf of Her Majesty, and purported to grant "in freehold unto the Right Rev. Father in God, Robert Lord Bishop of Capetown, and his successors of the said see, in trust for the English Church, at Pietermaritzburg, a certain piece of ground, containing 1 acre, 2 roods and 32 perches, situated in the town of Pietermaritzburg, in the district of Natal, and with full powers and authority henceforth to possess the same in perpetuity; subject, however, to all such duties and regulations as are either already or shall in future be established with regard to such lands."

The plaintiff's declaration, on which the judgment or order proceeds, after referring to the grant of March, 1850, continued as follows: "And the plaintiff saith that thereafter the defendant, in his capacity as such Lord Bishop of Capetown, caused the said plot of ground to be taken possession of for the use of the English Church in Natal, in terms of said deed, and occupied the same, and so continued in possession until on or about the month of October, 1853, when the defendant resigned his said see of Capetown, which was by Her most gracious Majesty dissolved, and thereout various sees or dioceses created, namely, the see or diocese of Capetown, the see or diocese of Grahamstown, and the see or diocese of this colony of Natal. And the plaintiff saith that the said newly created see of Capetown, to which the defendant was appointed bishop, was totally distinct from the former see of Capetown, and entirely excluded the colony of Natal, or any part thereof, and from the date of such resignation the said defendant ceased to have any right to hold the said property under the said trust. And the said plaintiff further saith that, by letters patent of Her Majesty, dated November 23, 1853, this colony was created into an independent and separate bishopric, to which the plaintiff was appointed bishop, and so became the successor in office of the defendant with reference to the said trust as far as relates to this colony of Natal. And the plaintiff lastly saith that the defendant by force and violence continued to keep partial and adverse possession of the said plot of ground aforesaid, and the buildings and premises erected thereon, to wit, the cathedral church known as St. Peter's, to the great damage of the plaintiff and against the peace of our

(2) *Doctrina Pandectarum*, vol. i. s. 201.

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Sovereign Lady the Queen, wherefore he saith he hath suffered damage to the value of one farthing, and brings this suit, praying the judgment of this honourable Court that the defendant be ejected from all or any possession he may have of the said plot of ground or the said buildings erected thereon as aforesaid. And that the said deed of grant be reduced or altered, or amended, by substituting the plaintiff's name and his successors in office in the said deed as the holders or trustees of the said property for the said purposes in the colony of Natal, and with full costs of suit."

The declaration is dated September 10, 1866. Issue was afterwards joined, the defendant putting the plaintiff to proof of his case, and insisting that the whole suit ought to be dismissed with costs. Evidence was entered into on both sides, that of the defendant being documentary, and consisting, amongst other things, of certain letters patent, dated June 25, 1847, on which he relied; that of the plaintiff consisting both of documentary and oral evidence. There is proof as between the plaintiff and the defendant of the plaintiff's title, and there is also proof that he was excluded from St. Peter's Church, as well as obstructed in having access thereto, and in taking part in and performing the accustomed religious services there as bishop. From the whole result of the evidence, documentary and oral, their Lordships can come to no other conclusion than that the defendant was the cause of and authorized this exclusion and obstruction; and regard being had to the letters patent put in on his behalf, and to the course pursued by him, he must be taken to have done so under a supposed title, alleging that the plaintiff has no right of any description, and that he, the defendant, had, and has, an estate in the land, and was, and is, trustee under the grant. Under these circumstances, the first matter to be considered is, as to the form and scope of the proceedings in the suit; and as to these, while on the one hand they are not so framed, especially in point of parties, as to have enabled the Supreme Court to alter or rectify the grant, or to remove the defendant from being a trustee, if he be one, or to appoint the plaintiff a trustee, yet, on the other, their Lordships are of opinion that the plaintiff is entitled, as between him and the defendant, to a judgment to some extent in his favour, provided he has, as against the defendant, a right, either legal or equitable, to use or have access to the church in question. In order to determine whether he has or has not any such right, their Lordships think it unnecessary to follow in detail the very able and elaborate arguments which have been directed more or less to the various questions arising, or supposed to arise, on the three cases of *Long* v. *the Bishop of Capetown* (1 Moo. P.C. N.S. 411; Brod. & Fre. Ecc. Cas. 309); of *In re the Bishop of Natal* (3 Moo. P.C. N.S. 115); and of *The Bishop of Natal* v. *Gladstone* (3 L. R. Eq. 1). Their Lordships think it sufficient for them to say that the following propositions are not at variance with any conclusions which have been arrived at in any one of those cases, have scarcely been disputed, and cannot be successfully controverted: viz., that the patents were not wholly void; that there was, by virtue of the patent of 1847, a corporation capable of taking as such under the grant; that there was a valid resignation by the defendant of the office held under the patent of 1847; and that by the two patents of 1853, of which the plaintiff's was the earlier, there was a creation of two new corporations, both capable of taking under a grant from the Crown, but neither coming within the terms of the grant of 1850, and consequently not taking an estate under it. The defendant's second patent, if the terms at the end of it be looked to, plainly creates a new corporation. A corporation, to be capable of taking an estate under the grant alone, must be the corporation described in it, and have existed at its date. Having regard to these propositions, and to the terms of the grant of 1850, be it remembered a grant from the Crown, "subject to all such duties and regulations as are or shall be established with regard to such lands," having regard, also, to the fact of Natal being separated from the Cape, to the circumstances and state of the colony of Natal, and the inception of the church there, we consider that it was competent for the Crown, in the words of the Natal patent of 1853, to "ordain and declare that the church (now in course of erection and not yet consecrated or dedicated),

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in the said city of Pietermaritzburg, shall henceforth be the cathedral church and see of the said William Colenso and his successors, Bishops of Natal;" and this being so, that the effect of the grant and the plaintiff's patent of 1853 was at least to give the plaintiff the right of access to the church, the right to officiate there as a bishop, and the right to perform there all the religious services which are or ought to be performed by a bishop in a cathedral consistently with the laws and usages of the Church of England, so far as the same are applicable to the church and colony in question.

There can be no doubt but that the plaintiff exercised all these rights, and had possession and occupation and access for these purposes, from the date of his appointment in 1853 until the end of 1863, a period of ten years. There was during this time no title but under the grant of 1850, and the plaintiff's patent of 1853.

Their Lordships, founding their judgments on all these considerations, and having regard also to the former decision of this Board in the matter of the Bishop of Natal, do not hesitate to state, with respect to the defendant, that he had, and has, no estate or title as trustee or otherwise, and no right to interfere; and, with respect to the plaintiff, that he has the rights expressed by that which is, in their opinion, the order which ought to have been made by the Supreme Court of Natal. That order their Lordships will humbly advise Her Majesty to substitute for so much of the existing order as begins with the word decree, and it is as follows:

Decree.—"That the plaintiff, the Bishop of Natal, do have free and uninterrupted access to the land and premises in the grant of March 19, 1850, mentioned, for the purpose of enjoying and exercising all rights, privileges and immunities which have hitherto been enjoyed and exercised, or ought to be enjoyed or exercised, by the Bishop of Natal as such bishop or otherwise, in reference to or within the cathedral thereon and its appurtenances, and that the defendant, the Bishop of Capetown and his agents, do abstain from in any manner interfering with such access, enjoyment or exercise; saving, however, to any except the defendant, any rights in reference to the cathedral as they also enjoyed."

Their Lordships recommend an order thus qualified because their Lordships' decision relates only to the questions in dispute between the plaintiff and the defendant.

Their Lordships, in coming to the conclusion at which they have arrived, have not failed to take into consideration the power of attorney which was revoked by the defendant's deed of April 13, 1864, and that part of the defendant's letters patent of 1853 which is in these terms: "We are, moreover, pleased to order and direct that the said Bishop of Capetown, under that title, may take up, continue and proceed with every act or engagement lawfully commenced, done or entered into as Bishop of Capetown under the letters patent heretofore granted to him as bishop of the said see of Capetown."

The plaintiff's rights depend on the grant of 1850, and his patent of 1853. That patent was subsequent to the defendant's resignation, but preceded the defendant's patent of the same year. The fact that the defendant gave, and that the plaintiff accepted, a power of attorney, may be evidence of what they at one time may both have supposed their relative rights and positions to be; but the power of attorney could not call rights or interests into existence which did not otherwise exist, nor does its revocation preclude the plaintiff from asserting the continuance or existence of the rights conferred on him by the Crown. It has already been determined that the Bishop of Capetown has no jurisdiction, coercive or consensual, over the Bishop of Natal; the words quoted from the Bishop of Capetown's patent are plainly insufficient to give him any estate in the land and premises in question, or to continue any estate in him. He ceased to be trustee when he resigned. He then ceased to have any interest, legal or otherwise, under the grant. Without an estate there could not be, and, in our opinion, there was not intended to be, any continuance in him of the trust created by the grant. Even if the estate had remained vested

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in the defendant, and he had continued a trustee, he, as trustee, would have no right to obstruct or exclude the plaintiff, as has been done. The conclusions at which their Lordships have arrived would be the same whether considered with reference to English law and equity, or Roman-Dutch law.

It is manifest from what we have stated that we differ from the Supreme Court, so far, at all events, as the defendant is concerned, in form more than in substance. The judgment of the Supreme Court purported to deal with the actual estate in the land, church and premises, and, as we conceive, with the trust. This, in our opinion, could not be properly done in a suit constituted as the present suit is; therefore we have recommended the substitution of the order which has been read for that which was originally made by the Supreme Court. So far the appeal has been successful; but as we are of opinion that the defendant has no estate, and was wholly wrong in the course he thought fit to take, we shall humbly advise Her Majesty to the effect that no costs of the appeal be given, and that that part of the judgment in the Supreme Court which gave the plaintiff his costs there be not disturbed. As between the plaintiff and the defendant, the plaintiff was substantially right, and the fact that he asked for more than he was entitled to led to no additional issues or evidence.

Their Lordships will humbly advise Her Majesty in conformity with this judgment.

SIR W. ERLE, SIR J. COLVILE, SIR J. NAPIER and LORD JUSTICE GIFFARD. June 31, 1869.

JEAN BAPTISTE GIRAUD, *appellant;* JOHN BORTHWICK PATERSON, *respondent.*

38 L. J. P.C. 65; 21 L. T. 200; 18 W. R. 359.

Practice—Action at Law—Reversal of Judgment—Nominal Damage.

COLONY.—*The Judicial Committee will not recommend Her Majesty to reverse the judgment of an inferior Court in a suit in which nominal damages alone are to be recovered.*

This was an appeal from a judgment of Her Majesty's Supreme Consular Court at Constantinople.

The action was brought in the Consular Court of Smyrna, by the appellant, a French subject, resident at Smyrna, against the respondent, an English merchant carrying on business there.

The petition alleged that the respondent demised to the appellant certain farms, for a term of years, computed from October 1, 1860, at certain rent, and subject to certain conditions. That in the month of July, 1861, without any forfeiture having been committed by the appellant, the respondent wrongfully re-entered and took possession of the said farms and of the furniture, farming implements, live stock and other property thereon, and appropriated them to his own use. The petition also alleged that the appellant mortgaged to the respondent a farm and its appurtenances, as a security for the rent of the before-mentioned farms of the respondent, the condition of the said mortgage being that in the event of the appellant faithfully observing the covenants in the lease of the said farms, the respondent should re-convey to the appellant his farm free of all mortgage or other charges. The petition then alleged that the respondent had, without the consent or authority of the appellant, wrongfully sold the farm so mortgaged by the appellant, and prayed that the respondent might be decreed certain damages for breach of contract committed by the respondent in re-entering and re-taking possession of his farms, and for the wrongful seizure by the respondent of the appellant's property thereupon, and also for the wrongful sale of the appellant's farm.

The respondent filed his answer to this petition, alleging that subsequently

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to the execution of the lease referred to in the petition, a judgment was delivered by the French Consular Court at Smyrna, by which the appellant was ordered to deliver to the respondent the estate mentioned in the said lease, and to repay to him, the respondent, certain sums of money for his account for farming purposes. That the appellant appealed from this judgment to the Imperial Court at Aix, and that the said appeal was, on May 13, 1863, dismissed with costs. That in the month of September, 1861, the appellant, for certain illegal acts committed by him in the said farm, was by the Ottoman Supreme Criminal Tribunal at Smyrna condemned to three months' imprisonment, and was forbidden ever to re-enter on the said farm. That the appellant never paid any portion of the rent due whilst in occupation of the said farm, and committed divers and sundry breaches of covenants.

The Consular Court at Smyrna gave judgment for the respondent.

From this judgment the appellant appealed to Her Majesty's Supreme Consular Court at Constantinople, which Court affirmed the judgment of the Consular Court of Smyrna, and dismissed the appeal with costs.

From this judgment the present appeal was brought.

Bere, for the appellant.

Manisty and *Butt*, for the respondent.

Sir William Erle delivered the judgment of their Lordships.—The petition on the part of the appellant in this case was, in substance, for damages in consequence of his being wrongfully deprived of his property in a certain farm, and the stock that was thereupon. The matter was litigated in the Court at Smyrna, and afterwards in the Supreme Consular Court at Constantinople. The judgment of the Consular Court at Constantinople is, that the appellant had no right to the damages which he sued for, and upon the appeal from that judgment the question is raised whether such judgment is right, and their Lordships have come to the conclusion that it is their duty to recommend that the appeal should be dismissed. The interest of the appellant in the farm in question is derived under the indenture of demise, which gave him an interest of six years, to commence in October, 1860. There were the usual terms between landlord and tenant for the reparation of a farm in the country where these farms are situated, and covenants for the payment of rent, for the keeping in repair, and for some course of cultivation, as to which their Lordships would make the general remark, that it was essential that the lessee should continue in the occupation in order that he might be enabled to do his duty as tenant, in respect of those covenants.

There is another provision in the deed, which bears upon the stock. There was a covenant on the part of the lessor for advances to be made by him amounting to 1,055 Turkish liras, 555 down, and 500 by way of further advances; and the lessee, Giraud, in consideration of those advances, and by way of security for them, mortgaged, pledged, and made over to Mr. Paterson all the stock upon the farm. It appears that Mr. Giraud entered upon the farm and continued in occupation. There are provisions about rights to the labour of the labourers, and other rights which led to contests, and which led to an unsatisfactory conduct of the farm. Before a year had elapsed there were proceedings, perhaps of a criminal nature, against Mr. Giraud for assault, under which he was arrested and taken to prison, where he was confined for forty-seven days. Before the time of his going to prison, there had been an omission on the part of Mr. Giraud to collect in the crops at the time when they were ripe, and persons were put upon the farm to collect in those crops for the mutual interest of the landlord and the tenant. Upon the whole of the evidence, as it was reviewed by the Judge of the Consular Court, and as far as it has been brought to our attention, the fact of Mr. Paterson putting in persons to come upon the farms and collect in the crops in 1861 was not an eviction by Mr. Paterson of Mr. Giraud. Very much turns upon the point whether or no Mr. Paterson can be considered to have been the cause of, or in any way accessory to bringing about the arrest of Mr. Giraud and taking him

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to prison. The imputation has been made. It has been attempted to be supported here by a report heard by Mr. Giraud from some of the witnesses that they had been paid by Mr. Paterson to come; but their Lordships are of opinion that there is no sound ground upon which they can rely in fixing upon Mr. Paterson an imputation of such very grave guilt as procuring Mr. Giraud to be wrongfully arrested and confined in prison in order that during the time that he was so confined he might take advantage of his absence, take possession of his farm, and otherwise damage him in respect of his property. Their Lordships can find no ground for that imputation.

Then, having cleared the ground so far, their Lordships come to that which is the cardinal point on which their opinion turns; and the cardinal point upon which the judgment of the consul in the Court below turned. He states that the point is, who first by his own act annulled this contract? Mr. Giraud says the imprisonment was substantially the breaking of that contract, but it is not found that that was caused by Mr. Paterson. Then, whilst Mr. Giraud was in prison, it seems that he had formed the intention of what may be described as abandoning the farm. He came to the conclusion that his imprisonment had been procured through Mr. Paterson, and his evidence is in effect that he did not return to Bergaine because he knew it was in possession of Mr. Paterson's agents, whom he had seen there,—the agents that were put there to collect the crops, as we understand the evidence. He goes on to say, "I did not go near Mr. Paterson after I was released, and I did not go back to the farm, and did not intend to go, as I intended to sue him, Mr. Paterson; and as far as I was concerned, I did not care what became of the farm."

Their Lordships in this case find a great conflict of evidence about many of the facts, but the cardinal fact of the case, in their judgment, is established by the plain explicit statement of Mr. Giraud himself. They have no hesitation in relying upon that statement, and they gather from it that he, knowing that the farm was vacant, intentionally avoided returning to that farm, intentionally left it for Mr. Paterson at his peril to deal with it as he might choose, but it was a vacant possession which the tenant had abandoned; and according to the passage which I have read, it is an abandonment, not without example, probably, in many parts of the British dominions, where the tenant, believing that he has got an interest for some time, does not intend to do his duty as tenant and cultivate the farm, and keep up as well as he can a performance of the duties which are cast upon him by the lease, but means to keep the nominal interest in the farm and rest entirely upon the litigation and the damages which he may obtain in the course of the litigation. We do not at all pretend to judge between Mr. Giraud and Mr. Paterson further than as to the facts upon which our judgment is founded. Mr. Giraud was of opinion that Mr. Paterson was the cause of his imprisonment. If he was wrong in that, we think that he was not justified in abandoning that farm, and not justified in bringing any litigation upon Mr. Paterson for preventing that farm from being ruined, and taking possession of it, and taking care of it. Mr. Giraud did not intend to go back. So far as the interest in the farm is concerned, their Lordships think that there would be no claim to damages. Then, with respect to the stock which was left on the farm, the amount of the stock is a matter upon which there is much conflicting evidence. Upon one side, Mr. Giraud makes a large claim; on the other side, there is no evidence upon which the consul in the Court below could rely, and the provision of the indenture of lease that the whole of the stock on the farm should be considered as mortgaged to secure repayment to the plaintiff of the advances of 1,055 Turkish liras, comes in aid of Mr. Paterson to prevent any claim for substantial damages in respect of the stock that was upon the farm, and which was charged as a mortgage security. The term had not, in time, come to an end, but the term virtually, as between landlord and tenant, was at an end; the interest of the tenant was abandoned, and in substance the intention of the parties to that mortgage would be carried out by holding that

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the landlord, with that mortgage, was entitled to secure himself by the stock upon the farm.

This being a suit in which damages alone are to be recovered, if there was a nominal interest which might be the subject of an action in some of the Courts of common law, that species of nominal interest for the mere nominal claim for damages would be no ground before the Judicial Committee of the Privy Council to recommend that the judgment of the Court below should be reversed, and the appellant to be entitled to their Lordships' judgment. Their Lordships will, therefore, recommend to Her Majesty that this appeal be dismissed, with costs.

SIR J. COLVILE, SIR J. NAPIER, and LORD JUSTICE GIFFARD. July 6, 1869.

WARWICK HASTINGS RYLAND, *appellant;* ALEXANDRE MAURICE DELISLE, *respondent.*

38 L. J. P.C. 67; L. R. 3 P.C. 17; 21 L. T. 325.

Debtor and Creditor—Lower Canada—Civil Code — Compensation — Liquidated Debts.

COLONY. COMPANY.—*Clause* 1187 *of the Civil Code of Lower Canada provides that "where two persons are mutually debtor and creditor of each other, both debts are extinguished by compensation which takes place between them."*

Clause 1188 *provides that "compensation takes place by the sole operation of law between debts which are equally liquidated and demandable, and have each for object a sum of money or a certain quantity of indeterminate things of the same kind and quality."*

The respondent, a shareholder in a company in Lower Canada, upon whose shares calls remained unpaid, was also a creditor of the company to an amount equal to the calls for salary as manager of the company:—Held, *in an action by a creditor of the company against the respondent, for a debt due from the company, that compensation had not taken place between the company in respect of calls and the respondent in respect of salary, a shareholder not being liable to pay a call till twenty days after a call was made, and no call having been made.*

This was an appeal from a judgment of the Court of Queen's Bench of Lower Canada, reversing a judgment of the Superior Court for Lower Canada, in the district of Montreal, by which the respondent was condemned to pay to the appellant 638*l.* 4*s.* 7*d.* currency, with interest on the sum of 612*l.* 10*s.* from September 13, 1854, together with the costs of suit.

The respondent was sued as a shareholder in the Montreal and Bytown Railway Company, the action being founded on the provision of a provincial statute, which, by section 19, enacted that, "Each shareholder shall be individually liable to the creditors of the company to an amount equal to the amount unpaid on the stock held by him for the debts and liabilities thereof, and until the whole amount of his stock shall have been paid up, but shall not be liable to an action therefor before an execution against the company shall have been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recoverable, with costs, against such shareholders."

The declaration in the action alleged that by a judgment rendered on April 30, 1856, in a cause wherein Joseph Doutre was plaintiff and the Montreal and Bytown Railway Company were the defendants, the said company was condemned to pay to the said Joseph Doutre 612*l.* 10*s.* with interest from September 13, 1854, and costs afterwards taxed at 21*l.* 14*s.* 7*d.* That at the time of the rendering of the said judgment, and for more than six months

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immediately preceding that time, the said company was and had ever since continued to be, and still was, insolvent, *en déconfiture*. That the company having failed to satisfy the aforesaid judgment, the plaintiff had, on October 19, 1857, sued out execution against the goods and chattels, lands and tenements of the said company, which execution had been afterwards by the sheriff of the district, to whom it was addressed, returned unsatisfied either in whole or in part, in which execution the said plaintiff had incurred costs to the extent of 4*l*. That the said Joseph Doutre had sold and transferred to the plaintiff for good and valuable consideration all his right and interest in the said judgment and execution. That on May 4, 1853, the said Alexandre Maurice Delisle subscribed for and became a shareholder to the extent of forty shares, of 25*l*. each, to wit, to the extent of 1,000*l*. of the capital stock of the said company, and that the said defendant had, ever since May 4, 1853, continued to be and still was a shareholder to the extent of the said forty shares or sum of 1,000*l*., on account whereof the said defendant had not paid anything, leaving the whole of the said stock so held by him as aforesaid unpaid. That at all the times hereinbefore referred to, the defendant had been the president and director of the said railway company. That by reason of the premises and by law the said defendant was individually liable to the said plaintiff, who was a creditor of the said company in the manner aforesaid for the debt so due by the said company to the said plaintiff, to an amount equal to the amount so unpaid on the stock so held by him as aforesaid, to wit, to the amount of 1,000*l*.

The respondent pleaded two pleas of compensation and the general issue. By the first plea, upon which the defence to the action mainly rested, he alleged in substance that he had been president and director of the said railway company for two years and a half, at a salary, and that the company had become indebted to him for salary accrued and for money laid out and expended, in the sum of 2,438*l*. 5*s*. 8*d*., as appeared by extract or statement from the books, and that the amount so credited operated as an extinguishment by compensation of any shares of unpaid stock.

Special and general answers and a replication were filed to the said pleas, by which the appellant alleged that the allegations in the pleas were untrue and insufficient in law.

At the trial, the respondent was, on the part of the appellant, examined as a witness, and admitted that, on or about May 4, 1853, he subscribed for and took stock in the Montreal and Bytown Railway Company to the extent of forty shares of 25*l*. each, to wit, to the extent of 1,000*l*.; but he alleged that he had paid a call of 100*l*. cash, and that the remainder was more than compensated by salary owing to him from the said company as president and director thereof. That a sum of 1,000*l*. was voted him for his services for the year ending on the first Monday of March then next (1854), and that on March 22, 1854, at a meeting of the directors of the said company, the respondent was again named and appointed president of the company, and his salary as president was fixed at 1,000*l*., to be computed from March 1, 1854. That no call had been made upon the respondent's unpaid stock beyond the one of 100*l*. claimed to have been paid by him, and it appeared that the company did not, in respect of the stock subscribed for by the respondent, credit itself with a set-off against the salary due to the respondent for any greater sum than the 100*l*. called up. The respondent admitted that at the close of the year 1855 the said company was insolvent.

The respondent called no witnesses, but it was contended that the amount due by him to the company for the balance unpaid upon the stock was compensated by the amount due by the company to him in March, 1854, for the salary as president up to that date, and article 1,188 of the Civil Code of Lower Canada was relied on. The said article 1,188 is as follows: "Compensation takes place by the sole operation of law between debts which are equally liquidated and demandable, and have each for object a sum of money or a certain quantity of indeterminate things of the same kind and quality; so soon as the

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debts exist simultaneously, they are mutually extinguished in so far as their respective amounts correspond."

On March 31, 1866, the Superior Court of Lower Canada gave judgment and overruled the exceptions of compensation pleaded by the respondent, found the respondent to be debtor to the Montreal and Bytown Railway Company in 900*l.* unpaid on his stock, approved the appellant's claim as a judgment creditor of the said company, having execution against the said company unsatisfied.

The respondent appealed from this judgment to the Court of Queen's Bench for Lower Canada. And on March 5, 1868, the Court of Queen's Bench reversed the judgment of the Superior Court for Lower Canada.

From this judgment this appeal was brought.

J. Browne and *A. Thesiger*, for the appellant.—The statute gives a personal individual right to a creditor as against a shareholder, which continues until the whole stock is "paid up." The statute makes the shareholder personally liable to the creditors of the company. That liability can only be discharged either by payment or by "paying up" the stock. Compensation between the shareholder and the company cannot affect those rights. Article 1,196 of the *Civil Code* provides that "compensation does not take place to the prejudice of rights acquired by third parties." The requisites of compensation as declared by the *Code* did not in the present case exist, inasmuch as the company had not called up the amount remaining unpaid upon the shares. The amount did not become "a debt" within the meaning of article 1,187. The debts were not debts "equally liquidated and demandable," nor did they ever "exist simultaneously" within the meaning of article 1,188, for while on the one hand the respondent had an immediate title to the payment of his salary, the company on the other hand could not sue him for the amount unpaid on his shares until a call had been made. The question has been raised whether a company can prove for future calls under the bankruptcy of a shareholder, and it was held that it cannot—*The South Staffordshire Railway Company* v. *Burnside* (5 Ex. Rep. 129; 2 L. J. Ex. 120); *The General Discount Company* v. *Stokes* (34 L. J. C.P. 25); *Hopkins* v. *Thomas* (7 Com. B. Rep. N.S. 711; s. c. nom. *Thomas* v. *Hopkins*, 29 L. J. C.P. 117); *Civil Code of Lower Canada*, arts. 1,187, 1,188, 1,189; *Pothier*[1]; and *Toulier, Droit Civil*, vol. 7. p. 446.

Mellish and *Kerr*, for the respondent.—Compensation took place by operation of law between the balance due by the respondent to the company upon stock, the calls upon which were unpaid for by him, and the sum of money due to the respondent for his services as president of the company, which had been actually credited to him in the books of the company, and this was the case not only before judgment was recovered in the action against the company, but even before the debt, which was the basis of the action, had been contracted. It is clear a judgment debtor of the company's can only stand in the same position as the company. A judgment creditor of the company suing a holder of unpaid stock in the company, cannot stand in a better position than the company itself could if suing the shareholder.

GIFFARD, L.J., delivered the judgment of their Lordships.—The appeal in this case is from a judgment of the Court of Queen's Bench in Lower Canada, reversing a judgment of the superior Court of the district of Montreal, with costs.

The judgment in the Montreal Court, which was delivered on March 31, 1866, found the respondent to be debtor to the Montreal and Bytown Railway Company in 900*l.*, on the stock held by him, and approved the appellant's claim as a judgment creditor of a company, having execution against the company unsatisfied, and condemned the respondent accordingly, as prayed for by the appellant.

The action in which that judgment was given was an action brought by the appellant, as a creditor of the company, against the respondent, a shareholder, as a defendant, and in that action it was proved that there had been a return by

(1) Compensation, ii. 334.

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the sheriff of *nulla bona* to an execution against the company. The action was founded on the section of the General Railways Act which is under the head of "Shareholders," and is the first paragraph of section 19. By that section and paragraph it is enacted, that "Each shareholder shall be individually liable to the creditors of the company to an amount equal to the amount unpaid on the stock held by him for the debts and liabilities thereof, and until the whole amount of his stock shall have been paid up, but shall not be liable to an action therefor before an execution against the company shall have been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recoverable, with costs, against such shareholder."

The defendant referred to the *Code*, and the case made by him was, that there was due to him from the company for salary a sum very far exceeding anything that he was or could be made liable to the company for or in respect of calls; that the sums due to him from the company, in point of fact, extinguished his liability to the company, and that inasmuch as the company never could have maintained proceedings against him in respect of any calls that they might make, the creditor was in no better position than the company. We assume that no calls beyond calls for a sum of 100*l.* had been made on the part of the company; if any such calls had been made, it was the business of the defendant both to have alleged and proved that they had been made; there is neither allegation nor proof to this effect; the Courts below proceeded on the assumption that no calls beyond 100*l.* had been made; and there can be no doubt but that they were right upon the pleadings and facts before them in making that assumption.

What then are the provisions of the *Code* which were relied on? They were these: First of all, it is said in clause 1,187: "Where two persons are mutually debtor and creditor of each other, both debts are extinguished by compensation which takes place between them in the cases and manner hereinafter declared"; and then in clause 1,188, "Compensation takes place by the sole operation of law between debts which are equally liquidated and demandable, and have each for object a sum of money or a certain quantity of indeterminate things of the same kind and quality." As calls had not been made, there could have been no compensation as between this shareholder and the company at the time of the action being brought by the creditor, for when we turn to the Railways Act we see that before any action could have been maintained by the company as against the shareholder, there must have been calls made by the directors, and thirty days must have elapsed from the date of the calls. Moreover, at the time when the appellant brought his action as creditor, the respondent, if he had any claim at all, had a right to proceed against the company and recover payment from the company for the 2,000*l.*, or whatever sum was due to him, and the company could not have set up as against that action any counter-claim which they might have had in respect of his being a shareholder; it follows, therefore, that the amount payable on the stock held by the defendant was not actually paid, discharged and extinguished, and that the clauses in the *Code* which have been relied on do not apply to a state of circumstances in which, although there was a claim by the defendant against the company, there was no counter-right on the part of the company, and no compensation as between him and them, and consequently no extinguishment of the debt. The creditor under the Act is in a different position from that of the company, and can recover so long as anything remains *unpaid* on the stock held by the shareholder.

This being so, their Lordships will humbly advise Her Majesty that the judgment of the Court of Queen's Bench should be reversed.

The result, therefore, will be to restore the judgment of the superior Court in Montreal; and their Lordships are of opinion that the appellant should have the costs in both the Courts below, and also the costs of this appeal.

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IN THE QUEEN'S BENCH. Nov. 4, 1868.

ROWE *v.* HOPWOOD.

38 L. J. Q.B. 1; L. R. 4 Q.B. 1; 19 L. T. 261; 17 W. R. 28; 9 B. & S. 881.

Referred to, *Maccord* v. *Osborne*, [1876] E. R. A.; 45 L. J. C.P. 727; 1 C.P. D. 568; 35 L. T. 164; 25 W. R. 9 (C.P. D.).

Infant—Contract during Infancy—Goods Sold and Delivered—Subsequent Recognition of Debt—9 Geo. 4. c. 12. s. 5.

INFANT. A.—*To a declaration for goods sold and delivered, the defendant pleaded infancy, and the plaintiff replied a ratification of the debt after majority; in support of the replication a copy of the items of the account was put in evidence, at the foot of which the defendant, after he came of age, had written, "Particulars of account to end of year* 1867, *amounting to* 162*l.* 11*s.* 6*d. I certify to be correct and satisfactory," with the addition of his signature:*—Held, *not a sufficient recognition of the debt to satisfy the* 9 *Geo.* 4. *c.* 12. *s.* 5; *and that the construction of the document was for the Court, and not for the jury.*

Declaration for money payable for goods sold and delivered, goods bargained and sold, and money due upon an account stated[1].

Pleas—Payment into Court of 153*l.* 4*s.*, and to the residue infancy.

Replication, that the defendant after he attained the full age of twenty-one years, and before action, by a writing made and signed by him, ratified and confirmed the said debts and promises in the declaration mentioned. Issue.

At the trial, which took place at the Cambridgeshire Summer Assizes, 1868, before Cockburn, C.J., it appeared that the action was brought to recover from the defendant, an undergraduate of Trinity College, the sum of 204*l.* 5*s.* 4*d.*, balance of the price of wines, &c. supplied by the plaintiff, a wine-merchant, carrying on business in Cambridge. In support of the replication, the plaintiff offered in evidence a copy of the items of the account, at the foot of which the defendant had written as follows:

"Particulars of account to end of year 1867, amounting to 162*l.* 11*s.* 6*d.* I certify to be correct and satisfactory.

"J. B. HOPWOOD.

"Jan. 31, 1868."

The defendant had a verdict on the plea of infancy, and the learned Chief Justice being of opinion that the document written and signed by the defendant did not amount to a ratification of the debt under Lord Tenterden's Act, 9 Geo. 4. c. 14. s. 5, directed a nonsuit, with leave to the plaintiff to move to set aside the same and for a new trial.

O'Malley now moved accordingly.—The document written and signed by the defendant after coming of full age is a sufficient recognition of the debt to satisfy the requirements of the 9 Geo. 4. c. 14. s. 5, which enacts that "no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy; unless such promise or ratification shall be made by some writing signed by the party to be charged therewith." The contract of an infant, although it be not for necessaries, is voidable only, and no new consideration for a subsequent promise is necessary; and it is clear from the language of the enactment in question that either a promise to pay or a recognition without a promise will constitute a sufficient ratification of a debt contracted during infancy. In delivering judgment in *Harris* v. *Wall* (1 Ex. Rep. 122; 16 L. J. Ex. 270), Rolfe, B. says that "Apart from Lord Tenterden's Act, any act or declaration which recognizes the existence of the promise as binding, is a ratification of it"; and further,

(1) The writ was issued out of the Court of Pleas of the borough of Cambridge, but the action was subsequently moved into the Court of Queen's Bench by *certiorari*.

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" Any written instrument signed by the party which, in the case of adults, would have amounted to the adoption of the act of a party acting as agent will, in the case of an infant who has attained his majority, amount to a ratification." *Hartley* v. *Wharton* (11 Ad. & E. 934; 9 L. J. Q.B. 209) and *Cory* v. *Gertchen* (2 Madd. 40) are also favourable to the plaintiff's construction of the document in question.

[COCKBURN, C.J.—In *Thrupp* v. *Fielder* (2 Esp. 627) Lord Kenyon, C.J. held a mere acknowledgment of a debt to be insufficient, and required proof of an express promise to pay.]

At all events, the construction of the document was for the jury, and not for the Court.

COCKBURN, C.J.—We are of opinion that there should be no rule. To entitle a plaintiff to recover a debt incurred by the defendant during infancy, the statute requires that there should be a ratification thereof in writing after the debtor has attained his majority, and the construction of such a document is for the Court and not for the jury. I concur with the view taken by the Court of Exchequer in the case cited; but the document with which we have now to deal contains no such recognition of the debt as was there relied on. It seems that an account was handed to the defendant containing the items of the goods supplied, for the purpose of obtaining from him a recognition of the debt, and accordingly he writes thereupon what amounts simply to an admission that the items are correct, and adds his signature. That is not sufficient to enable the plaintiff to maintain this action, and we ought not in such a case to strain the language of the legislature, the object of which was that infancy should be a protection, unless, after the party has attained his majority, he should make a distinct and binding acknowledgment of the debt; and such I do not take to be the effect of the writing relied upon.

LUSH, J., HANNEN, J. and HAYES, J. concurred.

Rule refused.

IN THE QUEEN'S BENCH. Nov. 6, 1868.

BISSELL *v.* JONES AND ANOTHER.

38 L. J. Q.B. 2; L. R. 4 Q.B. 49; 19 L. T. 262; 17 W. R. 49; 9 B. & S. 884.

Followed, *In re Nicholson*, [1870] E. R. A.; L. R. 5 Ch. 332; 22 L. T. 286; 18 W. R. 411 (L.J.).

Debtor and Creditor—Composition Deed—Equality—Suretyship of Creditor —Discounting Compositions.

BANKRUPTCY. N.—*By a composition deed under the Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134.) *s.* 192, *the debtor assigned his property for realization and distribution to a creditor, who covenanted, as surety, with the general body of creditors, to pay to them by instalments* 5*s. in the pound on their debts, which sum he was also himself to receive; provided that he should not be liable under such covenant for a greater amount in the whole than* 3,000*l. The deed also provided that the surety should apply any surplus, which might remain after the payment of the composition, towards the payment of the remaining* 15*s. in the pound on his own debt, it being thereby stipulated that he " should have the advantage of this security for the remainder of his debt, in consideration of his undertaking the liability of suretyship "*:—Held, *that this stipulation created no such inequality as to avoid the deed.*

The deed further provided, that if the surety should arrange with any creditor to make an immediate payment of the composition payable to him, with a deduction therefrom by way of discount in consideration of such immediate payment, the surety should be at liberty to repay himself out of the trust fund the full amount of the composition payable to such creditor, without

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deducting the sum allowed to the surety for discount:—Held *also, that this created no such inequality as to avoid the deed.*

The declaration contained the usual money counts.

The defendants pleaded a composition deed, of which the material part was as follows:

"This indenture made July 1, 1867, between William Jones the elder, William Jones the younger and Daniel Cripps Jones, of the city of Gloucester, trading in co-partnership under the style or firm of 'William Jones & Sons,' as builders and contractors for public and other works, and hereinafter called 'the said debtors,' of the first part; William Philip Price, Richard Potter and Charles Walker, of the city of Gloucester, timber-merchants, carrying on business under the style or firm of 'Price & Company,' of the second part; and all the creditors of the said debtors jointly, or of each or either of them separately, other than the said William Philip Price, Richard Potter and Charles Walker, of the third part: Whereas the said debtors are jointly indebted to the said Messrs. Price & Co. in the sum of 644*l.* 11*s.* 6*d.*, and they are jointly or separately indebted to divers other creditors; and whereas the said debtors, being unable to pay their debts in full, it has been agreed that such arrangement shall be made between the debtors and their creditors as is hereinafter expressed: Now this indenture witnesseth, that in pursuance of the said agreement in this behalf, and in consideration of the premises, the said debtors do hereby for themselves and every of them doth hereby for himself, his heirs, executors and administrators, covenant with the said William Philip Price, Richard Potter and Charles Walker, their executors and administrators, that they, the said debtors, their heirs, executors or administrators, or some or one of them, will pay to the said William Philip Price, Richard Potter and Charles Walker, their executors or administrators, a composition of 5*s.* in the pound on the said sum of 644*l.* 11*s.* 6*d.* owing to them as aforesaid, by the following instalments, that is to say, 2*s.* 6*d.* in the pound at the expiration of four calendar months from May 2 now last past, and 2*s.* 6*d.* in the pound at the expiration of twelve calendar months from the said May 2. And the said debtors do hereby for themselves, and every of them doth hereby for himself, his heirs, executors and administrators, and the said William Philip Price, Richard Potter and Charles Walker (as sureties for the said debtors, and by way of separate covenant) do hereby for themselves, and every of them doth hereby for himself, his heirs, executors and administrators, covenant with the several persons parties hereto of the third part, and their respective executors and administrators, that the said covenanting persons or their respective heirs, executors or administrators, or some or one of them, will pay to the said persons parties hereto of the third part respectively, or their respective executors and administrators, a composition of 5*s.* in the pound, on the amount of their respective debts, by the following instalments, (that is to say) 2*s.* 6*d.* in the pound at the expiration of four calendar months from May 2 now last past, and 2*s.* 6*d.* in the pound at the expiration of twelve calendar months from the said May 2: Provided always, that the said William Philip Price, Richard Potter and Charles Walker, or any or either of them, their or any or either of their heirs, executors or administrators, shall not be liable under the aforesaid covenant to a greater amount in the whole than the sum of 3,000*l.* And this indenture also witnesseth, that in further pursuance of the said agreement, and in consideration of the premises, the said debtors do, and every of them doth hereby assign unto the said William Philip Price, Richard Potter and Charles Walker, their executors, administrators and assigns, all and singular the building materials, tools, utensils, stock-in-trade and effects now belonging, or which may at any time hereafter belong to the said debtors, or any or either of them, in or about the said business or in connexion therewith, and all sums of money now due, or which may hereafter become due, to the said debtors, or any or either of them, under or by virtue of any contracts already entered into, or which may hereafter be entered into, by or with them in relation to their said business (and a list of which now existing contracts is, for the

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convenience of the parties, but not so as to restrain the generality of the preceding description, set forth in the first schedule hereunder written), and the full benefit of all such existing and future contracts respectively; and all other moneys (if any) which may arise or become payable to the said debtors, or any or either of them, from or in respect of the said business; and all the right, life interest, claim and demand whatsoever of the said debtors, or any or either of them, in or to the said premises, or any part thereof: To hold the said premises hereby assigned, or expressed so to be, unto the said William Philip Price, Richard Potter and Charles Walker, their executors, administrators and assigns —Upon trust that the said William Philip Price, Richard Potter and Charles Walker, or the survivor or survivors of them, or the executors or administrators of such survivor, shall at such time or times, and in such manner, as they or he shall, in their or his absolute discretion, think fit, sell, call in, collect and convert into money the said premises, and shall apply the moneys to arise thereby, or which shall otherwise come to their or his hands by virtue of any of the provisions of these presents, in manner following; that is to say, first, in payment of all the costs and expenses of this arrangement, and the negotiation preparatory thereto, and all the costs and expenses attending the preparation and execution of these presents, or otherwise in relation thereto, and all the costs and expenses which may be incurred in or about the execution of the trusts or powers of these presents, or any of them, or otherwise relating to the premises; secondly, in or towards payment of the said composition of 5*s*. in the pound, at the times and in the manner hereinbefore mentioned in that behalf, in aid of the covenants for payment of such composition hereinbefore contained, and so as to indemnify the said sureties from their liability under their aforesaid covenant; and, thirdly, in or towards payment of the remaining 15*s*. in the pound of the said sum of 644*l*. 11*s*. 6*d*. due and owing to the said Messrs. Price & Co. as aforesaid;—it being hereby stipulated that the said Messrs. Price & Co. shall have the advantage of this security for the remainder of their debt in consideration of their undertaking the liability of suretyship as hereinbefore appears, and shall stand possessed of the surplus (if any) of the said moneys and premises in trust for the said debtors: Provided always, and it is hereby agreed and declared, that if the said W. P. Price, R. Potter and C. Walker, as such sureties as aforesaid, or any or either of them, shall arrange with any creditor to make an immediate payment of the composition payable to him under these presents, with a deduction therefrom by way of discount in consideration of such immediate payment, then and in every such case, the surety or sureties making such immediate payment shall be at liberty to repay themselves or himself out of the aforesaid trust premises the full amount of the composition payable to such creditor under these presents without deducting the sum so allowed to such surety or sureties for discount as aforesaid," &c.

Allegation of the performance of all conditions, &c. necessary to make the deed operative and available under the Bankruptcy Act, 1861, and to release the defendants from the said debts, and to make the deed binding upon the plaintiff, and that the plaintiff was an assenting party thereto, and was and is bound by the same.

Second replication, that the plaintiff was not nor is an assenting party to the deed as alleged.

Demurrer and joinder in demurrer.

Macnamara, in support of the demurrer.—There is nothing unequal in the stipulation in the deed under which Price & Co., who are parties thereto of the second part, may possibly get something over and above the two instalments, amounting to 5*s*. in the pound, which are to be paid alike to themselves and the general body of debtors. The property of the debtors is assigned to Price & Co., who covenant, as sureties, with all the other creditors to pay them the instalments as they become due, and such advantage as they may reap from the right to retain any sums remaining over and above, after such payments, towards the payment in full of their own demand is expressly stated in the deed to be in consideration of their undertaking the liability of suretyship, and

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there is nothing unreasonable in such a stipulation. Secondly, it is objected, on the ground of inequality, that Messrs. Price are enabled by the deed to make immediate payment of the composition due to any creditor, with a deduction therefrom by way of discount in consideration of such immediate payment, and afterwards to repay themselves out of the trust fund the full amount of the composition payable to such creditor without deducting the sum allowed as discount. So far from this being a disadvantage, it may be beneficial to a creditor to have his debt paid in advance, and if the sureties consent to accelerate the payment, it is nothing more than reasonable that they should be entitled to the rebate.—(He was then stopped,)

R. G. Williams, contra.—The provision under which Price & Co. are enabled to retain and apply any surplus after payment of the instalments towards the payment of their own debt in full renders the deed bad for inequality, as it is manifest that they may thus get more than the other creditors.

[LUSH, J.—Or they may get less. COCKBURN, C.J.—It may be quite worth the creditors' while to agree to a state of things under which the sureties might get something over the 5*s*., in consideration of this sum being guaranteed to themselves.]

This case goes much further than *Wells* v. *Hacon* (33 L. J. Q.B. 204), a decision, it should be stated, which this Court arrived at not without hesitation. There the surety, in consideration of his suretyship, was simply entitled to a priority of payment over the other creditors, upon whom it was compulsory to look to the trustee appointed under the deed for their dividends, which were only payable upon demand in writing. There is also a second objection to this deed, upon the ground of inequality. By it the debtors assign all and singular their property to Price & Co. upon trust (after payment of the costs, &c. of the arrangement) for the payment of the instalments of the composition as they become due. There is also a covenant on the part of the debtors, and of Price & Co., as sureties, to pay the instalments, with a proviso that the sureties shall not be liable for a greater amount in the whole than the sum of 3,000*l*. The deed further provides that if Price & Co., as such sureties, shall arrange with any creditor for the immediate payment of the composition, with a deduction by way of discount, they shall be at liberty to repay themselves out of the trust money the full amount of the composition payable to such creditor, without deducting the sum allowed as discount. By the terms of the deed, therefore, the creditors have the security of the covenant of the debtors, of the sureties and the trust fund for payment of the composition, and are entitled to insist that the trust fund shall, so far as is possible, be rendered available for that purpose. Then, suppose that the trust fund, augmented by the 3,000*l*., to which extent the sureties are bound by their covenant if necessary to contribute to it, should prove unequal to the payment to the creditors of more than 2*s*. 6*d*. in the pound, instead of 5*s*., it is possible for the sureties by discounting the claims of creditors and then charging the estate with the full amount of the composition to exhaust the fund, leaving the remainder of the creditors nothing but the covenant of the debtors to look to—*Thompson* v. *Knight* (36 L. J. Ex. 30; 2 L. R. Ex. 42).

COCKBURN, C.J.—With respect to the first objection, which is founded upon that part of the deed enabling the sureties, in case the estate should realize more than 5*s*. in the pound, to apply the surplus, so far as it will go, of their own debt in full, the case is governed by *Wells* v. *Hacon* (33 L. J. Q.B. 204). We must assume that the deed is for the benefit of all concerned, and the tendency of the Courts, on such questions, has been to look at these deeds as intended by the legislature to give a majority of the creditors of an insolvent the power of determining, notwithstanding the objections of the few, what arrangement as between themselves and the debtor can most advantageously be carried out. Looking at the present deed, it seems impossible to say that it contains anything either collusive, or so extravagant as to invalidate it. We have to deal with an insolvent estate, from which it seems to be admitted on all hands that the utmost the creditors can get is 5*s*. in the pound, and it is doubtful whether even

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so much can be realized; certain creditors of the estate are, however, so far satisfied that that amount will be forthcoming that they are willing to guarantee its payment to the general body of creditors, on the condition that if by their own diligence and good management of the insolvent estate they can realize more, they shall be at liberty to retain the surplus towards the payment of their own debt in full. In this there is nothing either collusive, or tending to give the sureties any undue advantage over the other creditors, and so far as the first objection goes we must hold the deed valid.

With respect to the second point, I think the objection raised must also fail. The sureties who are to realize the estate must be taken to have such knowledge of the probable amount which may eventually become distributable, as to enable them to judge whether or not they ought, in justice to the creditors in general, to discount any particular demand; and the effect of the proviso in the deed which enables them to pay any creditor in advance must not be read as authorizing them to deal with the estate otherwise than for the benefit of all.

LUSH, J.—I am of the same opinion. The statute intended to leave it to the prescribed majority to make such arrangement as they think proper, provided that the arrangement be *bonâ fide* and for the equal benefit of assenting and dissenting creditors; and if these conditions be fulfilled, the deed is valid, and we are not to inquire whether any particular stipulation which it may contain is for the benefit of the creditors or not. It seems to me that the provisions of the deed before us apply equally to both classes of creditors, and we are bound therefore to uphold it.

HANNEN, J., and HAYES, J., concurred.

Judgment for the defendants.

IN THE QUEEN'S BENCH. Nov. 12, 1868.

In re ELSTONE AND ROSE, *a Plaint in the County Court of Sheffield.*

38 L. J. Q.B. 6; L. R. 4 Q.B. 4; 19 L. T. 280; 17 W. R. 52; 9 B. & S. 509.

Referred to, *Liverpool Gas Co.* v. *Everton*, [1871] E. R. A.; 40 L. J. M.C. 104; L. R. 6 C.P. 414; 23 L. T. 813; 19 W. R. 412 (C.P.); *Sheffield Waterworks* v. *Bennett*, [1872] E. R. A.; 41 L. J. Ex. 233; L. R. 7 Ex. 409; 27 L. T. 199 (Ex. (Ex.)): affirmed, [1873] E. R. A.; 42 L. J. Ex. 121; L. R. 8 Ex. 196; 28 L. T. 509 (Ex. Ch.). Referred to, *Reg.* v. *Longe*, [1897] E. R. A.; 66 L. J. Q.B. 278 (L. JJ.); *Reg.* v. *Shoreditch Assessment Committee*, [1911] E. R. A.; 80 L. J. K.B. 185; 1910 2 K.B. 859; 103 L. T. 262 (C. A.).

County Court—Prohibition—Jurisdiction—Ejectment—Value not exceeding 20*l.*—30 *&* 31 *Vict. c.* 142. *s.* 11.

COUNTY COURT. B.—*At the trial of an ejectment in a County Court there was a conflict of evidence as to whether the value of the premises exceeded* 20*l. by the year. The premises were held subject to a ground-rent, and by deducting the amount of such ground-rent, the Judge arrived at the conclusion that the value did not exceed* 20*l. by the year, that he therefore had jurisdiction, and he gave judgment for the plaintiff*:—Held, *that although there was a conflict of evidence as to the value, this Court would grant a prohibition, as the Judge was wrong in deducting the ground-rent.*—Held *also, that a convenient way to determine the value, would be to consider the case as if it arose under the Poor Law Assessment Act,* 6 *&* 7 *Will.* 4. *c.* 96. *s.* 1, *and to find out what a tenant would give for it in the market.*

Rule calling upon the Judge of the County Court of Yorkshire, holden at Sheffield, to shew cause why a writ of prohibition should not issue to restrain him from issuing a warrant or warrants of execution for the recovery of possession

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of tenements, and to prohibit other proceedings on a judgment on a plaint in the County Court.

It appeared that the action was brought to recover the possession of certain leasehold tenements, consisting of a dwelling-house and premises, held under a building lease granted by the trustees of the Duke of Norfolk to John Thomas Hall, at a yearly ground-rent of 9*l*. 17*s*. The plaintiff had purchased the premises, subject to the ground-rent; and the defendant had got possession under an agreement with Hall.

It was objected at the hearing that the Judge had no jurisdiction under section 11. of 30 & 31 Vict. c. 142, as the value of the premises exceeded the sum of 20*l*., and the rent payable in respect thereof also exceeded 20*l*. by the year. There was contradictory evidence before the Judge as to what was the value of the premises, and he decided that the value did not exceed 20*l*., that he had jurisdiction, and gave judgment for the plaintiff.

An application was made to Montague Smith, J., for a prohibition, and that learned Judge directed that the County Court Judge should be asked whether he had deducted the ground-rent in ascertaining the value or not. The County Court Judge declined to answer the question, and it was stated that his notes did not give the required information. Under these circumstances, a shorthand note of the judgment was obtained, which the County Court Judge admitted was substantially correct; and it appeared that, in ascertaining the value, he had deducted the ground-rent, the result of which deduction was that the value did not exceed 20*l*. The matter was again brought before Montague Smith, J., who, at the instance of the plaintiff, referred it to the Court.

Oppenheim shewed cause against the rule.—This rule has been obtained on the ground that the 11th section of 30 & 31 Vict. c. 142. does not give jurisdiction to try this ejectment. That section is as follows: " All actions of ejectment where neither the value of the lands, tenements or hereditaments, nor the rent payable in respect thereof, shall exceed the sum of 20*l*. by the year, may be brought and prosecuted in the County Court of the district in which the lands, tenements or hereditaments are situate." Assuming that the Judge made the deduction of the ground-rent, as alleged by the defendant, it is submitted that he was right in doing so. The word " value " in the 11th section means the value to the litigant parties. That is shewn by *In re Brown and Cocking* (37 L. J. Q.B. 250; 3 L. R. Q.B. 652), which was a decision as to the meaning of the words " the rent payable in respect thereof," which occur in the same section.

[BLACKBURN, J.—The question is really like a question of rating, namely, what the premises would let for to a hypothetical tenant. COCKBURN, C.J.—Yes; in the Parochial Assessment Act, 6 & 7 Will. 4. c. 96. s. 1, we have a kind of legislative exposition of the words " net annual value," that is to say, the rent at which the same might reasonably be expected to let from year to year, &c. That being so, would not the more convenient way be to ascertain what would be the value to let in the market?]

There are always some deductions to be made even in a rating case, and there is no reason why the deduction of the ground-rent should be held to be wrong. Secondly, this is not a case in which a prohibition ought to go. There was a conflict of evidence before the Judge as to the value; some witnesses saying that the value was above 20*l*., and others that it was less. It was a question, therefore, for the Judge to inquire into and determine; and *Joseph* v. *Henry* (19 L. J. Q.B. 369) shews that this Court will refuse a prohibition in such a case. See also *The Guardians of the Lexden Union* v. *Southgate* (10 Ex. Rep. 201; 23 L. J. Ex. 316).

[COCKBURN, C.J.—There is not really any dispute as to the facts. As far as one can understand from the shorthand notes, the Judge seems to have said, " But for the ground-rent, I should have said the value would exceed the sum of 20*l*., but I deduct the ground-rent, and then I decide that I have jurisdiction." That is not a conflict of evidence, but the application of a mistaken rule of

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law upon admitted facts. LUSH, J.—The Judge refuses to say what he did, but it is pretty clear that he did deduct the ground-rent.]

It is submitted that that is not so clear; the affidavits are contradictory upon that matter.

Ryalls, in support of the rule, was not heard.

COCKBURN, C.J.—I am of opinion that this rule should be made absolute. There are two questions for the decision of the Court. The first is, whether the County Court Judge, in ascertaining the value of the house or premises sought to be recovered, is empowered to deduct the amount of the ground-rent, which the immediate landlord is bound to pay to the ground landlord, so as to have jurisdiction to try the action. The second question is, whether the prohibition ought to go, under the circumstances of the case. Now, upon the first question, it seems that, irrespective of the deduction of the ground-rent, the Judge was of opinion that the value would be so great that he would not have jurisdiction to try the action. There is no doubt that the 11th section of the statute has left the meaning of the word "value" uncertain. It is quite true that there is a difference between the amount of the value to the tenant and of the value to the landlord, inasmuch as it may be worth while for the tenant to pay 200*l.* a year for a house in respect of which 20*l.* ground-rent has to be paid, while the house would only be of the value of 180*l.* to the landlord, as he would have to pay the ground-rent out of the 200*l.* which he would receive from his tenant. There must always be some such difference in the value to landlord and tenant; and that being so, what is the criterion of value which the Court ought to adopt? I think that the meaning may be found by analogy with a case by no means dissimilar, where the legislature has dealt with the question of value. In assessing houses or land to the poor-rate, the legislature has said that the criterion is the rent at which the house might reasonably be expected to let to a tenant from year to year. Taking this to be a legislative interpretation of the meaning of the word "value," I think that we ought to say that the best way is to take the market value of the property, and the rent given by the tenant to the landlord would probably be the rent to be obtained in the market; and therefore I come to the conclusion that the Judge was wrong, as by deducting the ground-rent, he has arrived at such a value as would give him jurisdiction, when in fact the case was beyond his jurisdiction. Next, I think that where there is a conflict of evidence as to facts upon which the jurisdiction of an inferior Judge depends, although the decision of the Judge may not be absolutely conclusive, wherever there is a reasonable ground for upholding his decision, this Court will not interfere by prohibition, there having been an honest exercise of his judgment upon the evidence before him. But where there is no fact in issue, and the Judge has arrived at an erroneous decision in point of law, and there has been an erroneous assumption of an authority which does not exist, this Court will interfere to get rid of the effect of a wrong decision. The rule must therefore be made absolute.

BLACKBURN, J.—I am entirely of the same opinion. I merely wish to add that, although I was not present when *In re Brown and Cocking* (37 L. J. Q.B. 250; 3 L. R. Q.B. 652) was decided, I perfectly agree with the decision. But it does not apply to the present case. There the question was, as to the rent payable in respect of the houses, and the fact that there were people who were willing to pay more than the amount of the rent payable by the defendant had nothing to do with the "rent payable" within the meaning of the statute. I also think that in the present case the County Court Judge took a wrong view of the meaning of the word "value" in the 11th section; I think that that word is to be construed very much in the same way as "value" in a poor law assessment Act. Upon the second point I do not know of any case in which the rule as to prohibition in such a case was more properly laid down than in *Thompson* v. *Ingham* (14 Q.B. Rep. 710; 19 L. J. Q.B. 189), which might have been carried to a Court of Error. Patteson, J., in delivering the judgment of the Court, said, "The Judge had clearly jurisdiction, *primâ facie*, to try a plaint for use and occupation. The pleadings, if there were any in the County Court, would

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not shew that the title is in question. The point whether it is or not, must of necessity arise upon the evidence, and as soon as it appears that it is, the jurisdiction of the County Court ceases. The Judge must, of necessity, determine that point for the time, because on it depends whether he hears the case on the merits. Is then his determination conclusive? We think that it is not. The objection is analogous to a plea to the jurisdiction in other Courts, which is indeed determined in the first instance by the Court in which it is pleaded, but is subject to a writ of error. The County Court Act gives no writ of error, or appeal of any sort; but then it is presumed that the Court deals only with matters within its jurisdiction. If a doubt arises as to that question, we think it impossible to contend that any of the provisions of the Act make the solution of that doubt by the Court itself final. If so, the question must be open to one of the Superior Courts on motion for a prohibition, by affidavit." Now, in the present case, the question being whether the Judge was right in holding that the value exceeded 20*l.*, I think the case is one for a prohibition. In a case like *In re Brown and Cocking* (37 L. J. Q.B. 250; 3 L. R. Q.B. 652), I agree that though the finding of the County Court Judge is not conclusive, for all practical purposes a strong case must be made out to justify us in coming to the conclusion that a prohibition must go. Upon the whole of the facts which are before us, it is clear that the Judge thought that if he deducted the ground-rent, the value would be below 20*l.*, but that if the ground-rent was not deducted the value would exceed 20*l.* I think, therefore, that he was wrong in holding that he had jurisdiction.

LUSH, J.—I am of the same opinion. In making this rule absolute we are only following the acknowledged rule which ought to prevail, namely, to give the words of the 11th section their plain meaning.—[His Lordship read the section.]—There is the cognate section which follows it, section 12, which gives power to try actions where title comes in question where neither the value nor the rent payable in respect thereof shall exceed the sum of 20*l.* by the year. If we were to construe the section as Mr. Oppenheim suggests, we must suppose the words to mean "the plaintiff's interest in the lands," &c., instead of "the value of the lands," &c., shall exceed the sum of 20*l.*; but that is not consistent with the language used in the section.

HANNEN, J.—I am of the same opinion.

Rule absolute, with costs.

IN THE QUEEN'S BENCH. Nov. 23, 1868.

THE QUEEN *v.* THE RIGHT HONOURABLE GATHORNE HARDY.

38 L. J. Q.B. 9; L. R. 4 Q.B. 117; 9 B. & S. 926; 19 L. T. 352; 17 W. R. 173.

Referred to, *Reg.* v. *Local Board of Grasmere*, [1873] E. R. A.; 42 L. J. Q.B. 131; L. R. 8 Q.B. 227; 21 W. R. 445 (L. JJ.).

Local Government Act, 1858 (21 & 22 *Vict. c.* 98)—*Adoption of Act by Parish including a Corporate Borough but not the Parliamentary Borough.*

LOCAL GOVERNMENT. A.—*By section* 14. *of the Local Government Act*, 1858, "*in cases where any place hereby authorized to adopt this Act includes within its limits any less place, which if it were not so included, would, of itself, be authorized to adopt this Act, such less place shall not be entitled to adopt this Act, unless the greater place, within the limits of which it is included, has refused to adopt the same; or unless it has been determined by one of Her Majesty's Principal Secretaries of State, in manner hereinafter mentioned, that such less place ought, as respects the adoption of this Act, to be excluded from the limits of such greater place.*"

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By section 17. *a petition may be presented to the Secretary of State against the resolution for the adoption of the Act.*

The corporate borough of L. was included within the parish of L, but the boundaries of the parliamentary borough of L. extended beyond the parish. The vestry of the parish resolved to adopt the Act. Some of the inhabitants of the corporate borough appealed under the above 17*th section, but the Secretary of State dismissed the appeal, and ordered that the Act should be adopted throughout the whole parish, including the corporate borough.*

This order having been brought up by certiorari *was held to be good; section* 14, *in terms providing for such a case, where a borough, the less place, was included in a larger place having a known and defined boundary.*

This was a rule calling upon the Secretary of State for the Home Department to shew cause why a *certiorari* should not issue to remove into this Court all and singular the orders made by the Right Honourable Spencer Walpole, the late Secretary of State for the Home Department, ordering the Local Government Act, 1858, to be in force throughout the entire parish of Lymington, in the county of Southampton, in order that the same might be quashed.

It appeared from the affidavits, that the parish of Lymington is in extent about 1,500 acres, and comprises within its area the corporate borough of Lymington, which is in extent about 100 acres. The borough is a corporate borough, mentioned in schedule B. section 2, of 5 & 6 Will. 4. c. 76, and its boundaries are defined by 2 & 3 Will. 4. c. 64. schedule D, from which it appears that the parliamentary borough includes the parish and part of another. The portion of the parish without the borough is called the Tything of Lymington, and is a place having a known and defined boundary, being a manor of itself, and the inhabitants residing therein are separately assessed from those living within the borough for all parliamentary taxes and the police rates. The population of the borough at the census taken in 1861 was 2,416 and of the tything of 1,655.

On August 16, 1866, the vestry of the parish resolved to adopt the Local Government Act, 1858. Doubts arose whether the resolution was legal, on the ground, among others, that the corporate portion of the parish had not adopted the Act by its town council. The opinion of counsel was taken, and at a meeting of the inhabitants of the parish it was determined to appeal to the Secretary of State for the Home Department, who however dismissed the appeal, and made the order now complained of.

A meeting was then held, and certain persons, against the will of the rest, formed themselves into a local board. A rule *nisi* for an information in the nature of a *quo warranto* was obtained against them, but was discharged, the Court intimating that the proper mode of proceeding was by *certiorari*, if there was any remedy at all.

The present rule was obtained at the instance of Mr. W. H. Grove, an inhabitant of the parish, and other inhabitants, and of many burgesses of the borough, who were opposed to the introduction of the Local Government Act into the parish.

The Attorney-General (Sir J. B. Karslake) (Archibald with him) shewed cause against the rule. The order of the Secretary of State is perfectly good. The parish of Lymington is a "place having a known or defined boundary within the meaning of the 3rd clause of the 12th section of 21 & 22 Vict. c. 98," and therefore has power under that section to adopt the Act. The 13th section shews how meetings are to be summoned, and in places having known and defined boundaries they are to be summoned by the churchwardens, as has been done in this case. By section 14. any less place, included in another which is authorized to adopt the Act, is not entitled of itself to adopt it, unless the greater place has refused, or unless a Secretary of State thinks it ought to be excluded from the limits of the greater. Section 17. gives an appeal to a Secretary of State, of which Mr. Grove has availed himself, but without obtaining redress, because the Secretary of State considered that it was right that the

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Act should be adopted by the whole parish. By section 18. power is given to order an inquiry into the matter. By section 81. the orders are to be binding and conclusive, and by section 137. of 11 & 12 Vict. c. 63. incorporated by section 4. of the Act now under consideration, the *certiorari* is taken away, though not, of course, where there is no jurisdiction to make the order.

[COCKBURN, C.J.—There is some difficulty in seeing how the parish can oust the borough from its right to adopt the Act for itself.]

But the statute provides for all such matters being settled by the Secretary of State.

[HANNEN, J.—The Act gives him power to enter upon and decide this very question.]

[He was then stopped.]

Grove, in person, in support of the rule.—Sections 13. and 24. shew that the local board for this corporate borough ought to be the mayor, aldermen and burgesses acting by the council. The inhabitants of the parish outside the borough have no right to take away the right of the borough to adopt the Act and appoint their own local board. This case does not fall within the provisions of section 14. at all. It cannot be said that the borough is a less place included within a greater, which would of itself be authorized to adopt the Act, for the boundaries as fixed by 2 & 3 Will. 4. c. 64. extend over a larger space.—He referred to *The Queen* v. *the Northowram and Clayton Ratepayers* (7 Best & S. 110; 35 L. J. Q.B. 90).

COCKBURN, C.J.—I do not think that the objection last taken by Mr. Grove, that it was not competent for the parish to adopt the Act, because the parish is comprehended within the parliamentary borough, which consists of this parish and of another, has really any bearing whatever upon the subject. It might as well be said, because a parish was not the county in which it was situate, that it could not adopt the Act. A parish is a place having a well-known and defined boundary. This parish happens, for parliamentary purposes, to have been united with another parish, and in the parliamentary returns for the borough of Lymington there is a district which is more than co-extensive with the parish of Lymington. I do not think that has any application to the question before us. I was no party to the decision in *The Queen* v. *the Northowram and Clayton Ratepayers* (7 Best & S. 110; 35 L. J. Q.B. 90), but I do not quarrel with that case; it does not govern the present one. Then comes the question, whether the 14th section includes it? I think that it does, according to its terms, and, looking at the great inconvenience which would result if we were to say that the borough could prevent the parish from adopting the Act, I think that we ought not to put such a limited construction upon the statute. With regard to the machinery provided by the 13th section, I think that the answer to Mr. Grove's position is this: that the statute having provided for corporate boroughs and places under the jurisdiction of the Improvement Commissioners, and the others, then makes provision, in section 13, for the way in which the meeting for the purposes of the 12th section shall be formed, and by whom the petition in writing shall be issued, and then it follows, that the three sub-sections of section 12. referred to corporate boroughs, to places under the jurisdiction of the Improvement Commissioners, and then to all other places having a defined boundary, and not being corporate boroughs. It is by the light of the 14th section that we must see whether, when a corporate borough, being a less place, is included in the larger, the parish, the provision applies. If a borough purposes to insist upon its right to adopt the Act, and to keep within its own more limited jurisdiction, instead of adopting it in compliance with the rest of the parish, of which the borough forms a part, that matter must be brought before the Secretary of State, who will exercise, no doubt, a sound discretion with reference to what is more convenient and preferable to be adopted.

LUSH, J.—I am of the same opinion. I think that the 14th section in its terms comprehends this case, and I cannot help thinking that it was intended to comprehend it. When one looks to the inconvenience which would result

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from the opposite view, we find it would be very great. There are the different items of sewerage, lightage, watering, and so on. The intention seems to have been to make the area as large as possible within the fair meaning of the statute. Then it is contended that this borough does not come within the 14th section, as being a less place included within the limits of a larger, because in the Act assigning an area for parliamentary representation, it has assigned to it a limit round the parish of Lymington for the purposes of that particular Act. I do not think that that brings the case within the provision of this particular Act any more than the association of a number of parishes within a poor-law union would make the whole union a place within this Act. I think, therefore, that this parish is the larger, and the borough the smaller place within it.

HANNEN, J.—I am of the same opinion.

Rule discharged, with costs.

IN THE QUEEN'S BENCH. May 7, 1868.

THE QUEEN *v.* TUGWELL.

38 L. J. Q.B. 12; L. R. 3 Q.B. 704; 9 B. & S. 367: see also s.c. [1868] E. R. A. 1280; 37 L. J. Q.B. 275 (Q.B.).

Applied, *R.* v. *Harrald*, [1873] E. R. A.; 42 L. J. Q.B. 211; L. R. 8 Q.B. 418; 28 L. T. 767; 21 W. R. 910 (Q.B.). See, *Isaacson* v. *Durent*, 1886, 54 L. T. 684 (Elect. Pet.).

Municipal Corporation—Quo Warranto—Town Councillor—Reg. Gen. H. T. 7 & 8 Geo. 4. 1827—Burgess Roll—Right to Vote—5 & 6 Will. 4. c. 76.

QUO WARRANTO. B.—*The Gen. Rule of H. T. 7 & 8 Geo. 4, that the objections intended to be made to the title of a person against whom an information in the nature of a* quo warranto *is to be filed, shall be specified in the rule to shew cause, is a rule applicable to the pleadings only, and does not prevent the relator at the trial of the information going into objections which may not be specified in the rule.*

ELECTION LAW. B.—*After a burgess-roll has been made up in the manner provided by the 5 & 6 Will. 4. c. 76, the persons whose names are upon that roll are entitled to vote at the election of councillors, and upon the trial of an information their right cannot be questioned.*

Information, in the nature of a *quo warranto*, to shew by what authority the defendant claimed to exercise the office or franchise of councillor of the borough of Scarborough, in the county of York.

The defendant pleaded that the borough of Scarborough was an ancient borough; that the bailiffs and burgesses were one body corporate and politic in deed, fact and name, by the name of the bailiffs and burgesses of the borough of Scarborough; that within the borough there of right ought to be one mayor, divers, to wit, six aldermen, and divers, to wit, eighteen councillors, to be elected in the manner specified by the Act of Parliament, passed in the sixth year of the reign of the late King William the Fourth, intituled, "An Act to Provide for the Regulation of Municipal Corporations in England and Wales"; that the borough is divided into two wards, namely, the north ward and South ward; that nine of the eighteen councillors were apportioned to each of such wards; that on November 1, 1867, an election was duly held for the election of three councillors to supply the places of those who went out of office in the south ward, before an alderman of the borough and two assessors; that the defendant was an enrolled burgess and duly qualified to be elected to be a councillor, and that the burgesses of the south ward did elect him to be a

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councillor; that he was declared to be duly elected, and that he then and there accepted the office, &c.

Replication, that the burgesses of the south ward did not elect the defendant as alleged.

At the trial, which took place before Hannen, J., at the last York Spring Assizes, it appeared that the borough was divided into the north and south wards, as alleged in the plea, and that on November 1, 1867, the defendant was declared to have been elected a councillor for the south ward. There were six candidates, among whom were the defendant and the relator, Dr. Jackson. The number of votes which were given for the defendant was 281, and for the relator 279.

The rule *nisi* for the information was obtained upon the affidavits of several persons, but it did not specify the reasons for which the election was alleged to be bad, nor did it set out the names of the voters or the votes which were objected to. The affidavits upon which the rule was granted shewed that four votes which were recorded for the defendant were bad, two because the persons supposed to be voting were dead, one because the person supposed to be voting was at sea, and the fourth because the voter had already, at the same election, voted for the north ward.

The relator also sought to shew that certain voters on the burgess-roll, who voted for the defendant, were not duly qualified.

A verdict was entered for the Crown, with leave to the defendant to move to set that verdict aside and enter a verdict, instead thereof, for the defendant, if the Court should be of opinion that it was not competent to the relator to go into other objections besides those on which the rule for the information had been obtained, or to question, at the trial, the qualifications of persons appearing on the burgess-roll.

A rule having been obtained,

Overend and *Shepherd* shewed cause.—The rule must be discharged. There is no reason why the relator should not be allowed to question other votes as well as the four which were mentioned in the affidavits. The defendant relies, as to the first point, on the rule of Hil. Term, 7 & 8 Geo. 4. 1827, which may be found set out at page 267, in 6 B. & C., and which is as follows: "Whereas much vexation and expense has been occasioned to defendants in informations in the nature of a *quo warranto*, by the practice of raising issues upon various matters distinct from the ground on which the information was granted by the Court" .... "Now, for providing a remedy in this behalf, it is ordered that from henceforth the objections intended to be made to the title of the defendant shall be specified in the rule to shew cause, and that no objection not so specified shall be raised by the prosecutor on the pleadings without the special leave of the Court or of some Judge thereof."

[BLACKBURN, J.—That rule seems only to apply to the pleadings.]

Yes, it has no application to the point now before the Court—see the observation of Coleridge, J., in *The Queen* v. *Thomas* (8 Ad. & E. 183; 7 L. J. Q.B. 141). In *The Queen* v. *Preece* (5 Q.B. 94, 95, h; 12 L. J. Q.B. 335) it was objected that the rule did not comply with the above rule of Court, because it did not shew that the defect in the defendant's title intended to be relied upon was the defect in his election as alderman, and that if the defendant pleaded that he was councillor the relator might traverse it, and would thus bring forward an objection not specified in the rule *nisi*. To this Coleridge, J., said, "Surely they may traverse whatever you allege"; and Lord Denman, C.J., said, "The rule of Court merely requires that the rule *nisi* shall contain a statement of the intended objections in the nature of a bill of particulars. In shewing cause the defendant may set up a different title, which would put this out of question." In *The Queen* v. *Edge* (12 Q.B. 936; 18 L. J. Q.B. 69) it is said, in the marginal note, "In the rule *nisi* for a *quo warranto* information, it is not enough, under Reg. Hil. 7 & 8 Geo. 4, to state that the party against whom the application is made was not entitled to be appointed to the office and the relator was." Lord Denman, C.J., said, after the judgment of the

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Court had been given, "We ought to observe that the objection here is quite insufficiently stated."

The second question is, whether the relator could, upon the trial, question the right of certain of the electors to be upon the burgess-roll. It is said that the relator has no right to dispute their qualifications behind their backs. But a man's name may be on the burgess-roll without his being a burgess; and if so he cannot be entitled to vote, although, of course, if he be a burgess and has his name on the roll, he will be entitled. The question is discussed in *Grant on Corporations*, p. 214.

[MELLOR, J.—Section 29 of 5 & 6 Will. 4. c. 76, says, "that every burgess of any borough who shall be enrolled on the burgess-roll for the time being, &c., shall be entitled to vote.]

That section does not touch the point.

[BLACKBURN, J.—Section 22 says that the list, when revised, "shall be the burgess-roll of the burgesses of such borough entitled to vote," &c.]

It cannot mean that they are entitled to vote if they are not burgesses. An information in the nature of a *quo warranto* will not go to remove a disqualified person from the burgess-roll—*In re Armstrong* (25 L. J. Q.B. 238).

[MELLOR, J.—I see no reason why the revision of the burgess-roll should not be final, no disqualification being shewn at the time. In *Rawlinson on Corporations* it is stated, at p. 42, note 1, that the mayor's decision as to expunging a name under the 18th section is conclusive—see *In re the Mayor of Hythe* (5 Ad. & E. 832).]

Mr. Grant, at the page before referred to, says, "Perhaps, however, the rule is more accurately and precisely stated as follows: that when the qualification of the electors depends on the tenure of a corporate office or place, that qualification cannot be questioned through the medium of proceedings impeaching the title of a person elected by them to any office; but when the qualification depends upon inhabitancy or any other circumstance which cannot be directly challenged by a legal proceeding, then, from necessity, it may be questioned and tried through such medium," &c. The question was discussed in *The King* v. *Hughes* (4 B. & C. 368), which was an information in the nature of a *quo warranto* for usurping the office of Mayor of Monmouth; and Bayley, J., said, "In *Symmers* v. *Regem* (Cowp. 485) the issue was 'not duly elected,' and upon that issue everything may be brought in question which can be investigated in such a proceeding. If a prosecutor were at liberty to shew that any one who had voted was not duly qualified, the result would be that the party was not duly elected. The defendant in that case was therefore entitled to give any matter in evidence which would be open to the defendant on this record; and there it was held that he could not give evidence to impeach the votes of the corporators *de facto*. In *The King* v. *Mein* (3 Term Rep. 596) Lord Kenyon (who is a very high authority upon such points) says, 'It is objected that the titles of electors cannot be impeached through the medium of the elected, and the case in *Cowper* has been relied upon, but there the electors were members of a corporation whose titles might have been questioned in *quo warranto* informations.' He therefore recognizes *Symmers* v. *Regem* (Cowp. 485), and takes a distinction between that case and *The King* v. *Mein* (3 Term Rep. 596). These cases were before the 32 Geo. 3. c. 58, and I certainly do not think that by the 3rd section of that Act it was intended to extend the power of objecting to the titles of the corporators, and perhaps it was meant to be applicable to head or presiding officers, although that is certainly made doubtful by the introduction of the word *election*. *The King* v. *Smith* (5 M. & S. 271) stands upon a different footing. The defendant had been elected Mayor of Colchester, at a meeting holden before one Hedge, and unless Hedge were at the time mayor *de jure*, there could not be a good corporate meeting; consequently it was open to the prosecutor to question his title."

[BLACKBURN, J.—I think that Holroyd, J., in *The King* v. *Hughes* (4 B. & C. 368) was of opinion that you could not impeach the title of the electors. He says, "It is obvious that many nice questions may arise as to whether an officer

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is so *de facto* or not. Sometimes that may be so combined with the question of title *de jure* that they cannot be severed. But when a person is in possession of the office his title cannot be thus questioned." No one was ever more accurate in expressing his meaning in language than that learned Judge. He cautiously chooses his words.]

In *The Queen* v. *Quayle* (11 Ad. & E. 508; 10 L. J. Q.B. 99) the title of persons on the roll to be there was allowed to be impeached, Lord Denman, C.J., saying, "As to opening the burgess-roll, the inconvenience may be very great; but it may well be doubted whether there would not be more mischief caused by our refusing so to do."—See also *The Queen* v. *Parkinson* (37 L. J. Q.B. 52; 3 L. R. Q.B. 11).

[MELLOR, J.—In *The Queen* v. *Quayle* (11 Ad. & E. 508; 10 L. J. Q.B. 99) the question was treated in a cursory manner, and I cannot help thinking that the inconvenience of opening the burgess-roll would be much greater than by refusing to allow it to be done. It is important that the number of burgesses should be known, and objections may be made next year to these names being retained.]

It is submitted that their title may be impeached within six years—see 32 Geo. 3. c. 58. s. 3.

Field and *Simpson*, in support of the rule.—Upon the first point, the rule of Hilary Term excludes the right of going into objections which are not specified in the rule *nisi* for the information. If it could be done, the object of the rule would be defeated. The object is to enable the defendant to know what objections he has to meet. The rule *nisi* simply calls upon the defendant to shew by what authority he claims to exercise the office.

[BLACKBURN, J.—Why did you not object, on shewing cause, that the rule was too vague? You cannot do it at the trial.]

On this point they referred to *The Queen* v. *Thwaites* (1 El. & B. 704; 22 L. J. Q.B. 238) and to *The Queen* v. *Hammond* (17 Q. B. 772; 21 L. J. Q.B. 153). Secondly, the burgess-roll cannot be questioned. The 5 & 6 Will. 4. c. 76, by sections 15 to 23 and section 29, provides for the making out the roll, and shews that it was intended to be conclusive.

[MELLOR, J.—There is the fullest provision for any person making objections.]

BLACKBURN, J.—Upon the two questions raised upon the argument of this rule, one must be answered in favour of the relator, and the other in favour of the defendant. The rule *nisi* for the information was granted upon affidavits, which made it appear that although the defendant had apparently a majority, in reality he had not such a majority. The rule was made absolute, an information was filed, and there was a single replication that the burgesses did not elect the defendant. The contention of the defendant at the trial was, that the relator could not go into any objections other than those which were specified in the affidavits on which he moved for the rule *nisi*, and that contention rested upon the general rule which has been brought to our notice. In order to ascertain what was the object in view in making that rule, it is necessary to remember what is the character of the information in the nature of a *quo warranto*. This appears from the 9 Anne, c. 20, s. 4; the information cannot be filed without leave of the Court, and this Court has always said that, not only there must be something wrong in the defendant exercising or intruding into the office, but that the relator shall not be disqualified, and that the objections shall be such as are fit and proper to be made. If the Court thinks right, the information may be filed, and the Crown in its prerogative might traverse everything, and put the party holding the office to expense by replying several matters. An illustration of the hardship of this right in the Crown is to be found in *The King* v. *M'Kay* (4 B. & C. 351), where there were sixteen general replications, and thirty special replications setting up various customs as to the election or appointment of the bailiff of the borough, which office the defendant in that case was alleged to have usurped. The Court having, in the

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exercise of its discretion, granted the information upon one point, the relator raised, in all, forty-six points. In order to provide a remedy for this inconvenience, the rule in question was made.—[His Lordship read the rule.]—The effect of this rule is, that if any objections made to the title of the defendant, not specified in the rule, appear on the pleadings without the leave of the Court or a Judge, they may be struck out. It is argued by Mr. Field that the effect of this rule is, that the relator shall be confined to particular bits of evidence, but I do not think that when a single issue is raised, it was intended to exclude any evidence which should be relevant to such issue. If the rule is too vague, the defendant might apply for particulars. I have a strong impression that such particulars of the objections have been ordered to be given. Therefore upon this first point the relator would be entitled to have the rule discharged.

Upon the second point, it is said that at the trial the relator had a right to object to persons on the burgess-roll, on the ground that they were not qualified to be upon such roll. The question turns upon the construction to be put upon several sections of the 5 & 6 Will. 4. c. 76. Without inquiring into the authorities which have been referred to, it seems to me that it must have been intended that the burgess-roll should be conclusive as to the persons upon it being entitled to be electors. By the 15th section the burgess-list is to be made out by the overseers; the list is to be published, and, as they may have been mistaken in making it out, provision is made by the 17th section that persons omitted may make claims, and persons not entitled to be on the list may be objected to. By sections 18 and 19 the mayor, together with two assessors, are to revise the lists, and determine upon the validity of the claims and objections, and sign the list in open Court. By section 22 the list, when revised, is to be copied into a book, and that book is to be the burgess-roll of the burgesses of such borough entitled to vote. Therefore most careful provision is made by the Act, and it seems to me that it was intended that the people whose names are upon the burgess-roll are entitled to vote, and that it is not open to the relator to say at the trial that they are not entitled to vote, or to question the roll. While the burgess-roll remains, it is intended to be conclusive. The 9th section says, that every male person of full age who has occupied, as provided in the Act, and shall have been an inhabitant householder, as provided, shall, if duly enrolled, &c., be a burgess, &c. It may be said that this language "If duly enrolled" is ambiguous, but we may read it in combination with the other provisions to which I have referred, and so reading it, I am of opinion that we ought to hold that the burgess-roll is conclusive. There is no decision against this view, except what was said incidentally in *The Queen* v. *Quayle* (11 Ad. & E. 508; 10 L. J. Q.B. 99), and that is not enough to shew that the proper construction is not that the burgess-roll shall not be opened upon the trial of the information.

MELLOR, J.—I am of the same opinion. Upon the first point I do not wish to add anything. Upon the second, everything that I have heard in argument leads me to the conclusion in favour of the burgess-roll being held to be conclusive as to the right of those whose names are upon it to vote. The machinery provided by the Act seems to me to be complete and ample for ensuring that the roll shall truly represent who those persons are. Ample means are provided for questioning the title of the electors. In the 9th section there is, no doubt, some change in the language, but when you look at all the sections, I think the construction we put upon the language of the others consistent with the language of the ninth.

HANNEN, J.—I am of the same opinion. I do not think that the General Rule of Hilary Term is at all applicable to this case. I think it was only intended that the class of objections should be stated, and if in the statement there is anything calculated to mislead, the relator may be required to state them in a more specific form; if that is not required, then all objections coming within the terms of the rule may be insisted upon at the trial. The contrary view would lead to results most unjust, because, while it would be open to one side to go

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into any number of objections, the other side would be confined to the particular objections specified. I cannot find that *The Queen* v. *Thwaites* (1 El. & B. 704; 22 L. J. Q.B. 238) is inconsistent with this view.

Upon the second point, the whole purview of the several sections is to secure that the burgess-roll should be conclusive, and I infer that it was never intended that it should be questioned in the manner now insisted upon.

The rule was ordered to stand over until the next term and then to be discharged or made absolute, according to the result of the calculation of the votes[1].

IN THE QUEEN'S BENCH. Nov. 10, 1868.

DICKSON *v.* THE SWANSEA VALE AND NEATH AND BRECON JUNCTION RAILWAY COMPANY.

38 L. J. Q.B. 17; L. R. 4 Q.B. 44; 19 L. T. 346; 17 W. R. 51.

Referred to, *Higgs* v. *Assam Tea Co.*, [1869] E. R. A.; 38 L. J. Ex. 233; L. R. 4 Ex. 387; 21 L. T. 336; 17 W. R. 1125 (Ex.); *In re Romford Canal Co.*, [1883] E. R. A.; 52 L. J. Ch. 729; 24 Ch. D. 85; 49 L. T. 118 (Ch. D.); *In re Gwelo Exploration Co.*, 1901, 1 Ir. R. 38 (M.R.: Reversed, C. A., *Ibid*).

Railway Company—Lloyd's Bond—Assignee of Chose in Action—Equities between Company and Obligee.

COMPANY. F.—*In an action upon a money bond made by a railway company, it was pleaded, on equitable grounds, that by a deed between the obligee and the company it was agreed that as certain instalments, which under the terms of the deed were to be paid in shares, became due, the company should, in addition, pay to the obligee 75l. per cent. of the nominal value of the shares in Lloyd's bonds; and that the obligee should pay and satisfy each bond as it became due, and should in the meantime pay all interest due upon them, and indemnify and save harmless the company from all losses, costs, charges, &c., to which they should become liable on account of the non-payment of the bonds or interest, or by reason of having entered into them. And the plea stated that the bond sued upon was a Lloyd's bond, issued and delivered by the company to the obligee in pursuance of the agreement. Replication that after the making of the bond, and before the action, the obligee assigned the bond sued upon for a good and valuable consideration to certain persons, of which the company had notice; and that the assignees had not at the time of the assignment, and never had till after the commencement of the suit, any notice or knowledge of the deed mentioned in the plea, or of any private arrangement between the obligee and the company with reference to the payment of the bond, or to the liability of the company upon it; and that they took the bond and accepted the security of it on the faith of the contract appearing on the face of it. The replication went on to state that the assignees from the date of the assignment to them had been the beneficial owners of the bond, and that the action was commenced and prosecuted by the obligee as a trustee for them, and for their sole use and benefit*:—Held, *on demurrer, that the replication was good, as the bond appeared to have been delivered to the obligee for the express purpose of raising money upon it, and it was not*

(1) See the report in [1868] E. R. A. 1280; (37 L. J. Q.B. 275), which this report would more properly have preceded. In that report, the rule is said to have been to shew cause why judgment in the prosecution should not be entered for the defendant, *non obstante veredicto*. This was the form of the rule as entered in the Crown Office, but it was stated in the course of this argument that it was intended that the rule should have been to shew cause why the verdict should not be entered for the defendant; and that if it had been properly drawn up, it would be in the form given in this report.

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reasonable to set up as an answer to a claim by the equitable owners, a secret arrangement by which the bond was not to be enforced.

Declaration—That the defendants, by their bond, dated October 7, 1864, became bound to the plaintiff in the sum of 1,000*l.*, to be paid by the defendants to the plaintiff.

Second plea, on equitable grounds, that before the making of the bond a deed, dated September 29, 1864, was made and entered into between the plaintiff and the defendants, whereby it was mutually covenanted and agreed by and between the plaintiff and the defendants that, as and when certain instalments and sums, which, under the terms of the deed, were to be paid in shares of the defendants, became due the defendants should, in addition thereto, when so required by the plaintiff, from time to time pay to the plaintiff such further sums in Lloyd's bonds, having three years to run from the date of issue, and bearing interest at the rate of 5*l.* per cent. per annum, payable half-yearly, as should be equivalent to 75*l.* per cent. of the nominal value of any such shares; and that the plaintiff should pay or satisfy the Lloyd's bonds to be from time to time so issued and delivered to him in accordance with the deed, as and when the same respectively became due, and in the meantime should pay all interest which might from time to time become due thereon respectively, and should indemnify and save harmless the defendants from and against the bonds or any of them, and also from and against all losses, costs, charges, damages and expenses whatsoever which the defendants might become liable or be called upon or compelled to pay for or on account of the non-payment thereof, or any of them, or any interest due thereon, or by reason of the defendants having entered into the same. Averment, that the bond declared upon was and is a Lloyd's bond issued and delivered by the defendants to the plaintiff in pursuance of the covenants and agreements hereinbefore stated, and subject to the covenant and agreement of the plaintiff to pay and satisfy the same as and when the same became due, and to pay the interest, and so to indemnify and save harmless the defendants.

Replication—That after the making of the bond, and before this suit, the plaintiff assigned the bond mentioned in the declaration for a good and valuable consideration to R. Pigott, J. Mann the younger, J. Lloyd and W. L. Lloyd, of which the defendants had notice; and that the assignees had not at the time of the assignment, and never had till after the commencement of this suit, any notice or knowledge of the deed mentioned in the plea, or of any private arrangement between the plaintiff and the defendants with reference to the payment of the bond, or to the liability of the defendants thereon; but they took the bond and accepted the security of it on the faith of the contract appearing on the face of it. Averment, that the assignees, from the date of the assignment of the bond to them, as before mentioned, hitherto, had been the beneficial owners of the bond, and that the action was commenced and prosecuted in the name of the plaintiff as a trustee for the assignees, and for their sole use and benefit, and not for the use or benefit of the plaintiff or of his creditors under his bankruptcy.

Demurrer and joinder in demurrer.

Gray (*Gadsden* with him), in support of the demurrer.—The replication is bad. It must be taken as admitted on the record, that at the time when the bond was delivered to the plaintiff there was an agreement between him and the company that it should not be enforced. The instrument was, therefore, in the nature of an accommodation bill, and was not negotiable. There never was a moment when the defendants were liable to the plaintiff in respect of it, and there was no interest for the plaintiff to assign.

[COCKBURN, C.J.—Does it lie in the mouth of the company, who put this bond into the hands of the plaintiff for the purpose of raising money, to say we gave this bond for the purpose of enabling the obligee to commit a fraud? LUSH, J.—The plea is a sort of bill in equity to restrain an action on the bond. Would not this replication be a good answer to such a bill?]

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The assignees cannot have taken by this assignment a greater interest than that of the plaintiff. In *In re the Natal Investment Company, Lim.* (37 L. J. Ch. 362),—where a company purchased land and gave debentures for the price, whereby they undertook to pay certain sums to the purchaser, his executors, administrators or transferees, or to the holder for the time being,—it was held that the transferee of these debentures took them subject to all the equities existing between the company and the seller of the land.

[LUSH, J.—In that case there was a failure of consideration between the parties.]

Secondly, a bond like the present cannot be enforced, as it does not appear to have been given for work done and therefore the company acted *ultra vires* in issuing it. In *Chambers* v. *the Manchester and Milford Railway Company* (5 Best and S. 588; 33 L. J. Q.B. 268) it was held, that an action could not be maintained against the company on one of these bonds, which had been given as a security for money lent.

[*G. Bruce*, for the plaintiff, objected that this defence could only be properly raised under a plea of *non est factum*.]

It may be gathered from the facts stated in the plea, that the object of giving this bond was to raise money for the benefit of the company.

[COCKBURN, C.J.—Consistently with this plea the arrangement was within the powers of the company.]

Lastly, the assignee of the bond could only recover, in equity, the amount which he had paid for it, but the replication does not allege that the assignees gave full value for the bond.

[LUSH, J.—That is not necessary, if there was an absolute sale of it.]

G. Bruce, for the plaintiff, in support of the replication, was not called on.

COCKBURN, C.J.—We need not call upon the other side to support this replication, as we have no doubt that it is good. It is a replication to a miscalled, equitable plea, and the facts alleged by it, when looked at in the view suggested by my Brother Lush, appear to be that the action is brought upon a bond made by the defendants, which *primâ facie* is good, but which they seek to get rid of by this plea. The plea must be looked at as if an action had been brought at law, and the defendants had gone into equity to obtain an injunction to restrain such action. They would then have had to allege that, having given these bonds to the plaintiff in order that he might obtain money on the security of them, there was a secret understanding between him and themselves that he should find money to discharge them when the time for payment came. The effect of this would be to enable the plaintiff to go into the market and raise money on the security of these bonds, when by a secret arrangement the bonds were not binding as between the parties, and the remedy which they purported to give was a deceptive one. In such a case, the plaintiff would merely have to allege, by way of answer, the facts stated in this replication, that the assignees had been deceived by means of these bonds, and that the plaintiff had by the assignment become a trustee for them, and, being such trustee, was bound to allow them to sue in his name. This would be a good answer in equity, for no Court of equity could resist such a case when the facts were brought before it. Now this is an equitable plea, and what would be an answer to such a bill filed in equity is a good equitable replication.

LUSH, J.—I am of the same opinion. The terms of the plea are, that the bonds were given in pursuance of an agreement that when certain instalments payable to the plaintiff in shares became due, the defendants should pay to the plaintiff 75 per cent. of the value of the instalments in Lloyd's bonds; and that the plaintiff should take up these bonds as they became due, and should in the mean time pay all interest due upon them, and should furthermore indemnify and save harmless the defendants from all charges and expenses which they might become liable to in respect of them. It is, therefore, perfectly clear that the defendants gave these bonds to the plaintiff for the very purpose of enabling him to raise money upon them, and the

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indemnity in the deed shews that it was contemplated that the company might be sued on the bonds. In this state of things, now that the plaintiff has raised money upon them, it is not reasonable that the defendants should set up as an answer to the claim of the equitable owners that there was a secret arrangement that the bonds should not be enforced. If there had been a bill in equity to restrain an action on this bond, it could not for a moment be contended that it would be inequitable for him to say that he was suing only as trustee, but it would be a good answer to the suit. The case of *In re the Natal Investment Company (Lim.)* (37 L. J. Ch. 362) in no way conflicts with this position, but rather supports it. In that case a certain person had contracted to sell an estate to a company, and they delivered debenture bonds, whereby they undertook to make certain payments to him, or to his executors, administrators or transferees, or to the holders for the time being. It turned out afterwards that he had no estate to sell, and that he had deposited the debentures with a third person as a security for a debt; and it was argued that the person who advanced the money was not bound by the equities between the original parties to the contract. The argument proceeded on this,—that the bonds were payable not only to the seller of the estate, but to bearer. Now the whole gist of the reasoning on which the judgment of the Lord Chancellor is founded is, that the debentures were not given for the purpose of negotiating them. He says, in effect, that if there had been a previous bargain that these debentures should be negotiable, the company would have had no answer to proceedings for enforcing them, and the decision proceeds, in fact, upon the particular words of the instruments.

HANNEN, J. and HAYES, J. concurred.

Judgment for the plaintiff.

IN THE QUEEN'S BENCH. Nov. 10, 1868.

BISHOP *v.* KITCHIN AND ANOTHER.

38 L. J. Q.B. 20.

Contract—Restraint of Trade—Action for Consideration of Executed Agreement—Divisibility of Contract.

CONTRACT. E.—*An action was brought to recover arrears of an annuity, the consideration for which was an agreement by the annuitant, a commercial traveller in the hop-trade, "that he would not, at any time thereafter, either on his own account or on account of any other person or persons whomsoever, excepting the defendants, solicit orders for hops from any of the customers in the West of England or in South Wales or any district whatsoever":*—Held, *without deciding whether the restraint of trade, so far as it regarded the West of England and South Wales, could be enforced; that the plaintiff, who had performed his part of the contract, was entitled to recover the consideration due in respect of it.*

The first count of the declaration stated, in substance, that an agreement in writing was made between the plaintiff and the defendants, in which (after reciting that the plaintiff had been a commercial traveller in the hop-trade in the West of England and in South Wales, and that the defendants had agreed to purchase the good will and interest of the plaintiff in his connexion among the buyers of hops in consideration of an annuity and agreement for the employment of the plaintiff as traveller for the defendants) the plaintiff agreed that he would not, at any time thereafter, either on his own account or on account of any other person or persons whomsoever, excepting the defendants, solicit orders for hops from any of the customers, or from any of the persons in the district before mentioned, or *any district whatsoever*, but would

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introduce the names of the defendants to such customers and persons, and use his influence in endeavouring to make such customers and persons customers of the defendants; and, in consideration of the premises, the defendants undertook to pay to the plaintiff an annuity of 100*l.* during his life, and agreed to employ him as their traveller over the district before mentioned, at a salary of 250*l.* per annum, payable quarterly, with a proviso that, so long as the plaintiff should be so employed and in receipt of the salary, the annuity should be suspended. Averment of conditions precedent. Breach, non-payment of arrears of the salary.

Second count—That the plaintiff and the defendants agreed, as in the first count mentioned, and after the making of the agreement, and while the plaintiff was not employed as the traveller of the defendants or in receipt of the salary of 250*l.*, four quarterly payments of the 100*l.* a year became due; and the plaintiff did all things necessary to entitle him to be paid the same, and all things happened and all times elapsed to entitle the plaintiff to be paid the same, and to maintain this action for the breach of the agreement hereinafter alleged. Breach, that four quarterly payments of the annuity were still due and unpaid.

Demurrer to the second count and joinder in demurrer.

H. T. Cole (*Lopes* with him), in support of the demurrer.—There are two questions to decide; first, assuming that the agreement as set out is bad, as being in general restraint of trade, can the part of it which relates to trading in a particular district be separated from the rest? Secondly, whether the agreement thus limited is still unreasonable?

[Lush, J.—*Price* v. *Green* (16 Mee. & W. 346; 16 L. J. Ex. 108) is conclusive as to the first point.]

Even if the agreement be thus limited, the restraint is greater than is necessary for the protection of the defendants.

[*Pinder*, in support of the declaration, pointed out that the action was brought, not to enforce the agreement, but to recover the consideration for the restraint on the plaintiff.]

The action is practically an attempt to enforce an unreasonable restraint of trade.

Pinder, in support of the declaration, was not heard.

Per Curiam[1].—The agreement having been executed and the plaintiff having submitted to the restraint, he is clearly entitled to recover the consideration due in respect of it.

Judgment for the plaintiff.

IN THE EXCHEQUER CHAMBER. Nov. 27, 1868.

(Appeal from the Court of Queen's Bench.)

HYAMS v. WEBSTER.

38 L. J. Q.B. 21; L. R. 4 Q.B. 138; 17 W. R. 232: affirming, [1867] E. R. A. 1627; 36 L. J. Q.B. 166; 8 B. & S. 272; L. R. 2 Q.B. 264; 16 L. T. 118; 15 W. R. 619 (Q.B.).

Not followed, *Cox* v. *Paddington Vestry*, 1891, 64 L. T. 566 (Q.B. D.).

Negligence — Metropolitan Board of Works — Liability of Contractor — 18 & 19 Vict. c. 120. ss. 110, 111, 135.—25 & 26 Vict. c. 102. s. 33.

London. D. Negligence. B.—*The defendant, a contractor, was engaged by the Metropolitan Board of Works to construct a sewer along a highway. It was necessary to cut a trench in the highway, and, after building the sewer, to*

(1) Cockburn, C.J., Lush, J., Hannen, J. and Hayes, J.

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fill in the trench, and restore and make good the surface of the highway. The sewer was built and finished; the trench was filled in and completed by the defendant; the work was properly done; the surface of the road was properly reinstated and made good, but, subsequently, a hole appeared in the highway which was caused, as the jury found, by the natural subsidence of the soil. Into this the plaintiff's horse fell and the plaintiff's wife was injured. The defendant did nothing to the highway after he had completed the work; but the jury found that the parish had not taken to it so as to relieve the defendant from the obligation of looking after the work and making good its subsequent defects:—Held, *affirming the judgment of the Court of Queen's Bench* (*see* 36 L.J. Q.B. 166), *that the defendant was not liable in an action brought against him by the plaintiff, he having done all that he was bound to do to the highway.*

1. This was an appeal, by the plaintiff, pursuant to the Common Law Procedure Act, 1854, from a decision of the Court of Queen's Bench, making absolute a rule to enter a nonsuit.

2. The declaration alleged that the defendant before, &c. was a contractor employed by the Metropolitan Board of Works to break up certain parts of a public highway called St. Mark's Road, Kennington, and afterwards to make good the surface; that he broke up the highway, but did not make good the surface, but negligently allowed holes and ruts to remain and be in and upon the surface of the highway without taking any precaution to guard against danger to horses and carriages passing along the highway, whereby a horse and cart of the plaintiff, being driven along the highway by the servant of the plaintiff, and in which the plaintiff's wife was, by the improper conduct of the defendant, came in contact with the said holes and ruts in the highway, whereby the horse and cart were thrown down, and the plaintiff's wife was thrown out of the cart, and damage ensued, as alleged in the declaration.

3. The defendant pleaded not guilty by the statute 25 & 26 Vict. c. 102. s. 106, a public act; and also, that the horse and cart in the declaration mentioned were not the plaintiff's.

4. Issue was joined on the pleas, and by virtue of a suggestion duly entered, the cause was tried in London. The defendant, in answer to interrogatories delivered by order of a learned Judge, deposed "I do not know whether, in the months queried, I did open the highway; it was opened by men working for me and under the direction of my manager. But I have no personal knowledge of the matter or the dates, beyond the fact I know it was opened, and closed and filled in after my work was done. That I was employed by a contract to make a sewer and works for the Metropolitan Board of Works in St. Mark's Road, Kennington, and making such sewer involved opening the highway. The contract is, I believe, in the possession of the Metropolitan Board of Works. I say that I do not believe, in the months mentioned in this interrogatory, or at any other time, I caused any holes or ruts in the said road; I only caused in the road the excavation for the sewer, and the same was, to the best of my belief, properly filled up again when the sewer was built. I do not know and cannot tell the name or address of the person who filled up the same, or the date when it was done; if, indeed, it ever was."

5. At the trial, before the Lord Chief Justice and a special jury, on February 24, 1866, the following facts were proved: That the plaintiff was a furniture-dealer, and, on February 17, 1865, was possessed of a horse and cart and harness, which horse and cart, about eight o'clock in the evening, was being driven along the St. Mark's Road, Kennington, in the county of Surrey, by the plaintiff's son, the plaintiff's wife riding in the cart. That the defendant was a contractor, and had been engaged to construct a sewer along the highway, and for that purpose it was necessary to cut a trench in the highway and, after building the sewer, to fill in the trench or opening and restore and make good the surface of the highway; and that the defendant, in fact, opened the highway in or about the month of May in the year 1864.

6. The sewer was built and finished, and the defendant afterwards filled in

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the opening or trench in the highway, and such filling in was completed in about two months after the road was first broken open, and was properly done; and when the defendant's men finished, in August, 1864, the surface of the road had been properly reinstated and made good, and the top metalling put in its proper position.

7. That some little time after the opening had thus been filled in, holes and ruts began to appear in the highway, and the same were caused by the subsidence of the filling in of the trench, and the defendant did nothing whatever to the road after he had first filled the trench. That a subsidence to a greater or less degree sometimes takes place six months or longer after an excavation of this description has been filled in.

8. That the horse and cart of the plaintiff on the day in question, about eight o'clock in the evening, were driven and fell into a hole in the highway, the hole being caused by the subsidence of the filling in executed by the defendant, whereby the injuries mentioned in the declaration were sustained.

9. That the highway was not a turnpike-road, nor had it been repaired by the parish in which it was situate, after the openings were made, and after the same were filled in by the defendant. Matthew James Jennings, the foreman of the defendant, stated that the parish foreman of the roads asked the witness to reserve some of the defendant's gravel for them to repair the roads with; and the witness stated that he had given gravel and brickbats for that purpose; and the witness also stated that he sent stuff from the depot of the defendant, and that the parish paid nothing for it, and that the stuff so sent was laid about the road generally. It was proved that notice of action was duly given, and no point arises thereon.

10. The Lord Chief Justice put the following questions to the jury: First, was there a hole in the highway? secondly, whether the subsidence was in consequence of the works of the defendant being defectively executed or arising from natural causes? and thirdly, whether the parish had taken to the road so as to relieve the defendant from any obligation to look after the work, and make good its subsequent defects? To which questions the jury answered: First, that there was a hole in the highway; secondly, that the hole was occasioned by natural subsidence; and thirdly, that the parish had not taken to the road so as to relieve the defendant from the obligation of looking after the work, and making good its subsequent defects. The learned Judge thereupon directed the verdict to be entered for the plaintiff, and the jury assessed the damages at 40*l*.

11. A rule was obtained, on the part of the defendant, calling on the plaintiff to shew cause why the verdict obtained in this cause should not be set aside, and a verdict for the defendant or a nonsuit entered instead thereof, or why a new trial should not be had between the parties, on the grounds,—first, that the evidence shewed that the defendant was not liable for the injury alleged in the declaration; secondly, that the defendant having properly restored and repaired the part of the highway where the accident complained of occurred, was not liable in respect of subsequent subsidences of the soil; thirdly, that the finding of the jury was in substance a finding for the defendant.

12. Cause was in due course shewn on the part of the plaintiff against the rule; and, after argument, the Court of Queen's Bench ordered that the verdict obtained should be set aside and a nonsuit entered instead thereof—[see 36 L. J. Q.B. 168.]

The question for the opinion of this Court was, whether the decision of the Court below, in making the rule to enter a nonsuit absolute, was correct in point of law.

Laxton, for the appellant.—The decision in the Court below was wrong, and the action is maintainable either at common law or under the statute 18 & 19 Vict. c. 120. That statute, by section 69, gives power to make, repair and maintain the sewers; and by section 110, whenever it is necessary for any person to break up the pavement, surface or soil of any street, he shall with all convenient speed complete the work on account of which the same is broken up, " and fill in the ground and make good the pavement or surface or soil so broken

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up," &c. After the answers of the jury to the questions put to them it must, no doubt, be taken that the defendant did fill up the trench which he had made, and with proper materials, in the first instance. He was bound to do so under the provisions of section 111, which imposes a penalty upon any person who, having broken up the pavement or surface of the street, does not " with due diligence cause the ground to be filled in, and the pavement to be reinstated, and the surface to be made good in a proper and substantial manner." The facts found in the case shew that it was reasonable to expect that a subsidence would take place, and it was therefore incumbent upon the defendant to take care, by a careful supervision, that there should not be any such subsidence as would cause danger to the public.

[BYLES, J.—It is clear that his liability ceased as soon as he had properly completed the work of filling in the trench and reinstating the surface.]

The very fact of the subsidence having taken place shews that the work could not have been properly completed. This Court, in *Gray* v. *Pullen* (4 Best & S. 981; 34 L. J. Q.B. 265), put a construction upon these sections which is in favour of the appellant.

[CHANNELL, B.—No; the only question which the Court had there to consider was, whether the defendant Pullen was liable, he not having done the work himself, but having employed one Hubble as a contractor. There was no decision which can help the appellant in this case.]

The 11th section shews that the defendant was bound to look after the work; he was liable to a penalty for every day during which it remained in an improper condition. The application of the penalties is provided for by section 234, and no part would come to the possession of the plaintiff. In the Court below, Lush, J., in delivering the judgment of the Court, observed upon the 33rd section of 25 & 26 Vict. c. 102, but that section only applies to turnpike-roads, and was referred to simply for the purpose of drawing the inference that if the liability of the contractor in the case of a turnpike-road, was not carried beyond the restoring the road to its original state, it would not be carried further in the case of a common highway. It is submitted the defendant, under the present statute, was bound to exercise a supervision which would prevent the public from being injured.

Montagu Chambers (*Philbrick* with him), *contra*, was not heard.

KELLY, C.B.—It appears that the defendant in this case, being a contractor under the Metropolitan Board of Works, had the duty imposed upon him of digging a trench for the purpose of the construction of a sewer, and afterwards of filling up the trench, and reinstating the road in which the trench had been cut. The case finds, or rather the evidence in the case states, that it was about the month of May that he commenced these works, and he completed them in the month of August, and it proceeds to state that he finished the sewer. In August, 1864, the surface of the road had been properly reinstated and made good, and the metalling was in its proper position. Upon the whole of the evidence given in the case, the Lord Chief Justice seems to have left it to the jury—first, whether there was a hole in the highway? About that there was no manner of doubt. Secondly, whether the subsidence was in consequence of the work of the defendant being defectively executed, or arising from natural causes? Upon that the jury found that the hole was occasioned by natural subsidence, that is, in other words, that the work was not defectively executed. Taking that, together with the evidence, we can entertain no doubt whatever that it was established that this trench, which had been cut for the purpose of the sewer, was well and completely filled up, and that the work was not defectively executed; and we must take it on that finding, on the language of the statute, it was completed either with the same or similar materials, of the like quality or thickness, and cemented or bound together in the same or in an equally substantial manner. That is all that the statute requires. If the work had been otherwise executed, the jury would have found on the question left by the Lord Chief Justice, that it was defectively executed. They find it was

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not defectively executed, but that the subsidence arose from natural causes. It appears, in fact, that the subsidence took place, as subsidences often do, some months afterwards, after the work had been completed. The highway was reinstated almost in the very terms of the Act of Parliament. The question is, whether the defendant is liable for the subsidence. It is said that the jury, in answer to the third question, whether the parish had taken to the road, found that the parish had not taken to the road so as to relieve the defendant from the obligation of looking after the works and making good its subsidence and defects. Now, if this finding had been warranted by the law, in the first instance, and then by the facts of the case, it might have presented a very different case for our consideration; but in the first place, it is perfectly immaterial whether or not the parish had taken to the road. If the defendant completed the work which he was employed to effect, he had no right to remain for a single moment afterwards on the road. He had no right to interfere with the road if he had done his duty according to the terms of the Act of Parliament; therefore it is perfectly immaterial whether the parish took to the road or not. Then the jury go on to say, "so as to relieve him from looking after the work and making good its subsequent defects." It seems certainly from that, that the jury have imagined that he was bound after the completion of the work to look after the road, and to make good its subsequent defects. All I would observe upon that is, that the jury were mistaken. It could only be by the terms of the Act of Parliament that any such duty was imposed upon the defendant; and when we look at the two sections relied on by Mr. Laxton, the 110th and 111th, all we find in those two sections taken together is, that when a trench of this kind has been cut, it is to be filled up with all practicable expedition, and the highway is to be reinstated and made good in a satisfactory and substantial manner. All that appears to have been done, and no authority or power to look after the spot or interfere with the road afterwards was conferred on the defendant by the Act; certainly there was no obligation imposed on him to make good a subsidence which might take place six months, or even a longer time, after the work has been completed. Under these circumstances, we think the judgment of the Court of Queen's Bench perfectly right, and that it must be affirmed.

BRAMWELL, B.—I am of the same opinion. I think the finding of the jury amounts to this, that this accident was attributable to a want of repair of the road, and not that it was the result of the want of a proper filling up of the trench.

CHANNELL, B.—I am of the same opinion. I think the finding of the jury was in fact a finding for the defendant, unless there was an obligation, imposed by the Acts, to prevent subsidence after the road had been once filled in.

BYLES, J., KEATING, J. and MONTAGUE SMITH, J. concurred.

Judgment affirmed.

IN THE QUEEN'S BENCH. Nov. 20, 1868.

HART AND ANOTHER *v.* SMITH.

38 L. J. Q.B. 25; L. R. 4 Q.B. 61; 9 B. & S. 543; 19 L. T. 419; 17 W. R. 158. Followed, *Ex parte Williams*, [1870] E. R. A.; 39 L. J. Bk. 1; L. R. 10 Eq. 57; 18 W. R. 406 (Bk).

Debtor and Creditor—24 & 25 Vict. c. 134. s. 192.—Composition Deed—Want of Bonâ Fides—*Assets exceeding Amount of Composition—Equitable Pleading.*

BANKRUPTCY. N.—*To a plea, setting up a composition deed, the plaintiffs replied, on equitable grounds, that the deed was not executed or assented to by them; that the defendant at the time the deed was made was in possession of*

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available assets sufficient for the payment of a much larger composition than that agreed upon; that the agreements in the deed were not bonâ fide *made for the equal benefit of all the creditors; that the said agreements were made solely from motives of benevolence and kindness to and for the defendant, and for his sole and only benefit, and without any just regard to the rights or interests of the other creditors, and to give the defendant a release and discharge from his debts on the payment of the composition; that such composition was only a nominal composition, and wholly disproportioned to the assets of the defendant which were available to the payment of the said creditors, their debts and demands*:—Held, *on the authority of* In re Cowen; Ex parte Foster (36 L. J. Bk. 41), *and agreeing with that decision* (Hannen, J., hæsitante) *that the replication was good, and an answer to the plea.*

The declaration contained counts upon several bills of exchange accepted by the defendant; also the usual money counts.

The defendant, in his first plea, pleaded a composition deed entered into on December 5, 1866, between himself, a trustee and certain of his creditors, being a majority, &c., as required by the 192nd section of the Bankruptcy Act, 1861, whereby he covenanted to pay a composition of 2*s*. in the pound, by two equal instalments. The deed recited an agreement of October 25, 1866, for which the deed pleaded was to be substituted, as was alleged to have been agreed to by the said majority of the creditors.

To this plea the plaintiffs replied, upon equitable grounds, that the said pleaded deed in the said first plea mentioned was never executed by them or either of them, nor did they, nor did either of them, ever assent to or approve of the said deed; and that the plaintiffs were not, nor were either of them, parties to, nor did they, nor did either of them, ever assent to or approve of either of the said two agreements mentioned and referred to in the said pleaded deed, that is to say, the alleged agreement first therein mentioned and referred to, whereby it is alleged to have been agreed between and by all the parties to the said pleaded deed, to substitute for the covenants, trusts, powers and provisions contained in and expressed by the said indenture of October 25, 1866, mentioned in the said pleaded deed, the several covenants, trusts, powers and provisions contained in the said pleaded deed, and the said alleged agreement in the said pleaded deed secondly mentioned and referred to, whereby it is alleged that a majority in number, representing three-fourths in value of the creditors of the defendant, whose debts respectively amounted to 10*l*. and upwards, had agreed to accept the said composition of 2*s*. in the pound, payable as and secured in manner therein mentioned, in full discharge of their said several debts and demands, and to execute, or in writing assent to or approve of, the said pleaded deed. And the plaintiffs further say, that at the respective times when the said two agreements were made and entered into and assented to, and approved as aforesaid, and when the said pleaded deed was made and executed and assented to and approved of as aforesaid, by the said majority of the defendant's said creditors as aforesaid, as in the said first plea mentioned, the defendant had and was in possession of available assets sufficient for the payment to the said creditors of a much larger composition than 2*s*. in the pound, upon the amount of their said respective debts. And the plaintiffs further say, that the said two agreements and the said pleaded deed were not, nor were either of them, *bonâ fide* made or entered into or executed, or assented to or approved of by any or either of the defendant's said creditors, or by any or either of the said parties thereto, or by the said creditors who assented to or approved of the same, for the equal benefit of all the defendant's said creditors, mentioned in and within the meaning of, the said deed; and the same agreements, and each of them, and the said pleaded deed were respectively made and entered into and executed and assented to and approved of by the said parties thereto, and by the said majority of the said defendant's creditors, solely from motives of benevolence and kindness to and for the defendant, and for his sole and only benefit, and without any just regard to the rights or interests of the defendant's said other creditors; and

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to give the defendant a release and discharge from his said debts and demands, on the payment of the said alleged composition of 2*s.* in the pound upon the amount of their said respective debts in the pleaded deed and in the said secondly-mentioned agreement mentioned. And the plaintiffs further say that the same alleged composition of 2*s.* in the pound in truth and in fact was only a nominal composition, and wholly disproportionate to the said assets of the defendant of which he at the times aforesaid was possessed and had, and which could and might and ought to have been and were available towards the payment of the defendant's said creditors, their said debts and demands.

Demurrer, and joinder in demurrer.

[There were other pleas which were demurred to, but it is not considered that the arguments or judgments upon those demurrers need be reported.]

Henry James, for the plaintiffs.—The replication is good. It falls short of any averment of absolute fraud, but it sets up what is sufficient to invalidate a deed of composition by which it is sought to bind non-assenting creditors. It is essential to such a deed that the creditors who execute it should be actuated by perfect good faith, and that the deed should be free from all taint of fraud. It cannot be contended that the majority of the creditors have a right, from motives of kindness to the debtor, to bind the rest of the creditors to take a composition of 1*d.* in the pound.

[LUSH, J.—*Dauglish* v. *Tennent* (36 L. J. Q.B. 10) shews that such a deed must be executed in good faith between the debtor and his creditors.]

Just so. And further, there is a case of *In re Cowen; Ex parte Foster* (36 L. J. Bk. 41; 2 L. R. Ch. Ap. 563) which is precisely in point. This replication is drawn exactly in accordance with that judgment. There the composition was 2*s.* 6*d.* in the pound; the debts amounted to 1,054*l.*, the assets being sufficient to pay much more than the composition agreed to. The assenting creditors were friends of the bankrupt, and had executed the deed for the benefit of the debtor without any regard to the rights and interests of the other creditors. Turner, L.J. (see page 43) said, "The power given by this section to a majority of creditors to bind the minority must, I think, be considered as or in the nature of a statutory power, the exercise of which would be binding only when it was fairly and *bonâ fide* exercised. Independently of what must, as I think, be presumed to have been the intention of the legislature, the words of the section seem to me to import that the absence of any taint of fraud and the *bonâ fides* of the arrangement with a view to the benefit of all the creditors, were meant to be essential to the validity of the deeds. The deeds are to be binding on the non-assenting creditors, not absolutely, but only as if they were parties to and had executed the same; and even creditors who were parties to and had executed the deeds could not, as I apprehend, have been bound by them if they were tainted by fraud or *mala fides*. Counts of law in dealing with deeds of this description, with reference to other provisions contained in them, have held that the deeds must be reasonable, and these decisions at law have been much pressed upon our attention in the course of the argument before us; but it would be very difficult to apply the test of reasonableness to cases like the present. How could a Court of justice determine what it would be reasonable for creditors to accept under all the varied circumstances of arrangements between debtors and their creditors? I think, therefore, that the cases at law afford us but little assistance in determining this case; and I am not disposed to go further than to say that, in my opinion, it is necessary, in order to render a deed of such a description as we have here to deal with, binding upon non-assenting creditors, that the deed should be free from all taint of fraud, and should be made and entered into *bonâ fide* with a view to the benefit of all the creditors of the debtor. In determining whether these conditions have been observed or not, I do not think that the Court will measure in golden scales the propriety of the arrangement which has been made between the debtor and his creditors, or will weigh with nicety the question whether the estate of the debtor would be capable of paying more than the composition agreed upon; but I think that in order to render such a deed as the one before us binding on non-assenting creditors, the

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conditions which I have mentioned must in substance have been observed." And the judgment of Cairns, L.J., adopted the same view. It is submitted that this case is decisive.

Sir G. Honyman (*L. Kelly* with him), *contra*.—The contention of the plaintiffs is quite novel. The statute expressly gives power to the majority of creditors to bind the rest, and the Court cannot look into the question of whether such creditors have been actuated by feelings of kindness to the debtor or not. The intention of the legislature was to allow the majority of the creditors to make a beneficial arrangement, which would avoid the necessity of proceeding in the Court of Bankruptcy in the regular manner.

[COCKBURN, C.J.—It must be borne in mind that this replication is pleaded on equitable grounds. I think that the decision by the Lords Justices is in point, and is binding upon us. The question which would have to be left to a jury upon such an issue would, I think, be, was this agreement entered into for the benefit of the general body of the creditors, or was it entered into by the required majority for the benefit of the debtor, but at the expense of the rest of the creditors?]

It rather appears that the Lords Justices gave their decision under the peculiar circumstances of the case, which almost satisfied them that there had been absolute fraud and that the assenting creditors would get their debts paid in full.

[COCKBURN, C.J.—That is not given as the reason of their decision.]

Henry James was not called upon to reply.

COCKBURN, C.J.—We are bound by the decision of the Lords Justices in *In re Cowen; Ex parte Foster* (36 L. J. Bk. 41; 2 L. R. Ch. Ap. 563). I entirely agree with that decision. It seems to me that the legislature intended, by the provisions in the Bankruptcy Act as to these composition deeds, to substitute a species of commercial domestic forum consisting of the debtor and the creditors in the place of the costly proceedings in the Bankruptcy Court which resulted in the eating up of a large portion of the bankrupt's estate, and they thought that it would be much better that the whole matter should be left to the more economical proceeding to be managed by the creditors. By the 192nd section it was intended that the arrangement which the majority in number, representing three-fourths in value, of the creditors whose debts should respectively amount to 10*l.* and upwards, thought was best, should be binding upon the rest; but it was never intended that such an arrangement should be binding upon non-assenting creditors, where it was made at the expense of those creditors and from motives of benevolence in which they did not concur. I conceive that the *bonâ fides* of such an arrangement depends upon its being entered into with the honest intention of doing what would be for the advantage of the general body of the creditors. I entirely concur in the principle of the decision in *In re Cowen; Ex parte Foster* (36 L. J. Bk. 41; 2 L. R. Ch. Ap. 563); and even if I did not do so, I should consider that we are bound by it.

LUSH, J.—I bow to that decision; but I also think that the arrangement to be good ought to be one entered into by the requisite majority of the creditors acting in the interest of the general body of creditors, and not simply for the benefit of the debtor without considering the interest of the general body of creditors.

HANNEN, J.—I agree that we are bound by the decision of the Lords Justices in *In re Cowen; Ex parte Foster* (36 L. J. Bk. 41; 2 L. R. Ch. Ap. 563), and that if a different construction ought to be put upon the section it must be done by a Court of error. I have not very carefully considered that case, and although, upon consideration, I might agree with all that was said by the Lords Justices, I at present think it right to say that I do not conceive the legislature intended to exclude from the operation of the section all such deeds as are executed by the requisite majority of creditors on the ground that they had been executed from motives of kindness and benevolence. I think that it was intended to guard against deeds being entered into under circumstances amount-

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ing to fraud. If all motives of kindness and benevolence are to be excluded, it will follow that if one creditor whose assent was necessary to make up the requisite majority was actuated by such motives the deed would be invalidated. I think it will be found that the decision of the Lords Justices does not involve that doctrine.

HAYES, J.—*In re Cowen; Ex parte Foster* (36 L. J. Bk. 41; 2 L. R. Ch. Ap. 563) was decided by a Court of great authority, and is binding upon us.

Judgment for the plaintiffs.

IN THE EXCHEQUER CHAMBER. June 16, Nov. 26, 1868.

(Appeal from the Court of Queen's Bench.)

WOODHOUSE *v.* MURRAY.

38 L. J. Q.B. 28; 9 B. & S. 720; L. R. 4 Q.B. 27; 19 L. T. 570; 17 W. R. 206: affirming, [1867] E. R. A. 1755; 36 L. J. Q.B. 289; 8 B. & S. 464; L. R. 2 Q.B. 634; 16 L. T. 559; 15 W. R. 1109 (Q.B.).

Explained and not applied, *Ex parte Foxley; In re Nurse*, 1868, L. R. 3 Ch. 515; 18 L. T. 862; 16 W. R. 831 (L. JJ.). Dictum referred to, "*The Heart of Oak*," [1870] E. R. A.; 39 L. J. Adm. 15; 21 L. T. 727 (Adm.). See, *Ex parte Pearson; In re Mortimer*, [1873] E. R. A.; 42 L. J. Bk. 44; L. R. 8 Ch. 667; 28 L. T. 796; 21 W. R. 688 (L. JJ.). Followed, *In re Baum; Ex parte Cooper* (2), [1879] E. R. A.; 48 L. J. Bk. 54; 10 Ch. D. 322; 39 L. T. 523; 27 W. R. 299 (C. A.).

Bankruptcy—Act of Bankruptcy—Fraudulent Transfer—Bill of Sale to Execution Creditor—24 & 25 Vict. c. 134. *s.* 73.

BANKRUPTCY. B. H.—*Execution was levied upon goods on the premises of a trader, who was in insolvent circumstances and had ceased to carry on his trade, for a debt exceeding* 50*l. The trader executed a bill of sale, by which he mortgaged all his stock-in-trade and effects to secure the judgment debt, and the sheriff withdrew*:—Held, *that whatever might have been the case before the passing of the Bankruptcy Act*, 1861, *s.* 73, *the bill of sale was now an act of bankruptcy, for it prevented the creditors from treating the seizure and sale as an act of bankruptcy and obtaining a distribution of the property seized by means of an adjudication in bankruptcy; and that any benefit which might be expected to arise from postponing a forced sale was a benefit only to the execution creditor, and not to the rest of the creditors, who took no benefit under the security.*

This was an appeal from a decision of the Court of Queen's Bench (reported 36 L. J. Q.B. 289), where the facts are fully stated. It will here be sufficient to mention that on May 1, 1866, the plaintiff recovered judgment against one Proudfoot for 10,634*l.* 11*s.* 10*d.*, and that on May 10 execution was levied at his private residence and a portion of the debt satisfied. On June 5 execution for the balance was levied on the stock-in-trade of Proudfoot at his manufactory. On August 17 Proudfoot executed two deeds in favour of the plaintiff, for the purpose of securing the balance of the judgment debt, a mortgage of the residue of his term in the premises where he carried on his business, and a bill of sale of the stock-in-trade, machinery, &c., upon these premises. On the 18th the sheriff withdrew; but on the 28th the plaintiff took possession of the premises, and on September 12 Proudfoot (who was in insolvent circumstances, and had ceased to carry on his trade when he executed the deeds) was adjudicated bankrupt. The Court of Queen's Bench held, that the effect of the bill of sale was to defeat the remedies afforded to creditors by section 73 of the Bankruptcy

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Act, 1861[1], and that it was therefore an act of bankruptcy and void as against the defendant, the creditors' assignee. The plaintiff appealed to this Court.

Quain (*Manisty* and *G. Bruce* with him), for the appellant.—The plaintiff will submit, as in the Court below, that the bill of sale was no act of bankruptcy. *Primâ facie* a conveyance of the whole or a substantial part of the debtor's effects to a creditor is an act of bankruptcy. But exceptions have been engrafted on this rule by late decisions; and the question is whether the present case can be brought within any one of them. If the debtor had anything like an equivalent for the mortgage of his property, the transaction can be upheld. By granting this mortgage he obtained a short respite from utter ruin. The Court below based their judgment upon the proposition that the effect of the mortgage was to defeat the operation of section 73. But at the time of the deed it could not be positively affirmed that bankruptcy would be most beneficial to the creditors. The "equivalent" is a present equivalent to the bankrupt, not to his creditors under a future bankruptcy.

[CHANNELL, B.—An equivalent which may be, but is not necessarily, for the benefit of the creditors.]

Yes. The law as to the consideration which will prevent a conveyance of the debtor's property from being an act of bankruptcy is laid down in the cases of *Whitmore* v. *Claridge* (33 L. J. Q.B. 87) and *Bittleston* v. *Cooke* (6 E. & B. 296; 25 L. J. Q.B. 281), and they shew that if the consideration is substantial the deed will be supported.

S. Temple, for the respondent.—If the argument of the plaintiff is well founded, a friendly debtor and creditor may always get rid of the operation of section 73.

[BRAMWELL, B.—Do not the creditors get a benefit from the fact that the debtor is at liberty to turn himself round?]

The only equivalent suggested is, that the creditors are to be prevented from availing themselves of an act of bankruptcy. The equivalent should be one which, through the debtor, is for the benefit of all the creditors. In *Bittleston* v. *Cooke* (6 E. & B. 296; 25 L. J. Q.B. 281) Lord Campbell said: "I should think the transaction must have appeared to both parties likely rather to have benefited than to have defeated the creditors;" shewing that benefit to the creditors, and not to the debtor, is the test.

Quain, in reply.

Cur. adv. vult.

The judgment of the Court[2] was delivered, on Nov. 26, by—

KELLY, C.B.—The question in this case is, whether a trader against whom a judgment had been obtained for 10,000*l.* and upwards, and the judgment creditor having levied between 3,000*l.* and 4,000*l.*, and afterwards sent in a second execution and seized for 6,500*l.* and upwards, by executing to the judgment creditor a mortgage of the whole of his estate and effects, committed an act of bankruptcy.

The jury have found that the mortgage was *bonâ fide*, and executed to save expense, and to make the most of the property. But, notwithstanding this finding, we are of opinion that the trader has committed an act of bankruptcy. It is contended for the plaintiff, the judgment creditor, who sues the defendant, the assignee of the bankrupt, for the value of the property seized, of which he

(1) By the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134. s. 73,) If any execution shall be levied by seizure and sale of any of the goods and chattels of any trader debtor, upon any judgment recovered in any action personal, for the recovery of any debt or money demand exceeding 50*l.*, every such debtor shall be deemed to have committed an act of bankruptcy from the date of the seizure of such goods and chattels; and unless in the meantime a petition for adjudication of bankruptcy against the debtor be presented the sheriff shall proceed with the execution, and shall at the end of seven days after the sale pay over the proceeds to the execution creditor, who shall be entitled thereto, notwithstanding such act of bankruptcy, unless the debtor be adjudged a bankrupt within fourteen days from the day of the sale, in which case the money so received by the creditor shall be paid by him to the assignees under the bankruptcy.

(2) Kelly, C.B., Bramwell, B., Channell, B., Byles, J. and Montague Smith, J.

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had possessed himself, that although in general the assignment of all the estate and effects of a trader is an act of bankruptcy, yet it is not so where the debtor takes what has been called an equivalent; and *Bittleston* v. *Cooke* (6 E. & B. 311; 25 L. J. Q.B. 289) and other cases shew that where, besides the assignment of the estate, the debtor obtains a further advance of money, this advance may be deemed an equivalent. In this case, however, there is no such equivalent, and, as far as we can see, no equivalent at all. The debtor had the choice of allowing the judgment creditor to sell the property seized, and so, by means of the proceeds, satisfy the judgment debt, or of executing this mortgage, by which he assigns and transfers the estate and effects, instead of the proceeds upon the sale, to the judgment creditor. By adopting this latter course, he divests himself of the whole of his property, and leaves not a single shilling to be applied in satisfaction of the claims of any one of his creditors. He, in fact, makes over the whole of his property to the one favoured creditor who has obtained the judgment, leaving nothing whatever for his other creditors. If he had allowed the law to take its course, and the judgment creditor to sell the property which he had seized, any other creditor might, under the 73rd section of the Bankruptcy Act, have treated the seizure and sale as an act of bankruptcy, and, by obtaining an adjudication within a fortnight, would have enabled the creditors, through the assignee in bankruptcy, to recover the money, the proceeds of the sale, from the judgment creditor, and apply it to the use and benefit of the creditors at large.

In the state of the law before this statute, when the seizure and sale under an execution were not an act of bankruptcy, and the execution creditor was entitled to the proceeds upon the sale, it may have been indifferent, as between the execution creditor and the other creditors, whether the goods were sold under the execution or transferred by bill of sale to the execution creditor. But, in the altered state of the law, this is no longer so; and the plaintiff in this case clearly obtains, by means of the bill of sale, as between himself and the other creditors, payment of his whole debt, and takes away all the property of the bankrupt, which, if he had proceeded with the execution, would have been distributable among the general creditors under a bankruptcy. In *Bittleston* v. *Cooke* (6 E. & B. 311; 25 L. J. Q.B. 289), one of the cases referred to, it is observed, by Crompton, J., that "the old cases clearly establish the rule that the conveyance of a trader's property, leaving it no longer in his option whether he would continue his trade, was in law an act of bankruptcy as necessarily defeating his creditors." On this an exception has been grafted, "that the conveyance is not an act of bankruptcy if it be for an equivalent." In this case not only, as already observed, is there no new advance to constitute an equivalent, but there is no conceivable benefit whatever accruing to the creditors. It is said that the mortgage, by leaving the debtor in possession of his house and property, might enable him to carry on his business and retrieve his affairs. But here the debtor had ceased to trade two months before, and the saving of expense and the avoiding the sacrifice of property by a forced sale, which seem to have induced the jury to treat the mortgage as *bonâ fide*, were a benefit only to the judgment creditor, the mortgage, whatever might ultimately be the produce of the property, leaving absolutely nothing for the other creditors. If a transaction of this nature could be protected against the operation of the Bankrupt Laws, every debtor might at any time, by suffering a judgment and execution, and then assigning the property seized to the judgment creditor, convey away the whole of his estate to this one favoured creditor, defrauding every other creditor of the whole amount of his debt—the very evil which the 73rd section of the Bankrupt Act was enacted to prevent. We are, therefore, of opinion that the assignee is entitled to this property, and that the judgment of the Court of Queen's Bench should be affirmed.

Judgment affirmed.

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IN THE QUEEN'S BENCH. Nov. 27, 1868.

WOODWARD AND ANOTHER *v.* PELL.

38 L. J. Q.B. 30; L. R. 4 Q.B. 55; 9 B. & S. 994; 19 L. T. 557; 17 W. R. 117.

Bill of Exchange—Acceptor charged in Execution by Holder after Payment by Indorser—Indorser's Remedy over against Acceptor.

BILLS OF EXCHANGE. I.—*The drawer or indorser of a dishonoured bill of exchange becomes entitled, by paying the amount of it to the holder, to an immediate right of action against the acceptor, although the holder continues to retain the bill as security for costs; and the right of such drawer or indorser to sue the acceptor is not affected by the circumstance that the holder, after receiving the amount and before payment of his costs, has charged the acceptor in execution for the amount of the bill and then released him from custody.*

The holder of a dishonoured bill of exchange brought actions against the acceptor and an indorser. On March 3 he recovered judgment against the acceptor. On March 21 the indorser paid to the holder the amount of the bill. The bill was kept by the holder till his costs were paid on April 13, when he handed it to the indorser, who transferred it to the plaintiffs. On March 29 the holder had charged the acceptor in execution on his judgment, but on the same day discharged him from custody:—Held, *that the plaintiffs were entitled to sue the acceptor notwithstanding his arrest and discharge from custody, as the right of action of the indorser, under whom they claimed, became vested as soon as he paid the amount of the bill on the 21st, and that the holder had after that day only a lien on the bill for his costs, and could not by his voluntary act in discharging the acceptor from custody, defeat the remedy over of the indorser.*

Declaration against the defendant as acceptor of a bill of exchange for 300*l.*, drawn by Messrs. Cresswell & Sons, indorsed by them to H. W. Cresswell, who indorsed it to the plaintiffs; with the common counts for money paid, for interest and for money due upon accounts stated.

Plea—That when the bill became due the Metropolitan and Provincial Banking Co., Lim., were holders of it, who thereupon impleaded the defendant as the acceptor of the bill in an action for the recovery of the amount, in which action they recovered judgment against him for the amount of the bill, and all damages sustained by the Metropolitan and Provincial Banking Co., Lim., by reason of the non-payment thereof, together with their costs of suit; and afterwards the company issued a writ of *capias ad satisfaciendum* upon the judgment in the usual form, and duly indorsed to levy the debt, damages and costs against the now defendant, directed to the Sheriff of Middlesex, under which writ the now defendant was arrested by and detained in the custody of the sheriff until he was released and discharged therefrom by the company; and afterwards and after such release and discharge the company transferred the bill to the plaintiffs, and the plaintiffs took and received the same with notice of the premises. Second plea, to the residue of the declaration, never indebted.

Replication—First, a joinder in issue. Secondly, that after the bill had been indorsed to H. W. Cresswell, the banking company in the plea mentioned became the holders of the bill as transferees and indorsees of and from H. W. Cresswell, and that upon the maturity and dishonour of the bill H. W. Cresswell was liable to pay the amount of it to the bank as such holders thereof, by reason of his having indorsed the same in blank and transferred it to the banking company; and before the banking company recovered judgment and issued the writ of execution against the defendant as in the plea mentioned, H. W. Cresswell had been compelled by proceedings duly taken by and at the suit of the banking company to pay, and had paid to the company, the amount of the bill, and had taken up the same, and thenceforth became and was the lawful holder of the bill until he afterwards indorsed the same for valuable consideration to the plaintiffs as in the declaration mentioned; and the plaintiffs thenceforth

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became and were the *bonâ fide* holders of the bill for value, and the defendant did not at any time pay or discharge the amount of the bill or any part thereof to the banking company, or to any other person whatever.

Issue thereon.

The cause was tried, before Keating, J., at the Gloucester Summer Assizes, 1866, when a verdict was found for the plaintiffs for 300*l.* damages, and 40*s.* costs of suit, subject to the opinion of the Court upon the following

CASE.

The bill of exchange upon which the action was brought was a bill for 300*l.*, dated August 7, 1865, payable to drawer's own order four months after date, and drawn by Edward Cresswell & Sons upon, and accepted by, George Pell, the defendant. This bill was duly indorsed by Edward Cresswell & Sons, the drawers, to Henry William Cresswell, who indorsed it in blank and handed it to J. C. Hodges, who indorsed it to his bankers, the Metropolitan and Provincial Banking Co., who held the bill as such indorsees at maturity. The bank commenced three actions upon it, against the defendant, the acceptor, against E. Cresswell & Sons, the drawers, and against H. W. Cresswell, the indorser. In an action by the bank against H. W. Cresswell, the writ was issued on January 15, 1866. On March 13, 1866, H. W. Cresswell, for the purpose of taking up the bill, handed over to J. C. Hodges securities for an amount equal to that of the bill, and out of the proceeds of those securities, and on behalf of H. W. Cresswell, Hodges paid, on March 21, 1866, the amount due on the bill to the Metropolitan and Provincial Banking Co.; whereupon, on April 3, an order was made to stay proceedings on payment of costs. The bill remained in the hands of the bank until the costs were taxed and paid. The costs were taxed at 21*l.* 11*s.* 4*d.*, and that sum was, on April 13, 1866, paid to the bank by the plaintiffs, as solicitors for and on behalf of H. W. Cresswell, and on the same day the bill was delivered over to the plaintiffs as such solicitors. Two or three days afterwards, and before May 31, 1866, the plaintiffs, to whom H. W. Cresswell was indebted for costs in an amount larger than that of the bill, applied to him for money on account, and he transferred to them the bill in question (which had already been indorsed in blank by him as aforesaid) in part payment of their claim against him; but there was no further or other indorsement of the bill to the plaintiffs. In the action by the bank against the defendant, the acceptor, the writ was issued on December 29, 1865. Judgment was signed on March 3, 1866; and on March 6 the bank lodged a *ca. sa.* against defendant, on the judgment, with the sheriff of Middlesex, indorsed to satisfy 310*l.* 9*s.* 11*d.*, being the amount due on the bill and costs, and 1*l.* 5*s.* costs of execution. On March 29, the defendant, having been arrested in another suit, was informed by the sheriff's officer that he held this *ca. sa.* The sheriff's officer communicated then with the bank, and received an order to detain the defendant under their execution, which he did accordingly, and subsequently, about four hours afterwards, the following order:

"March 29.

"Metropolitan Provincial Bank *v.* Pell.—Discharge the defendant as to this action on payment of 9*l.* 1*s.* 10*d.* and your fees."

This payment was made, and thereupon the defendant was released. No receipt was given by the sheriff for the payment made to him by the defendant; but on April 12, when the sheriff paid over to the bank the before-mentioned sum of 9*l.* 1*s.* 10*d.*, the following receipt was given:

"In the Exchequer of Pleas.—The Metropolitan and Provincial Banking Co. *v.* Geo. Pell.—Received, April 12, 1866, of Mr. Bunn, officer to the sheriff of Middlesex, the sum of 9*l.* 1*s.* 10*d.* in discharge of debt and costs herein.

"For Davidson, Carr & Bannister, plaintiff's attorneys,

"JAMES HOLDITCH.

"9*l.* 1*s.* 10*d.* 12/14/66."

This sum of 9*l.* 1*s.* 10*d.* was the amount of taxed costs due to the bank in their action against the defendant Pell. No further or other payment was at

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any time made by the defendant Pell in respect of the bill. The plaintiffs, on May 31, 1866, and after the bill had been transferred to them by H. W. Cresswell in manner aforesaid, commenced the present action.

It is agreed between the parties that the pleadings in the action on both sides shall form part of the case; also, that the Court shall be at liberty to draw any inferences of fact which, in the opinion of the Court, a jury ought to have drawn, and to make any amendments in the pleadings which the Judge before whom the cause was tried ought to have made.

The question for the opinion of the Court is, whether, upon the facts stated, the defendants remained liable to pay the amount of the bill to the plaintiffs. If the Court shall be of opinion in the affirmative, then the verdict is to be entered for the plaintiffs as aforesaid; but if the Court shall be of a contrary opinion, then a nonsuit is to be entered.

H. Matthews, for the plaintiff.—This case involves the question, which does not seem ever to have arisen before, whether the acceptor of a bill, who has been taken into custody for the amount, is liable to an action at the suit of a subsequent transferee of the bill. Admitting that a discharge of the acceptor from custody would release the other parties to the bill, it does not follow that his discharge is to deprive them of their remedy over against him. The indorser fills a double character: as regards the holder he is a surety, but as between himself and the prior parties to the bill he is a principal. It would, therefore, be extremely hard if the right which Cresswell, as indorser, had previously acquired should be taken away by a subsequent discharge of the acceptor, who, as regards Cresswell, is only a surety.

[HAYES, J.—How could the bank discharge a debt which was no longer due to them? It had been previously paid by Cresswell.]

The case of *Thompson* v. *Parish* (5 Com. B. Rep. N.S. 685; 28 L. J. C.P. 153) shews that, to discharge a debtor from custody is not to extinguish the debt to all intents and purposes. And although it would seem from *Daglash* v. *Darley* (2 B. & P. 61) that to discharge the acceptor from custody is to release the indorsees, this cannot apply to the present case where it is evident from the dates, that the right of Cresswell had accrued before the discharge of the defendant.

[LUSH, J.—When Cresswell paid the amount of the bill, did not the bank hold their judgment against the defendant as trustees for Cresswell?]

The money paid by Cresswell was money paid to the use of the acceptor, and he was entitled to have the judgment assigned to him, so as to continue the defendant in custody.—He cited *Tarlton* v. *Allhusen* (2 Ad. & E. 32; 4 L. J. K.B. 17); *Callow* v. *Lawrence* (3 M. & S. 97); and *Byles on Bills*, 8th edit.

A. S. Hill, for the defendant.—The defendant contends that, having been once arrested for the amount of the bill and then discharged from custody, he cannot be sued by any other party to the bill. His liability on the bill ceased when he incurred the liability of a judgment and execution. By reference to the dates, it will be seen that it was not until after the defendant had been discharged from custody that Cresswell became entitled to the bill. The absence of authority on this subject is an argument in the defendant's favour, as the same circumstances must often have arisen before. But the case of *Jacques* v. *Withy* (1 Term Rep. 557) shews that a judgment is extinguished for all purposes by discharging the debtor.

LUSH, J.—I am of opinion that the plaintiffs are entitled to judgment. It appears that the Metropolitan and Provincial Banking Company were the holders of this bill, and brought three actions upon it: one against the defendant, the acceptor; the second against the drawers, and the third against an indorser. In the action against the acceptor, they obtained judgment on March 3, 1866. They issued a writ of *ca. sa.* and lodged it with the sheriff on March 6. On March 21, before the defendant was charged in execution under this writ, Cresswell, the indorser of the bill, who had also been sued by the bank, paid over to the bank the amount of the bill. If Cresswell had paid the costs due to the bank, he would have been entitled to have the bill handed over to him,

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and on March 21 he would have been entitled to sue the defendant upon the bill. The defendant was charged in execution on March 29, and if Cresswell had paid all that was due on March 21 he would have been entitled to have the judgment obtained against the defendant assigned to him, and to proceed upon it, as the bank had not then discharged the acceptor from their custody. Cresswell's right of action was, therefore, vested on March 21. On March 29 the defendant was charged in execution, and it would be monstrous if his discharge from execution by the bank were to bar the remedy over against him. The result would be, as my Brother Hayes has said, that the voluntary act of a stranger would discharge the remedy over of the surety. We cannot hold that this is the case when we see that, if Cresswell had paid the debt and costs on March 21, there would have been no answer to this action. In my opinion, the whole effect of the non-payment of the costs was, that the bank had a lien on the bill until they were paid, so that it was just the same, as far as Cresswell's rights against the acceptor were concerned, as if he had paid them on the 21st. The surety's right of action had vested on that day, and could not be affected by any execution issued against the principal afterwards. I think, therefore, that the plaintiffs are entitled to judgment.

HANNEN, J., and HAYES, J., concurred.

Judgment for the plaintiffs.

IN THE QUEEN'S BENCH. Nov. 19, 21, 1868.

WASON v. WALTER.

38 L. J. Q.B. 34; L. R. 4 Q.B. 73; 8 B. & S. 671; 19 L. T. 409; 17 W. R. 169.

Discussed, *Henwood* v. *Harrison*, [1872] E. R. A.; 41 L. J. C.P. 206; L. R. 7 C.P. 606; 26 L. T. 938; 20 W. R. 1000 (C.P.). Referred to, *Davies* v. *Duncan*, [1874] E. R. A.; 43 L. J. C.P. 185; L. R. 9 C.P. 396; 30 L. T. 464; 22 W. R. 575 (C.P.); *Milissich* v. *Lloyds*, [1877] E. R. A.; 46 L. J. C.P. 404; 36 L. T. 423; 25 W. R. 353 (C. A.); *Purcell* v. *Sowler*, 1876 1 C.P. D. 781 (C.P. D.): affirmed, [1877] E. R. A.; 46 L. J. C.P. 308; 2 C.P. D. 215; 36 L. T. 416; 25 W. R. 362 (C. A.); *Usill* v. *Hales*, [1878] E. R. A.; 47 L. J. C.P. 323; 3 C.P. D. 319; 38 L. T. 65; 26 W. R. 371 (C.P. D.); *Macdougall* v. *Knight*, [1886] E. R. A.; 55 L. J. Q.B. 464; 17 Q.B. D. 636; 55 L. T. 274; 34 W. R. 727; 14 A.C. 194 (C. A.); *Allbutt* v. *General Medical Education*, [1889] E. R. A.; 58 L. J. K.B. 606; 23 Q.B. D. 400; 61 L. T. 585; 37 W. R. 771 (C. A.); *Macquire* v. *Western Morning News*, [1903] E. R. A.; 72 L. J. K.B. 612; [1903] 2 K.B. 100; 88 L. T. 757; 51 W. R. 689 (C. A.); *Hunt* v. *Star Newspaper Co.*, [1908] E. R. A.; 77 L. J. K.B. 732; [1908] 2 K.B. 309; 98 L. T. 629 (C. A.).

Libel — Privileged Publication — Parliamentary Debates — Articles commenting upon Parliamentary Debates.

LIBEL AND SLANDER. E.—*The publication of a faithful report of a debate in either House of Parliament is privileged, so that the publisher is not responsible for defamatory statements made in the course of the debate so reported and published; and the publication of articles fairly commenting upon the debate so reported and published is equally privileged.*

A full and faithful report of a debate in the House of Lords was published in a newspaper. In the course of this debate the conduct and character of the plaintiff was attacked with great severity. An article was also published in the newspaper, commenting upon the charges made against the plaintiff in the course of the debate, and treating them as well founded:—Held, *that the publication of the charges made against the plaintiff during the debate was privileged,*

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and that the article, assuming it to be a fair comment upon these charges, was also privileged.

The first count of the declaration stated that, before the committing of the grievances thereinafter mentioned, Earl Russell, had, at the request of the plaintiff, presented to the House of Lords a certain petition in writing of the plaintiff, praying that a Committee of the House of Lords might be appointed to investigate certain charges made by the plaintiff in the petition against Sir FitzRoy Kelly; and thereupon the defendant falsely and maliciously printed and published in a certain newspaper called the *Times*, in the form of a debate in the House of Lords, the words following. [The declaration then set out a report of a debate in the House of Lords, headed, "Parliamentary Intelligence. House of Lords. Tuesday, February 12." The debate was commenced by Earl Russell, who presented a petition from the plaintiff, Mr. Rigby Wason, against Sir FitzRoy Kelly, the Chief Baron of the Exchequer, praying that their Lordships would appoint a Committee to investigate the charges made in the petition, and if they found those charges to be proved, then to concur with the other House of Parliament in praying that Sir FitzRoy Kelly might be removed from his judicial position. The petition contained charges of falsehood and deceit against Sir FitzRoy Kelly, to which it is unnecessary to allude at length. Lord Russell, in presenting this petition, stated the grounds for his belief that the charges in it were altogether unfounded; and the Lord Chancellor (Lord Chelmsford), Lord St. Leonards and Lord Derby, who took part in the debate, attacked the conduct of the plaintiff in presenting the petition in terms of great severity, the Lord Chancellor charging him with falsehood, cowardice and rancorous malice.]

The second count charged the plaintiff with falsely and maliciously printing and publishing of the plaintiff, in a newspaper called the *Times*, the words following. [The count set out at length a leading article published in the *Times* newspaper on the morning after the debate, commenting upon the petition and the discussion which had taken place upon it, and treating the charges as false and malignant.]

Plea, not guilty, and issue thereon.

At the trial, before Cockburn, C.J., at the London Sittings after Michaelmas Term, 1867, the publication of the report of the debate and of the leading article in the *Times* newspaper was proved. The counsel for the defendant called the reporters of the newspaper to prove the accuracy of the report.

The Chief Justice then summed up the case to the jury, and directed them that, if they thought that the report of the debate was honest, *bonâ fide* and truthful, it was a privileged publication, and one which was not the subject of a civil action, and their verdict on the first count must be for the defendant. That the same principle which had been held to apply to the publication of proceedings in a court of justice appeared to his Lordship to apply with equal, if not with greater, force to the Houses of Parliament. With reference to the second count, the Chief Justice directed the jury that the debate and the charges which led to it were matters of public concern, upon which a public writer was justified in making such comments as the circumstances warranted, and which a jury should be of opinion were fair and reasonable with reference to the subject-matter of the discussion; and that the jury would have to say whether the article was, in their judgment, an unfair comment, one which could be ascribed to malicious and sinister motives, or only a fair comment which a public writer, exercising his privilege in discussing a matter of public concern, might fairly indulge in.

The jury found a verdict for the defendant on all the counts.

T. Jones had obtained, in Hilary Term, 1868, a rule calling on the defendant to shew cause why the verdict should not be set aside and a new trial had between the parties for misdirection by the learned Lord Chief Justice, first, in directing the jury that the publication of the libel charged in the first count was privileged, if they should find the libel to be a true and faithful report of the debate in the House of Lords; secondly, in directing the jury to find their verdict

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for the defendant, if they thought that the comments contained in the libel charged in the second count, on the conduct of the plaintiff in presenting the petition to the House of Lords, and on the debate in the House of Lords, were fair comments and within the limits of fair criticism.

The Attorney-General (Sir J. Karslake), J. D. Coleridge and *C. W. Wood*, shewed cause.—The direction of the Chief Justice was on both points correct, and the verdict ought not to be disturbed. The main question, whether the publication of a fair report of a parliamentary debate is privileged is not settled by any express decision, but strong opinions have been expressed in favour of deciding it in the affirmative. It will be remembered that the jury have found that the reports were fair and accurate, and that the debate was brought about by the plaintiff's own act in presenting his petition. The defendant has published the whole of this debate, and the Court will say whether he is liable to an action for libel. Although the subject is without any express authority there are cases in which the point before the Court appears to have been discussed. *The King* v. *Wright* (8 Term Rep. 293) is the first. It was an application for a criminal information against a bookseller for publishing a libel on Horne Tooke. This libel was alleged to be contained in a report by the Committee of Secrecy of the House of Commons, a literal copy of which had been published by the defendant. The Court refused the information, Lord Kenyon saying that it was impossible to admit that a proceeding in either House of Parliament was a libel; and Lawrence, J., said, "The proceedings of Courts of Justice are daily published, some of which highly reflect on individuals, but I do not know that an information was ever granted against the publishers of them"; and the learned Judge goes on to refer to an action brought some years before by one Currie against Walter, proprietor of the *Times*, for publishing a libel in the paper called the *Times*, which supposed libel consisted in merely stating a speech made by a counsel in Court on a motion for leave to file a criminal information against Currie. Eyre, C.J., who tried the cause, ruled that this was not a libel nor the subject of an action, it being a true account of what had passed in Court; and in this opinion the Court of Common Pleas afterwards, on motion for a new trial, concurred. He proceeds—"Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of Courts of Justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings. The same reasons also apply to the proceedings in parliament. It is of advantage to the public, and even to the legislative bodies, that true accounts of their proceedings should be generally circulated; and they would be deprived of that advantage if no person could publish their proceedings without being punished as a libeller. Though, therefore, the defendant was not authorized by the House of Commons to publish the report in question, yet, as he only published a true copy of it, I am of opinion that the rule ought to be discharged." It is true that in *The King* v. *Creevey* (1 M. & S. 273), where the defendant, a member of the House of Commons, was indicted and found guilty of a libel contained in a report of a speech delivered by the defendant in the house, and which he had caused to be published in a newspaper, the Court refused a new trial, and held that the publication was not privileged. But the question of privilege did not properly arise in that case, and it cannot be considered to have overruled *The King* v. *Wright* (8 Term Rep. 293). There is all the difference in the world between the publication of a single speech and the report of the whole of a debate.

[LUSH, J.—It is just as if any one were to publish only the evidence in favour of one party at a trial.]

In *The King* v. *Abingdon* (1 Esp. 225) an information against Lord Abingdon for publishing in the newspapers a speech which he had delivered in the House of Lords, charging an attorney with unprofessional conduct, Lord Kenyon held that there was no privilege; but there also, not only was there no report of the

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whole debate, but only of part of the speech. The important decision of *Stockdale* v. *Hansard* (9 Ad. & E. 1; 8 L. J. Q.B. 294), where this Court held that a resolution of the House of Commons directing a report made to the House to be printed and published, did not protect the defendant, who had published the report, from the consequences of a libel which was contained in it, cannot be relied on by the plaintiff, as the report of a committee ordered by the House to be printed does not stand on the same footing as the report of a debate. The decision there was only on demurrer, and the question was simply whether the resolution justified the publication of the report.

[LUSH, J.—It was assumed that, apart from the resolution, there was no defence to the action.]

The judgment of Lord Denman (9 Ad. & E. 114; 8 L. J. Q.B. 296), where he says, that if calumnious speeches made in parliament were reported and published, the law would attach responsibility to the publisher, may be explained as relating to the publication of single speeches, as in *The King* v. *Creevey* (1 M. & S. 273) and *The King* v. *Abingdon* (1 Esp. 225). In *Davidson* v. *Duncan* (7 El. & B. 229; 26 L. J. Q.B. 104), where the question was as to the privilege attending the publication of the proceedings in a Court of Justice, Lord Campbell assigns as a reason for this privilege the public benefit from the publicity of the proceedings. His Lordship says, that the "balance of public benefit from the publicity is great. It is of great consequence that the public should know what took place in Court, and the proceedings are under the control of the Judges. The inconvenience, therefore, arising from the chance of the injury to private character is infinitesimally small as compared to the convenience of publicity." If benefit to the public is to be assigned as a reason for conferring a privilege on the publication of any proceedings, no one can deny that the benefit to the public from the publication of full reports of parliamentary debates is great. In former times there were questions as to whether the publication of debates was not a breach of the privileges of the House, but at the present day every facility is given to enable the newspapers to prepare accurate reports of the debates, and a gallery is set apart for the use of the reporters. With regard to the question raised by the second count, it is for the Court to say whether the debate was so far a matter of public interest as that a fair comment upon it is privileged. The verdict of the jury negatives any improper motive on the part of the defendant; and the case of *Campbell* v. *Spottiswoode* (3 Best & S. 769; per Cockburn, C.J., 777; 32 L. J. Q.B. 185, 192) is abundant authority for holding that the proceedings of parliament are matters which a newspaper is at liberty to discuss. They also cited *Stockdale* v. *Hansard* (2 Moo. & R. 12); *Lewis* v. *Levy* (9 L. J. Q.B. 282; El. B. & El. 557); *Turnbull* v. *Bird* (2 Fost. & F. 508); and *Lake* v. *King* (1 Saund. 131 b).

T. Jones and *R. E. Turner*, in support of the rule.—It has never been decided that the report in a newspaper of what passes in parliament is privileged, but, on the contrary, it has always been assumed that no such privilege exists. In *Stockdale* v. *Hansard* (9 Ad. & E. 1; 8 L. J. Q.B. 294) it is assumed that there would be no defence to an action like the present. The judgment of Littledale, J. (9 Ad. & E. 181; 8 L. J. Q.B. 316) establishes this proposition. The learned Judge said, "It is said that it is proper that the members of the House should have the right to send copies of all the parliamentary papers to their constituents to justify themselves in case their constituents should find any fault with their conduct in parliament. If the member whose conduct is blamed by his constituents wishes to vindicate his conduct, he may send what parliamentary papers he pleases, provided they do not contain any matter criminatory of individuals; but I think it can never be considered as justifiable to publish defamatory matter of other persons to justify his own conduct in parliament. As to the general information to be given to the public of all that is going on in parliament, I cannot conceive upon what ground that can be necessary. I do not consider as a matter of right that the public should know all that is going on in parliament. But as to the right of communicating the proceedings in parliament to the public, if it be meant to communicate any papers which contain

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matters defamatory as they think proper, that is a matter which, in my judgment, can only be done by an act of the legislature. And I do not think that the communicating defamatory papers to the public can be justified as a matter of necessity, or as reasonable to be done." And the learned Judge adds (9 Ad. & E. 182; 8 L J. Q.B. 316), "Then it is said that, though the defaming a man's character be an evil, yet it is an evil of small magnitude compared with the advantages that may result from the publication of defamatory papers. The advantages are altogether undefined and uncertain, and cannot, as a matter of law, be set off against the positive injury arising to a man from his character being defamed. But if such a principle of law could be admitted, it would be necessary to shew what was the advantage to be derived from such a publication."

[COCKBURN, C.J.—Though I concur in the decision in *Stockdale* v. *Hansard* (9 Ad. & E. 1; 8 L. J. Q.B. 294), I cannot agree with that learned Judge, that it is not of material importance for the public to know what passes in parliament.]

In the judgment of Patteson, J., that learned Judge says (9 Ad. & E. 211; 32 L. J. Q.B. 324), "But it is said that the constituents have a right to watch over the conduct of their representative, and therefore to know what passes in the House. The House itself is of a different opinion; for it is only by sufferance that any one is allowed to be present at its debates; it is only by sufferance that the debates are allowed to be published; and it is only by special permission of the House that its votes, proceedings and papers are communicated to the public, and that in the manner in which they think fit to order. If the constituents had a right to know all that passes, or if the House of Commons were an open Court, then, indeed, there might be some colour for saying that it was necessary to publish all its proceedings. It is upon the ground that Courts of Justice are open to the public that what passes there is public at the time, and that it is important that all persons should be able to scrutinize what is there done, that the publication of everything which there passes has been thought to be lawful. I for one do not go that length, but think, with some Judges of great name who have gone before me, that the doctrine is to be taken with much limitation; but I feel sure that it cannot apply to a Court which is not open, whose proceedings in contemplation of law are secret at the time they take place, and to whom *ex parte* statements, often grossly defamatory, are made without the defamed persons having any opportunity of being heard, and, indeed, often without the possibility of any inquiry being instituted."

[LUSH, J.—Do you contend that if there had been a debate on the subject of this report Hansard would have been liable to an action if he had reported it?]

Yes, if defamatory words had been spoken during the debate. In the discussions before parliament upon different bills by which it has been sought to amend the law of libel, it has always been assumed that no such privilege as that which is now claimed existed. This will be found by reference to the debates in *Hansard*[1]. With regard to the leading article, which is the subject of the

(1) *Hansard*, vol. 70, p. 1252, House of Lords, July 18, 1843. In Committee on the Libel and Defamation Bill: "On clause 7. permitting reports of proceedings in Courts of justice and in the two Houses of Parliament to be published, Lord Campbell said, that this was a most important clause. It was founded upon the tenth proposition of the recommendations of the Committee on the Law of Libel: 'That no action, indictment or information shall be maintainable for a faithful report of any proceedings of Courts of justice, or before magistrates acting in the discharge of their duty, or of any proceedings in either House of Parliament at which strangers have been permitted to be present, provided that such proceedings are not of such a nature that a report thereof would be contrary to good manners.'" Lord Brougham said (p. 1255), "The Courts never held, on the contrary, the rule was the other way, that any indemnity whatever should be given to the publisher for printing everything that was said in parliament." The clause was rejected.—*Hansard*, vol. 149, p. 947-8. Libel Bill. Second reading. Lord Campbell said, "In the discharge of his duty he had last session moved for a select committee to consider whether the same immunity might not be given to reports of the proceedings of both Houses of Parliament which were now given to reports of the proceedings in Courts of justice. . . . . He could not understand on what ground a difference should be made between the reports of the proceedings of the two Houses of Parliament and

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second count, the writer might have ascertained, if he had carefully read the report of the debate, that certain of the charges against the plaintiff were founded on error.

[HANNEN, J.—The jury have found that the comments are fair.]

There was no evidence for the jury.

[LUSH, J.—Under Fox's Libel Act the jury were entitled to decide the question.]

The jury should have been directed to find for the plaintiff.—[They cited *Davidson* v. *Duncan* (7 El. & B. 229; 26 L. J. Q.B. 104), per Wightman, J., and *Lewis* v. *Clement* (3 B. & Ald. 702).]

Cur. adv. vult.

The judgment of the Court[2] was delivered on Nov. 25 by—

COCKBURN, C.J.—This case was argued a few days since, before my Brothers Lush, Hannen and Hayes, and myself, and we took time, not to consider what our judgment should be, because as to that our minds were made up at the close of the argument, but because, owing to the importance and novelty of the point involved, we thought it desirable that our judgment should be reduced to writing before it was delivered. The main question for our decision is whether a faithful report in a public newspaper of a debate in either House of Parliament, containing matter disparaging to the character of an individual as having been spoken in the course of the debate, is actionable at the suit of the party whose character has thus been called in question. We are of opinion that it is not. Important as the question is, it comes now for the first time before a Court of law for decision. Numerous as are the instances in which the conduct and character of individuals have been called in question in parliament during the many years that parliamentary debates have been reported in the public journals, this is the first instance in which an action of libel founded on a report of a parliamentary debate has come before a Court of law. There is, therefore, a total absence of direct authority to guide us. There are indeed dicta of learned Judges having reference to the point in question, but they are conflicting and inconclusive, and having been unnecessary to the decision of the cases in which they were pronounced, may be said to be extrajudicial. In the case of *The King* v. *Wright* (8 Term Rep. 293), Mr. Justice Lawrence placed the reports of parliamentary debates on the same footing with respect to privilege as is accorded to reports of proceedings in Courts of justice, and expressed an opinion that the former were as much entitled to protection as the latter. But it is to be observed that in that case the question related to the publication by the defendant of a copy of a report of a committee of the House of Commons, which report the House had ordered to be printed, not to the publication of a debate unauthorized by the House. Again, in *Davidson* v. *Duncan* (7 El. & B. 232; 26 L. J. Q.B. 107), Mr. Justice Wightman seems disposed to treat the reports of proceedings in Parliament as entitled to the same privilege as reports of proceedings in Courts of Justice. But here, again, the question before the Court had reference to the report, not of a proceeding in Parliament but of

the reports of Courts of justice. His bill, he should add, proposed to restrict the immunity to reports of proceedings within the Houses at which strangers should have been permitted to be present, and not when they were sitting *foribus clausis*." Lord Wensleydale said (p. 969), "The bill raised the question whether newspaper proprietors should be permitted to publish with impunity speeches vilifying the character of individuals, on the ground that those speeches had been made in parliament. That certainly ought not to justify the publication of slander. Among several witnesses examined before the Select Committee was the solicitor to the *Times*, who stated that the proprietors thereof had been sued for having printed a speech made by Dr. Lushington in the House of Commons, and had to pay the costs of the action brought against them by the party who considered himself aggrieved by the report of the speech. He appealed to their Lordships whether they did not expect that their proceedings should be reported carefully in the public journals; and if so, whether publishers of papers should be exposed to any risk in that course? No doubt a member of parliament attempting to abuse the privileges of parliament, for the purposes of slander, was the worst of slanderers, and he certainly should endeavour to secure the public against such a gross abuse."

(2) Cockburn, C.J., Lush, J., Hannen, J. and Hayes, J.

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proceedings at a public meeting of Improvement Commissioners of a particular locality in which the conduct of an individual had been assailed, and which report the Court held not to be privileged, without being in any way called upon to determine how far the privilege would have extended to a report of proceedings in Parliament. On the other hand, in *Stockdale* v. *Hansard* (9 Ad. & E. 1; 8 L. J. Q.B. 294), Mr. Justice Littledale and Mr. Justice Patteson use language from which it may be safely inferred that they would have deemed the report of a parliamentary debate if containing an attack on character as not entitled to be held privileged in an action for libel. But here again the question was not how far the publication of parliamentary debates was privileged, but solely whether an order of the House of Commons directing a paper forming no part of the proceedings of the House, and containing libellous matter, to be printed and sold to the public, and a resolution of the House that such an order was within its privileges, protected the publisher of the paper from an action of libel. Any opinion expressed on the subject of the report of parliamentary debates was therefore beyond the scope of the inquiry, and must be considered as more or less extra judicial.

Several cases were cited in the course of the argument before us, but they turned for the most part on the question of parliamentary privilege, and therefore appear to us very wide of the present question. The case of *The King* v. *Wright* (8 Term Rep. 293) approaches nearest to the one before us. In that case a committee of the House of Commons having made a report imputing to Horne Tooke seditious and revolutionary designs after his acquittal on a trial for high treason, and the House having ordered the report to be printed for the use of its members, the defendant, a bookseller and publisher, printed and published copies of the report. On an application for a criminal information, the Court refused the rule, apparently on the ground that the report of a committee of the House of Commons, approved of by the House, being part of the proceedings of Parliament, could not possibly be libellous. Lord Kenyon, C.J., says (p. 296), "This report was first made by a committee of the House of Commons, then approved by the House at large, and then communicated to the other House, and it is now *sub judice;* and yet it is said that this is a libel on the prosecutor. It is impossible for us to admit that the proceeding of either of the Houses of Parliament is a libel, and yet that is to be taken as the foundation of this application." Lord Kenyon and his colleagues appear to have thought that a paper, though containing matter reflecting on the character of an individual, if it formed part of the proceedings of the House of Commons, would be so divested of all libellous character as that a party publishing it, even without the authority of the House, would not be responsible at law for the defamatory matter it contained. If this doctrine could be upheld, it would have a manifold bearing on the present question, for as no speech made by a member of either House, however strongly it may assail the conduct or character of others, can be held to be libellous, it would follow, such a speech being a parliamentary proceeding, that the publication of it would not be actionable. But this is directly contrary to the decision in *The King* v. *Lord Abingdon* (1 Esp. 225) and *The King* v. *Creevey* (1 M. & S. 273), in which the publication of speeches made in parliament reflecting on the character of individuals was held to be actionable; and it must be admitted that the authority of the case of *The King* v. *Wright* (8 Term Rep. 293) is much shaken, not only by the decision in *The King* v. *Creevey* (1 M. & S. 273), but also by the observations made by Lord Ellenborough in his judgment in the latter case. Beyond, however, impugning the authority of *The King* v. *Wright* (8 Term Rep. 293), the two last-mentioned cases afford little assistance towards the solution of the present question. There is obviously a very material difference between the publication of a speech made in parliament for the express purpose of attacking the conduct or character of a person, and afterwards published with a like purpose or effect, and the faithful publication of parliamentary debates in their entirety with a view to afford information to the public, and with a total absence of hostile intention or malicious motive towards any one. The case of *Lake* v.

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King (1 Saund. 131 b), which was cited in the argument before us, has no application to the present case. There a petition having been presented to the House of Commons by the defendant impugning the conduct of the plaintiff, copies of the petition had been printed and circulated among the members of the House, and it was held that the printing and circulating petitions, being according to the course and usage of parliament, no action would lie. The case of *Stockdale* v. *Hansard*[1], which was much pressed upon us by the counsel for the defendant, is in like manner altogether beside the question. In that case a report from the Inspectors of Prisoners relative to the gaol of Newgate, in which a work published by the plaintiff, a bookseller, and which had been permitted to be introduced into the prison, had been described as "of a most disgusting nature," and as containing "plates obscene and indecent in the extreme," had been presented to the House in conformity with the Act of 5 & 6 Will. 4. c. 38. In another report, being a reply to a report of the Court of Aldermen on the same subject, the inspectors had reiterated their charges as to the character of the book, adding that it had been described by medical booksellers to whom they (the inspectors) had applied for information as to its character, as "one of Stockdale's obscene books." These papers the House had ordered to be printed, not only for the use of the members, but also, in conformity with a modern practice, for public sale, the proceeds to be applied to the general expenses of printing by the House. An action of libel having been brought by Stockdale against the defendants, the printers of the House of Commons, for publishing these papers, the defence as raised by the plea which this Court had to consider was, first, that the papers in question had been published by order of the House of Commons; secondly, that the House having resolved (as it had done), with a view to such an action, that the power of publishing such of its reports, votes, and proceedings as it should be deemed necessary was an essential incident to the functions of parliament, the question became one of privilege, as to which the decision of the House was conclusive, and could not be questioned in a Court of law.

From the doctrines involved in this defence, namely, that the House of Commons could, by their order, authorize the violation of private rights, and by declaring the power thus exercised to be matter of privilege, preclude a Court of law from inquiring into the existence of the privilege,—doctrines which would have placed the rights and privileges of the subject at the mercy of a single branch of the legislature,—Lord Denman and his colleagues, in a series of masterly judgments which will secure to the Judges who pronounced them admiration and reverence so long as the law of England and a regard for the rights and liberties of the subject shall endure, vindicated at once the majesty of the law and the rights which it is the purpose of the law to uphold. To the decision of this Court in that memorable case we give our unhesitating and unqualified adhesion. But the decision in that case has no application to the present. The position that an order of the House of Commons cannot render lawful that which is contrary to law, still less that a resolution of the House can supersede the jurisdiction of a Court of law by clothing an unwarranted exercise of power with the garb of privilege, can have no application where the question is, not whether the act complained of, being unlawful at law, is rendered lawful by the order of the House, or protected by the assertion of its privilege, but is, independently of such order or assertion of privilege, in itself privileged and lawful.

Decided cases thus leaving us without authority on which to proceed in the present instance, we must have recourse to principle in order to arrive at a solution of the question before us. And fortunately we have not far to seek before we find principles in our opinion applicable to the case, and which will afford a safe and sure foundation for our judgment.

It is now well established that faithful and fair reports of the proceedings of Courts of justice, though the character of individuals may incidentally suffer, are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible. The immunity thus afforded in

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respect of the publication of the proceedings of Courts of justice rests upon a twofold ground. In the English law of libel malice is said to be the gist of an action for defamation. And though it is true that by malice, as necessary to give a cause of action in respect of a defamatory statement, legal and not actual malice is meant; while by legal malice, as is explained by Mr. Justice Bayley in *Bromage* v. *Prosser* (4 B. & C. 247, 255), is meant no more than the wrongful intention which the law always presumes as accompanying a wrongful act, without any proof of malice in fact, yet the presumption of law may be rebutted by the circumstances under which the defamatory matter has been uttered or published; and if this should be the case, though the character of the party concerned may have suffered, no right of action will arise. "The rule," says Lord Campbell, in the case of *Taylor* v. *Hawkins* (16 Q.B. 308; 20 L. J. Q.B. 313), "is, that if the occasion be such as repels the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of actual malice."

It is thus that, in the case of reports of the proceedings of Courts of justice, though individuals may occasionally suffer from them, yet, as they are published without any reference to the individuals concerned, but solely to afford information to the public and for the benefit of society, the presumption of malice is rebutted, and such publications are held to be privileged. The other and the broader principle on which this exception to the general law of libel is founded is, that the advantage to the community from publicity being given to the proceedings of Courts of justice is so great that the occasional inconvenience to individuals arising from it must yield to the general good. It is true that, with a view to distinguish the publication of proceedings in Parliament from that of those of Courts of justice, it has been said that the immunity accorded to the reports of the proceedings of Courts of justice is grounded on the fact of the Courts being open to the public, while the Houses of Parliament are not; as also that, by the publication of the proceedings of the Courts, the people obtain a knowledge of the law by which their dealings and conduct are to be regulated. But, in our opinion, the true ground is that given by Lawrence, J., in *The King* v. *Wright* (8 Term Rep. 293), namely, that though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast advantage to the public that the proceedings of Courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings. In *Davidson* v. *Duncan* (7 El. & B. 232; 26 L. J. Q.B. 107) Lord Campbell says: "A fair account of what takes place in a Court of justice is privileged. The reason is, that the balance of public benefit from the publicity is great. It is of great consequence that the public should know what takes place in Court, and the proceedings are under the control of the Judges. The inconvenience, therefore, arising from the chance of injury to private character is infinitesimally small as compared to the convenience of publicity." And Mr. Justice Wightman says: "The only foundation for the exception is the superior benefit of the publicity of judicial proceedings, which counterbalances the injury to individuals, though that at times may be great." Both the principles on which the exemption from legal consequences is thus extended to the publication of the proceedings of Courts of justice appear to us to be applicable to the case before us. The presumption of malice is negatived in the one case, as in the other, by the fact that the publication has in view the instruction and advantage of the public, and has no particular reference to the party concerned. There is in the one case, as in the other, a preponderance of general good over partial and occasional evil. We entirely concur with Lawrence, J., in *The King* v. *Wright* (8 Term Rep. 293), that the same reasons which apply to the reports of the proceedings in Courts of justice apply also to proceedings in parliament. It seems to us impossible to doubt that it is of paramount public and national importance that the proceedings of the Houses of Parliament shall be communicated to the public, who have the deepest interest

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in knowing what passes within their walls, seeing that on what is there said and done the welfare of the community depends. Where would be our confidence in the government of the country, or in the legislature by which our laws are framed, and to whose charge the great interests of the country are committed—where would be our attachment to the constitution under which we live, if the proceedings of the great council of the realm were shrouded in secrecy, and concealed from the knowledge of the nation? How could the communications between the representatives of the people and their constituents which are so essential to the working of the representative system, be usefully carried on if the constituencies were kept in ignorance of what their representatives are doing? What would become of the right of petitioning on all measures pending in parliament, the undoubted right of the subject, if the people are to be kept in ignorance of what is passing in either House? Can any man bring himself to doubt that the publicity given in modern times to what passes in parliament is essential to the maintenance of the relations subsisting between the government, the legislature and the country at large? It may, no doubt, be said that while it may be necessary as a matter of national interest that the proceedings in parliament should in general be made public, yet that debates in which the character of individuals is brought into question ought to be suppressed. But to this, in addition to the difficulty in which parties publishing parliamentary reports would be placed, if this distinction was to be enforced, and every debate had to be critically scanned to see whether it contained defamatory matter, it may be further answered that there is perhaps no subject in which the public have a deeper interest than in all that relates to the conduct of the public servants of the state; no subject of parliamentary discussion which more requires to be made known than an inquiry relating to it. Of this no better illustration could be possibly be given than is afforded by the case before us. A distinguished counsel, whose qualifications for the judicial bench had been abundantly tested by a long career of forensic eminence, is promoted to a high judicial office, and the profession and the public are satisfied that in a most important post the services of a most competent and valuable public servant have been secured. An individual comes forward and calls upon the House of Lords to take measures for removing the Judge, in all other respects so well qualified for his office, by reason that on an important occasion he had exhibited so total a disregard of truth as to render him unfit to fill an office for which a sense of the solemn obligations of truth and honour is an essential qualification. Can it be said that such a subject is not one in which the public has a deep interest, and as to which it ought not to be informed of what passes in debate? Lastly, what greater anomaly, or more flagrant injustice, could present itself than that, while from a sense of the importance of giving publicity to their proceedings the Houses of Parliament not only sanction the reporting of their debates, but also take measures for giving facility to those who report them, while every member of the educated portion of the community, from the highest to the lowest, looks with eager interest to the debates of either House, and considers it a part of the duty of the public journals to furnish an account of what passes there, we were to hold that the party publishing a parliamentary debate is to be held liable to legal proceedings because the conduct of a particular individual may happen to be called in question.

The learned counsel for the plaintiff scarcely ventured, as of his own assertion, to deny that the benefit to the public from having the debates in parliament published was as great as that which arose from the publishing of the proceedings of the Courts of justice; but he relied on the dicta of Mr. Justice Littledale and Mr. Justice Patteson, in *Stockdale* v. *Hansard* (9 Ad. & E. 1; 8 L. J. Q.B. 294), and on the opinions of certain noble and learned Lords in the course of debates in the House of Lords on bills introduced by Lord Campbell for the purpose of amending the law of libel. There is no doubt that in delivering their opinions in *Stockdale* v. *Hansard* (9 Ad. & E. 1; 8 L. J. Q.B. 294), the two learned Judges referred to denied the necessity, and,

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in effect, the public advantage of the proceedings in parliament being made public. The counsel for the defendant in that case having insisted, as a reason why the power to order papers to be printed and published should be considered within the privileges of the House of Commons, on the advantage which resulted from the proceedings of parliament being made known, the two learned Judges, not satisfied with demonstrating by conclusive argument, as they did, that the House had not the power to order papers of a libellous character, and forming no part of the proceedings of the House, to be published, still less to conclude the legality of such a proceeding by the assertion of privilege, thought it necessary to follow the counsel into the question of policy and convenience, and in so doing took what we cannot but think a very short-sighted view of the subject. This is the more to be regretted, as their observations apply not only to the printing of papers by order of the House, the only question before them, but also to the publication of parliamentary proceedings in general, the consideration of which was not before them, and therefore was unnecessary. Lord Denman, in his admirable judgment, than which a finer never was delivered within these walls, and in which the spirit of Holt is combined with the luminous reasoning of Mansfield, while overthrowing by irresistible arguments the positions of the Attorney-General, was content to answer the argument as to the policy of allowing papers to be published by order of either of the Houses of Parliament, not by denying the policy of giving to the House power to order the printing and publishing of papers, but by saying that such power must be provided for by legislation. On the subject of the publication of parliamentary debates he said nothing, nor was he called upon to say anything. That the legislature did not concur with the two Judges in their view of the policy is manifest from the Act of the 3 & 4 Vict. c. 9, passed in consequence of the decision in *Stockdale* v. *Hansard* (9 Ad. & E. 1; 8 L. J. Q.B. 294), the preamble of which statute recites that "it is essential to the due and effectual exercise and discharge of the functions and duties of parliament, and to the promotion of wise legislation, that no obstructions or impediments should exist to the publication of such of the reports, papers, votes or proceedings of either House of Parliament, as such House of Parliament may deem fit or necessary to be published." After which the Act proceeds to provide for the prevention of actions being in future brought in respect of papers published by order of either House of Parliament.

As regards the attempt of Lord Campbell to fix the legality of the publication of parliamentary debates on the sure foundation of statutory enactment, we think it may be as well accounted for by the apprehension as to the result of any proceeding at law in which the legality of such publication should come in question produced in his mind by the language of the Judges in *Stockdale* v. *Hansard* (9 Ad. & E. 1; 8 L. J. Q.B. 294), as by any conviction of the defectiveness of the law. And as regard the opinions of the noble and learned persons in the debates of the House of Lords, we must observe that the discussion proceeded on the assumption that the publishing of parliamentary debates, if involving defamatory matter, was contrary to law and actionable, although no decision to that effect had ever been pronounced, and no argument or discussion on the point had ever taken place. We, before whom this question is now presented for judicial decision for the first time, and who have had the advantage of able and learned arguments at the bar to assist us, must endeavour to ascertain the law as applicable to the case, and if our minds are satisfied as to what the law is, must decide according to our convictions, undeterred by the authority of great names or the opinions of those who, although our superiors in all other respects, had not the advantage of forensic discussion, or the opportunity of a judicial consideration of the subject. And this is the more necessary as we observe that one of the main grounds insisted on for resisting Lord Campbell's bill was, that there was no necessity for legislation, inasmuch as no action had ever been brought in respect of the publication of a parliamentary debate. We cannot but think that had the noble and learned persons referred to foreseen that such an action as the present would be brought, in which a party, having by his own attack upon a public man given rise to a debate in one of the Houses of

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Parliament which he knew would in the ordinary course of things be reported, brings an action for the publication of the discussion which he himself has provoked, and which publication he would have hailed with satisfaction if the result of it had been favourable to himself and damaging to the object of his attack, they would have paused before they assumed that by the law such an action could be maintained, or at all events would have seen the necessity for an immediate amendment of a law so defective. We, however, are glad to think that, on closer inquiry, the law turns out not to be as on some occasions it has been assumed to be. To us it seems clear that the principle on which the publication of the reports of the proceedings of Courts of justice have been held to be privileged apply to the reports of parliamentary proceedings. The analogy between the two cases is in every respect complete. If the rule has never been applied to the reports of parliamentary proceedings till now, we must assume that it is only because the occasion has never before arisen. If the principles which are the foundation of the privilege in the one case are applicable to the other, we must not hesitate to apply them, more especially when by so doing we avoid the glaring anomaly and injustice to which we have before adverted. Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied.

Our law of libel has in many respects only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized. Comments on government, on ministers and officers of state, on members of both Houses of Parliament, on Judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or of *ex officio* informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties? Again, the recognition of the right to publish the proceedings of Courts of justice has been of modern growth. Till a comparatively recent time the sanction of the Judges was thought necessary, even for the publication of the decisions of the Courts upon points of law. Even in quite recent days Judges in holding the publication of the proceedings of Courts of justice lawful, have thought it necessary to distinguish what are called *ex parte* proceedings as a probable exception from the operation of the rule. Yet *ex parte* proceedings before magistrates, and even before this Court, as for instance on application for criminal informations, are published every day; but such a thing as an action or indictment founded on a report of such an *ex parte* proceeding is unheard of, and if any such action or indictment should be brought it would probably be held that the true criterion of the privilege is not whether the report was, or was not, *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected.

It is to be observed that the analogy between the case of reports of proceedings in Courts of justice and those of proceedings in parliament being complete, all the limitations placed on the one to prevent injustice to individuals will necessarily attach on the other. A garbled or partial report, or of detached parts of proceedings, published with intent to injure individuals, will equally be disentitled to protection.

Our judgment will in no way interfere with the decisions that the publication of a single speech for the purpose or with the effect of injuring an

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individual will be unlawful, as was held in the cases of *The King* v. *Lord Abingdon* (1 Esp. 225) and *The King* v. *Creevey* (1 M. & S. 273). At the same time it may be as well to observe that we are disposed to agree with what was said in *Davidson* v. *Duncan* (7 El. & B. 232; 26 L. J. Q.B. 107) as to such a speech being privileged if *bonâ fide* published by a member for the information of his constituents. But whatever would deprive a report of the proceedings in a Court of justice of immunity will equally apply to a report of proceedings in parliament.

It only remains to advert to an argument urged against the legality of the publication of parliamentary proceedings, namely, that such publication is illegal as being in contravention of the Standing Orders of both Houses of Parliament. The fact, no doubt, is that each House of Parliament does by its Standing Orders prohibit the publication of its debates. But practically each House not only permits, but also sanctions and encourages the publication of its proceedings, and actually gives every facility to those who report them. Individual members correct their speeches for publication in *Hansard* or the public journals; and in every debate reports of former speeches contained therein are constantly referred to. Collectively as well as individually, the members of both Houses would deplore as a national misfortune the withholding their debates from the country at large. Practically speaking, therefore, it is idle to say that the publication of parliamentary proceedings is prohibited by parliament. The Standing Orders which prohibit it are obviously maintained only to give to each House the control over the publication of its proceedings, and the power of preventing or correcting any abuse of the facility afforded. Independently of the Orders of the Houses, there is nothing unlawful in publishing reports of parliamentary proceedings. Practically such publication is sanctioned by parliament. It is essential to the working of our parliamentary system and to the welfare of the nation. Any argument founded on its alleged illegality appears to us therefore entirely to fail. Should either House of Parliament ever be so ill-advised as to prevent its proceedings from being made known to the country—which certainly never will be the case—any publication of its debates made in contravention of its orders would be a matter between the House and the publisher. For the present purpose we must treat such publication as in every respect lawful, and hold that while honestly and faithfully carried on, those who publish them will be free from legal responsibility, though the character of individuals may incidentally be injuriously affected. So much for the great question involved in this case.

We pass on to the second branch of this rule, which has reference to alleged misdirection in respect of the second count of the declaration, which is founded on the article in the *Times* commenting on the debate in the House of Lords, and the conduct of the plaintiff in preferring the petition which gave rise to it.

We are of opinion that the direction given to the jury was perfectly correct. The publication of the debate having been justifiable, the jury were properly told that the subject was, for the reasons we have already adverted to, pre-eminently one of public interest, and therefore one on which public comment and observation might properly be made; and that consequently the occasion was privileged in the absence of malice. As to the latter, the jury were told that they must be satisfied that the article was an honest and fair comment on the facts; in other words, that in the first place they must be satisfied that the comments had been made with an honest belief in their justice; but that this was not enough, inasmuch as such belief might originate in the blindness of party zeal, or in personal or political aversion; that a person taking upon himself publicly to criticize and to condemn the conduct or motives of another must bring to the task, not only an honest sense of justice, but also a reasonable degree of judgment and moderation, so that the result may be what a jury shall deem under the circumstances of the case a fair and legitimate criticism on the conduct and motives of the party who is the object of censure.

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Considering the direction thus given to have been perfectly correct, we are of opinion that in respect of this alleged misdirection, as also on the former point, the ruling at Nisi Prius was right, and that consequently this rule must be discharged.

Rule discharged.

IN THE QUEEN'S BENCH. Nov. 27, 1868.

HARGREAVES AND ANOTHER *v.* ARMITAGE.

38 L. J. Q.B. 46; L. R. 4 Q.B. 143; 17 W. R. 140.

Sheriff—Escape—Irregular Order of Release by Registrar in Bankruptcy.

SHERIFF. C.—*By the Bankrupt Law Consolidation Act*, 1849 (12 & 13 *Vict. c.* 106), *s.* 27, "*any registrar of the Court may, during vacation, or during the illness or absence from any other reasonable cause of any Commissioner thereof, act for and as the deputy of such Commissioner; and any such registrar so acting shall have and exercise all power vested in the Court,*" &c. *By the General Orders in Bankruptcy*, 1852, *rule* 44. (*a rule continued by No.* 36. *of the Rules and Orders under the Bankruptcy Act*, 1861), "*except in cases of emergency, the nature whereof shall be entered on the proceedings, no registrar shall sit or act for any Commissioner under section* 27. *without the express request in writing of such or some other Commissioner.*" *In an action against the sheriff for an escape, he pleaded that he discharged the debtor in obedience to an order for his release duly made by a registrar of the Court of Bankruptcy. The plaintiff replied that the registrar had not been requested in writing by any Commissioner of the Court to sit or act for him, nor had any case of emergency, as in the General Order of* 1852, *arisen, nor was the nature of such emergency entered on the proceedings*:—Held, *on demurrer, that the replication was bad and the sheriff not liable; as, although the order might possibly have been reversed by the Lord Chancellor for irregularity, there was nothing on the face of it to give notice to the sheriff of its irregularity, and it was not his duty to inquire whether the registrar was duly qualified.*

Declaration against the defendant, as sheriff of Lancashire, for allowing one Samuel Harris Brockelhurst, whom he had arrested under a *ca. sa.*, at the suit of the plaintiff, to escape.

Second plea—That, after the passing of the Bankruptcy Acts, 1859 and 1861, the defendant, as and being the sheriff of Lancashire, took Brockelhurst into custody, and detained him in custody, in execution, as a prisoner for debt, at the suit of the plaintiffs in the action, under the writ of *capias ad satisfaciendum*, as in the declaration set forth; and thereupon, afterwards, and whilst the defendant, as in the declaration mentioned, had and detained Brockelhurst in the custody and detainer of the defendant; and whilst Brockelhurst remained in such custody and detainer, Brockelhurst duly filed a petition for adjudication of bankruptcy in the Court of Bankruptcy for the Manchester district, at Manchester, and proceedings were so duly had and taken in and by the Court, in the matter of the bankruptcy, that Brockelhurst was duly adjudicated bankrupt, and afterwards surrendered and duly obtained his protection from arrest; and thereupon, afterwards, and whilst Brockelhurst was still so in the custody and detainer of the defendant, an order was duly made upon the defendant by the registrar of the Court of Bankruptcy, duly acting and having jurisdiction in that behalf, according to the provisions of the Bankruptcy Laws, for the immediate release and discharge of Brockelhurst from the custody of the defendant as to the detainer by the defendant and all other detainers, which order, and the summons thereon indorsed, were and are respectively in the words and figures following, and to the following tenor and effect:

"The Bankruptcy Act, 1861.—In Her Majesty's Court of Bankruptcy

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at Manchester.—January 26, 1867.—I certify that Samuel Harris Brockelhurst, of No. 159, Tamworth Street, Stretford Hulme, in the county of Lancaster, builder and contractor, has this day been brought up before me by the within-named Henry Mapleston, in obedience to the within summons; and I did, upon the application of Mr. Coulson, solicitor for the said bankrupt, order his immediate release from the custody of the sheriff of Lancaster as to the present and all other detainers.

"DAVID C. MACRAE, Registrar."

(Seal of the Court.)

And the said summons above referred to was and is in the words and figures following, and to the following tenor and effect; that is to say:

"The Bankruptcy Act, 1861.—In the Court of Bankruptcy for the Manchester District at Manchester.—In the matter of Samuel Harris Brockelhurst, by whom a petition for adjudication of bankruptcy has been filed.—To Henry Mapleston, of the city of Manchester, sheriff's officer.—These are to will and require you, to whom this summons is directed, personally to appear before the registrar acting in the prosecution of the said petition, on Saturday, January 26 instant, at one o'clock in the afternoon precisely, in this Court, then and there to be examined by virtue of the said petition and of the above-mentioned act, and bring with you the body of the said Samuel Harris Brockelhurst; and herein you are not to fail at your peril. Given under my hand and under the seal of the Court this 26th day of January, 1867.

"D. C. MACREA, Registrar."

"Note.—This summons is issued on the application of Messrs. Grundy & Coulson, the solicitors for and on behalf of the said bankrupt."

Averment—That David C. Macrea, in the order and summons mentioned, and making the same, was and is the registrar duly appointed under the Bankruptcy Acts in the Court of Bankruptcy, and had jurisdiction in the matter; and Mapleston, in the summons mentioned, was the agent and servant of the defendant as such sheriff, and the summons was served on him as the agent and servant of the defendant, and the registrar of the Bankruptcy Court having jurisdiction in the matters aforesaid made the order of discharge; and the defendant thereupon, acting *bonâ fide* and in obedience to the order, and believing the same to be binding on him in law, released and discharged Brockelhurst; which are the acts complained of in the declaration.

Demurrer to the plea, and joinder in demurrer.

Replication to the plea—That David C. Macrea, in making the order in the plea mentioned, claimed and assumed to act by virtue of the provisions of the 27th section of a certain Act entitled the Bankrupt Law Consolidation Act, 1849. And the plaintiffs say that, in pursuance of the powers therein contained, a general order was, upon October 19, 1852, duly made, which was and is in the words and figures following; that is to say: "Except in cases of emergency, the nature whereof shall be entered on the proceedings, no registrar shall sit or act for any Commissioner under section 27[1] (meaning the said 27th section before mentioned), without the express request in writing of such or some other Commissioner." And the plaintiffs say that, in pursuance of the powers contained in the Bankruptcy Act, 1861, certain general orders were duly made,

(1) By the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), s. 27, it is enacted, "that any registrar of the Court may, during vacation, or during the illness, or absence from any other reasonable cause, of any Commissioner thereof, act for and as the deputy of such Commissioner; and any such registrar so acting shall have and exercise all power vested in the Court, except the power of commitment, the hearing of any disputed adjudication, or the hearing or determining of any question of the allowance or suspension of any bankrupt's certificate."

By the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 52, the registrars of the Court of Bankruptcy shall have power to make adjudication of bankruptcy, to receive the surrender of any bankrupt, to grant protection, to pass the last examination of any bankrupt in cases wherein the assignees and creditors do not oppose, to hold and preside at meetings of creditors, to audit and pass accounts of assignees, and to sit in chambers and dispatch there such part of the administrative business of the Court, and such uncontested matters as shall be defined in general orders, &c.

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whereby it was provided, amongst other things, that the general order of October 19, 1852, should be acted upon for the purposes mentioned in the 45th section of the last-mentioned Act[2]. And that the order bearing date October 19, 1852, before mentioned, was, at the time of the making of the said order in the said second plea mentioned, and still is in full force and effect. And the plaintiffs further say, that David C. Macrea had not, before the making of the order in the plea mentioned, been requested in writing by any Commissioner of the Court to sit or act for him, nor had any case of emergency, as in the general order of October 19, 1852, mentioned, arisen, nor was the nature of such emergency entered upon the proceedings in manner provided by the general order.

Demurrer, and joinder in demurrer.

J. P. Murphy, in support of the demurrer.—The order of release by the registrar of the Bankruptcy Court which is pleaded by the defendant, is bad on the face of it. In *Ex parte Morgan; In re Pennell* (32 L. J. Bk. 61) the Lord Chancellor expressed his opinion that where an order was made by a registrar, acting for and in the absence of the Commissioner of the district Court of Bankruptcy, it was essential, not only that the order should be properly made, but that it should shew on the face of it that it was properly made, and that as there was nothing on the record in the case before the Court to shew that the Commissioner was absent "from illness or any other reasonable cause," or that the registrar had been expressly in writing requested to act for him, it was irregular.

[LUSH, J.—It would be one thing to hold this order bad on appeal to the Lord Chancellor, and another thing to hold that it was bad so as to afford no protection to third parties. How do you distinguish this case from *Lloyd* v. *Harrison* (35 L. J. Q.B. 153), where it was held that the sheriff was justified in discharging a debtor upon production of the certificate of registration of a deed of arrangement which afterwards turned out to be invalid?]

If the order is defective on the face of it, it ought not to protect the sheriff, and in the opinion of the Lord Chancellor, the order ought itself to shew the circumstances under which the registrar was authorized to act.

[LUSH, J.—Your replication does not say that the order was not made during vacation. At any rate the registrar might have been duly authorized to make the order: and how is the sheriff able to inspect the proceedings in bankruptcy?]

The registrar is an officer with a conditional jurisdiction, and the sheriff ought to satisfy himself that these conditions have been observed.

Holker (*Baylis* with him), in support of the plea, was not heard.

LUSH, J.—I am of opinion that the plea is good, and the replication bad. The Registrar, as regards the sheriff, must be taken to have had the power which he professed to exercise. By section 27. of the Bankrupt Act of 1849 the registrar may during vacation, or in case of the illness, &c. of the Commissioner, act for him for the purpose of granting orders like the one set out in the plea. By a general order made under the power of the Bankrupt Acts, the authority created by section 27. can only be exercised after certain directions have been fulfilled. But it is impossible for the sheriff to know whether these events have happened. It is true that the Lord Chancellor has jurisdiction over such an order upon appeal, and may direct it to be vacated; but if there is no such appeal, the order is like the certificate in *Lloyd* v. *Harrison* (35 L. J. Q.B. 153). It purports to be duly made by a competent officer, and the Court cannot throw on the sheriff the burden of inquiring whether it was in fact duly made.

HANNEN, J. and HAYES, J. concurred.

Judgment for the defendant.

(2) By No. 36. of the General Orders made under the powers of the Bankruptcy Act, 1861, s. 45, until further order, and in cases not otherwise provided for by these orders, the Rules and Orders in Bankruptcy bearing date respectively October 19, 1852, &c., shall, where applicable, &c., be acted upon for the several purposes mentioned in section 45.

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IN THE QUEEN'S BENCH. Nov. 27, 1868.

MAINWARING *v.* MILNER AND ANOTHER.

38 L. J. Q.B. 49; L. R. 4 Q.B. 149; 9 B. & S. 1002; 19 L. T. 559; 17 W. R. 608.

*Bail and Bail Bond—Arrest on Mesne Process—Render to Queen's Prison or County Gaol—*11 *Geo.* 4. *&* 1 *Will.* 4. *c.* 70. *s.* 21.—1 *&* 2 *Vict. c.* 110. *ss.* 1. *and* 3.

CRIMINAL LAW. D.—*The provisions of* 11 *Geo.* 4. *&* 1 *Will.* 4. *c.* 70. *s.* 21, *enabling defendants held to bail on mesne process to be rendered in discharge of their bail to the prison of the Court out of which the process issued, or to the common gaol of the county in which they were arrested, apply to arrests by virtue of writs of capias under* 1 *&* 2 *Vict. c.* 110.

M. having been arrested in Yorkshire upon a capias under 1 *&* 2 *Vict. c.* 110, *the defendants executed a bail-bond, by which they undertook that if he should be condemned in the action he should satisfy the costs and condemnation or render himself to the custody of the keeper of the Queen's Prison:*— Held, *in an action on the bond, the declaration alleging that M. did not render himself to the custody of the keeper of the Queen's Prison, that a plea that M. in due time rendered himself to the common gaol of the county in which he was arrested, was good.*

Declaration, that the defendants, on June 25, 1867, at Barnsley, in Yorkshire, came in their proper persons before one Edward Lancaster, then and there being a Commissioner duly appointed and empowered to take and receive all and every such recognizance or recognizances of bail or bails in and for the county as any person or persons should be willing to acknowledge or make before him in any action or suit depending in this honourable Court, according to the form of the statute in such case made and provided, and then and there before him, so being such Commissioner, became pledge and bail, and each of them became pledge and bail, for one William Milner, and then and there did jointly and severally undertake that if William Milner should be condemned in an action of debt then depending against him in this honourable Court at the suit of the plaintiff, that he should satisfy the costs and condemnation or should render himself into the custody of the keeper of the Queen's Prison or that the defendants would do it for him which recognizance was afterwards brought into this honourable Court to be enrolled and recorded, and thereupon the recognizance, at the request of the plaintiff, was then and there duly enrolled and recorded in this honourable Court as by the record of the recognizance still remaining in this honourable Court fully appears; and although the plaintiff afterwards, by the judgment of this honourable Court, recovered in the action against William Milner 256*l.* 14*s.* 6*d.* for her damages, which she had sustained as well by reason of the debt then owing by him to the plaintiff as for her costs and charges by her about her suit in that behalf expended, whereof W. Milner was convicted, as by the record and proceedings thereof still remaining in this honourable Court more fully appears, yet he hath not satisfied to the plaintiff the damages, being the costs and condemnation in the recognizance mentioned, or any part thereof, nor rendered himself on that occasion unto the custody of the keeper of the Queen's Prison according to the recognizance; and the recognizance and judgment still remain in force, and the plaintiff has not as yet obtained any execution or satisfaction of the judgment, whereby an action has accrued to the plaintiff to demand and have of the defendants the sum of 256*l.* 14*s.* 6*d.* Breach, that the defendants had not nor had either of them paid the amount or any part of it. There was also the common count for money payable by the defendants to the plaintiff on a recognizance.

Second plea—That the recognizance in the first count is the same as that

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in the second count, and that William Milner was held to bail on a writ of *capias* issued under the Act 1 & 2 Vict. for, amongst other things, abolishing arrest on mesne process in civil actions, except in certain cases, under which writ he was arrested in the county of York. Averment, that on the occasion in the declaration mentioned William Milner in due time rendered himself to the common gaol of the county in which he was so arrested, according to the form of the statute in such case made and provided.

Demurrer and joinder in demurrer.

Ryalls, in support of the demurrer.—The plea is bad. The render relied on by the plea is not a render within the terms of the recognizance. The defendants will contend that the Act of 11 Geo. 4. & 1 Will. 4. c. 70. s. 21.[1] enabling a defendant in custody under mesne process to be rendered to the gaol of the county where he was arrested, instead of to the prison of the Court where he was arrested, applies to an arrest under a *capias*, according to 1 & 2 Vict. c. 110. But the former Act applies only to mesne process properly so called, and mesne process is altogether abolished by the Act 1 & 2 Vict. c. 110. Under the old law a defendant in custody under mesne process could not be discharged except for irregularity, without extinguishing the debt, but if arrested under the new practice he may be discharged without any such difficulty. In *Brown* v. *M'Millan* (7 Mee. W. 196; 10 L. J. Ex. 147), it was held that the 7th section of 7 & 8 Geo. 4. c. 71, providing that no sheriff or other officer should upon any mesne process issuing out of the superior Courts, arrest or hold any person to special bail within certain counties, unless the process were indorsed for bail in a sum not less than 50*l*., did not apply to writs of *capias* issued under 1 & 2 Vict. c. 110; and Parke, B. says that the words mesne process are used in a different sense in the two acts. In *Ireland* v. *Berry* (1 Dowl. & L. P.C. 866; 13 L. J. Q.B. 140) it was held that rule 1. of Trinity Term, 3 Will. 4, did not apply to the case of a defendant in custody under 1 & 2 Vict. c. 110, as the detention was on a proceeding quite collateral, and not a custody under process within the meaning of 2 Will. 4. c. 39.

[*Forbes*, in support of the plea, referred to rule 106. of Hilary Term, 1853[2].]

(1) By 11 Geo. 4. & 1 Will. 4. c. 70. s. 21, "A defendant, who shall have been held to bail upon any mesne process issued out of any of His Majesty's superior Courts of record, may be rendered in discharge of his bail, either to the prison of the Court out of which such process issued, according to the practice of such Court, or to the common gaol of the county in which he was so arrested, and the render to the county gaol shall be effected in the manner following; that is to say, the defendant, or his bail, or one of them, shall for the purpose of such render obtain an order of a Judge of one of His Majesty's superior Courts of Westminster, and shall lodge such order with the gaolor of such county gaol, and a notice in writing of the lodgment of such order, and of the defendant's being actually in custody of such gaolor by virtue of such order, signed by the defendant, or the bail, or either of them, or by the attorney or agent of any or either of them, shall be delivered to the plaintiff's attorney or agent, and the sheriff or other person responsible for the custody of the debtors in such county gaol, shall, on such render so perfected, be duly charged with the custody of such defendant, and the said bail shall be thereupon wholly exonerated from liability as such."

By 1 & 2 Vict. c. 110, "An Act for abolishing arrest on mesne process in civil actions, except in certain cases," &c., after reciting that the present power of arrest upon mesne process is unnecessarily extensive and severe, and ought to be relaxed; it is enacted, "that from and after the time appointed for the commencement of this Act no person shall be arrested upon mesne process in any civil action in any inferior Court whatsoever, or (except in the cases and in the manner hereinafter provided for) in any superior Court."

By section 3, "If a plaintiff in any action in any of Her Majesty's superior Courts of law at Westminster, in which the defendant is now liable to arrest, whether upon the order of a Judge, or without such order, . . . shall, by the affidavit of himself or some other person, shew, to the satisfaction of a Judge of one of the said superior Courts, that such plaintiff has a cause of action against the defendant or defendants to the amount of 20*l*. or upwards, or has sustained damage to that amount, and that there is probable cause for believing that the defendant . . . . or any one or more of the defendants is or are about to quit England unless he or they be forthwith apprehended, it shall be lawful for such Judge, by a special order, to direct that such defendant or defendants so about to quit England shall be held to bail for such sum as such Judge shall think fit, not exceeding the amount of the debt or damages."

(2) By Regulæ Generales, 1853, 106, "on application by defendant or his bail, or either of them, for an order to render a defendant to a county gaol, it shall be specified on whose behalf such application shall be made, the state of the proceedings in the cause, for what amount the

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That rule at the most only recognizes the possibility of a render to the county gaol after 1 & 2 Vict. c. 110.

[LUSH, J.—The Queen's Prison is discontinued as a place of imprisonment for debtors by 25 & 26 Vict. c. 104, and Whitecross Street prison is substituted for it. It is impossible, therefore, that the render can be literally according to the terms of the recognizance.]

The Act 1 & 2 Vict. c. 110. contains no provisions as to the render of defendants in discharge of bail, and it was the duty of the defendants to have caused the recognizance to be framed in such a manner as that they might have been enabled to render the debtor to a county gaol.

Forbes, in support of the plea, was not called upon.

LUSH, J.—I am of opinion that the defendants are entitled to our judgment. I speak on this subject with much more diffidence than I should have felt some years ago, but it is my impression that ever since the passing of 1 & 2 Vict. c. 110. there has never been a doubt but that the facilities for rendering defendants in discharge of bail introduced by 11 Geo. 4. & 1 Will. 4. c. 70. s. 21. applied to defendants in custody under 1 & 2 Vict. c. 110. The act 11 Geo. 4. & 1 Will. 4. c. 70. s. 21, which enables a defendant to be rendered to the gaol of the county in which he was arrested instead of to the prison of the Court out of which the process issued, uses the words "held to bail upon any mesne process." But the term "mesne process" equally applies to process by writ of *capias* under 1 & 2 Vict. c. 110. The distinction between the two kinds of process is, that whereas before the passing of this last Act mesne process might be issued at the will of the party and before the commencement of an action, it can now only be issued by special order of a Judge at chambers, and is entirely collateral to the action itself. It is an interlocutory process, the object of which is not to keep the debtor in prison as a satisfaction of the debt, but to secure his person so as to prevent him from going abroad. But I think that until now no one ever doubted that the existing power of arrest was within the meaning of 11 Geo. 4. & 1 Will. 4. c. 70. I am clearly of opinion that assuming that the recognizance was properly framed, a render to the county gaol would have been a good discharge of the bail before this Act; and this brings us to the question, is it a good discharge of the present recognizance? I do not mean to say that the recognizance might not have been framed so as to express with more accuracy what the defendants were bound to do, but we must read it so as to give effect to the intention of the parties if the words enable us to do so. Now the words of the obligation are, "that W. Milner should satisfy the costs and condemnation or should render himself to the custody of the keeper of the Queen's Prison;" and the question is whether W. Milner has been rendered so as to discharge this obligation. No doubt when the form of the recognizance was first prepared the Queen's Prison meant the old prison belonging to this Court, but when the defendants entered into their obligation an Act of Parliament had forbidden that this prison should any longer be used for the imprisonment of debtors. The words "Queen's Prison" can now therefore be used in no other sense than that of any prison of the Queen to which the defendant may lawfully be rendered, and the plea affords a good answer to the action by shewing that there was a render to the county gaol, which, by 11 Geo. 4. & 1 Will. 4. c. 70, was substituted for the prison of the Court out of which the process issued.

HANNEN, J.—I am of the same opinion. The question is, what have the bail agreed to do? They have agreed that the debtor shall satisfy the costs and condemnation or render himself into the custody of the Queen's Prison. Now, the defendant could not render himself to a prison which was no longer available for the imprisonment of debtors, and I take it that what was meant was that he should render himself according to the ordinary practice at the present time;

defendant was held to bail, and by the sheriff of what county he was arrested, which facts shall be stated in the order; and that on such order being lodged with the gaoler of the county gaol in which such defendant was so arrested, the defendant may be rendered to his custody in discharge of the bail," &c.

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and I see that, in the 9th edition of *Chitty's Forms*, in the form of recognizance of bail, the obligation is to render the defendant to the custody of the keeper of the Queen's Prison, so that the old words are still used, I suppose because it was thought that they would receive the same construction as under the former mesne process. Now that the Queen's Prison as such has been abolished the words must mean that the render shall be to the prison which is in the place of the Queen's Prison. The Act 1 & 2 Vict. c. 110. is intituled 'An Act for abolishing arrest on mesne process in civil actions, except in certain cases,' clearly shewing that the legislature intended that in some instances mesne process should continue to exist, and the process by special order under this Act is something in lieu of mesne process, and therefore subject to the provisions of 11 Geo. 4. & 1 Will. 4. c. 70. s. 21.

HAYES, J., concurred.

Judgment for the defendants.

IN THE QUEEN'S BENCH. Dec. 17, 1868.

FORD AND ANOTHER *v.* COTESWORTH AND ANOTHER.

38 L. J. Q.B. 52; L. R. 4 Q.B. 127; 19 L. T. 634: affirmed, 39 L. J. Q.B. 188; L. R. 5 Q.B. 544; 23 L. T. 165; 18 W. R. 1169 (Ex. Ch.).

Referred to *Cargo Ex "Argos,"* [1873] E. R. A.; L. R. 5 P.C. 134; 28 L. T. 745; 21 W. R. 707 (P.C.): followed, *Cunningham* v. *Dunn*, [1879] E. R. A.; 48 L. J. C.P. 62; 3 C.P. D. 443; 38 L. T. 631 (C. A.). Referred to, *Wright* v. *New Zealand Shipping Co.*, 1878, 4 Ex. D. 165; 40 L. T. 413 (C. A.); *Postlethwaite* v. *Freeland*, [1880] E. R. A.; 49 L. J. Ex. 630; 5 A.C. 599; 42 L. T. 845; 28 W. R. 833 (H.L.); *Dahl* v. *Nelson*, [1880] E. R. A.; 12 Ch. D. 568; 41 L. T. 365: affirmed, 50 L. J. Ch. 411; 6 A.C. 38; 44 L. T. 381; 29 W. R. 543 (H.L.). Referred to, *Hick* v. *Raymond*, [1892] E. R. A.; 61 L. J. Q.B. 42; [1891] 2 Q.B. 626 (C. A.): affirmed, [1893] E. R. A.; 62 L. J. Q.B. 98; [1893] A.C. 22; 68 L. T. 175; 41 W. R. 384 (H.L.). Referred to, *Lyle Shipping Co.* v. *Cardiff Coporation*, [1900] E. R. A.; 69 L. J. Q.B. 899; [1900] 2 Q.B. 638; 83 L. T. 329; 49 W. R. 85 (C. A.); *Hick* v. *Rodocanachi*, [1891] E. R. A.; 61 L. J. Q.B. 42; [1891] 2 Q.B. 626; 40 W. R. 161 (C. A.): affirmed, [1893] A.C. 22 (H.L.). Referred to, *Castlegate Steamship Co.* v. *Dempsey & Co.*, [1892] E. R. A.; 61 L. J. Q.B. 620; [1892] 1 Q.B. 854; 66 L. T. 742; 40 W. R. 533 (C. A.); *Ardan Steamship Co.* v. *Weir & Co.*, 1904, 6 F. 294 (C. S.): reversed, [1905] E. R. A.; 74 L. J. P.C. 143; 1905, A.C. 501; 93 L. T. 559 (H.L.).

Shipping — Charter-Party — Discharge of Cargo — Reasonable Time — Contract implied by Law—Action.

SHIPPING. B. I.—*Where a charter-party is silent as to the time to be occupied in the discharge of cargo at the port of destination, the law implies a contract to discharge within a reasonable time. But where delay in the discharge takes place owing to unforeseen circumstances at the port of destination, over which neither the charterer nor the shipowner, whose joint duty it is to deliver the cargo, had any control, and neither party has undertaken by contract, express or implied, that there should be no delay, any loss arising therefrom must remain where it lies, and cannot form the subject of an action.*

The first count of the declaration stated that the plaintiffs and the defendants agreed by charter-party that the plaintiffs' ship called the "*Craigie Lea,*" then being in the port of Liverpool, should immediately be made ready to receive cargo, and should then be loaded according to the defendants' orders, and proceed with all convenient speed to Lima or Valparaiso, and that the defen-

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dants should load her with a full and complete cargo of lawful merchandise, which she should carry as aforesaid, and then deliver to the defendants' consignees, in consideration of certain sums in the said charter-party in that behalf respectively mentioned, and upon the terms (amongst others) that the said ship should be unloaded at the port of discharge by the defendants' consignees with all due and reasonable despatch, and within a reasonable time for so doing; that the said ship was made ready and loaded by the defendants under the said charter-party, and by their orders proceeded to Lima, and safely carried the said cargo to Lima aforesaid, and was then ready to deliver the same to the defendants' consignees according to the said charter-party, whereof they had also due notice; and all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiffs to have the said charter-party performed by the defendants on their part, and to have the said vessel unloaded and discharged of her cargo by the defendants' consignees within a reasonable time in that behalf. Yet the defendants' consignees did not nor would unload the said ship at her said port of discharge with due and reasonable despatch, nor within a reasonable time in that behalf for so doing, and also delayed, kept and detained the said ship for divers long and excessive and unreasonable periods of time in unloading and discharging the cargo out of the same, whereby the plaintiffs during all those times aforesaid were deprived of the use of the said ship, and incurred expense in keeping the same and maintaining the master and crew thereof, and were put to extra cost in and about insuring the same, and lost and were deprived of the benefit of divers homeward charters which could and but for the aforesaid wrongful detention of the said ship would have been made. There were also counts for the demurrage of the ship, and for money upon an account stated.

Third plea—That it was by the said charter-party provided that the defendants should not be liable in respect of (amongst other things) any delay in the unloading of the said ship, or for any delay, keeping or detention thereof caused by the acts or restraints of princes and rulers; and that the defendants were always ready and willing to unload the said ship with due and reasonable despatch and within a reasonable time in that behalf, and the defendants did not delay, keep or detain the said ship for any long, excessive or unreasonable period in unloading the same, but used the best care and despatch in the premises; but that the said delay complained of by the plaintiffs in the unloading of the said ship was caused solely by the matters and things beyond the power and control of the defendants and by the said charter-party provided to be excepted, to wit, by the acts and restraints of princes and rulers, within the meaning of the said charter-party.

Issue thereon.

At the trial, which took place before Cockburn, C.J., at Guildhall, at the Sittings after Trinity Term, 1868, it appeared that the defendants, on July 24, 1865, chartered at a lump sum the plaintiffs' ship, the "*Craigie Lea*," from Liverpool to Valparaiso or Lima. The charter-party fixed the number of days for loading the ship, but was silent as to the time to be allowed the charterers for unloading at the port of destination, merely providing that the ship should proceed there, or as near as she could safely get, and then deliver the cargo in the usual and customary manner agreeably to bills of lading. The "*Craigie Lea*" arrived at Callao, the port of Lima, on February 26, 1866, and lay waiting to discharge from that day down to March 9. The Peruvian Government allow no cargo to be landed at Callao except through the custom-house, and the ordinary discharge of a ship at that port, owing to the dilatoriness both of the authorities and the persons employed about the port, the absence of the usual appliances and the total want of organization which prevails there, is very slow. At the time of the arrival of the "*Craigie Lea*," the usual difficulties attendant upon the unshipping of goods at Callao were increased in an extraordinary degree by reason of the political disturbances which prevailed in the country, and the fact that hostilities with Spain were imminent. The "*Craigie Lea*" commenced unshipping goods on March 9, and continued

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discharging small portions of her cargo from time to time as launches could be procured for the purpose, down to April 11. On that day news of the bombardment of Valparaiso by the Spanish Fleet arrived at Callao, and thereupon the custom-house authorites refused to permit the landing of more goods; and on April 18 issued orders to the captains of ships in the port to remove from their discharging places. The "*Craigie Lea*," nevertheless, remained at her moorings until April 26, on which day the Spanish Fleet arrived off Callao; and being in the line of fire she then removed under the direction of the Spanish Admiral from Callao to the north side of the bay. The blockade of Callao continued from April 26 until May 10, on which day the Spanish Fleet sailed away from Callao; and on May 12 the "*Craigie Lea*" returned to the discharging place, and recommenced unloading and completed the discharge of her cargo on June 21.

The Lord Chief Justice ruled that the charter-party being silent as to the time for unloading at the port of destination, there was an implied contract on the part of the defendants to discharge within a reasonable time, and left to the jury the questions, first, whether looking to the ordinary state of circumstances at the port there was any unreasonable delay on the part of the defendants; secondly, whether looking to the existing or extraordinary circumstances at the port there was any unreasonable delay, reserving for the Court the question whether the plaintiffs' claim was to be decided with reference to the ordinary or extraordinary state of circumstances, and directing the jury to assess the damages provisionally in respect of the seven days, from April 11 to April 18, during which the ship was at the discharging place, but unable to unload by reason of the refusal of the custom-house authorities to suffer goods to be landed. The jury found that there was no unreasonable delay on the part of the defendants under either the ordinary or extraordinary circumstances, and assessed the amount due for demurrage for the seven days (if any) at 15*l*. a day; whereupon the Lord Chief Justice directed a verdict to be entered for the defendants, reserving leave to the plaintiffs to move to set aside the verdict with respect to the seven days and enter a verdict for the plaintiffs.

Field obtained a rule, in pursuance of the leave reserved, calling upon the defendants to shew cause why the verdict should not be set aside, and a verdict entered for the plaintiffs for 105*l*., or such further sum as the Court might direct, or for a new trial, upon the ground that the cargo was not discharged within a reasonable time, the delay having been caused by political and other extraordinary circumstances not within the contemplation of the parties; and also that the verdict was against the evidence.

Milward and *C. Russell* shewed cause.

Field and *Philbrick*, in support of the rule.

The following authorities were cited—*Adams* v. *the Royal Mail Steam-Packet Co.* (5 Com. B. Rep. N.S. 492; 28 L. J. C.P. 33); *Kearon* v. *Pearson* (7 Hurls. & N. 386; 31 L. J. Ex. 1); *Hudson* v. *Ede* (36 L. J. Q.B. 273); *Burmester* v. *Hodgson* (2 Campb. 488); *Rogers* v. *Forresters* (2 Campb. 483); *Randall* v. *Lynch* (2 Campb. 352); *Harris* v. *Dreesman* (9 Ex. 485; 23 L. J. Ex. 210); *Goodwyn* v. *Cheveley* (4 Hurls. & N. 631; 28 L. J. Ex. 298); *Phillips* v. *Irvine* (7 Man. & G. 325; 13 L. J. C.P. 145); and *Maclachlan on Merchant Shipping*, 445.

Cur. adv. vult.

The judgment of the Court [1], prepared by BLACKBURN, J., was now read by

HANNEN, J.—This was an action to recover compensation in damages for the detention of the plaintiffs' ship by the defendants.

On the trial, before the Lord Chief Justice, at Guildhall, it appeared that the defendants chartered the plaintiffs' ship from Liverpool to Lima or Valparaiso. By the charter-party, a specified number of days were agreed upon for loading the vessel at Liverpool; but there was no such agreement as to the

(1) Cockburn, C.J., Blackburn, J., Mellor, J. and Lush, J.

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discharge at her port of destination, the charter-party merely providing that the vessel should proceed there, or as near as she could safely get, and deliver the cargo in the usual and customary manner, agreeably to bills of lading, and so end the voyage. The contract being thus silent as to the time which is to be occupied in the discharge, the question arises, what is the agreement which the law implies in such a case?

It appeared on the trial that the vessel duly arrived at Callao, the port of Lima, and began to discharge in the manner usual there. The custom-house authorities will not allow any cargo to be landed except through the customs; and, in consequence of their dilatoriness and the general sluggishness of the population, the ordinary discharge of a vessel at Callao is very slow. The vessel remained discharging till, news having arrived of the approach of the Spanish fleet, the customs' authorities suspended all landing of goods, in order that they might remove those already in the custom-house out of the reach of the apprehended bombardment. The vessel consequently lay, with the cargo partly on board, for seven days, when she was ordered away, to be out of the danger of bombardment. She returned, and her discharge was finally completed.

The Lord Chief Justice ruled that, during the period when the vessel was not at Callao at all, there was no claim for damages. He reserved for the Court the question whether the plaintiffs were entitled to recover for the detention during the seven days when the vessel was at her discharging berth, but, owing to the unusual state of things, the customs' authorities would not allow the discharge to proceed. The damages for that detention, if the plaintiffs were entitled to recover, were agreed to be 15*l.* for each day, amounting in the aggregate to 105*l.*

As to the rest of the detention, he left the question to the jury whether the detention was occasioned by anything beyond the usual and ordinary delays of the port. The jury found on this point for the defendants. Mr. Field obtained a rule to enter the verdict for the plaintiffs for 105*l.*, pursuant to the leave reserved, or for a new trial, on the ground that the verdict was against the weight of evidence. No complaint was made of the direction in point of law.

On the argument, in last Trinity Term, before my lord and my brothers Mellor and Lush, the Court refused to disturb the verdict, and took time to consider as to the point reserved.

The Court has come to the conclusion that the plaintiffs are not entitled to recover. The question depends upon what the contract implied by law is, where there is a charter-party silent as to the time to be occupied in the discharge. We agree that whenever a party to a contract undertakes to do some particular act, the performance of which depends entirely on himself, so that he may choose his own mode of fulfilling his undertaking, and the contract is silent as to time, the law implies a contract to do it within a reasonable time under the circumstances; and if some unforeseen cause, over which he has no control, prevents him from performing what he has undertaken within that time, he is responsible for the damage. But where the act to be done is one in which both parties to the contract are to concur, and both bind themselves to the performance of it, there is no principle on which, in the absence of a stipulation to that effect, either expressed by the parties or to be collected from what they have expressed, the damage arising from an unforeseen impediment is to be cast by law on the one party more than on the other; and consequently we think that what is implied by law in such a case is not that either party contracts that it shall be done within either a fixed or reasonable time, but that each contracts that he shall use reasonable diligence in performing his part. It is on the application of this principle to a charter-party that the present question depends.

We think that delivering cargo is as much the duty of the shipowner as of the merchant; and consequently that the contract in a charter-party implied by the law, in the absence of any stipulation, is, that each party shall use reasonable diligence in performing his part of the delivery at the port of discharge,—

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the merchant being ready to receive in the usual manner, and the owner, by his captain and crew, to deliver in the usual manner. So that there is no contract implied by law on the part of the shipowner to allow his vessel to be kept there for the usual time, if, by reasonable diligence on the part of the merchant, the cargo might be sooner taken away; and no contract implied by law on the part of the merchants to take the cargo out within such usual time, though he could not by reasonable diligence perform it; though very commonly there are stipulations to that effect.

There is not much authority bearing on the point on which we have had most difficulty. We think it firmly established, both by decided cases and on principle, that where a party has, either expressly or impliedly, undertaken, without any qualification, to do anything, and does not do it, he must make compensation in damages although the performance was rendered impracticable by some unforeseen cause over which he had no control. In a charter-party, the merchant generally expressly contracts that he will provide a cargo to be put on board. The shipowner has nothing whatever to do with the mode in which the merchant is to fulfil this contract; and, accordingly, where the merchant is prevented by an unforeseen cause from fulfilling it, the shipowner is entitled to compensation in damages—*Barker* v. *Hodgson* (3 M. & S. 267). In the present charter-party, as is generally the case, the parties have agreed on a specified number of lay days for putting the cargo on board. Where a charter-party is silent, as it rests exclusively on the merchant to procure the cargo, the law would imply a contract to do so within a reasonable time after the vessel is ready to receive cargo; and we agree that, in estimating what is the reasonable time within which the cargo is to be provided, we are to consider what is a reasonable time under ordinary circumstances, and not to take into account any peculiar difficulty which may have arisen from the mode in which the merchant has chosen to procure the cargo—*Adams* v. *the Royal Mail Steam Packet Company* (5 Com. B. Rep. N.S. 492; 28 L. J. C.P. 33); *Kearon* v. *Pearson* (7 Hurls. & N. 386; 31 L. J. Ex. 1). It may be different if the contract is framed with reference to any peculiar state of things—*Harris* v. *Dreesman* (9 Ex. 485; 23 L. J. Ex. 210).

It would rather appear, from the declaration set out in the report of *Adams* v. *the Royal Mail Steam Packet Company* (5 Com. B. Rep. N.S. 492; 28 L. J. C.P. 33), that the contract expressly provided for a number of lay days and ten days on demurrage; but perhaps those were only allowed for the discharge of the cargo at St. Thomas's; otherwise, no question as to any implication of a reasonable time could have arisen. However this may have been, it is pointed out by Williams, J., that "the circumstances relied on to excuse the breach are circumstances which impeded, not the loading, but the procuring the coals wherewith to load the vessel;" and that was unquestionably true; the case was clearly rightly decided, but the present point did not arise. In *Kearon* v. *Pearson* (7 Hurls. & N. 386; 31 L. J. Ex. 1), Wilde, B., says that the stipulation in that case, "that the vessel shall be loaded with usual despatch," does not relate to the facilities which the charterers may have in their trade of getting the coal alongside the vessel (which, by express stipulation, was to be loaded in the Nelson dock), but to the putting it on board; but that, even if it were otherwise, there was an express stipulation that it should be loaded with usual despatch, not with usual diligence.

In this, also, we perfectly concur; but that case has no bearing on the question of what is implied when the contract is silent as to the time for discharging the cargo.

Whenever in the charter-party it is agreed that a specified number of days shall be allowed for unloading, and that it shall be lawful for the freighter to detain the vessel for that purpose, a further specified time, on payment of a daily sum, this constitutes a stipulation on the part of the freighter that he will not detain her beyond these two specified periods—*Randall* v. *Lynch* (2 Campb. 352). Lord Tenterden, *Abbott on Shipping*, 5th edit. p. 181, says, "And where the time is thus expressly ascertained and limited by the terms of

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the contract, the merchant will be liable to an action of damages if the thing be not done within the time, although this may not be attributable to any fault or omission on his part, *for he has engaged that it shall be done.*" The last sentence is put in italics by Lord Tenterden, indicating that he thought it the reason why the merchant was liable. In the present case the time for discharging is not so limited; all that is said is, that the cargo shall be discharged in the usual and customary manner; that is to say, that the master and crew shall take that part which by the custom of the port falls upon them, and the freighter do the rest.

And as we have before observed, it is difficult to see on what principle delay in an act in which both sides are to concur is, in the absence of a stipulation in the contract, to fall on one more than the other, if neither be in fault. In *Rodgers* v. *Forresters* (2 Campb. 483), the express contract was that "the said freighter should be allowed the usual and customary time to unload the said ship at the port of discharge"; and in *Burmester* v. *Hodgson* (2 Campb. 488), where the contract was silent, Mansfield, C.J., said, that the law could only raise an implied promise to do what was in *Rodgers* v. *Forresters* (2 Campb. 483) stipulated for by an express covenant, viz., to discharge the ship in "the usual and customary time." On this Mr. Field based his argument, that the charter-party was to be construed as if a specified number of lay days for discharging the cargo had been inserted in it; the only difference being that instead of the parties fixing the number of days, they left that to be ascertained by subsequent inquiry, as to what was usual and customary in the port for such a vessel. And if that is so it would follow that the plaintiffs are entitled to recover; for it is clear that delay resulting from a threatened bombardment was neither usual nor customary. But we are aware of no authority for saying that the law implies a contract to discharge in the *usual time*, except what is said in *Burmester* v. *Hodgson* (2 Campb. 488), in which case it was not necessary for the decision. We think that the contract which the law implies is only that the merchant and ship owner should each use reasonable despatch in performing his part. That such was the opinion of Lord Tenterden appears to be implied from his ruling in *Rogers* v. *Hunter* (1 Moo. & M. 63), as to what was the obligation of the holder of a bill of lading.

If this be so, the delay having happened without fault on either side, and neither having undertaken by contract, express or implied, that there should be no delay, the loss must remain where it falls. It is true that at Callao, the usual course appears to be for the merchant to procure lighters, and the master and the crew have fulfilled their part of the duty of delivering the cargo, when they have assisted in getting the cargo out of the ship and putting it on board the lighters. It might have been physically possible for the merchant in this case to have procured so many lighters that the cargo might have been all taken out of the ship and put in those lighters, though the Customs' authorities would not permit any of those lighters to be unloaded; but the construction of the charter-party must be the same whatever by the custom of the port of discharge be the share of the shipowner in delivering cargo; and we do not think the merchant was bound to do so unreasonable a thing. If the contract be, as we construe it, only to use reasonable diligence in performing his part of the delivery, he was guilty of no breach whilst the landing of the cargo was rendered impossible by a cause over which he had no control. We think, therefore, that the rule should be discharged.

Rule discharged.

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IN THE QUEEN'S BENCH. Nov. 26, 1868.

THURLOW v. MACKESON.

38 L. J. Q.B. 57; L. R. 4 Q.B. 97; 19 L. T. 448; 17 W. R. 280.

Referred to, *Bettyes* v. *Maynard*, [1883] E. R. A.; 49 L. T. 389; 31 W. R. 461 (C. A.).

Mortgagor and Mortgagee—Power of Sale—Purchase-money allowed to remain on Mortgage.

MORTGAGE. O.—*A mortgagee, who has* bonâ fide *contracted to sell according to the power of sale in his mortgage-deed, may allow part of the purchase-money to remain outstanding on a mortgage of the property, though the power of sale has no mention of any such privilege.*

A mortgage, by way of sub-lease, contained a power to sell the premises upon default in payment of principal or interest, "by public sale or private contract, for such price or prices as could reasonably be gotten for the same, and with, under and subject to such conditions and stipulations as to title or otherwise as the mortgagee might deem expedient, with full power to buy in the same, or any part or parts thereof respectively, and to abandon and vary the terms of any and every sale or agreement for or relating to the sale thereof, and to re-sell the premises so bought in, or as to which the contract should have been so abandoned, or any part or parts thereof, at any future auction, or by private contract, with like powers from time to time of buying in, abandoning, varying and re-selling thereof, and in such manner as he should think advisable, without being liable for any loss occasioned thereby, or to demise, lease or let the premises, or any part of them, for such term of years, or from year to year, or otherwise, and either with or without taking any fine for the same, and upon such terms and in such manner as he should think proper;—and it was agreed that the receipt of the mortgagee for any money to arise from the sale, lease, &c., should discharge the persons to whom it was given from being answerable for the misapplication or non-application, or from being bound to see to the application of the money therein mentioned, or from being bound or concerned to inquire into the necessity or propriety of any sale or sales, lease or leases, disposition or dispositions, which might be made by virtue of the mortgage-deed":—Held, *that the mortgagee, after* bonâ fide *contracting to sell according to the power of sale contained in his deed, might allow part of the purchase-money to remain outstanding on a mortgage of the premises, and that the purchaser would obtain an unincumbered title to the property.*

The declaration stated, that on December 14, 1859, by an indenture then made between Edward Mackeson of the first part, the defendant of the second part, and Luke James Marshall of the third part,—after reciting an indenture of lease on October 17, 1848, whereby certain lands in the parish of St. Mary, Battersea, in the county of Surrey, were demised by Richard Chambers to Henry Hart Davis for a term of 108 years, from September 29 then last past, and an indenture of November 18, 1848, whereby the lands were demised by Henry Hart Davis to the defendant for all the residue then unexpired of the term except the last five days, subject to a proviso for the re-assignment thereof by the defendant on payment of certain moneys therein mentioned, and that the indenture contained a power of sale, and that in pursuance of such power the defendant had sold the premises to Henry Paine for 550*l*., and that by an indenture, dated May 15, 1852, between the defendant of the first part, Edward Mackeson of the second part, and Henry Paine of the third part, the tenements were assigned by the defendant to Edward Mackeson for the term of 108 years, less the last five days thereof, upon the terms and subject to the powers therein contained; and also reciting an indenture of further charge for the considerations therein mentioned,—Edward Mackeson, at the request of the defendant,

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assigned, and the defendant assigned and confirmed unto Luke James Marshall the tenements comprised in and demised by the indenture of lease of October 17, 1848, and assigned by the indenture of May 15, 1852, to hold to Luke James Marshall, his executors, administrators and assigns, for the residue then to come of the term of 108 years, except the last five days thereof, subject as therein mentioned, and the defendant thereby, for his own acts only, covenanted with Luke James Marshall, his executors, administrators and assigns, that he, Lumsden Mackeson, had not at any time or times made, done, committed or executed, or knowingly or willingly permitted or suffered, or been party or privy to any act, deed, matter or thing whatsoever, whereby or by reason or means whereof the messuage or tenement, ground and premises, or any part or parts thereof, were, was, could, should, or might be in anywise impeached, charged, incumbered or otherwise prejudicially affected; and afterwards, to wit, on December 18, 1863, by an indenture then made between Luke James Marshall, in consideration of 700*l.* then paid to him by the plaintiff, assigned, transferred, and set over unto the plaintiff the tenements demised by the indenture of lease, to hold to the plaintiff for the residue then to come of the term of 108 years, less the last five days thereof, subject as therein mentioned: Yet the defendant had not, in pursuance of such power of sale contained in the indenture of November 18, 1848, sold the premises to Henry Paine, and had, before making the covenant, made, done, committed and executed, and knowingly and willingly permitted and suffered, and been party and privy to an act deed, matter and thing whereby and by means whereof the said messuage, or tenement, ground and premises, were impeached, charged, incumbered, and otherwise prejudicially affected: by means of which premises the plaintiff was unable to assign the tenements and to complete a contract which he afterwards entered into for the grant of an annuity on the security of the leasehold estate and interest in the tenements so purported to be assigned to him, and divers expenses incurred by him in endeavouring to make out a title to the tenements under the contract became lost and useless to him; and by reason of not being able to complete the contract, he was unable to obtain an advance of money, and was thereby much injured in his trade and prospects, and was obliged to pay interest and commission on the amount which would have been, but was not, advanced, and the consideration-money paid by him for the purchase of the hereditaments became lost to him, and also the expenses of the purchase and other large sums paid by him in building on and improving the lands; and he was and is otherwise injured.

Pleas.—First, that the deed of December 14, 1859, is not the plaintiff's deed; secondly, that the deed of December 18, 1863, is not the deed of L. J. Marshall; thirdly, denial of breaches.

The defendant also demurred to the breach alleging that the defendant had not, in pursuance of the power of sale, sold the premises to Paine.

Joinder in issue on the pleas, and joinder in demurrer.

The issues in fact came on to be tried, at the Sittings in Middlesex, after Hilary Term, 1868, before the Lord Chief Justice and a special jury, and by consent a verdict was found for the plaintiff, subject to the opinion of the Court on the following special case. And it was ordered that an arbitrator should settle the case if the parties differed, and that if the Court should decide in favour of the plaintiff, the Court should say on which of the heads of damage mentioned in the particulars the plaintiff was entitled to recover, and it was to be referred to the arbitrator to assess the damages if necessary.

CASE.

By indenture, dated October 17, 1848, made between Robert Chambers of the one part, and Henry Hart of the other part, Chambers demised certain premises at Battersea to Davis for the term of 108 years, from September 29, 1848, subject to a yearly rent of 12*l.*

By indenture, dated November 18, 1848, between Davis of the one part and the defendant of the other part, after reciting the indenture of lease of October 17, 1848, Davis, in consideration of 450*l.* paid to him by the defendant,

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and in consideration that the defendant had agreed to advance to Davis the further sum of 100*l.*, bargained, sold and demised the lands comprised in the indenture of lease to the defendant for all the residue then unexpired of the term, except the last five days, subject to a proviso for redemption on payment of the principal moneys intended to be thereby secured, and certain interest thereon. And it was by the indenture further provided that, "if default should be made in payment of the principal moneys intended to be thereby secured, or any part or parts thereof, or of the interest thereof, or of any part or parts thereof, contrary to the covenant thereinbefore contained for payment of the same, then and in such case it should be lawful for the defendant, his executors, administrators or assigns, to sell and dispose of the messuage or tenement, land and premises thereinbefore demised, or intended so to be, with their appurtenances, for all the remainder of the term thereby created, together or in parcels, and either by public sale or private contract, or partly by both, and as well before as after, and subject to any lease or letting which might have been granted or made of the premises respectively, under the power thereinbefore contained, for such price or prices as could reasonably be gotten for the same, and with, under and subject to such conditions and stipulations, as to title or otherwise, as the defendant, his executors, administrators or assigns, might deem expedient, with full power to buy in the same or any part or parts thereof respectively, and to abandon and vary the terms of any and every sale or agreement for or relating to the sale thereof, and to re-sell the premises so bought in, or as to which the contract should have been so abandoned, or any part or parts thereof, at any future auction or by private contract, with like powers from time to time of buying in, abandoning, varying and re-selling thereof, and in such manner as he or they should think advisable, without being liable for any loss occasioned thereby, or to demise, lease or let the several premises, or any part or parts thereof, for such term of years, or from year to year, or otherwise, and either with or without taking any fine for the same, and upon such terms and in such manner as he or they should think proper; and also, if they should think fit, to receive and take the rents and profits of the premises until sold; and also to make, do, give and execute all acts, deeds, receipts, assignments and assurances requisite for carrying every such sale, lease or letting into execution, either with or without the concurrence of Davis, his executors, administrators or assigns"; and it was thereby agreed and declared that "the receipt or receipts in writing of Lumsden Mackeson, his executors, administrators or assigns, for any money to arise from the said sale or sales, lease or leases, or otherwise payable to him or them by virtue of those presents, should effectually discharge the person or persons to whom the same should be given from being answerable or accountable for the misapplication or non-application, or from being in anywise bound to see to the application of the money therein respectively mentioned to be received, or from being bound or concerned to inquire into the necessity or propriety of any sale or sales, lease or leases, disposition or dispositions, which might be made by virtue of those presents."

On December 22, 1848, Lumsden Mackeson advanced to Davis the sum of 76*l.* 17*s.* 1*d.*; on December 30, 1848, the further sum of 20*l.*; and on January 23, 1849, the further sum of 3*l.* 2*s.* 11*d.*; making together the full further sum of 100*l.* agreed to be advanced by the defendant. Davis made default in payment of the said mortgage moneys and interest secured by the indenture of November 18, 1848, and afterwards became bankrupt. The defendant, on April 3, 1851, offered the property comprised in the mortgage for sale by public auction; but there were no bidders. On May 12, 1852, the defendant, by Edward Mackeson as his agent, entered into a contract with Henry Paine for the sale of the property for 550*l.*, a copy of which contract formed part of the case. (The contract simply stated that Paine had become purchaser of the property for 550*l.*)

At the date of this contract, there was due to the defendant a larger sum than 550*l.* for principal, interest and costs on his mortgage.

By indenture, dated May 15, 1852, and made between the defendant of

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the first part, Edward Mackeson of the second part, and Henry Paine of the third part,—after reciting, among other things, the indentures of October 17, 1848, and November 18, 1848, and that default had been made in the payment of the principal moneys and interest, and that the defendant, as mortgagee, and in pursuance of the power of sale in the indenture of November 18, 1848, contracted and agreed with and to Paine for the absolute sale to him of the messuage or tenement, land and premises mentioned in the indenture, at or for the price of 550*l.*, and that it had been agreed that the sum of 500*l.*, portion of the purchase-money of 550*l.*, should remain on mortgage of the premises, and should be secured as and in manner hereafter mentioned,—it was witnessed that, in pursuance and performance of the agreement, and in consideration of the sum of 50*l.* (portion of the purchase-money or sum of 550*l.* paid by Paine to the defendant), and also in consideration of the covenant thereinafter contained for payment of the sum of 500*l.*, the residue of the purchase-money or sum of 550*l.*, the defendant, in pursuance of the power or authority reposed in him by the indenture of November 18, 1848, as such mortgagee as aforesaid, and of every other power and authority in anywise enabling him in that behalf, did, at the request of Paine, transfer and bargain, sell and assign unto Edward Makeson the messuage and premises comprised in the lease of October 17, 1848, as are comprised in and demised by the indenture of November 18, 1848, with the appurtenances, to hold the messuage and premises thereinbefore assigned, or intended so to be, subject to the rent, covenants, conditions and agreements reserved and contained in the indenture of October 17, 1848, but freed and discharged from all principal moneys and interest intended to be secured by the indenture of November 18, 1848, unto Edward Mackeson, upon certain trusts for sale in case Paine should make default in payment of the sum of 500*l.* and interest; and it was thereby declared that Edward Mackeson should stand possessed of the proceeds of sale upon trust, in the first place, to pay the costs of the sale; and, in the next place, to pay, retain and satisfy the sum of 500*l.* and interest; and lastly, to pay, or cause to be paid, the residue of the moneys unto Paine, or other the person or persons for the time being entitled to the same, or as he or they should appoint; and it was thereby declared and agreed that, upon satisfaction of the trust, Edward Mackeson should assign the premises to Paine, and Paine thereby, amongst other things, covenanted for himself, his heirs, executors, administrators and assigns, that he, his executors, administrators and assigns, should and would well and truly pay, or cause to be paid unto the defendant, his executors, administrators or assigns, the principal sum of 500*l.* and interest for the same after the rate of 5*l.* per cent. per annum in manner following: that was to say, 100*l.* part of the principal sum and interest for the whole thereof at the rate aforesaid, on May 15, 1853, and the like sum of 100*l.*, other part of the principal sum, on May 15 in each succeeding year, until the whole of the principal sum should be paid, with interest at the rate aforesaid for so much of the principal sum as should from time to time remain unpaid; and in default of payment, it should be lawful for Edward Mackeson, at the request of the defendant, to sell and dispose of the messuage or tenement and premises,

The draft of the indenture of May 15, 1852, was perused by an independent solicitor on behalf of Paine, and he paid the 50*l.* mentioned in the deed on the execution of the deed. Paine was let into the possession of the premises, and he personally occupied them until some time after his bankruptcy hereinafter mentioned. During the time of his occupancy, Paine paid the ground-rent payable under the lease, and he also insured and repaired the premises. Paine paid the interest on the sum of 500*l.* referred to in the assignment to him, and paid 200*l.* on account of the principal. This sum of 200*l.* was paid as follows: May 12, 1852, 50*l.*; June 20, 1853, 50*l.*; May 1, 1854, 100*l.* The defendant credited the whole sum of 550*l.* to Davis. As before stated, there was a much larger sum due to the defendant, and Davis was bankrupt. His estate paid no dividend and there were no assets. The defendant did not prove under Davis's estate for the balance due to him.

The defendant, on July 7, 1854, advanced to Paine a further sum of 150*l.*

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on security of the property. On the occasion of the advance, a deed was executed, whereby Paine charged the premises with the payment of 150*l*. in addition to the 350*l*. due on the prior mortgage.

Paine made default in payment of the principal and interest secured by the indenture of July 7, 1854, and afterwards became bankrupt.

In the month of December, 1859, the defendant agreed to sell the premises to Mr. Luke James Marshall for 425*l*.

By an indenture dated December 14, 1859, and made between Edward Mackeson of the first part, the defendant of the second part, and Marshall of the third part, and which indenture was duly executed by the defendant and all the parties thereto, after reciting amongst other things the indentures of October 17, 1848, November 18, 1848, May 15, 1852, and July 7, 1854, Edward Mackeson, for the considerations therein mentioned, at the request of the defendant, assigned and the defendant confirmed unto Luke James Marshall the premises comprised in and demised by the above-mentioned indenture of lease of October 17, 1848, and assigned by the above-mentioned indenture of May 15, 1852, to hold to Marshall, his executors, administrators and assigns, for the residue then to come of the term of 108 years, except the last five days thereof, subject as therein mentioned, and thereby they, Edward Mackeson and the defendant, entered into the usual covenant that they had done nothing to incumber the premises.

Marshall took possession of the premises pursuant to the last-mentioned deed, and in or about the month of September, 1863, agreed to sell them to the plaintiff for 700*l*. By indenture, dated September 18, 1863, and made between Luke James Marshall of the one part, and the plaintiff of the other part, which indenture was duly executed by all the parties thereto, Marshall, in consideration of 700*l*., assigned unto the plaintiff the premises demised by the lease, to hold to the plaintiff for the residue then to come of the term of 108 years, less the last five days, subject as therein mentioned.

On the execution of this deed the plaintiff paid to Marshall the purchase-money of 700*l*., and was let into possession of the premises.

At the time of entering into the contract for purchase, and at the time of paying his purchase-money, the plaintiff had no personal knowledge of the contract of May 12, 1852, nor of any of the facts mentioned in this case, except so far as such facts are disclosed by the several deeds. Messrs. Mackeson & Goldring acted as the solicitors of the defendant in all the transactions entered into by him with respect to the property as above set forth. They also acted as the solicitors of Marshall with respect to the property, and also to the plaintiff's solicitors in preparing the indenture of September 18, 1863; and they were then aware of all the circumstances stated in the case, but did not communicate to the plaintiff the objection as to the title, if any, created by the deed of May 15, 1852. On the completion of the purchase from Marshall, all the original deeds set out in this case were delivered to the plaintiff, and they have ever since been, and are now in his possession, or in the possession of those claiming under him. The plaintiff has since the date of his purchase continued, and he is now, in the occupation of the premises. No application, process or proceeding of any kind has been taken or made by or on behalf of any person or persons whomsoever in any way to interfere with the beneficial occupation or enjoyment of the premises by the plaintiff; but upon the plaintiff's attempting to raise money upon the security of the premises, he was met by the objection that his title was bad for the reasons alleged in the declaration in this action.

It is agreed between the parties that the Court shall be at liberty to draw any inferences and find any facts which, in the opinion of the Court, a jury ought to have drawn or found.

The demurrer to the first breach is to be argued at the same time as the special case.

The questions for the consideration of the Court are, first, is the plaintiff entitled to succeed on the first breach in the declaration? Secondly, is the plaintiff entitled to succeed on the second breach in the declaration?

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If the Court shall be of opinion that the plaintiff is entitled to succeed on either breach, the third question for the opinion of the Court is, what is the proper measure of damages, and upon which of the items in the particulars of damage delivered in the action is the plaintiff entitled to recover?[1]

If the Court shall be of opinion that the plaintiff is entitled to succeed on either breach, the verdict for the plaintiff is to stand, but for such an amount of damages only as shall be agreed upon between the plaintiff and the defendant, or as shall be assessed (subject to the opinion to be expressed by the Court upon the third question above submitted) by the arbitrator. But if the Court shall be of opinion that the plaintiff is not entitled to succeed on either of the breaches alleged in the declaration, then the verdict for the plaintiff is to be set aside, and a verdict to be entered for the defendant.

Joshua Williams, of the Chancery bar (*Beresford* with him), for the plaintiff. —There are two questions in this case: first, whether the power of sale in the mortgage-deed was properly executed by the sale in 1852; secondly, whether the defendant has committed a breach of his covenant against incumbrances in the deed of 1859. The first question is somewhat bare of authority; but looking at the jealous control which Courts of equity have always exercised over mortgage transactions, it is submitted that the power of sale ought to be strictly exercised, and that a sale which continues the mortgagee in the ownership of the property is not lawful. The obvious intention of the parties to the original mortgage was that there should be a power of selling for ready money only, and that the property should not be employed for the purpose of fresh mortgages. Here the mortgagee has used the power for his own convenience, and although he, no doubt, meant to act legally he was guilty of what was in strictness a fraud on the power. It is the same as if he himself had bought back the property within a week, which would clearly have been illegal—*Robertson* v. *Norris* (1 Giff. 421). *Davey* v. *Durrant* (1 De Gex & J. 535; 26 L. J. Ch. 830) may perhaps be relied upon by the other side. But this case is no direct authority, as is shewn by *Sugden's Vendors and Purchasers*, 14th edit. 66, where Lord St. Leonards says, "In *Davey* v. *Durrant* (1 De Gex & J. 535; 26 L. J. Ch. 830) it seems to have been considered that under such a power of sale a part of the purchase-money may be left on mortgage, but this point did not arise, as the mortgage was a distinct transaction, and the mortgagee who sold submitted to be charged with the whole of the purchase-money, and that one of the Lords Justices considered was the proper course." In *Davey* v. *Durrant* (1 De Gex & J. 535; 26 L. J. Ch. 830) the power of sale in the mortgage deed was to sell the premises either together or in parcels, and by public sale or private contract, without the consent of the mortgagor, for the best price in money that could be reasonably obtained for the same, and to buy in when offered for sale, and to make and execute all necessary contracts with and conveyances unto or according to the direction of the purchaser or purchasers of the same hereditaments and premises respectively. It appeared that the mortgagee in selling the property allowed part of the purchase-money to remain outstanding on a mortgage. Lord Justice Knight Bruce says, "It was said that the arrangement by which part of the purchase-money was suffered to remain on a mortgage of the property sold was such as to reduce the price, and was otherwise unjustifiable. But that arrangement appears to me to have increased rather than diminished the price, if the price was at all affected by it. Nor can I say that it is beyond the right or authority of a mortgagee, with a power of sale, to effect a sale of which one of the terms shall be that even a considerable portion of the purchase-money shall be allowed to remain on mortgage of the property, that mortgage being as between the seller and those entitled to the equity of redemption, at the seller's risk, that is, he charging himself with the whole amount of the purchase-money in account with them, as has been done in the present instance." But the judgment of Lord Justice Turner is to a different effect. His Lordship says, "The agreement was

(1) The decision of the Court rendered it unnecessary to argue this question as to the damages.

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that the mortgagee would either allow this part of the purchase-money to remain on mortgage or would procure the amount for the purchaser on mortgage; and it appears that the transaction was carried into effect by a mortgage being made by the defendant to a person who was believed on his part to have actually advanced the money. I doubt, therefore, whether this objection on the part of the plaintiff at all arises. But, supposing it to arise, I find on referring to the power of sale in the mortgage-deed that all arrangements made by the mortgagee are to be as binding as if the mortgagor had concurred, and I think, therefore, that this objection is wholly untenable." In the present case, the clause as to the receipt discharging the purchaser from seeing to the application of the purchase-money, shews that there could only be a sale for ready money.

[LUSH, J.—The clause as to the receipt only relieves the purchaser from seeing to the application of the purchase-money. It does not give the mortgagor greater rights. Must not the mortgagor be taken to have had the benefit of the whole amount of the purchase-money?]

It does not appear that the mortgagor was credited with the amount of the purchase-money.

[*Mellish*, for the defendant, drew attention to the fact that the property was conveyed freed and discharged from the principal, &c., secured by the first mortgage.]

With regard to the second question, it is submitted that the sale was conducted in such a manner as to be an act which might prejudicially affect the property. A covenant against incumbrances may be implied from the recitals in the deed of 1859.—He cited *Stroughill* v. *Buck* (14 Q. B. Rep. 781; 19 L. J. Q.B. 209); *Lady Cavan* v. *Pulteney* (2 Ves. 544); *Severn and Clerke's case* (1 Leo. 122); *Calvert* v. *Sebright* (15 Beav. 156); *Bac. Abr.*, tit. "Covenant," (a.), *Sugden's Vendors and Purchasers*, 14th edit. 603.

Mellish (*Gray*, and *W. W. Mackeson*, of the Chancery bar, with him), for the defendant.—It is stated in the case as an admitted fact that there was a valid contract of sale. The power of sale in the mortgage-deed is not required for the purpose of making a good title at law to the property, but only for the purpose of barring the equity of redemption. This equity of redemption is barred as soon as there is a valid contract of sale, and it cannot matter how the conveyance is made. It is the settled practice in equity that in a suit for specific performance the mortgagor need not be made a party—see *Corder* v. *Morgan* (18 Ves. 344). This shews that in equity the contract constitutes the sale, and it cannot concern the mortgagor how it is carried out. This Court will only consider the question whether the title is good or bad. After crediting the mortgagor with the whole amount of the purchase-money the mortgagee, in an action on the covenant, could not have resisted a plea of payment nor could he have proved on the mortgagor's estate in bankruptcy.

[LUSH, J.—And if the amount of the purchase-money had exceeded the principal which was due, the mortgagor could have sued in equity for the balance.]

Davey v. *Durrant* (1 De Gex & J. 535; 26 L. J. Ch. 830) is an authority in favour of the defendant. It is true that Turner, L.J., in that case refers to the clause by which arrangements by the mortgagee are to be as binding as if the mortgagor had concurred; but it does not follow that his decision turned upon that clause. Whether the purchase-money is paid down to the mortgagee or credited by him to the mortgagor cannot make a farthing's difference.

The COURT then called on the plaintiff's counsel to reply to the first point.

Joshua Williams, in reply.—It is admitted that there was a valid contract of sale, but though the parties agreed to sell according to the power in the mortgage-deed the transaction which followed was not a sale. The cases cited shew the importance of confining the mortgagee to the terms of his power. If the property had realized a surplus over the amount due it would be of great importance that the mortgagee should have the money in his hands to hand over to the mortgagor, as the second mortgagor might turn out to be an unsubstantial person.

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LUSH, J.—The opinion which we have formed on the question which Mr. Williams has just argued makes it unnecessary to give any decision on the construction of the covenant in the deed of 1859, as we are clearly of opinion that the power of sale was duly exercised, so that there is an end of the case.

The question is, whether the mortgagee's power to sell on default of payment of the principal and interest was duly carried into effect by him. If it was so carried out the right of the mortgagor to redeem was barred. This power of sale is given in very extensive terms, and is not fettered by any such restrictions as those for which Mr. Williams has contended. The power of sale is in these terms.—[The learned Judge read the power of sale, including the proviso as to the mortgagees receipt discharging the purchaser.]—Now, Mr. Williams contends that the stipulation that the receipt of the mortgagee shall discharge the purchaser from seeing to the application of the purchase-money amounts to a restriction on the power, and makes it imperative on the mortgagee to enable him properly to execute the power that he should sell for money paid down, and give a receipt for the money. But I think that there is no such restriction on the power. The stipulation as to the receipt is an additional power given to the mortgagee, and is intended to facilitate the sale by not binding the purchaser in equity to see to the application of the purchase-money, and discharging him from any such obligation.

The only question is, therefore, has that power been *bonâ fide* exercised? I quite agree that if, under the pretence of a sale, there was some contrivance by which the mortgagee should clothe himself with the absolute, though not apparent, ownership, and this was done with the intention of barring the mortgagor of his equity of redemption, that the sale would not be valid. But the question is always, was the sale *bonâ fide?* if it is, then no matter how the payment is made, the mortgagor's right is barred. Mr. Williams admits that when the contract of sale was entered into it was a valid contract, and the right of the mortgagor was so far barred; but then he contends that the contract was afterwards varied so that the sale was not carried out. Now, it is quite conceivable that after such a contract had been made the parties might have come to a collusive arrangement. The mortgagee might have said, "I do not want you to have the property; I would rather keep it myself." And there might have been an understanding that the purchaser should not keep the property, but should convey it back to the owner. But I cannot find any evidence to lead to the conclusion, nor can I conceive it possible, that this was the intention of the parties here. After the contract was made it appears that the purchaser did not find it convenient to pay the whole of the money at once, and there was an agreement that a portion of the purchase-money should remain due on a mortgage of the property, and the mortgagee, in order to secure himself, instead of conveying the property over to the buyer, conveyed it to a trustee, upon trust to sell it in case the purchaser should make default in the payment of the purchase-money. This was merely a mode of carrying out the original contract of sale, which the parties had a perfect right to adopt, but which in no way concerned the mortgagor. So that the sale itself was carried out in the way in which the law allows it to be carried out. Mr. Williams contends that a mortgagee cannot exercise a power of sale of this description unless he receives the whole of the purchase-money; and that where the bargain is that the greater part of the money is to remain on mortgage, that there the power has not been duly executed. If any authority in equity had been cited to shew that the right of redemption was not under such circumstances extinguished, we should, of course, have been bound to hold that this title was incumbered. But in the only way in which I can look upon the case of *Davey* v. *Durrant* (1 De Gex & J. 535; 26 L. J. Ch. 830) it appears to me stronger than the present one, for there the contract of sale provided that a portion of the purchase-money was not to be paid, and therefore the original bargain was not such a one as was made here. But even in that case the sale was held to be good, and a *bonâ fide* exercise of the power. We were referred to a very high authority (Lord St. Leonards), but I do not take the remarks of that very learned person in the sense which

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Mr. Williams does, but rather as intimating that there may be a transaction, apparently a sale, but which is in reality not a sale, and which would be no execution of the power. He says that in *Davey* v. *Durrant* (1 De Gex & J. 535; 26 L. J. Ch. 830) the sale and the agreement as to the purchase-money were distinct transactions. There was a real sale, and therefore a real execution of the power. I think that upon the proper construction of the original mortgage this sale was a *bonâ fide* transaction, and it is the vendee who in reality mortgages the premises to secure the purchase-money. The right of redemption has therefore been destroyed, and the title is in no way incumbered.

HANNEN, J., concurred.

Judgment for the defendant.

IN THE QUEEN'S BENCH. Nov. 24, 1868.

BLACKBURN, J. and HAYES, J.

SULLIVAN *v.* PEARSON.

38 L. J. Q.B. 65; L. R. 4 Q.B. 153.

Approved, "*The Hope*," [1883] E. R. A.; 52 L. J. P. 63; 8 P.D. 144; 49 L. T. 158; 32 W. R. 269 (C. A.). Referred to, *Ross* v. *Buxton*, [1889] E. R. A.; 58 L. J. Ch. 442; 42 Ch. D. 190; 60 L. T. 630; 38 W. R. 71 (C. D.).

Lien—Attorney—Costs.

SOLICITOR. K.—*The lien of an attorney for costs is confined to cases where there are fruits of the litigation actually acquired, such as a clean verdict or a judgment or an acknowledgment of a debt; but the Court will not interfere to cause it to attach where after verdict and before judgment a rule for a new trial has been obtained, so as to prevent a settlement of the action between the parties, without prior satisfaction of the attorney's costs.*

This was a rule calling upon the plaintiff and the defendant to shew cause why they or one of them should not pay to Mr. John Morrison, the plaintiff's attorney, his costs in this action, to be taxed by one of the Masters.

The plaintiff was a costermonger, and a pauper; the defendant was a contractor for public works; and the action was brought to recover compensation for personal injuries received by the plaintiff in consequence of his falling down a cutting not sufficiently protected by planking.

The action was tried, before a special jury, at Guildhall, on February 26, 1868, and resulted in a verdict for the plaintiff for 25*l.* damages. The defendant, on April 19, obtained a rule *nisi* for a new trial, on the ground that the verdict was against the evidence. This rule had not yet been reached, and therefor had not been argued. The plaintiff subsequently called, on August 10 following, on the defendant, Mr. Pearson, at his counting-house, and asked him to settle the action, as he was starving. The defendant gave him 10*l.* and took a receipt from him for the 10*l.* in settlement of the action and solicitor's charges, in full of all demands. On the 20th of the same month (August), Morrison (the plaintiff's attorney) wrote to the defendant's attorney, stating that he had a lien for his costs on the damages. On September 4, Morrison took out a summons calling upon the defendant to pay his costs, in consequence of his having fraudulently and collusively compromised the action, after verdict, with the plaintiff in person. The Judge refused to make any order, and indorsed the summons, "No order."

Hance (*O. B. C. Harrison* with him) now shewed cause against the rule on behalf of the defendant.—Where a judgment has been obtained, the Court has interfered to protect the attorney's lien for costs; but here no judgment has ever

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been got, and a rule has been obtained to set aside the verdict and for a new trial.

[BLACKBURN, J.—Are there any cases where the distinction has been made between the progress of the cause whilst the client is *dominus litis* and the period subsequent to the judgment?]

The cases are collected in 1 *Chitt. Arch. Practice*, p. 136, 11th ed. It is there said that the lien is only a claim to the equitable interference of the Court, and confines it to cases of judgments recovered, or money or costs awarded or ordered to be paid to the client in a cause where the attorney has been engaged. It is also said there that even after notice of his lien given to the opposite party or his attorney, the parties may compromise before verdict or judgment without regard to the attorney's claim for costs. *Barker* v. *St. Quintin* (12 Mee. & W. 441; 13 L. J. Ex. 144) was an action against a sheriff for false imprisonment, and the sheriff justified under a *ca. sa.*, and there was a replication that before the writ was delivered or executed the plaintiff in the former action released the debt and gave notice to the sheriff, and forbade him to execute the writ. To this it was rejoined that the attorney of the plaintiff in the former action had a lien on the judgment for his fees, and that while the judgment stood and the fees were unpaid the release of the now plaintiff, the then defendant, and the then plaintiff was collusively and fraudulently agreed upon to defraud the attorney, and that the defendant had notice of the same, and was commanded by the attorney to excute the writ, and it was held that the rejoinder was bad, and there was judgment for the plaintiff. Lord Abinger there said, "The attorney is not the *dominus litis*, so as to marshal the proceedings on the judgment or the execution, as he may think fit." In *Quested* v. *Callis* (10 Mee. & W. 18; 11 L. J. Ex. 345) it was held that the attorney of a defendant has no right to prevent the defendant compromising the action without his consent. In *Clark* v. *Smith* (6 Man. & G. 1051; 13 L. J. C.P. 97), where the plaintiff and the defendant compromised the action after verdict for the plaintiff, and after the defendant had expressed his intention to move for a new trial, and the attorney proceeded to tax costs and sign judgment after notice of the compromise, the judgment was set aside. And the Court there said, nothing but clear proof of collusion between the parties would invalidate the compromise, and it lay upon the attorney to satisfy them of the collusion, which he then failed to do. *Ex parte Hart* (1 B. & Ad. 660) is to the same effect, and there the compromise was after notice of the lien and after notice of trial. Here there was no collusion, and the evidence of any notice of lien is unsatisfactory.

Willis, in support of the rule.—The plaintiff is no doubt *dominus litis*, and the compromise might be good if it were made *bonâ fide;* but where there is collusion, the Court will interfere to protect the attorney at any stage of the proceedings. In *Ex parte Games* (3 Hurls. & C. 294; 33 L. J. Ex. 317), after declaration, the plaintiff executed a release to the defendant, and gave his own attorney notice not to proceed. The release was pleaded; to this plea there was a replication confessing the release; judgment was signed for the costs, and a writ of execution issued. Notice was given by the plaintiff to the sheriff not to issue execution; thereupon the plaintiff's attorney obtained a Judge's order calling upon the plaintiff or the defendant to pay his costs, and the Court held the order to be properly made.

[BLACKBURN, J.—There appeared to be collusion in that case, but in the present case I see nothing at all like collusion.]

In *Gould* v. *Davis* (1 Cr. & J. 415; 9 L. J. Ex. 111), where the plaintiff and the defendant collusively settled an action, by the latter depositing a bill of exchange in the hands of a third party, the Court ordered the bill to be given up to the plaintiff's attorney. Bayley, B., says, "If the cause went on, the attorney would have had a lien on the fruits of the action." Here instead of a judgment a security is obtained, an undertaking by the defendant to pay at some future day. Part of this is clearly in satisfaction of the claim of the plaintiff's attorney.

[BLACKBURN, J.—That case seems to me to have gone on the ground that

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there were fruits of the litigation obtained by the attorney's exertions, and therefore they ought to pass through his hands.]

BLACKBURN, J.—This rule must be discharged. An attorney who has conducted a cause, and by the fruits of his exertions has obtained judgment, has a right to have the amount for which judgment has been obtained pass through his hands. This lien does not amount to an equitable assignment, but the Court will protect it where the judgment has been obtained and the fruits of the judgment acquired, and it sees that a proper case for its interference is made out. Where collusion appears, and the object is that the plaintiff should get more than he otherwise would, and the attorney should get less, the Court will interfere; but those are cases where the fruits of the judgment have been actually obtained. I do not say that it is a conclusive test that the judgment should be signed. *Ex parte Games* (3 Hurls. & C. 294; 33 L. J. Ex. 317) was the case of an actual judgment, and costs in respect of the judgment; and I should say that if there was a clean verdict, and nothing to be done but judgment to be signed, that case would not necessarily differ from the one where judgment has actually been signed. So in cases where there is an agreed debt obtained by the exertions of the attorney, and so much agreed to be given for the debt, and so much for the costs, if the attorney did not get his costs he would be defrauded; but here the plaintiff is a pauper, and obtained a verdict for 25*l.*, but a rule *nisi* for a new trial was obtained on the ground that the verdict was against the weight of evidence, and that rule would never have been granted unless the Judge had disapproved of it, considering the smallness of the amount of damages. Here these matters were at such a stage that it was doubtful whether the plaintiff would ultimately proceed, and the plaintiff was still *dominus litis*. The litigation had not arrived at the stage where the attorney had succeeded, and the fruits were ready to be gathered by his client. Beyond this, the defendant had good reason to give the 10*l.* It would save him from a new trial, and that was a sufficient reason, irrespective of the suggested motive, to deprive the attorney of costs. It was not at all a case of getting hold of the fruits of the judgment. Unless we lay down the rule that where an attorney commences litigation with a pauper for his client, that he has from that moment the power of preventing the plaintiff and the defendant settling the action except on the terms of discharging his lien for costs, we must discharge this rule. We are not prepared to go so far, and therefore this rule must be discharged.

HAYES, J., concurred.

Rule discharged.

IN THE QUEEN'S BENCH. Nov. 26, 1868.

PHILLIPS *v.* CALDCLEUGH AND ANOTHER.

38 L. J. Q.B. 68; L. R. 4 Q.B. 159; 20 L. T. 80; 17 W. R. 575.

Referred to, *Cato* v. *Thompson*, 1882, 9 Q.B. D. 616; 47 L. T. 491 (C. A.).

Vendor and Purchaser—Abstract of Title—Objections to Deed from which Title is to commence—Conditions of Sale.

VENDOR AND PURCHASER. A.—*Property described in the conditions of sale as a freehold residence was purchased at a sale by private contract. One of the terms of these conditions was, "the abstract of title will commence with a conveyance, dated April* 17, 1860, *and no purchaser shall investigate or take any objection in respect of the title prior to the commencement of the abstract." The deed in question conveyed the property in fee subject to the covenants and conditions in a deed of* 1850. *What these covenants and conditions were did not appear*:—Held, *that the defendants had not deduced a title to the property*

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in compliance with their contract, as they were bound notwithstanding the conditions to shew that a clear freehold title passed by the conveyance of 1860.

This was an action to recover damages for the alleged non-performance by the defendants of a contract of sale by them to the plaintiff of a freehold residence, and by consent of the parties a CASE, of which the following is the material part, was stated for the opinion of the Court:

On June 5, 1867, the plaintiff entered into a contract with the defendants for the purchase by the plaintiff from the defendants of a house described as a freehold residence, No. 2, Lombardian Villas, St. Mary's Road, Peckham, being lot 2. referred to in the particulars and conditions of sale, for 600*l.*, subject to certain conditions of sale, and paid a deposit of 120*l.*

By the third of these conditions the vendor was, within four days after the sale, to deliver to the purchaser an abstract of title of the premises. The fifth condition was as follows:

The abstract of title to lots 1, 2. and 3. (being the freehold portion of the property) will commence with a conveyance, dated April 17, 1860, and no purchaser shall investigate or take any objection in respect of the title prior to the commencement of the abstract."

On June 11, 1867, the defendants delivered to the plaintiff a document entitled "An Abstract of the Title of Mr. Simon Caldcleugh and Thomas Dunckley to freehold situate and being No. 2, Lombardian Villas," &c. This abstract commenced with a deed, dated April, 1860, between William Tomkinson Riley, Alexander Brodie Cochrane, and William Pearson of the one part, and Edward Mathews and George Beckett of the other part. This deed recited that by indenture, dated March 2, 1850, Richard Edmunds assigned to Eli Richards a parcel of ground in St. Giles's, Camberwell, with the messuages erected upon it; that Richards became bankrupt in April, 1855, and in August, 1855, under the authority of the Court of Bankruptcy, executed a conveyance of all his real estate to the use of trustees in fee; that the trustees had contracted with Edward Mathews and George Beckett for the sale to them of the hereditaments thereinafter described in fee simple, subject, so far as the same premises were subject thereto, to the covenants and conditions on the part of the grantee, his heirs and assigns, in the indenture of March 2, 1850, and to the payment of the apportioned rentcharge in lieu of tithes (if any), but free from all other incumbrances.

The property was then conveyed by the trustees to Mathews and Beckett as tenants in common in fee, subject to the several covenants and conditions in the indenture of March 2, 1850, and subject to the payment of the apportioned rentcharge in lieu of tithes (if any), and Mathews and Beckett covenanted with the assignors to perform these covenants and conditions so far as they related to the property conveyed.

The abstract concluded by deducting title from Mathews and Beckett to the defendants.

The plaintiff required the vendors to shew, notwithstanding any of the conditions of sale, that the covenants and conditions contained in the indenture of March 2, 1850, and referred to in the first abstracted deed, did not in any manner affect the property comprised in lot 2, and that the purchaser incurred no liability in respect of them, but the vendors declined to go further back in the title than April 17, 1860, and referred the plaintiff to the fifth condition.

The plaintiff refused to accept the title, and brought an action to recover the damages for the non-performance of the contract.

The question for the opinion of the Court was whether the plaintiff was entitled to recover. If the Court should be of opinion in the affirmative, judgment was to be entered for the plaintiff for such interest as the Master should assess, with the costs; if in the negative, judgment was to be entered for the defendants, with costs.

Joshua Williams (*Steele* with him), for the plaintiff, was stopped; and

The COURT called upon

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Dowdeswell (*Raymond* with him), for the defendants.—There has been no breach of the conditions of sale. This was a purchase by private contract, so that the purchasers had an opportunity of looking into the deed of 1860 before they purchased the property. It was the intention of the defendants to sell the interest which they had, and nothing more, and this intention is disclosed on the conditions of sale. In *Souter* v. *Drake* (5 B. & Ad. 992; 3 L. J. K.B. 31) it was held that unless there be a stipulation to the contrary, there is, in every contract for the sale of an existing lease, an implied undertaking to make out the lessor's title to demise as well as that of the vendor to the lease itself. But there were here no negative words limiting the right to take objections to the title.

[HANNEN, J.—You should have provided that the vendor must be satisfied with the title on the face of the deed of 1860.]

In *Spratt* v. *Jeffrey* (10 B. & C. 249), where leases were sold by the lessor "as he holds the same, and the vendee agreed to accept an assignment without requiring the lessor's title," it was held that the vendee was to purchase without inquiring into the title of the lessor, and could not refuse to complete because of an objection to that title. When the defendants say, "We produce our title under the deed of 1860," they in effect say, "We furnish that title as it appears on the deed of 1860, and nothing more."

[LUSH, J.—You purport to sell a freehold estate, and your proviso assumes that the last deed shews a freehold title.]

He cited *Corrall* v. *Cattell* (4 Mee. & W. 734; 8 L. J. Ex. 225) and *Hanks* v. *Pulling* (6 E. & B. 659; 25 L. J. Q.B. 375).

LUSH, J.—I am of opinion that the plaintiff is entitled to judgment. Unfortunately for the defendants they have not, in my opinion, framed the conditions of sale so as to shew what they really meant to convey. The contract is for the sale of a freehold residence, and if there had been no conditions of sale the purchaser would have been entitled to a full written title. The question is, to what extent the conditions qualify this right. Now, the fifth of these conditions is that—[the learned Judge read the condition]—so that it is provided that the abstract shall commence with a certain conveyance. It is no doubt intended to restrict the right of inquiry, and not to allow it during any period prior to the date of the conveyance; but this leaves the purchaser still entitled to have a freehold title disclosed on the face of the conveyance. I quite agree that if it had been a question whether this was an error or mis-statement which only gave the purchaser a right to compensation, the case might have been different. Well, the deed of 1860, when produced, shews that this property is conveyed in fee, subject to certain covenants and conditions contained in a deed of 1850, without intimating what they are. It therefore clearly does not shew the title to which the plaintiff was entitled under the sale, but a title encumbered with conditions of which no one knows anything. The purchaser is therefore called upon to take property which, for aught he knows, may be subject to a right of way, or liable to receive drainage upon it, or may be subject to covenants restricting the use of the house, and otherwise impeding the enjoyment of the property. Therefore, without trenching on any of the cases cited, we must hold that the limitation in the contract is to prevent the purchaser from taking any objection to the title prior to the deed of 1860, but that he must have a good title on the face of this deed. If he had referred to some of the cases which have been cited he would have had no difficulty in framing conditions according to his understanding of the contract.

HANNEN, J.—I am of the same opinion. Mr. Dowdeswell very properly said that the question for us to consider is, what is the meaning of the parties, so far as it can be gathered from the fifth condition? It seems to me that the objection taken by the plaintiff is not avoided by the language of the parties entering into this agreement. The plaintiff is not seeking to investigate the title prior to this abstract, but he proposes to inquire into the title really conveyed by the deed of 1860. It is necessary, in order that he should know

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whether he had a good title under that deed, that the nature of the deed should be disclosed. But for this purpose the covenants and conditions subject to which the property is conveyed should be forthcoming, otherwise it is impossible to know what contract the parties are making.

Judgment for the plaintiff.

IN THE QUEEN'S BENCH. Jan. 12, 1869.

HENDERSON v. SQUIRE.

38 L. J. Q.B. 73; L. R. 4 Q.B. 170; 10 B. & S. 183; 19 L. T. 601; 17 W. R. 519.

Distinguished, *London & North-Western Railway* v. *Hill*, 1883, 12 L. R. Ir. 140 (Q.B. D.).

Landlord and Tenant—Implied Contract—Delivery of Possession—Under-Tenant holding over—Damages—Ejectment—Pleading—Amendment—Payment into Court.

LANDLORD AND TENANT.—*The defendant held a house and premises as tenant of the plaintiff, but without any lease or written agreement. He let part of the house to T, and, having received notice to quit on December* 25, 1866, *he gave notice to T. to quit on December* 21. *T. refused to go out; the defendant did all in his power to give up possession. The plaintiff brought an action of ejectment against him and T; judgment was signed on May* 21, 1867, *and on May* 29 *possession was given by the sheriff to the plaintiff*:—Held, *that the plaintiff was entitled to recover rent for one half-year, and also the costs of the ejectment, on the ground that there was an implied contract that the defendant would deliver up the absolute possession of the house and premises at the expiration of the tenancy.*

PRACTICE. L.—*The declaration contained a special count, alleging that the defendant was tenant upon the terms that he should at the determination of the tenancy give up possession to the plaintiff; that the tenancy was duly determined, yet that the defendant did not give up possession, whereby, &c. The defendant pleaded to this count, payment of* 40*s. into Court*:—

The Court, being of opinion that, under the circumstances of the case, the defendant could not have intended to admit that the plaintiff was entitled to recover more than the sum of 40*s., intimated that it would, if necessary, allow such an amendment as would leave the defendant at liberty to deny that there had been a breach of the contract alleged in the count.*

The first count of the declaration stated, that the defendant broke and entered a messuage and land of the plaintiff, that is to say, all that messuage being No. 73, Wardour Street, in the parish of St. James, Westminster, in the county of Middlesex, together with the stable, outbuildings and appurtenances thereto belonging, and ejected the plaintiff from his possession thereof and kept him so ejected for a long time, and during that time took and received to the use of the defendant all the issues and profits, and the beneficial use and occupation of the said messuage, stable, outbuildings and appurtenances, whereby the plaintiff during all that time lost and was deprived of the issues and profits, and the beneficial use and occupation thereof, and was prevented from letting the same, and incurred great expense in recovering the possession of the said messuage, stable, outbuildings and appurtenances.

The second count alleged that the defendant became and was tenant to the plaintiff of a messuage, stable, outbuildings and premises, with the appurtenances, upon the terms (amongst other things) that the defendant should at the determination of the said tenancy give up possession thereof to the plaintiff, and the said tenancy was duly determined: Yet the defendant did not, at the determination thereof, give up possession of the said messuage

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stable, outbuildings and premises, with the appurtenances, to the plaintiff, whereby the plaintiff lost the use and profits of the said messuage, stable, outbuildings and premises, with the appurtenances, and incurred expense in recovering possession of the same.

Pleas—First, to the first count, not guilty; secondly, to the second count, the defendant brings into Court the sum of 40*s*. and says that that sum is enough to satisfy the claim of the plaintiff in respect of the matter herein pleaded to.

Joinder of issue.

At the trial, which took place before Blackburn, J., at the Sittings in Middlesex after Michaelmas Term, 1867, it appeared that the defendant was tenant of a house of which the plaintiff was owner, and part of which he had let to James Turner. The defendant paid rent for it since 1858. His tenancy was determined at Christmas, 1866, and he gave notice to Turner to quit on December 21; but was unable to give up possession to the plaintiff in consequence of Turner refusing to go out. The plaintiff accordingly, on May 4, 1867, brought an action of ejectment against the defendant and Turner. Judgment was signed on May 21, and on the 28th, Turner having previously refused to attorn to the plaintiff, a writ of possession was executed by the sheriff. The present action was then commenced to recover the amount of half a year's rent, and also the amount of the costs of the ejectment. The half-year's rent, deducting the 2*l*. paid into Court, was proved to be 40*l*. 10*s*., and the amount of the costs 13*l*. 10*s*. The learned Judge ordered the verdict to be entered for the defendant, but gave leave to move to set that verdict aside and enter a verdict instead thereof for the plaintiff, for the said sums of 40*l*. 10*s*. and 13*l*. 10*s*., or either of them, as the Court should direct.

Hawkins subsequently moved for and obtained a rule accordingly.

Field and *Cave* shewed cause against the rule.—The defendant had a right to let the rooms to Turner, and is not liable in this action at the suit of the plaintiff. Turner cannot be said to be his agent, inasmuch as he held the premises over without the consent of the defendant, and was a wrongdoer, there being no new contract with the plaintiff.

[BLACKBURN, J.—But is there not in the contract of tenancy an implied contract that the tenant will give up possession to the landlord at the end of his tenancy?]

No; not in the case of a simple demise of this kind. The only authority to that effect is *Harding* v. *Crethorne* (1 Esp. 57), which will be relied on by the other side, but that case differs from the present in respect of the demise being by lease, and also in respect of the action being in assumpsit for use and occupation. In a lease there would be a specific contract by the tenant to quit and deliver up possession at the end of the term; but here there was no obligation to deliver up possession. The contract between the parties amounts to this: the landlord says, "I will allow you to occupy the house up to the determination of the tenancy"; and the tenant says, "I will pay you rent up to that time."

[COCKBURN, C.J.—Suppose the case of a book which is lent for a week: it must be delivered up at the end of the week; it would be no answer if the borrower were to say, I have lent it to another person and cannot get it back. BLACKBURN, J.—In *Harding* v. *Crethorne* (1 Esp. 57), Lord Kenyon's opinion upon the general proposition, irrespective of the demise being by lease, is very clear.]

[*Hawkins* here interposed, and said that upon the pleadings the contract was admitted; but the COURT intimated an opinion that, if necessary, the plea of the defendant might be amended, so as to shew that the admission by the payment into Court was limited to the sum of 40*s*., which it thought could not have been paid into Court in respect of the possession of the house not having been delivered up at the determination of the tenancy, and that therefore there would be no admission of the contract as set out in the declaration. The plea might be so amended as to leave the defendant at liberty to deny that there had been a breach of the contract alleged in the second count. In fact, no

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amendment was made, as the Court gave judgment for the plaintiff, making the rule absolute.]

There is no case where the defendant has been held to be liable except where the holding over has been by his consent. *Christy* v. *Tancred* (7 Mee. & W. 127; 10 L. J. Ex. 229: also 9 Mee. & W. 438; 11 L. J. Ex. 109; in error, 12 Mee. & W. 316) was a case where premises were let to two persons, and one of them held over, after the expiration of the term, with the assent of the other, and it was held that both were liable, Lord Abinger, C.B. saying, " The case of two tenants is a stronger one than that of a tenant and an under-tenant: both in effect hold over till both deliver up possession." And Parke, B. said that he doubted whether there was not a distinction between the case of a co-tenant and that of an under-tenant. In *Draper* v. *Crofts* (15 Mee. & W. 166; 15 L. J. Ex. 92), which was also a case of co-tenants, one of whom held over without the consent of the other, it was decided that the latter was not liable for rent becoming due during such holding over. In *Doe* v. *Harlow* (12 Ad. & E. 40) the defendant was held liable for mesne profits for the period during which his sub-tenant held over, but he had received rent from such sub-tenant, and had declared that he was his tenant when the plaintiff demanded possession. It is also submitted that the costs of the ejectment cannot be recovered.

Hawkins and *Raymond*, in support of the rule, were not heard.

COCKBURN, C.J.—I abide by the law as laid down by Lord Kenyon in *Harding* v. *Crethorne* (1 Esp. 57), that where there is a demise of a house or premises there is an undertaking by the tenant that he will at the expiration of the term deliver up possession to the landlord. This has been considered to be the law ever since that decision was given. It is referred to as law in the different text books. Woodfall, in his book on *Landlord and Tenant*, 6th edit. p. 322, says, " A tenant remains liable for rent unless he delivers up complete possession of the premises, or the landlord accepts of another in his room," and he cites *Harding* v. *Crethorne* (1 Esp. 57) as an authority for that proposition. Then there is the case of *Christy* v. *Tancred* (7 Mee. & W. 127; 10 L. J. Ex. 229; also 9 Mee. & W. 438; 11 L. J. Ex. 109: in error, 12 Mee. & W. 316), which is not indeed on all fours with *Harding* v. *Crethorne* (1 Esp. 57), being a case of a co-tenant holding over, but in which the doctrine laid down in *Harding* v. *Crethorne* (1 Esp. 57) was adopted by Parke, B. without an intimation of the slightest doubt—see the report 7 Mee. & W. 130. I think that we should be doing a great mischief by throwing any doubt whatever upon that doctrine. I can see a great distinction between the case of a co-tenant and that of an under-tenant; in the former the person who holds over has been let in by the lessor, but in the latter by the lessee only. The plaintiff therefore is entitled to recover, firstly, in respect of the possession not having been delivered up at the expiration of the term, and, secondly, in respect of the cost which he has been put to by reason of the action of ejectment which he has been obliged to bring as a necessary consequence to the not giving up possession at the expiration of the term.

BLACKBURN, J.—I have come to the same conclusion. The question is, whether there is not an implied contract by the tenant, not only to go out of possession, but also to restore the absolute possession to the landlord. The defendant did not secure that Turner should go out, and although there was no moral fault in that respect, yet if the law implies that when the landlord has given possession the tenant shall restore possession, the defendant must be responsible in damages. The first thing that strikes me is that if the tenant does not put his landlord in possession at the expiration of the term, he does not fulfil his contract. Then, in *Harding* v. *Crethorne* (1 Esp. 57), Lord Kenyon, C.J. said, " When a lease has expired, the tenant's responsibility is not at an end, for if the premises are in possession of an under-tenant, the landlord may refuse to accept the possession, and hold the original lessee liable, for the lessor is entitled to receive the absolute possession at the end of the term." *Christy* v. *Tancred* (7 Mee. & W. 127; 10 L. J. Ex. 229: also 9 Mee. & W. 438;

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11 L. J. Ex. 109: in error, 12 Mee. & W. 316) was the case of a co-tenant holding over, and in that case the Court of Exchequer, including Parke, B., held that the co-tenants were liable in an action for use and occupation. In the same case, as reported 9 Mee. & W., p. 447, Parke, B. doubted whether there might not be a distinction between the case of a co-tenant and that of an under-tenant, but no doubt was ever raised whether Lord Kenyon was right in what he laid down. It is quite true that there is but little authority upon the matter, but after a long lapse of time there has been no decision to the contrary, and it strikes me as being most reasonable and natural that the tenant should be bound, at the expiration of the term, to restore the absolute possession which he had received from the lessor. Then, upon the question of damages, the plaintiff is entitled to recover the rent and the costs of the action of ejectment; we must take it that this was the best means of obtaining possession, and would therefore follow, as the necessary consequence of the act of the defendant, within the doctrine laid down by the Court of Exchequer[1].

MELLOR, J.—I am of the same opinion. In none of the cases which have been brought to our attention has the slightest doubt been thrown upon Lord Kenyon's ruling in *Harding* v. *Crethorne* (1 Esp. 57). That ruling has been acted upon ever since, and there is no authority against it, while, in addition, it is consistent with common sense and experience. It is usual to insert in a lease a covenant that the lessee will at the expiration of the term yield up the possession of the premises, but that is from abundant caution, and is not necessary; and the same expression is used in notices to quit. Then, there being an implied contract to deliver up possession, the damages to be recovered are those which are necessarily incident to the lessor getting possession. The proper and legitimate course was to bring an action of ejectment.

HAYES, J.—I am of the same opinion.

Rule absolute.

IN THE QUEEN'S BENCH. Jan. 25, 1869.

SIMPSON *v.* MARAVITA.

38 L. J. Q.B. 76; L. R. 4 Q.B. 257; 10 B. & S. 77; 20 L. T. 275; 17 W. R. 589.

Irish Bankrupt Act (20 & 21 *Vict. c.* 60.)—*Certificate—Protection—Arrest in England—Debt and Costs.*

On November 20 *the defendant was adjudicated bankrupt, on the petition of a creditor, in Dublin. On January* 12, *he obtained a first-class certificate, and also an order for protection from arrest. The certificate was retained in the Court, to allow of any creditors, within a month, appealing against its being granted. The plaintiff had, on October* 2, *commenced an action against the defendant, upon a promissory note given in respect of a debt owing from the defendant, and which the defendant had entered in his schedule. The defendant pleaded to the action, but did not appear at the trial, on December* 10, *when a verdict passed for the plaintiff. The costs were taxed on January* 8, *and the defendant was arrested on the* 13*th, when he produced his order of protection*:—Held, *dissenting from* Maughan *v.* Vinesberg (37 L. J. C.P. 210), *that, having obtained his certificate, the defendant was privileged from arrest in respect of the costs as well as of the debt, and that the arrest was unlawful.*

This was a rule calling upon the defendant to shew cause why an order of Blackburn, J., ordering that he should be discharged out of custody, should not be rescinded.

It appeared from the affidavits, that the plaintiff and the defendant both carried on business in London. On October 2, 1868, the plaintiff brought an

(1) Probably the learned Judge was referring to the case of *Rolph* v. *Crouch* (37 L. J. Ex. 8).

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action against the defendant upon a promissory-note. The defendant pleaded several pleas, but did not appear at the trial, on December 10, and a verdict was obtained by the plaintiff for 67*l.* 17*s.* 6*d.* On January 8, 1869, the costs were taxed, a *ca. sa.* issued, and the defendant was arrested on the 13th. He then produced to the officer an order for protection issued by the Irish Court of Bankruptcy, dated January 12, and which was to remain in force until February 12. The officer refused to discharge him, and an application was made to Blackburn, J. to order his discharge. The affidavit upon which the order was granted, shewed that on November 20, 1868, the defendant was adjudicated bankrupt in Ireland, upon the petition of one of his creditors. He entered the plaintiff in his schedule as a creditor in respect of the debt for which the action was brought. The last examination took place on January 12, and he then obtained an order of protection, which he produced upon his arrest, and also a first-class certificate, which remained in the Court, one month being allowed for any creditor to appear against the said certificate being granted. The learned Judge ordered that the defendant should be discharged, unless within four days a rule *nisi* was obtained to rescind his order.

Garth (*Sharpe* with him) shewed cause against the rule.—The defendant was entitled to his discharge, and the order of Blackburn, J. was right. The case relied on in moving for the rule was *Phillips* v. *Allan* (8 B. & C. 477), where it was held that a discharge in Scotland was no answer to an action in England; but that case was explained by *Ferguson* v. *Spencer* (1 Man. & G. 987; 10 L. J. C.P. 20), which decided that the personal estate of the bankrupt in England vested in the assignees appointed under the bankruptcy in Ireland. That decision was upon the repealed Act, 6 & 7 Will. 4. c. 14, but the terms of the present Act (20 & 21 Vict. c. 60.) are similar. In delivering the judgment of the Court in *Ferguson* v. *Spencer* (1 Man. & G. 987; 10 L. J. C.P. 20), Tindal, C.J. referred to the case of *Rogers* v. *Love* (1 Huds. & Bro. 484), decided by the Irish Court of Exchequer, in these words: "The defendant traded in Ireland and England, and became indebted to persons residing in England, who issued a commission of bankruptcy against him under the 6 Geo. 4. c. 16; he was also indebted to the plaintiff at the date of the issuing of the commission. The plaintiff's debt was contracted in Ireland. The defendant obtained his certificate in England, and gave notice of it to the plaintiff, who was also aware of the proceedings under the commission. The plaintiff arrested the defendant under a marked writ, and the defendant gave bail, and now moved that an *exoneretur* should be entered on the bail-piece on his entering a common appearance; and the motion was granted." In the present case the bankrupt was entitled to the protection afforded by the certificate as soon as it was completed on January 12.

[COCKBURN, C.J.—We granted the rule because we were told that the final order of discharge had not been made at the time of the arrest, on the 13th.]

Shaw was then called upon to support the rule.—When the rule was moved for, it was understood that the final order had not been granted. It now appears that it had been completed, but inasmuch as, according to the practice in Ireland, it is retained in the Court for one month, it is submitted that the bankrupt is not entitled to the protection afforded by it until the expiration of that month.

[COCKBURN, C.J.—How can he be arrested here when he has obtained his final discharge in Ireland? When a man's debt has been discharged, he cannot be arrested for it. The debt with all its incidents is gone. Although he did not produce the certificate to the officer, the question now is, whether he can be liable to arrest when he has obtained his final certficate.]

The certificate remains in the Court, and is no protection.

[COCKBURN, C.J.—It could not be intended that he should be kept imprisoned for the month during which the certificate remains in the Court. MELLOR, J.—Your argument amounts to this, that you may arrest him although the debt is discharged; but the cause of action is extinct; the protection is given that he may produce it to the officer while the certificate remains in the Court.]

But he is clearly not privileged from arrest with respect to the costs,

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however he may be with respect to the debt. The costs were not provable under the bankruptcy, and *Maughan* v. *Vinesberg* (37 L. J. C.P. 210; L. R. 3 C.P. 318) is an express authority to shew that he is not entitled to be discharged with respect to the costs. The two cases are exactly similar, except that in *Maughan* v. *Vinesberg* (37 L. J. C.P. 210; L. R. 3 C.P. 318) the bankruptcy took place in England.

Garth was then called upon to distinguish that case.—It may be difficult to distinguish it, but the decision is contrary to the law laid down in other cases. It has always been considered that the costs, as well as the debt, are barred by the certificate—*Shelford on Bankruptcy*, p. 608; *Willett* v. *Pringle* (2 N. R. 191); *Scott* v. *Ambrose* (3 M. & S. 326); *Ex parte Pouchem; In re Cable* (1 Glyn & J. 385); and *Ex parte Hill* (11 Ves. 646) referred to therein.

COCKBURN, C.J.—In the case of *Maughan* v. *Vinesberg* (37 L. J. C.P. 210; L. R. 3 C.P. 318) these authorities, which establish that the costs as well as the debt are barred by the certificate, were not brought before the Court of Common Pleas. They have not been overruled, unless they have been so by *Maughan* v. *Vinesberg* (37 L. J. C.P. 210; L. R. 3 C.P. 318). That case does not appear to have received much consideration, and it was not fully argued. I do not think that we are bound by it. The arrest here was in respect of the debt and costs, and the authorities are conclusive to shew that the arrest was bad and unlawful. The defendant must therefore be discharged.

MELLOR, J., and HAYES, J., concurred.

Rule discharged, without costs.

IN THE QUEEN'S BENCH. Jan. 28, 1869.

GRAY *v.* WEST AND WIFE.

38 L. J. Q.B. 78; L. R. 4 Q.B. 175; 20 L. T. 221; 17 W. R. 497.

Commented on, *Craven* v. *Smith*, [1869] E. R. A.; 38 L. J. Ex. 90; L. R. 4 Ex. 146; 20 L. T. 400; 17 W. R. 710 (Ex.). Distinguished, *Sampson* v. *Mackay*, [1869] E. R. A.; 38 L. J. Q.B. 245; L. R. 4 Q.B. 643; 20 L. T. 807; 17 W. R. 883 (Q.B.).

Costs—Recovery of Sum not exceeding 10*l.* *in Action for Slander*—30 & 31 *Vict. c.* 142. *s.* 5.

COSTS. I.—*By section* 5. *of the* 30 *&* 31 *Vict. c.* 142, *if, in an action of tort commenced after the passing of the Act in a superior Court, the plaintiff recover a sum not exceeding* 10*l.*, *he is not to be entitled to costs unless the Judge certify that there was sufficient reason for bringing the action in the superior Court, or unless the Court, or a Judge at chambers, shall allow such costs. In an action of slander, commenced after the passing of the Act, the plaintiff recovered* 10*l.*; *the Judge refused to certify that there was sufficient reason for bringing the action in the superior Court*:—Held, *that, inasmuch as by section* 58. *of* 9 *&* 10 *Vict. c.* 95. *the plaintiff could not bring an action of slander in the County Court, and as he could only proceed in the superior Court, this Court would order that he should be allowed his costs.*

Quære—*If the above section has any application to cases in which the County Court has no jurisdiction.*

This was an action of slander, tried before Hannen, J., at the sittings for Middlesex after last Trinity Term. The verdict was for the plaintiff for 10*l.* The learned Judge was asked to certify that there was sufficient reason for bringing the action in the superior Court, but he declined to do so. Subsequently, an application for an order was made to a Judge at chambers, who referred the matter to the Court. A rule *nisi* was granted, calling upon the defendants to shew cause why the plaintiff should not be allowed his costs.

Francis (Nov. 16, 1868) shewed cause against the rule.—The Judge declined to certify, and this Court cannot interfere with the exercise of his discretion. The latter part of section 5. of 30 & 31 Vict. c. 142, " unless the Court or a

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Judge at chambers shall, by rule or order, allow such costs," only applies where the plaintiff has omitted to ask the Judge, who tried the cause, for a certificate that there was sufficient reason for bringing the action in the superior Court.

[HANNEN, J.—I certainly thought that it was not a case for costs. The plaintiff's case created an unfavourable impression on my mind. I thought that the action was a frivolous one, and that the damages were excessive.]

The provision in section 5. is intended to include all actions, whether within the jurisdiction of the County Court or not. If the plaintiff brings the action in the superior Court, and recovers a sum not exceeding 10*l*., he is not to get his costs unless the Judge grants his certificate. If he is asked to do so and refuses, the plaintiff has no remedy. The words "action of tort" must include an action of slander. The 4th section, referring to the sale of ale, beer, &c., prohibits any action being brought in *any* Court, superior Court or County Court.

Anderson, in support of the rule.—It cannot be alleged that the plaintiff was not justified in bringing the action. The damages which he has recovered are substantial damages. If he could have brought the action in the County Court, there might be some ground for saying that the 5th section would apply; but, by section 58. of the 9 & 10 Vict. c. 95, no action of slander can be brought in the County Court.

[COCKBURN, C.J.—It may be that the legislature intended that such actions should not be brought at all, unless there was a substantial cause of action; but I doubt whether section 5. applies. The intention was to drive all actions of minor importance into the County Court; but that can hardly be said to apply to an action of slander, which cannot be brought in the County Court at all.]

It is submitted that the plaintiff is clearly entitled to have his costs taxed by the Master.

Cur. adv. vult.

The judgment of the Court[1] was now delivered by

HAYES, J.—This was a case relating to the effect of the late County Court Act, 30 & 31 Vict. c. 142, upon the costs of actions brought in the superior Court; but as this action was commenced after the passing of that Act, and was tried after it had come into operation, the question stood clear of the provisions of the previous statutes, and depended entirely upon the construction of the 5th section of the late Act.

The action was for slander, and was commenced in October, 1867, and tried at the sittings for Middlesex after last Trinity Term, before our Brother Hannen, when the plaintiff obtained a verdict for 10*l*. The learned Judge declined to certify, and the plaintiff, having applied for costs to a Judge at chambers, who referred the question to the Court, a rule for the allowance of the plaintiff's costs was obtained and argued in last term.

The prominent point discussed in the case was, that the plaintiff had no power of suing the defendant for this cause of action in the County Court, the 58th section of the 9 & 10 Vict. c. 95, which excludes the County Court from original jurisdiction in slander, being still in force; and although by the 10th section of the late Act a defendant is enabled to apply, under certain circumstances, to have such an action remitted for trial to the County Court, no such application was made, and consequently the plaintiff was obliged to proceed to trial in the superior Court, or abandon his action altogether.

Under the elaborate enactments of the previous County Court Acts, the liability of plaintiffs to the loss of costs for proceeding in the superior Courts was carefully confined to cases in which the County Courts had jurisdiction—(see 9 & 10 Vict. c. 95. s. 129, 13 & 14 Vict. c. 61. ss. 11, 12, 13, and 15 & 16 Vict. c. 54. s. 5).

Indeed, the very object and intention of such provisions hitherto has uniformly been to further the jurisdiction of the inferior Court, by practically compelling plaintiffs to sue there for causes of action within its jurisdiction.

(1) Cockburn, C.J., Hannen, J. and Hayes, J.

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And it is obviously quite beside the general object of a County Court Act, to subject plaintiffs to the loss of costs for suing in the superior Courts for causes of action which could not be sued for elsewhere. What now gives rise to the question in this case is, that all the former enactments above mentioned, which expressly preserved the plaintiff's right to costs in cases in which the County Courts had no jurisdiction, were repealed by the late Act, section 33, Schedule C., and in lieu of the repealed enactments the right to costs is now governed by the brief provision contained in the 5th section of the late Act, which is as follows: "If in any action commenced after the passing of this Act in any of Her Majesty's superior Courts of record, the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit unless the Judge certify on the record that there was sufficient reason for bringing such action in such superior Court, or unless the Court, or a Judge at chambers, shall, by rule or order, allow such costs."

The general and comprehensive words of the earlier part of this section would certainly appear capable of embracing a case like the present; and it was contended, on behalf of the defendant, that they did so, and that, as the learned Judge at the trial had declined to certify under the 5th section, the Court would not now review his decision. But it is to be observed that the jurisdiction given to the Judge at the trial, and that given to the Court or a Judge at chambers, are separate and distinct. The Judge, at the trial, is empowered to certify on a single point, namely, whether there was sufficient reason for bringing the action in the superior Court. The power given to the Court, or a Judge at chambers, is generally to allow the plaintiff his costs. The words relating to the certificate of the Judge at the trial, are taken from those of the enactment previously in force on this point, which was contained in the 12th section of the 13 & 14 Vict. c. 61; and it is clear that they were there intended to apply to those cases only in which the County Court had jurisdiction, but in which, nevertheless, it was reasonable that the plaintiffs should sue in the superior Court. This is, in effect, the natural import of such a form of certificate, which is appropriate to express an option and reasonable election of the plaintiff to sue in the superior Court, as contrasted with the County Court, but appears quite inappropriate to refer to a case in which the plaintiff had no option, but was compelled to sue in the superior Court or not to sue at all. It appears to us that the certificate was intended to have the same meaning and application in the section now before us as a similar certificate had, under the 13 & 14 Vict. c. 61. s. 12. And if this be so, it seems to give rise to much doubt whether the 5th section of the late Act was really intended to have any application to cases in which the County Court had no jurisdiction. If, however, it was intended to apply to such cases, the general authority given to the Court or a Judge to allow the plaintiff his costs, would, at all events, enable them to do so in cases of this nature, where it appeared proper to make such allowance.

In making such allowance, we should not be reviewing or interfering with the discretion exercised by the Judge at the trial, who merely declined to give, in this case, a certificate which was not properly applicable to it, but was only applicable to cases in which the County Court had jurisdiction. And as it is plain that the legislature intended that plaintiffs who had the power of suing in the County Court, but elected, on reasonable grounds, to sue in the superior Court, were to be allowed their costs, it seems impossible to suppose that it was intended that such allowance should not be made to plaintiffs who had no such election, and whose only remedy was in the superior Court. We think, therefore, that as, in the present case, the plaintiff has recovered an amount much beyond what would have entitled him to costs under the general law applicable to actions for slander in the superior Court, and as he could not have sued elsewhere, that he ought to be allowed his costs in this action, and therefore that the rule should be made absolute.

Rule absolute with costs.

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IN THE EXCHEQUER CHAMBER. Feb. 2, 3, 1869.

(Error from the Court of Queen's Bench.)

MORTON AND OTHERS *v.* WOODS AND OTHERS.

38 L. J. Q.B. 81; L. R. 4 Q.B. 293; 18 L. T. 791; 17 W. R. 414; 9 B. & S. 632: affirming, [1868] E. R. A. 1246; 37 L. J. Q.B. 242; L. R. 3 Q.B. 658 (Q.B.).

Explained, *Ex parte Jackson*, [1881] E. R. A.; 14 Ch. D. 725; 43 L. T. 272; 29 W. R. 253 (C. A.). Explained and followed, *Ex parte Punnett*, [1881] E. R. A.; 50 L. J. Ch. 212; 16 Ch. D. 226; 44 L. T. 226; 29 W. R. 129 (C. A.). Explained, *In re Threlfall*, [1881] E. R. A.; 50 L. J. Ch. 318; 16 Ch. D. 274; 44 L. T. 74; 29 W. R. 128 (C. A.). Applied, *Kearsley* v. *Philips*, [1883] E. R. A.; 52 L. J. Q.B. 581; 11 Q.B. D. 621; 49 L. T. 435; 31 W. R. 909 (C. A.). See, *In re Roundwood Colliery*, [1897] E. R. A.; 66 L. J. Ch. 186; [1897] 1 Ch. 373; 75 L. T. 641; 45 W. R. 324 (C. A.).

Mortgagor and Mortgagee—Mortgagor in Possession—Attornment to Mortgagee by Deed not executed by Mortgagee—Power to Distrain—Tenancy by Estoppel—Bills of Sale Act, 17 & 18 *Vict. c.* 36. *s.* 7.—*Statute of Frauds.*

BILLS OF SALE. C. DISTRESS. A. MORTGAGE. L.—*B., in consideration of advances from the defendants (his bankers), conveyed to them two pieces of ground by a deed reciting that one portion was already mortgaged in fee, upon trust for the sale of the land and application of the purchase money. By the terms of the deed B., as a further security for the principal and interest for the time being due from him in respect of the advances, attorned and became tenant to the defendants, their heirs and assigns, at and from the date of the deed, of such of the hereditaments and premises thereby conveyed "as was or were in his occupation, for and during the term of ten years," if that security should so long continue, "at and under the yearly rent of* 800*l., to be paid yearly on every* 1*st day of October in every year, the first yearly rent to be paid and payable on the* 1*st day of October then next; provided that notwithstanding anything therein contained, and without any notice or demand of possession, it should be lawful for the defendants, their heirs, executors, administrators or assigns, upon or after the execution of the trusts of sale therein contained, to enter into and upon the mortgaged premises or any part thereof, and to eject B. and any tenant or person claiming or to claim under him therefrom, and to determine the term of ten years, notwithstanding any lease or leases that might have been granted by B." This deed was not executed by the defendants, the mortgagees, but B. continued his exclusive occupation of the premises until the defendants distrained upon him for arrears of rent, no rent having been paid by him:*—Held, *affirming the judgment of the Court of Queen's Bench, that B. having executed the deed, and the defendants having assented to it by advancing money to him under it, he became tenant at will to them, either by estoppel or by the operation of the Statute of Frauds, and that the distress was lawful.*

Held, *also, that the deed was not rendered invalid by reason of its not being registered under the Bills of Sale Act*, 17 & 18 *Vict. c.* 36.

This was a writ of error upon a special case stated for the opinion of the Court of Queen's Bench.

The special case will be found set out at length in 37 L. J. Q.B. 242.

For the purposes of this report the following extracts from the special case will be sufficient:

The action was brought by the assignees of John Brown, a bankrupt, to recover damages for an alleged illegal distress by the defendants.

John Brown was devisee with two other persons of certain premises, called the Rivet Manufactory, upon certain trusts in the will mentioned, and was also seised in fee of other premises, called the Rolling Mills. By indenture,

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dated May 30, 1862, he conveyed the Rolling Mills to Frederick Horn, in consideration of 1,500*l.* paid to him by Horn, to the use of Horn, his heirs and assigns for ever, subject to the proviso for redemption, and with the power of sale, in the indenture mentioned.

The defendants were the bankers of John Brown, who was indebted to them, on September 8, 1866, on the balance of his banking account in or about the sum of 1,300*l.*, and they subsequently made further advances to him to the amount of about 1,649*l.* 10*s.*, in part of a sum of 1,800*l.*, which they had agreed to advance to him; and by an indenture, dated September 12, 1866, made between the said John Brown of the first part and the defendants of the second part, reciting the indenture of May 30, 1865, and an indenture of further charge to Horn of 1,000*l.* upon the premises included in the last-mentioned mortgage, and reciting that under the will before mentioned, subject as therein mentioned, he was entitled in fee to one undivided moiety of all the real estate devised by the will, except, &c., and including in such real estate the Rivet Manufactory, and reciting that part of that real estate devised by the will (which part included the Rivet Manufactory) had by agreement and arrangement with the trustees and other parties beneficially interested in the will, been for some time and then was in the exclusive possession of John Brown, he conveyed to the defendants, in consideration of their refraining from taking proceedings against him for the balance, and of their making further advances to him, the Rolling Mills and the undivided moiety and all other share, beneficial estate and interest of him, John Brown, of and in the Rivet Manufactory, to have and to hold the land, &c. unto the defendants, their heirs, &c., according to the different natures or tenures thereof respectively, upon trust, &c.; "and as a further security for the principal and interest moneys for the time being due from John Brown, he did thereby attorn and become tenant to the defendants, their heirs and assigns, at and from the date of the last-mentioned indenture, of such of the hereditaments and premises thereby granted or otherwise conveyed as was or were in his occupation, for and during the term of ten years, if that security should so long continue, at and under the yearly rent of 800*l.* to be paid yearly on every 1st day of October in every year, the first yearly rent to be paid and payable on October then next; provided that notwithstanding any thing therein contained, and without any notice or demand of possession, it should be lawful for the defendants, their heirs, &c., before or after the execution of the trusts of sale therein contained, to enter into and upon the mortgaged premises, or any part thereof, and to eject John Brown and any tenant or person claiming or to claim under him therefrom, and to determine the term of ten years, notwithstanding any lease or leases that might have been granted by the said John Brown.

This indenture made September 12, 1866, was executed by John Brown on that day, but it was never executed by the defendants; nor was it ever registered as a bill of sale or otherwise.

The further advances were made by the defendants, and John Brown continued his exclusive occupation of the Rolling Mills and of the Rivet Manufactory.

On October 15, 1866, the defendants distrained for a year's rent (no rent having been paid) upon the goods and chattels which were upon those two sets of premises. In order to get rid of the distress, payment was made by the plaintiffs under protest, upon which the defendants withdrew.

The question was, whether the distress was legal; if it was not, the plaintiffs were to recover the money so paid by them to get rid of the distress.

The Court below gave judgment for the defendants, holding that the non-execution of the deed by the defendants was no objection to the right to distrain, as the effect of that deed was to create, not a term of years, but a tenancy at will; and secondly, that John Brown was estopped from denying that the relation of landlord and tenant existed between himself and the defendants.

Joshua Williams (Manisty, with him), for the plaintiffs.—The judgment of the Court of Queen's Bench was wrong on both points. The first question is,

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whether Brown was tenant at will? It is submitted that he was not. The intention of the parties was to create an estate for ten years; the deed speaks of such a term; if they had intended that Brown should be a tenant at will they would have said so. In *Bac. Abr.* tit. "Lease," (L) 3, citing *Bro. Abr.* tit. "Lease," 13, 22, it is said, "If one makes a lease for ten years at the will of the lessor, this is a good lease for ten years certain, and the last words are void for the repugnancy." That is like the present case, but stronger because there were the words "at the will of the lessor." A term of years is so called because there is a terminus beyond which it cannot go. If a tenancy at will had been created, it is obvious that at the end of the term there would be the same estate as before, *i.e.*, a tenancy at will, but at the end of this term Brown would be a tenant at sufferance until he paid rent so as to become something more—see *Co. Litt.* 57 *b*. That it was not the intention of the parties that at the death of the lessors the estate should determine, is shewn by the attornment of Brown to the defendants, "their heirs and assigns." An estate at will would determine upon the death of the lessors, and so if the lessor makes a present lease to another—*Disdale* v. *Iles* (2 Lev. 88; see also *Newport's case*, Skinner, 421). Again, it is to be observed that power is given to the mortgagees to determine the term of ten years, notwithstanding any lease or leases that might have been granted by Brown. That is inconsistent with his being tenant at will, for a tenant at will who grants a lease determines the estate at will, if the granting of the lease be made known to the lessor—*Pinhorn* v. *Souster* (8 Ex. Rep. 763; 22 L. J. Ex. 266); *Watkins on Conveyancing*, p. 1, and *Blunden* v. *Baugh* (Cro. Car. 302). Further, the provision in the deed that the estate is to be determined by entry solely, is inconsistent with the notion that it was intended to be an estate at will.

[KELLY, C.B.—Looking at the estate *rebus sic stantibus*, there being no execution of the deed by the defendants, how can it be said that anything more than an estate at will was created?]

At law, there is no tenancy at all. Secondly, as the defendants did not execute the instrument, there was no deed as required by 8 & 9 Vict. c. 106. s. 3, and there being no term there could be no power to distrain.

[CLEASBY, B.—But if there is no deed there would be a tenancy at will.]

Not a tenancy at will at the rent of 800*l*. If the parties intended that a term should be created at that rent, and Brown did not get the term, he cannot be liable to pay the rent.

[CLEASBY, B.—He attorned to the defendants at that rent.]

Swatman v. *Ambler* (8 Ex. Rep. 72; 22 L. J. Ex. 81) shews that the lessee is not bound until the lessor has executed, he never having received the consideration for which he has stipulated.

[KELLY, C.B.—In that case the demise was of an incorporeal hereditament, the tolls of a navigation. BYLES, J.—There was not any attornment, as there is in this case. KELLY, C.B.—And where the demise is of a corporeal hereditament the tenancy may be created by attornment.]

The decision did not proceed upon the ground of the hereditament being an incorporeal one, but upon the ground that the lessee had not got what he stipulated for, and the Court thought that the principle of the judgment in *Pitman* v. *Woodbury* (3 Ex. Rep. 4) applied. Here Brown did not get the estate for ten years, which he had agreed for. He had attorned to the defendants at the rent for a term of ten years, but as he did not get the term he is not liable for the rent.

[BYLES, J.—The only way of carrying out the intention of the parties is to construe it as the Court of Queen's Bench did. An attornment is as strong as payment of rent would be.]

In *West* v. *Fritch* (3 Ex. Rep. 216; 18 L. J. Ex. 50) Parke, B., said (see the report, 18 *Law Journal Reports*, 50), "The deed not having been executed by the mortgagee, it cannot operate as a lease." There the mortgagor had paid rent. Further, it is submitted that to create a demise there must be an act of the landlord. As to the effect of entry under a void lease coupled with payment

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of rent, see *Cole on Ejectment*, 450. Next, the ground upon which the Court of Queen's Bench gave judgment, viz., that there was an estoppel, is incorrect. It is a principle of law that where the truth appears from the instrument there can be no estoppel—see *Co. Litt.* 352 *b*, "Where the veritie is apparent in the same record, there the adverse party shall not be estopped to take advantage of the truth, for he cannot be estopped to allege the truth where the truth appeareth of record." It here appears that, as to the Rolling Mills, Brown was tenant to Horn, and, as to the Rivet Manufactory, to the trustees. The defendants have not the legal estate. That being so, he cannot be estopped from disputing the tenancy under the defendants. The case of *Pargeter* v. *Harris* (7 Q.B. 708; 15 L. J. Q.B. 113) is inconsistent with the judgment of the Court of Queen's Bench.

[BYLES, J.—My Brother Blackburn referred to *Cuthbertson* v. *Irving* (4 Hurls. & N. 742; 28 L. J. Ex. 306)—see 37 L. J. 245—as shewing that so long as the lessee continued in possession, he cannot set up any defence founded on the fact that the lessor has no interest in the premises.]

It is submitted that case is very different from the present.

Further, it is submitted that as Brown appears to be tenant to Horn and the trustees, he cannot attorn to the defendants, the mortgage never having been forfeited—see 11 Geo. 2, c. 19, s. 11; nor can he be liable to be distrained upon by them. In the Court below the judgment proceeded very much upon the authority of *Dancer* v. *Hastings* (12 B. Moore, 34; 5 L. J. C.P. 3) and *Jolly* v. *Arbuthnot* (4 De Gex & Jo. 224; 28 L. J. Ch. 547); but it is contended that too much weight was given to those cases. In *Dancer* v. *Hastings* (12 B. Moore, 34; 5 L. J. C.P. 3) the defendant was a receiver in Chancery, to whom the attornment was valid, and the plaintiff was rightly held to be estopped from disputing his right to distrain. That case is quite different from the present case, where the legal estate is in Horn and in the trustees. *Evans* v. *Matthias* (7 E. & B. 590) was decided upon the same grounds, and *Saunders* v. *Merryweather* (3 Hurls. & C. 902; 35 L. J. Ex. 115) gets rid of much of the effect of *Dancer* v. *Hastings* (12 B. Moore, 34; 5 L. J. C.P. 3) and *Jolly* v. *Arbuthnot* (4 De Gex & Jo. 224; 28 L. J. Ch. 547).

[KELLY, C.B.—Is there anything to shew that the relation of landlord and tenant was created between Horn and Brown? It may be that a man cannot be tenant of the same property to two persons at once, but I do not find that Brown was tenant to Horn.]

He must have been tenant to Horn.

[BYLES, J.—The 11 Geo. 2, c. 19, s. 11, seems to apply to fraudulent attornments, and to cases which arise between the lessor and the lessee. If Brown had paid the rent of 800*l.* to the defendants, would he not have been estopped from denying their title? If so, would he not be equally estopped by the attornment?]

Even if this Court should think that *Jolly* v. *Arbuthnot* (4 De Gex & Jo. 224; 28 L. J. Ch. 547) was exactly in point, still it would not be conclusive. It was a reversal by Lord Chelmsford of a decision of the Master of the Rolls, and is at most a decision simply of a Court of co-ordinate jurisdiction. If it had been intended that there should be a power to distrain, it would have been expressly given.

Next, if the estoppel authorizes a distress, it is opposed to public policy, as the deed would have the effect of a bill of sale, and under the 17 & 18 Vict. c. 36, s. 7, would be invalid unless registered. It is a "licence to take possession of personal chattels" within section 7.

[CHANNEL, B.—That section must be read with the preamble and the 1st section. It would be going a long way to lay down that such a deed as this must be registered as a bill of sale.]

Kemplay, contra, was not heard.

KELLY, C.B.—The question to be decided in this case is, whether the distress can be supported. It has been contended, on the part of the plaintiffs, that the defendants were not entitled by law to distrain, inasmuch as they were

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not seised of the legal estate, and the relation of landlord and tenant, out of which the right of distress must have arisen, was never created between the parties; and that proposition is sought to be supported on two grounds, first, that it appears from the instrument itself that if there be any tenancy at all, it is a tenancy for ten years, a lease for ten years; and, secondly, that the lease not being under seal, the mortgage-deed not being executed by the defendants, there is no such tenancy. It is said further, that the power of re-entry, which follows upon the attornment, does not convert the supposed or intended lease for ten years into a lease or tenancy at will, and, consequently, that there is, in effect, no tenancy, and so no right of distress. Although these are objections of a highly technical nature, we are bound to give effect to them if they are sustained by law, and the more so, as they have been supported by a very learned argument, in which all the authorities, ancient and modern, bearing on the question have been fully brought before us, on the part of the learned counsel for the plaintiffs. And, first, as to the objection, that, the defendants not having the legal estate in them, they could have no right of distress. It is perfectly clear that they had not the legal estate, but then that may be said of all lessors where there is a lease, or a tenancy by way of estoppel, who have no title at all. Here the defendants had an equitable estate; they certainly had no legal estate. As that, standing alone, would have no effect, this being a lease or tenancy by way of estoppel, it becomes of primary importance in the present case, because it is contended that this being a tenancy by way of estoppel, and only available to the defendants by the law of estoppel, such law is inapplicable where the truth against which the estoppel is to operate appears on the face of the instrument itself. It may be taken that it appears on this mortgage of September, 1866, that the defendants were not seised of the legal estate, but that the legal estate was outstanding in the first mortgagee, Horn. Now, in support of this proposition, a number of cases have been cited, but when we look with attention to the facts of those cases, and to the *ratio decidendi* in one and all of them, we find that none are directly in point. They are cases either of actions upon covenant where, unless the covenantor can under the terms of the instrument enforce the covenant by action at law, it is clear no such action is maintainable; or where an action of ejectment having been brought on a clause of re-entry, it was perfectly clear that in order to maintain the action there must be the legal estate or title in the plaintiff, and it appeared on the face of the instrument and the evidence in the case, that the plaintiff in ejectment had not the legal estate, but that it was outstanding in another person, and the action was held not to be maintainable. But even if any of the dicta to be found in one or more of the numerous authorities referred to by Mr. Williams, were to lead to the conclusion that where the truth against which the estoppel is directed appears upon the face of the deed, no estoppel arises, that doctrine must be taken to have been overruled in the case of *Jolly* v. *Arbuthnot* (4 De Gex & Jo. 224; 28 L. J. Ch. 547), and that by the Lord Chancellor sitting on appeal, by a Court of co-ordinate jurisdiction with that before which this case is now being decided. Even, therefore, if we were to find that which is binding on us by authority for the proposition contended for by the learned counsel, we should be bound to defer to the higher authority of the Lord Chancellor in *Jolly* v. *Arbuthnot* (4 De Gex & Jo. 224; 28 L. J. Ch. 547), which was an appeal from a decision of the Master of the Rolls, and which is therefore binding even upon the Court of Exchequer Chamber. Now, when we look to that case we find that there was a mortgage, and an agreement between the parties, by way of attornment, or a sufficient clause in itself to constitute a tenancy, that the tenancy should subsist, not between the mortgagor and mortgagee, but between the mortgagor and a receiver, who is named in the instrument appointed by the Court of Chancery. It is perfectly manifest that the receiver having been so appointed, he had no interest whatever in the premises, either legal or equitable. It appears from the instrument itself that there was no legal estate in him; he claimed the power of distress by virtue of a tenancy of this nature, and in his character of receiver, and the absence in him of any interest whatever likewise

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appeared on the face of the deed. The Master of the Rolls certainly took a view of the case in accordance with that contended for here by the plaintiffs. That case was very elaborately argued, and Lord Chelmsford, as Lord Chancellor, reversed the decision of the Master of the Rolls, and there being there a tenancy by way of attornment, or by reason of a clause sufficient in itself to constitute as between the mortgagor and mortgagee a lease or tenancy at will, or for years, he held that though it appeared on the face of the same instrument which contained the clause creating the tenancy, that it was a tenancy between the mortgagor and the receiver, and that the receiver had no interest legal or otherwise in the premises, that did not do away with the tenancy or right of distress, which arose by implication of law from the relation of landlord and tenant, thus created between the mortgagor and the receiver. And his Lordship, after stating that it was contended that the clause as to the receiver had no operation by estoppel, said, "It appears to me that the circumstances of the truth of the case appearing upon the deed is a reason why the agreement of the parties, which it embodies, should be carried out, either by giving effect to their intention in the manner which they have prescribed, or by way of estoppel to prevent their denying the right to do the acts which they have authorized to be done." Then his Lordship refers to the cases of *Cornish* v. *Scarell* (8 B. & C. 471) and *Dancer* v. *Hastings* (12 B. Moore, 34; 5 L. J. C.P. 3), as supporting the conclusion at which he had arrived. There is a distinction between *Jolly* v. *Arbuthnot* (4 De Gex & Jo. 224; 28 L. J. Ch. 547) and the case now before us; there the mortgagor and mortgagee, as well as the receiver, were parties to the transaction and to the creation of the tenancy to which the distress was incidental, while it appears in the present case that there was a first mortgagee, who is not a party to this transaction or to the instrument in question. That is relied on by Mr. Williams, but when we consider the causes of the law and the true reason of the law which led to the creation of the doctrine in question, it will appear manifestly that the creation of the tenancy, and the arising of an estoppel out of a tenancy thus created, is the sole cause of the legal estate being superfluous and unnecessary, and that it is the relation of landlord and tenant, subsisting between the parties to the instrument, which creates the tenancy in question, and not the consent of any third party, not a party to the instrument. Therefore, the two cases may be said to be identical. If we had any doubt, which we have not, on the question, we should feel ourselves bound to defer to this authority. Under these circumstances, although the defendants have not the legal estate in the lands in question, although that fact appears by reference at least to the instrument now before us, we think that does not disentitle the defendants to the distress in question, and does not at all affect the relation of landlord and tenant, or the incidents of that relation created by and arising out of the terms of the instrument.

We come now to the instrument itself, and have to consider the question whether there is a tenancy at will; if so, whether it was a tenancy to which this right of distress was incident. We find on looking at the instrument itself that after the usual language of a mortgage-deed the deed proceeds to state, "and as a further security for the principal and interest moneys for the time being due from the said J. Brown under and by virtue of the said indenture, the said J. Brown did thereby attorn and become tenant to the defendants, their heirs and assigns, and as from the date of the said last-mentioned indenture for and during the term of ten years, at the yearly rent of 800*l*." Then follows the proviso that, notwithstanding anything therein contained, it should be lawful for the defendants at any time to enter on the premises, and seize and take possession. Now, it is insisted on the part of the plaintiffs that here there is no tenancy at will; and the ground on which it is put is, that this is, if anything, a lease for ten years, and, that being so, that it was the intention of the parties to grant a lease for ten years, and that the lease not being under seal is void under the Statute of Frauds. But the answer on the part of the defendants is, that by the terms of the Statute of Frauds a lease for ten years or the creation of a tenancy for ten years, not under seal, is not void if it be

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made only in writing or by parol. I will consider hereafter the effect of the Statute of Frauds, which is not the ground upon which the Court of Queen's Bench decided this case. It is likewise contended on the part of the plaintiff that it was the intention of the parties to grant a lease for ten years, and that it would be contrary to their intention to hold it to be a tenancy at will. Now, in the first place, in support of that proposition, there is the high authority of *Brooke's Abridgment*, recognized and repeated in *Bacon's Abridgment*, of a case which shews that where there is an express lease for ten years, and then a proviso that the landlord or the lord may enter and determine the lease at his pleasure, that does not convert the lease for ten years into a tenancy at will, but such a proviso shall be construed to be repugnant to the instrument, and void. And perhaps that might be so in the ordinary case which one could suppose of a mere lease for ten or twenty or twenty-one years between landlord and tenant; but in order to consider whether that has any application to the present case we must look to the whole of the instrument. If we find the instrument in effect a deed of mortgage, and the tenancy, or the relation of landlord and tenant, the liability to pay rent, and the power of distress reserved to the landlord, all arising in a mortgage-deed, which appears to be a mere security for the re-payment of the principal sum advanced, and the interest, then the authority of those cases and of others to the same effect is no longer applicable; and we must look to the real intention of the parties to be collected, as we are bound to collect it, from the whole of the instrument taken together. When we look at the whole of the instrument there is nothing repugnant in it at all. The parties may have contemplated that the relation of mortgagor and mortgagee, and of the landlord and tenant, might subsist for ten years, or for probably more; that the money should remain unpaid and the interest be regularly paid in the mean time. They probably thought that ten years was a reasonable time to assign for the duration of the term thus created and intended to subsist between them. And accordingly we find in the first instance that there is the grant of a lease for ten years; but when we proceed and see that there is a power to enter at any time and take possession of the premises without demand and notice, when we remember that the whole instrument is only a security for the repayment of money advanced on mortgage or the payment of interest, it is quite manifest that what was intended was this: that whatever might be the nominal duration of the tenancy thus created, the nominal contrivance of the relation of landlord and tenant, it was to be in the power of the landlord, at any time when it was necessary for security, to enforce the instrument into which they had entered, and put an end to whatever tenancy was created and to receive and take possession of the whole of the premises. Therefore, we think that the Court of Queen's Bench was perfectly right. Taking those two portions of the clause together, the attornment by the mortgagor as tenant, and for a term of ten years, but with a power to the mortgagee at any time and without demand or notice to enter, seize and take possession of the premises, we think that that converted the tenancy or term of ten years into a mere tenancy at will, because, by means of the exercise of the power thus conferred on the mortgagee, he had the means at his mere will and pleasure, without more, to determine the tenancy in question. And we think, therefore, considering the whole instrument together, that the mortgagor having attorned tenant in respect of these premises to the defendants, without going through the useless form of walking out of the premises and into them again, having in fact derived and acquired possession and the right to the continuation of possession under the mortgagee as his landlord, that he became the tenant, and that the tenancy for years was converted into a tenancy at will. It is said that a tenancy at will cannot be created to continue beyond the lives of the party or of the lessor. When we come to consider the whole of the law on this question we find that it is based on very fine distinctions, and it would rather appear that a tenancy at will may continue to subsist after the death of one of the parties, unless the heir should do something to testify in some way his intention to discon-

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tinue the tenancy. It is enough to say that the mere circumstance of this power being reserved to the lessor and his heirs, does not necessarily prevent the estate in question becoming a tenancy at will or for a term.

But even if any doubt could remain as to the effect of this instrument, as to whether there was, strictly speaking, a tenancy at will created by this deed, when the clauses belonging to it are all taken together, the operation of the Statute of Frauds puts an end to the question, because, supposing, as Mr. Williams contended, but for the non-execution by the mortgagee, that he was to be the tenant under a lease for ten years, yet as it was not executed by the lessor therefore it must be said to be a term or lease created by parol only, by the express terms of the Statute of Frauds it is not absolutely void, but may be taken to be a tenancy at will. It remains, therefore, from the time of the execution of the instrument, or the attornment by the tenant, until the rent shall be paid, strictly a tenancy at will. As soon as the rent is paid under it, it becomes a tenancy from year to year. In the mean time it is a tenancy at will, and a distress by the landlord would be lawful. I do not enter into the other points raised by the plaintiffs.

In the first place, we hold with the Court of Queen's Bench that this is a tenancy at will on the true construction of the instrument as entered into between the parties. I say between the parties, because, though there has been an objection, in one form or other, that the defendants have not executed this deed, it is quite enough that Brown, the mortgagor, the alleged tenant, did execute the deed, and that it was assented to by the defendants. And we find that the deed was executed by Brown, and that the defendants proceeded to advance very large sums of money, in addition to further advances, and they must be taken to have accepted the deed, although it was not formally executed. We think it is a tenancy created by these parties, in much the same way as if Brown had written a letter containing all these terms, the contract for the payment of rent and everything else which is in the instrument, and that the proposal had been assented to without being signed on the part of the defendants. That would have constituted a tenancy between them, notwithstanding the introduction of the term for ten years, either by estoppel, or under the operation of the Statute of Frauds, as has been already stated, a tenancy at will until the payment of rent; and after the tenant has come into possession and remained in possession, and on payment of rent,—from and after that a tenancy from year to year. We are, therefore, of opinion that under this instrument a tenancy was created on the one ground or the other, being a tenancy at will as long as there should be no payment of rent.

With regard to the point made in reference to the Bills of Sale Act, we have no power to draw inferences of fact; therefore, if it could possibly be contended that the mortgage-deed was a bill of sale, and was in effect an evasion of that Act, we have no power so to determine; we are not sitting as a jury, and can only look to the facts found in this case. If, looking at the instrument itself, we were to say this was a bill of sale within the Act, we must hold every mortgage-deed in which premises are mortgaged with a power of distress or re-entry to be a bill of sale. But no such doctrine can possibly be supported; and even if the question had arisen, we should hold that this deed is not an evasion of the Act, and is not a bill of sale requiring registration within the meaning of the Act; consequently that objection likewise fails. Under these circumstances we are all of opinion that the Court of Queen's Bench was right, and its decision must be affirmed.

Decision affirmed.

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IN THE QUEEN'S BENCH. Jan. 26, 1868.

WREN AND ANOTHER *v.* WIELD.

38 L. J. Q.B. 88; L. R. 4 Q.B. 213; 20 L. T. 277.

Referred to, *Burnett* v. *Tak*, 1882, 45 L. T. 743 (Ch. D.).

Patent, Infringement of—Slander of Title—Particulars.

PATENT E. SLANDER OF TITLE.—*The plaintiffs carried on the business of machine-makers, and in their business sold machines to certain persons. The defendant wrote letters and made verbal statements to such persons, alleging that the machines so sold were infringements of a patent which he had obtained for such machines, and making claims in respect of such alleged infringement and the use of the machines.*

An action having been brought by the plaintiffs in respect of the injury caused by these letters and statements, the defendant pleaded not guilty.

The Court ordered him to deliver particulars to the plaintiffs, shewing in what part or parts the machines of the plaintiffs mentioned in the declaration were an infringement of the defendant's patents, and pointing out by reference to line and page of his specifications what part of the inventions therein described he alleged to have been infringed.

This was an application for a rule calling upon the defendant to shew cause why he should not deliver to the plaintiffs particulars shewing in what part or parts the plaintiff's spooling-machines mentioned in the declaration are an infringement of the defendant's patents of 1858 and 1860, or either of them, and pointing out by reference to the page and line of the defendant's specifications, which part of the inventions therein described they alleged to have been infringed.

The first count of the declaration stated that, before and at the time of the committing of the grievances hereinafter mentioned, the plaintiffs carried on the trade and business of engineers and machine-makers, under the style or firm of Wren & Hopkinson, and in their said trade and business lawfully made for sale and sold, and were lawfully making for sale and selling, from time to time, certain machines called spooling-machines, and by the making and selling of such machines as aforesaid were acquiring gains and profits, and the plaintiffs had sold some of the said machines to certain persons, to wit, persons carrying on trade under the style and firm of R. F. and J. Alexander & Co.; and thereupon the defendant, in a letter written and sent by the defendant to the said persons, falsely and maliciously wrote and published of the plaintiffs, in relation to their said trade and business, and in relation to the said machines being so made and sold by them as aforesaid, and in relation to the said machines sold by the plaintiffs to the persons as aforesaid, the words following: that is to say,

"It has come to our knowledge that you (meaning the said persons) have on your premises and are using spooling-machines made by Wren & Hopkinson (meaning the plaintiffs), of this city (and thereby meaning the said machines sold by the plaintiffs to the said persons), under an alleged patent of one Ermen & Smith, which have been advised is an infringement of our patent spooling-machine. You are perhaps not aware that other manufacturers have had similar machines, and when they became aware that they were an infringement of our patents they at once discontinued their use and returned them to the makers. We should regret exceedingly that any misunderstanding between us on this point should arise, but in justice to ourselves, should you think fit to dispute our claim, which is 25*l.* per spindle, we shall reluctantly be compelled to enforce it, along with damages, as we may be advised. Your reply per return, stating the number of spindles you have will oblige yours truly,

"WILLIAM WIELD & Co."

(Meaning the defendant.)

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The second count alleged that the defendant, in a certain other letter written and sent by the defendant to the said persons, falsely and maliciously wrote and published of the plaintiffs, and of the plaintiffs in relation to their said trade and business, and in relation to the said machines being so made and sold by them as aforesaid, and in relation to the said machines so sold by them to the said persons as aforesaid, the words following: that is to say,

"We (meaning the defendant) have this day received your return, and inclosed we beg to hand you our account for royalty, and we give you the alternative that you must either return the two machines (meaning the said machines so sold by the plaintiffs to the said persons as aforesaid) to the parties you bought them from (meaning the plaintiffs), or pay the inclosed account in ten days from the date of this letter. If we are compelled to sue you for our royalty, as per the inclosed account, we will sue for damages also, as we may be, advised. We are at a loss to know what Wren & Hopkinson (meaning the plaintiffs) have to do in this matter as between us. We purpose dealing with them (meaning the plaintiffs) in another way, as we may be legally advised.—We remain, yours truly,

"WILLIAM WIELD & Co."
(Meaning the defendant.)

The third count alleged that the defendant falsely and maliciously spoke to one Edmund Brookes, a member of the firm of "Jones, Brookes & Bros.," and published of the plaintiffs, and of the plaintiffs in relation to their said trade and business, and in relation to the said machines so being made and sold by them, the words following: that is to say,

"If you use their spooling-machine (meaning such a machine of the plaintiffs as aforesaid), I (meaning the defendant) will be forced to proceed against you for infringing my rights."

There were other similar counts.

The declaration concluded as follows: By means of the committing of which said several grievances by the defendant, the plaintiffs were and are greatly injured in their said trade and business, and in relation to the making and selling of such machines as aforesaid and otherwise, and divers persons, to wit, the said persons trading under the firm of R. F. and J. Alexander & Co., Jones, Brookes & Brothers, and Marshall & Co., the said Thomas Ainsworth and certain other persons trading under the firm of John Clark, jun. & Co., who respectively had theretofore purchased such machines as aforesaid from the plaintiffs, and who would otherwise have purchased other such machines as aforesaid from the plaintiffs, were prevented from so doing, and divers other persons who would otherwise have purchased such machines from the plaintiffs, were prevented from so doing, and the sale of such machines as aforesaid by the plaintiffs was greatly hindered and diminished, to the great loss and injury of the plaintiffs in their said trade and business, and otherwise.

Plea—Not guilty.

Issue thereon.

Webster, in support of the application.—The defendant has compelled the plaintiffs to ask for particulars. Instead of bringing an action for infringement, or proceeding by *scire facias* to repeal the plaintiffs' patent, he has written letters and uttered slanders against the plaintiffs as the maker of these machines, and having compelled the plaintiffs to bring an action against him, he pleads not guilty, without any plea of justification. It is impossible that the plaintiffs can go to trial safely without being furnished with particulars.

[COCKBURN, C.J.—I think that this is a reasonable application, but there is some difficulty in seeing what issue is raised upon the record upon which you can be entitled to particulars.]

It is submitted that the plea of not guilty raises such an issue. The case falls within the spirit of the rule that the plaintiff may be compelled to give particulars of the infringement of which he complains. He raises the issue

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whether his patent has been infringed or not, but by this novel mode of proceeding he has changed the position of the parties.

The COURT then granted a rule *nisi*.

Aston shewed cause in the first instance.—The plaintiffs are not entitled to these particulars. There is no rule of law under which the defendant can be forced to give them.

[COCKBURN, C.J.—A great injustice might be done to the plaintiffs if they were forced to go to trial in such a complicated matter without being made acquainted with the particular infringements upon which the defendant relies.]

If that is the opinion of the Court, no further opposition will be made to the rule being made absolute; but it is submitted that it ought to be so on the terms that the defendant should be entitled to begin and have the reply, in case evidence is adduced impeaching the validity of his letters patent, as is provided by the Patent Law Amendment Act, 1852, 15 & 16 Vict. c. 83. s. 41.

COCKBURN, C.J.—The defendant has not chosen to proceed in the way pointed out in that section, and I do not think that we ought to give him the benefit of such a privilege.

MELLOR, J. and HAYES, J. concurred.

Rule absolute.

IN THE QUEEN'S BENCH. Jan. 21, 1869.

SADLER *v.* SMITH.

38 L. J. Q.B. 91; L. R. 4 Q.B. 214: affirmed, [1870] E. R. A.; 39 L. J. Q.B. 17; 5 Q.B. 40; 10 B. & S. 17; 21 L. T. 502; 18 W. R. 148 (Ex. Ch.).

Arbitration and Award—Boat-Race—Jurisdiction of Referee—Stakeholder.

ARBITRATION, REFERENCE AND AWARD. B. GAMING AND WAGERING. C.—*K. and S, two watermen, agreed to row a "right-away sculler's race" upon the river Thames, the start to take place at half-past two p.m., the rowing to be according to the recognised rules of boat-racing, and a referee to be chosen at the last deposit, "whose decision shall be final." In watermen's races it is the practice for the men to start themselves. A referee was appointed and the race commenced; but a foul having taken place, the men were ordered by the referee to row over again. On the following day they came to the starting-place. After several fruitless attempts to start, K. rowed up to the referee's steamboat, which had drifted out of sight of the men, and complained that S. would not start. The referee looked for S, but not seeing him, told K. to inform S. that he must start, and that if he would not to row over without him. K. then went away, and the referee afterwards saw him row over the course, but did not hear him speak to S. The referee having decided that K. was entitled to the stakes, it was found by the jury, in an action against the stakeholder, that the referee's order was not communicated to S, and that a fair opportunity of starting was not given to him*:—Held, *that under the agreement it was necessary, to empower the referee to award the stakes, that there should be a race or a start; and, assuming that the referee had power in certain cases to direct one of the men to start without the other, yet, as the terms of his order were not conveyed to S, there never had been a start. The referee was therefore without that which was the foundation of his authority to award the stakes, and his decision was void.*

Declaration for money received by the defendant for the use of the plaintiff, and for money due from the defendant to the plaintiff on accounts stated between them.

Pleas.—First, never indebted; secondly, as to the claim for the money received for the use of the plaintiff, that before the receipt of the money by the defendant the plaintiff and one Henry Kelley entered into an agreement in the words and figures following: "Articles of agreement between Henry Kelley,

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of Putney, on the one part, and Joseph Sadler, of Putney, on the other part. They hereby agree to row a right-away sculler's race from Putney to the Ship at Mortlake, the start to take place between the aqueduct and the steamboat pier, on Wednesday, November 27, for the sum of 300*l.* a side; the start to take place at half-past two p.m. The steamboats accompanying the race to be behind the men at starting; the cutter also accompanying the men to keep astern of the sternmost man. To row according to the recognized rules of boat-racing. The referee to be chosen at the last deposit, and whose decision shall be final, 50*l.* a side being now staked in the hands of the editor of the *Sportsman* (the defendant), Monday, October 7. The second deposit of 50*l.* a side to be made on Thursday, October 17, at the *Sportsman* Office; the third, of 50*l.* a side on Thursday, October 31, at the *Sportsman* Office; the fourth, of 50*l.* a side on Thursday, 14, at the *Sportsman* Office; and the final, of 100*l.* a side, at 'The Bells,' Putney, on Thursday, November 21, between the hours of eight and ten p.m. In the event of the referee not being agreed to, the editor of the *Sportsman* to name one. The editor of the *Sportsman* to be final stakeholder. Either party failing to comply with these conditions to forfeit all money down.

"HENRY KELLEY.
"J. H. SADLER.

"Witness, Robert B. Wormald."

Averment—That the defendant received the money claimed in the declaration, as to which the plea was pleaded, upon the terms of the agreement, as stakeholder, to pay the money to the winner of the race according to the decision of the referee; that a referee was chosen, and that the referee decided that Kelley was the winner of the race. Averment of performance of conditions precedent to entitle Kelley to receive and the defendant to pay him the money claimed in the declaration to which the plea was pleaded; and that the defendant, in accordance with the terms of the agreement, and according to the decision of the referee, duly paid the money claimed in the declaration to which the plea was pleaded.

Replication.—First, a joinder of issue. Secondly, that the referee so to be chosen was to be a referee having jurisdiction only so far as the same was to be vested in referees by the recognized rules of boat-racing, and was appointed upon the terms, and subject to the conditions and with the powers, jurisdiction and restrictions to and with which such referees were and are subject and invested, that is to say, that he should decide any question connected with or arising out of the race according to the recognized rules of boat-racing, and only after it had commenced, nor should he direct either of the parties to start and row the race alone; of all which the defendant at the time of his receiving the deposit now sought to be recovered, and from thence hitherto, had notice. That before the payment of the money by the defendant on November 27, 1867, Kelley and the defendant came to the place for starting in the agreement mentioned prepared to start for the race, and started accordingly, and contested the race for some distance, and a foul took place, and the referee, considering both Kelley and the plaintiff in fault, and that the race so commenced was, as in fact it was, no race, ordered them to row again the following day, on November 28, 1867, subject to the conditions; and on the 28th Kelley and the plaintiff again came to the place for starting, and after several unsuccessful attempts to start, and whilst the plaintiff was ready and willing to start and row the race according to the agreement, the referee, without the knowledge or consent of the plaintiff, wrongfully, and in violation of the terms, conditions, restrictions and recognized rules of boat-racing, ordered Kelley to row over the course alone, and thereupon Kelley did row over the course alone and arrived at the winning-post, whereby he became and was guilty of a breach of the agreement; and although by rowing over the course and arriving at the winning-post Kelley did not become the lawful winner of the race, nor entitled to the stakes, nor any part of them, but violated the agreement, yet the referee, wrongfully and in violation of the terms, conditions, restrictions and recognized

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rules of boat-racing, without having any power or authority so to adjudicate and declare, adjudicated and declared Kelley winner of the race.

Averment—that by reason of the premises there was no start and no race according to the recognized rules of boat-racing, and that Kelley was not the lawful winner of the race, and that the plaintiff by reason of the premises became entitled to a return of his stake, being the amount claimed in the declaration, all conditions having been fulfilled necessary to entitle the plaintiff to demand the stake, and that he did before this suit and within a reasonable time and before the defendant had actually paid it over to Kelley, demand a return of his stake so deposited by him, yet the defendant paid over the stake to Kelley as the lawful winner of the race.

Rejoinder, taking issue on the replication.

At the trial, before Cockburn, C.J., at Guildhall, at the Sittings after Hilary Term, 1868, it appeared that Kelley and the plaintiff had entered into the agreement set out in the plea and that a Mr. W. Biffin was appointed referee. A foul having taken place on November 27, as stated in the replication, the race was finally arranged for November 28, 1867. Upon the afternoon of that day Kelley and Sadler took up their stations at the starting-post. It is the practice in a waterman's race for the men to start themselves. The referee was on board a steamboat, which had drifted so far from the starting-place that it was not possible to see the men distinctly. There was a delay in effecting a start, and after several attempts had been made without success, Kelley rowed up to the referee's steamboat and complained that Sadler would not start fairly. The referee looked for Sadler, but could not see him, and then told Kelley to go to his station and tell Sadler that he must start, and that if he would not start, to start without him. Kelley then rowed off. The referee did not hear him say anything to Sadler, but shortly afterwards saw him row over the course, and awarded him the stakes without further inquiry. The referee being applied to for a written decision, wrote a letter saying that his decision was that Kelley was entitled to the stakes, and that he, the referee, ordered him to row over, assigning as a reason that from what he had seen he had come to the conclusion that Sadler did not intend to start[1]. The stakes were accordingly paid to Kelley, and the present action against the defendant commenced.

The jury, in answer to questions from the Chief Justice, found, first, that Sadler intended to start; secondly, that the referee had no materials for forming an opinion that Sadler did not intend to start; thirdly, that the referee's order was not communicated to Sadler; and, fourthly, that a fair opportunity of starting was not given to Sadler.

A verdict was thereupon directed for the plaintiff, with liberty for the defendant to move.

Ballantine, Serjeant, having obtained, in Easter Term, 1868, a rule *nisi* for the plaintiff to shew cause why the verdict should not be set aside and a verdict entered for the defendant, on the ground that the decision of the referee was for the purposes of the action final,

Henry James and *Brickwood* shewed cause.—The plaintiff is entitled to retain the verdict entered in his favour. The referee in the decision which he gave entirely departed from the powers conferred upon him by the agreement. By the express terms of this agreement, the referee cannot intervene until the start has taken place, and no start ever did take place. It may be doubted whether in any event he was justified in telling one man to row over the course. But it is unnecessary to decide this question. The plaintiff takes his stand upon the broad ground that the referee acted without jurisdiction. If it were otherwise, who is to say when the powers of the referee are to commence? It surely could not be said that he might have awarded the stakes before the time fixed for the race,

(1) It is not necessary to give the words of this letter, which is mentioned in the judgment of Hannen, J.

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because he did not think that Sadler intended to start. Again, in the circumstances under which the referee gave his decision he was guilty of judicial misconduct. He decided against Sadler without giving him an opportunity of being heard; and it is clear that on this ground his award might be set aside—*In re Brook; Delcomyn and Badart* (33 L. J. C.P. 246). The award might also be set aside on the ground that by the referee's own admission it was given under the influence of a mistake—*In re Hall and Hinds* (2 Man. & G. 847; 10 L. J. C.P. 210). The decision was therefore given upon an occasion where the parties had not agreed to be bound by the decision of the arbitrator, and it was given upon an occasion where one of the parties was heard in the absence of the other and while the arbitrator was under an erroneous impression. It is impossible that such an award can stand, and no decision can be cited in the defendant's favour.—They cited *Benbow* v. *Jones* (14 Mee. & W. 193; 14 L. J. Ex. 257).

Garth and *Tennant*, in support of the rule.—The defendant was justified in paying over the stakes, and his decision that Kelley was entitled to them is final. But, assuming that any of the objections to his decision are well founded, it is clear that the plaintiff has mistaken his remedy, for he cannot obtain relief in an action at law. Misconduct of the referee in not hearing one of the parties can only be redressed by an application to the equitable jurisdiction of the Court. *Thorburn* v. *Barnes* (36 L. J. C.P. 184), where the arbitrators made an award in favour of the plaintiff without giving the defendant any opportunity of being heard, is a conclusive authority to this effect, and the point is treated as decided in the note to *Veale* v. *Warner* (1 Wms. Saund. 327 a). It is there stated that before the Act 9 & 10 Will. 3. c. 15, it was only where the arbitration was by rule of Court that the Courts of common law would refuse to enforce the performance of the award on the ground of misconduct in the arbitrator, so that relief could only be obtained in equity. But now, since the Common Law Procedure Act, 1854, section 17, an agreement of reference like the present one may be made a rule of Court; and *Parkes* v. *Smith* (19 L. J. Q.B. 405) shews this power would apply to an agreement to refer future disputes, so that the plaintiff had a remedy but did not avail himself of it.

[COCKBURN, C.J.—Here there has been no race according to the terms which the arbitrator prescribed.]

When the jurisdiction of the referee has once commenced he is the final judge of the facts.

[COCKBURN, C.J.—But how do you shew that his jurisdiction has ever commenced?]

So soon as the parties had tendered themselves for the race any question of fact was for the referee.

[HANNEN, J.—Has he jurisdiction to say that there shall be a start by one in the absence of the other?]

The Court is not at liberty to take any portion of the facts and say that the referee ought not to have decided upon it. The steward of a horse-race has always a right to say whether there is a start or not. The referee thought that Sadler had not *bonâ fide* intended to start. Suppose either of the two men had rowed for about forty yards and then stopped, the referee would surely be entitled to say whether he had started. In *Carr* v. *Martinson* (1 E. & E. 456; 28 L. J. Q.B. 126) the plaintiff and H. entered into an agreement to run one horse against another on a specified day, and that W. should be the starter, and the money paid over according to the decision of a named judge. W. did not appear on the ground, and the plaintiff's horse walked over the course, and was declared the winner by the judge, H. refusing to run the race. It was held that the judge had no power to award the stakes, but only because W, the starter, was absent, and therefore the race could not come off.

[COCKBURN, C.J.—If in the case cited the starter had refused to act, could the judge have awarded the stakes?]

It is contended he could.

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[COCKBURN, C.J.—The case cited seems an authority against you. Here the men start themselves; and if they fail to do so, the arbitrator cannot award the stakes.]

It was for the referee to decide any question of fact which arose after the men had taken up their quarters at the starting-place. They cited *Brown* v. *Overbury* (11 Ex. Rep. 715; 25 L. J. Ex. 169); *Benbow* v. *Jones* (14 Mee. & W. 193; 14 L. J. Ex. 257); *Walmsley* v. *Mathews* (3 Man. & G. 133); *Maryatt* v. *Broderick* (2 Mee. & W. 369; 6 L. J. Ex. 113); *Milner* v. *Field* (5 Ex. Rep. 829; 20 L. J. Ex. 68); *Smith* v. *Littledale* (15 W. R. 69); *Munro* v. *Butt* (8 E. & B. 738); *Evans* v. *Pratt* (4 Sc. N.R. 370; 11 L. J. C.P. 87); *Scott* v. *the Liverpool Corporation* (3 De Gex & Jo. 334; 27 L. J. Ch. 641); *Scott* v. *Avery* (5 H.L. C. 811); and *Russell on Arbitration*, 3rd edit. 293.

[COCKBURN, C.J.—I am of the opinion that this rule should be discharged. The action is brought to recover 300*l.* deposited by the plaintiff with the defendant, with the view to a sculler's race between the plaintiff and a waterman named Kelley, upon the terms of a written agreement. According to this agreement the race was to be a sculler's race, and the winner was to be entitled to the stakes deposited; and the decision of the referee was to be final. The referee has undoubtedly decided that the stakes should be awarded to Kelley; and if this decision is one which cannot be questioned, and which was conclusive, the plaintiff cannot recover in this action against the stake-holder. This is the question we have now to decide.

Now, according to the conditions of the race, as contained in the contract when properly interpreted, the race was to be begun by a start to be made by the men between themselves. The referee was not to interfere in that start. Whether that is a convenient mode of starting a race of this description may be seriously questioned, after the experience we have had in the matter before us; but it was part and parcel of the agreement. We must assume, however, that, according to the true construction of the contract, if these men failed to start through the default of either or both, the referee would have authority to intervene. I think it a grave question whether under the agreement the referee could interfere with the start; but, as far as my memory and my own decided conviction go, the point was abandoned at the trial, and it has not been pressed during the arguments before the Court. Therefore we must take it as admitted that in the event of default on the part of the men the referee would be entitled to intervene. We must also take it that there was delay and difficulty in the start. In consequence of this, and upon application being made to the referee, he gave an order that Kelley should inform Sadler that he (the referee) insisted on a start being made, and that if Sadler did not start, he, Kelley, was to be at liberty to row over the course without him. We must take it as a fact that this order was not properly communicated to Sadler, and that, inasmuch as the order implied that Sadler should have an opportunity of a fair start, that opportunity was not afforded to him by his opponent; in other words, we must take it as an established fact that the order given by the referee was never carried into effect. We must therefore assume that, if these facts had been present to the mind of the referee, he would have decided otherwise than he did decide. If these facts had been present to his mind, he never could have come to the conclusion that the start had been made, so as to entitle Kelley to row over the course, and have the stakes. The merits of the case were clearly in accordance with the verdict of the jury as I directed it to be entered. The stakes should never have been given up to Kelley, as there was no race. If Kelley had placed his boat alongside that of Sadler, and communicated to him intelligibly the order of the referee, and Sadler had then refused to start, it would have been very different as regards both law and justice. But it has been proved to the satisfaction of the jury that Kelley did not give his opponent a fair opportunity of starting, and that he did not make known to him that he was about to row over without him. Kelley, therefore, took an unfair advantage of Sadler. Such are the merits of the case; but it is said that the decision of the referee was final, whatever may be the justice and equity of the case. This proposition is

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maintained upon the authority of two sets of cases. In the first place it is said that this was essentially an arbitration, and that the decision of the referee is in substance an award, and the validity of an award cannot be disputed in an action by reason of misconduct or miscarriage in the arbitrator until the award has been set aside. Another class of cases has been cited, in which Courts of law have held, that in races and other similar cases, and where wagers of money are at stake, and where it has been agreed that stewards should be the sole judges of the result, that these judges cannot be superseded. I think, however, that this case is distinguishable from both classes of authorities. I quite agree that where parties have agreed that the result of a race, or any other subject-matter of wager, shall be determined by the decision of a particular judge chosen by themselves, they must abide by the decision of the person whom they constitute judge. But in all the cases called to our attention the event had come off. The race or subject-matter of the wager had taken place, and the Court said, "You must wait until the decision of the judge appointed has been taken, supposing that no decision has been given, or, if the decision has been given, we cannot interfere with it." This case is very different, because the event on which the arbitrator was to decide has never taken place at all. And that brings us to another question, namely, the effect of the authorities by which it has been held that an award, made by a person to whom the parties have agreed to refer any present or future differences, cannot be questioned unless that award has been invalidated or set aside. I think these cases are distinguishable. Here, by the terms of the contract, the referee had no power to start the parties; they were to start themselves. But let it be granted that, upon their failing to start themselves, he had authority to dictate how, and in what way a start should be made, and, as an alternative, to decide whether, if no start took place between the men themselves, one of them should be at liberty to row over the course; and let us assume that the referee had authority to make the order, still, the order he made was plainly a conditional one. It was that a start should be made, and that if a start were not made one of the parties should be at liberty to go over the course. His jurisdiction to make such an order may have come into operation in the circumstances which presented themselves; but, assuming that he did give that order, and that it was competent to give it, the order was never complied with; there never was a start such as he had prescribed; there never was a race such as he had contemplated and was implied in the order he gave. There was no start; there was no race. Then it was said that the referee decided that there was a start, and that there was a race, for this was implied in his award. But in the cases cited the arbitrator had given a decision upon the points which enabled him to make the award. Either this was proved in fact, or there was nothing to rebut it. Here the referee had power to award to whom the stakes were to be given, but that presupposes that there has been a race, and a race necessarily presupposes a start. *Primâ facie*, it would be implied when he awarded the stakes that there had been a start, and that there had been a race; but we have before us in evidence that there was no start, and that there was no race. These two things being absolutely necessary to give the referee jurisdiction to award the stakes, it seems to me that what would have been the foundation of his authority to award the stakes has failed. I think, therefore, that these cases do not apply, and we have here the case of stakes awarded without jurisdiction, without the conditions precedent upon which it would attach. There was no race or start which would have warranted the referee according to a just exercise of his authority in awarding the stakes, and we are not prevented from doing justice according to the merits of the case. The verdict will therefore stand as entered.

HANNEN, J.—I am of the same opinion, though I must admit that I had considerable difficulty in coming to a conclusion upon the case. I think that it was properly argued that we are not entitled to overrule the decision of the arbitrator upon any matter within his jurisdiction, and that, as to anything within his jurisdiction, his decision is final, and cannot be reviewed by a jury or by this Court. But the question here is, what has he decided? When we

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have ascertained what he decided, we must consider whether the decision is within his jurisdiction. Now, the terms of his decision, given immediately after the time for the race, were simply that Kelley was entitled to the stakes. This may be a decision involving all the steps necessary to vest in Kelley a good title to the stakes, or it may be merely an order by the referee, without any authority that the money should be paid over. It may be illustrated in this manner: Suppose there had been no race or pretence of a race, and the referee had said, "I award that Kelley is entitled to the stakes," he would not on that account have been entitled to them, because, in fact, it would not have been an award made with reference to such a race as the parties contemplated when they consented that the referee should have authority over them. Now in this particular case, the referee hearing a report that Sadler would not start, sent an order through his competitor Kelley that, if he did not start, he, Kelley, was to row the race without him. I will assume for the present purpose that the referee had power to make such an order. This seems to have been conceded (and I should think, from the nature of the case, that it was a sort of authority that it would be desirable to give to such a referee). It would then be in his power to say that the men should start at a particular time, if up to that time they had not been able to start themselves. I am accordingly inclined to think, and I assume for the purposes of this judgment, that if a question had subsequently been raised as to whether or not Sadler had refused to start, that it would have been within the jurisdiction of the referee to decide this question. But no such question arose. The referee, after sending the message to Sadler, that if he, Sadler, would not start, Kelley was to start without him, proceeded to look after the business of the race, and when Kelley came in, assumed that that which he had prescribed as the condition upon which the race was to depend had been done. It was precisely the same as if Kelley, instead of going back to where Sadler was, and saying, or appearing to say, something to him, had simply turned his boat round out of sight of the referee, and then turned ahead of the other boat and rowed in to the winning-post. If this had taken place, and we can suppose that the referee could have remained uninformed of it, he would, upon seeing Kelley come in, have assumed that what he had directed to be done had been done, though, in fact, nothing of the kind had happened, and no race would ever have taken place within the meaning of the parties. What I have illustrated by a strong instance is what has really taken place here. The referee sent Kelley back to give the order. Kelley, in fact, as found by the jury, communicated nothing whatever to Sadler; Sadler, therefore, never refused to start; the condition upon which the referee said that the race was to be run never took place; Kelley ought never to have started, and, not starting, did not in any way perform the race with reference to which the powers of the arbitrator had been given. Upon these grounds, I think that our judgment should be for the plaintiff. I ought to add, though it would have been better to have said so a few minutes earlier, that I do not think that the written award makes any difference in the case. The true award was made shortly after the race was run. This is manifest when you come to examine what the referee has said, because the operative passages in the written award, even if he had power to make a written award to alter the effect of that which he had done, do not alter it. He says—"My decision is, that Kelley is entitled to the stakes." I have already commented on the meaning which these words may bear. He goes on to say, "I did order him to row over." Later on he says, "I told him, if Sadler refused, to start without him, and this he did." But he does not anywhere say that Sadler had refused to start, or that the state of things had arisen upon which he had commanded Kelley to row over without him, and, in fact, we are informed that there was no discussion upon this subject afterwards, and no evidence offered respecting it; so that the facts remained just as they were immediately after this race, or semblance of a race.

HAYES, J.—I am entirely of the same opinion. It seems to me that the case is the same as if, in a race between two race-horses, one horse was started without giving the other an opportunity of starting, and consequently contrary

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to the real directions which the steward had given upon the subject. It is said that in point of fact one of the parties has had all the race to himself, and that the arbitrator has decided that he is entitled to the stakes. But in point of fact the arbitrator is the judge of the race, and to judge of the race he must have an opportunity of seeing how the two men have actually run. If either of them has a fair opportunity of starting, and refuses or omits to take advantage of it, that is his fault. Neither of these circumstances has taken place here, and there has been in truth no race at all. I think, therefore, that the referee had no authority to give his decision, and that the plaintiff is entitled to recover his stake.

Rule discharged.

IN THE QUEEN'S BENCH. Nov. 10, 1868; Jan. 20, 1869.

BAILY *v.* SIR C. DE CRESPIGNY.

38 L. J. Q.B. 98; L. R. 4 Q.B. 180; 19 L. T. 681; 17 W. R. 494.

Referred to, *Mills* v. *Guardians of the East London Union*, [1873] E. R. A.; 42 L. J. C.P. 46; L. R. 8 C.P. 79; 27 L. T. 557; 21 W. R. 142 (C.P.). Applied, *Newington Local Board* v. *Cottingham Local Board*, [1879] E. R. A.; 48 L. J. Ch. 226; 12 Ch. D. 725; 40 L. T. 58 (V.C.); *Kirby* v. *School Board for Harrogate*, [1896] E. R. A.; 65 L. J. Ch. 376; 1896 1 Ch. 437; 74 L. T. 6 (C. A.); *Nickoll & Knight* v. *Ashton, Edridge & Co.*, [1901] E. R. A.; 70 L. J. K.B. 600; [1901] 2 K.B. 126; 84 L. T. 804; 49 W. R. 513 (C. A.); *Krell* v. *Henry*, [1903] E. R. A.; 72 L. J. K.B. 794; [1903] 2 K.B. 740; 89 L. T. 328 (C. A.); *Grimsdick* v. *Sweetman*, [1909] E. R. A.; 78 L. J. K.B. 1162; [1909] 2 K.B. 740; 101 L. T. 278 (K.B.D. Div.); *In re Arthur's Estate*, [1880] E. R. A.; 49 L. J. Ch. 556; 14 Ch. D. 603; 43 L. T. 46; 28 W. R. 972 (M.R.); *Long Eaton Recreation Grounds Co.* v. *Midland Railway*, [1902] E. R. A.; 71 L. J. K.B. 837; [1902] 2 K.B. 574; 86 L. T. 873; 50 W. R. 693 (C. A.).

Covenant—" Assigns "—Land taken by Railway Company under Compulsory Powers—Repeal of Covenant by Operation of Law.

COVENANT. E. LANDLORD AND TENANT. MAXIMS. STATUTE. F.—*A landowner who has covenanted in the usual form that neither he nor his " assigns " shall build upon his land, is discharged from his covenant after selling the premises to a railway company under their compulsory powers, as the company became assignees of the land, not by the voluntary act of the former owner, but by compulsion of law.*

In an action of covenant by lessee against lessor it was alleged and admitted on the record that the defendant had covenanted that neither he nor his " assigns " should or would, during the term, permit to be built any messuage, &c., on a paddock fronting the demised premises; that the paddock had been purchased by a railway company, and conveyed to them by the defendant under the compulsory powers of their special Act, and that they had erected buildings on the ground contrary to the covenant. It was also stated that the buildings, &c., were not such as it was necessary or compulsory for the company to erect on the land in question:—Held, *that the defendant was not liable, as the railway company could not be taken to be assigns within the contemplation of the parties to the covenant, and it made no difference whether the company were required or empowered to take the land. The plaintiff was, therefore, one of a class of persons injured by the construction of the railway, for whom the legislature had provided no compensation.*

Declaration, that the defendant, by deed, demised (amongst other hereditaments) to the plaintiff a certain piece or parcel of ground in the parish of St. Giles, Camberwell, in Surrey, and the messuage or tenement, together with

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other erections and buildings then recently erected and built thereon by the plaintiff, for eighty-nine years from March 25, 1840, at a rent thereby reserved. And the defendant thereby (amongst other things) covenanted with the plaintiff that neither he, the defendant, his heirs, or his assigns, should or would during the term permit to be built on the ground or paddock fronting the premises demised by the deed, as aforesaid, towards the north, any messuage or dwelling-house, coach-house or stable, or other erection, save and except summer or pleasure houses in private garden ground, and also a church or chapel at the eastern extremity of the ground or paddock; and which ground or paddock was delineated on the ground plot or plan drawn in the margin of the deed. Averment of conditions precedent.

Breach—That after making the demise, and during the term, the defendant permitted to be built on the said ground or paddock certain erections other than those by the deed excepted, to wit, a railway station, with the appurtenances thereof, including water-closets and urinals. And the plaintiff says that by reason of the premises he has been greatly annoyed and damnified in the enjoyment of the land, messuage and hereditaments, demised by the deed, and the value of the land and messuage, and of the term, has been much depreciated, and the amenity and comfort of the land and messuage as a residence have been deteriorated by the interference with the prospect therefrom by reason of the erections aforesaid, and by reason of the smoke proceeding from the chimneys of the railway station and premises, and by reason of the plaintiff's messuage being overlooked by the windows of the railway station and premises; and by reason of the premises the plaintiff has been prevented from having so beneficial a use and occupation of the lands as he otherwise would have had, and has been otherwise damnified. And the plaintiff further says, that after the making of the deed and demise, and during the term thereby granted, the defendant assigned the ground or paddock to the London, Brighton and South Coast Railway Company, and that the company, after the assignment and during the term, and while they were possessed of the ground or paddock by virtue of the assignment from the defendant, erected and built the railway station, with the appurtenances, on the ground and paddock, contrary to the covenant, to the damage of the plaintiff as above mentioned.

Plea—That before the committing of the alleged breaches, and after the making of the deed, the London, Brighton and South Coast Railway Co. required to take and purchase the ground or paddock under the powers given them by the London, Brighton and South Coast (New Lines) Act, 1862, and for the purposes for which they were by the Act empowered to purchase and take the ground or paddock. That the ground or paddock was land which the company were empowered by the Act to purchase and take compulsorily for the purposes of the undertaking authorized by the Act; and that after the making of the deed, and before the committing of the alleged breaches, the company did, under and according to the powers conferred upon them by the Act, and by virtue of the Act, compulsorily purchase and take the ground or paddock, and for the completion of the purchase the defendant, by deed, did convey the ground or paddock to the company and their successors, which is the assignment in the declaration mentioned, whereupon and whereby the company under and by virtue of the Act became seised in their demesne as of fee of the ground or paddock, and continued so seised until afterwards the company, being so seised, built on the ground or paddock the erections in the declaration mentioned, which were erections reasonably required by them for the purposes of their undertaking authorized by the Act, which building by the company is the building complained of in the breaches. And that, except as aforesaid, the defendant did not permit the erections to be built.

Demurrer to the plea, and joinder in demurrer.

Replication—That although reasonable, still it was neither necessary nor compulsory for the railway company to build the station on the land in question.

Demurrer to the replication, and joinder in demurrer.

F. M. White, in support of the demurrer.—The plea is bad. It appears

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from the record that there was a paddock fronting the premises leased to the plaintiff, and that the defendant covenanted that neither he nor any one to whom he assigned this paddock should erect certain buildings upon it. It is not denied that these buildings have been erected on the paddock by a railway company, to whom it was assigned by the defendant, but the defendant says that there has been no breach of his covenant, since he was forced to assign the ground to the company in accordance with the powers conferred upon them by their special Act. But this is no sufficient excuse. It is necessary that the plea should go further and shew, not merely that the Act of Parliament enabled the company to take the land, but that it obliged them to erect the buildings upon it. A covenant is repealed by an Act of Parliament only where the Act makes it illegal for the covenantor to perform his covenant.

[LUSH, J.—The breach is, that the defendant permitted buildings to be erected on the paddock. You have to make out that he gave the company permission to build.]

In *Brewster* v. *Kitchell* (12 Mod. 167), where a memorandum was indorsed on the deed granting a rentcharge to the effect that the grantee was to be "paid the rentcharge without any deduction or abatement of taxes, charge or payment out of, for or concerning the rent," and the question was whether the grantor of the rent and his heirs should be obliged to pay the rent without deduction in respect of taxes imposed by Parliament in the future, and which it was provided the tenant might deduct from his rent, Holt, C.J. says, "This Act can by no means destroy this covenant because, though the tenant has a liberty to deduct, yet the Act does not hinder him from paying his rent without it, he does not break the law if he pays his rent without any deduction; and this is the difference when an Act of Parliament shall or shall not destroy a covenant. If a man covenant to do a thing which is lawful at the time of the making, and an Act come afterwards and make the thing covenanted to be done unlawful, such Act is a repeal of the covenant; but where a man obliges himself to do a thing which perhaps was not lawful before, and an Act makes it lawful, the Act does not repeal the covenant." So here, the company are at liberty to build upon the land; but, as it is admitted by the demurrer to the replication, there is no obligation upon them to do so. In *Wynn* v. *the Shropshire Union Railways and Canal Co.* (5 Ex. Rep. 420) the company were held to be discharged from their covenant to take a limited quantity of water from a stream by a subsequent Act of Parliament which extended their powers over this stream, but it was on the ground that the legislature had made it unlawful for them to perform their covenant; and that it was absurd to suppose an action would lie against them for doing what the legislature had said they should be obliged to do. *Barker* v. *Hodgson* (3 M. & S. 267) is another authority to shew that it is only where the performance of the covenant is rendered unlawful that the contract is dissolved; and possibly if the Act of Parliament had compelled the company to build the station the plaintiff would have had no remedy. If the plea is taken to mean that the covenant is repealed by the statute, the answer is that the operation of the statute is not compulsory, and the defendant, if he had pleased, might have bound the company by a covenant not to build on the ground which they took from him. If it is said that the company are not assigns within the meaning of the Act of Parliament, this objection is removed by the terms of the Lands Clauses Act, section 75, which require the seller of land to companies to make out a good title to it, and to execute a proper conveyance to the company. So that these companies are in the position of ordinary assignees of real property.

Raymond, in support of the plea.—The proposition of the defendant is simply this: In entering into a restrictive covenant on behalf of himself and his "assigns" he could only have meant persons to whom he should of his own free will assign his property, and not such assignees as the legislature might choose to thrust upon him. The covenant does not contemplate any interference with the land by the legislature.

[COCKBURN, C.J.—The object of the legislature is to give the person

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interested in the land the real value of his interest. Might not the claimant say, "The real value is so much, for you are taking the land to build upon it, and there will be a breach of the covenant with which I am burdened?" The lessee pays a larger rent because of the covenant. If this covenant is taken into account between the lessor and the company, is it not fair that the difference in the value of the land should be handed over to the lessee?]

The defendant is not a voluntary assignor. His execution of the conveyance to the company is a mere matter of form, and he could not require the company to bind themselves by restrictive covenants.

[HANNEN, J.—The answer to that is that he would be entitled to all the more compensation.]

In *Doe* d. *Mitchinson* v. *Carter* (8 Term Rep. 57), where a lessee covenanted not to assign, with a power of re-entry on default, and executed a warrant of attorney under which the term was taken in execution, it was held that there was no breach of the covenant. It was argued that the sale of the lease by the sheriff was a hostile act done by operation of law. And Lord Kenyon says, "I adopt the distinction relied on by the defendant's counsel between those acts that the party does voluntarily and those that pass *in invitum*. Judgments in contemplation of law always pass *in invitum*, and I see no difference between a judgment that is obtained in consequence of an action resisted and a judgment that is signed under a warrant of attorney, since the latter is merely to shorten the process and to lessen the expense of the proceedings." And Grose, J. refers to *Crusoe* v. *Bugby* (2 W. Black. 766; 3 Wills. 234) as an authority that although becoming bankrupt, &c. may be a breach of the covenant not to put away the term, yet it does not amount to an assignment. *Doe* d. *Goodbehere* v. *Bevan* (3 M. & S. 353) was an ejectment against a lessee for breach of his covenant not to part with his interest. It appeared that he had deposited the lease as a security for money borrowed, and then became bankrupt, and that the lease was sold by direction of the Chancellor to pay the debt. It was held that there was no forfeiture, Lord Ellenborough saying (page 358), "Here the question is upon the meaning of the term 'assigns,' whether by that term the proviso was meant to have effect against assigns in law as it would have against assigns of the party. Now the Courts have construed it to mean 'voluntary assigns' as contradistinguished from 'assigns' by operation of law." And Bayley, J. adds, "If 'assigns' mean voluntary assigns, what act is there to make them voluntary?" In the recent case of *Slipper* v. *the Tottenham and Hampstead Junction Railway Company* (36 L. J. Ch. 841), where a railway company, after notice to treat, arranged by private contract the price of the interest of a tenant in lands, who had a covenant in his lease not to assign without the consent of the lessor, the Master of the Rolls held, on the authority of *Wadham* v. *Marlowe* (8 East, 314, n.), that the covenant not to assign was superseded by the Lands Clauses Act, as the lessor could not refuse or assent to the assignment.

[LUSH, J.—There the Act of Parliament bore directly on the covenant not to assign.]

In that case, as in the present, the material fact was that the company were assignees by operation of law.

F. M. White, in reply.—In the case last cited, the breach was necessarily involved in that which the company were empowered to do. If this had been a covenant to maintain a plantation on the land, it may be admitted that there would be an answer to the action. But the plea is bad for not shewing that it was necessary and inevitable that the company should build on the paddock. If the defendant had foregone his compensation, he might have induced the company to enter into a restrictive covenant.

Cur. adv. vult.

The judgment of the Court[1] was now (Jan. 20) delivered by—

HANNEN, J.—This was an action on a covenant contained in a lease of

(1) Cockburn, C.J., Lush, J., Hannen, J. and Hayes, J.

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certain premises, granted by the defendant to the plaintiff in 1840, for a term of eighty-nine years, whereby the defendant covenanted that "neither he nor his assigns should or would during the term permit to be built any messuage," &c., on a paddock fronting the demised premises. The breaches alleged are, 1, that the defendant during the term permitted a railway station to be built on the paddock; 2, that the defendants assigned the paddock to the London and Brighton Railway Company, who erected the railway station on the paddock. To this declaration the defendant pleaded that after the making of the deed, the railway company required to take the said paddock, under two powers given them by Act of Parliament (1862) for purposes for which they were by the said Act empowered to take the same; that the paddock was land which the company were empowered to take compulsorily for the purposes of the undertaking authorized by the Act, and that the company, under the powers so conferred, did compulsorily purchase and take the paddock, and that the assignment by the defendant to the company was the assignment in completion of such compulsory purchase; that the company afterwards built on the paddock the erections complained of, which were erections reasonably required for the purposes of the undertaking authorized by the Act, and that, except as aforesaid, the defendant did not permit the said erections to be built. The plaintiff demurred to this plea, and also replied that the erections, though reasonable, were not necessary or compulsory for the company to build. To this replication there was a demurrer. It must be taken on these pleadings that the assignment by the defendant to the railway company was altogether made under the requirements of the Act of Parliament, and without any stipulation introduced into the conveyance by the vendor or the purchaser which would alter its character as an act done by the defendant in obedience to the command of the legislature. The 75th section of the Lands Clauses Consolidation Act, 1845, is imperative that the owner of lands shall, on the performance of the conditions imposed on the company, when required so to do, duly convey the lands to the promoters, or as they shall direct; and in default thereof, it shall be lawful for the promoters to execute a deed-poll, declaring the fact of such default having been made, and thereupon all the estate and interest in such land capable of being sold and conveyed (by such owner) shall vest absolutely in the promoters of the undertaking. We think that no such distinction can be drawn between the case of an owner of lands who does that which it is his duty to do, namely, convey to the company, and one who, by refusing to convey, obliges the company to obtain a title to the lands by the execution of a deed-poll. In the one case, as in the other, the transfer of the title is compelled by the legislature, and it cannot be supposed that it was intended that the landowner who acts solely in obedience to the law should be in a worse position than one who refuses compliance. In either case the railway company must be regarded as the assignee of the land, not by the voluntary act of the former owner, but by compulsion of law. The substantial question therefore raised is, whether the defendant is discharged from his covenant by the subsequent Act of Parliament, which *put it out of his power to perform it*. We are of opinion that he is so discharged, on the principle expressed in the maxim *Lex non cogit ad impossibilia*.

We have first to consider what is the covenant which the parties have entered into. There can be no doubt that a man may, by an absolute contract, bind himself to perform things which subsequently become impossible, or to pay damage for their non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was, or might have been, anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promissor. But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens. It is on this principle that the act of

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God is, in some cases, said to excuse the breach of a contract. That is, in fact, an inaccurate expression, because, where it is an answer to a complaint of an alleged breach of contract that the thing done or left undone was so by the act of God, what is meant is that it was not within the contract; for, as is observed by Maule, J., in *Canham* v. *Barry* (15 Com. B. Rep. 619; 24 L. J. C.P. 106), a man might by apt words bind himself that it shall rain to-morrow or that he will pay damages. This is the explanation of the case put by Lord Coke in 1 Rep. 98: " If a lessee covenants to leave a wood in as good plight as the wood was at the time of the lease, and afterwards the trees are blown down by tempest, he is discharged of his covenant," because it was thought that the covenant was intended to relate only to the tenant's own acts, and not to an event beyond his control, producing effects not in his power to remedy—see *Sheppard's Touchstone*, 8th edit. 133, 157.

It is on this principle that it has been held that an impossibility arising from an act of the legislature subsequent to the contract discharges the contractor from liability. Again, to quote an observation of Maule, J., in *The Mayor of Berwick* v. *Oswald* (3 El. & B. 665; 23 L. J. Q.B. (Ex. Ch.) 324), there is nothing " to prevent parties, if they choose by apt words to express an intention so to do, from binding themselves by a contract as to any future state of the law "; but " people in general must always be considered as contracting with reference to the law as existing at the time of the contract," and the words shewing a contrary intention ought to be pretty clear to rebut that presumption. To hold a man liable by words in a sense affixed to them by legislation subsequent to the contract, is to impose on him a contract he never made. This is the principle of that which was laid down in *Brewster* v. *Kitchell* (1 Salk. 198) that, " Where H. covenants not to do an act or thing which was lawful to do, and an Act of Parliament comes after and compels him to do it, the statute repeals the covenant. So, if H. covenants to do a thing which is lawful, and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed." To apply the foregoing observations to the present case: The defendant has covenanted that his " assigns " shall not build. The word " assigns " is a term of well-known signification, comprehending all those who take either immediately or remotely from or under the assignor, whether by conveyance, devise, descent or act of law—*Spencer's case* (5 Co. Rep. 16; 1 Smith's Lead. Cas. 5th edit. 43). The defendant when he contracted used the general word " assigns," knowing that it had a definite meaning, and he was able to foresee and guard against the liabilities which might arise from his contract so interpreted. The legislature by compelling him to part with his land to the railway company, whom he could not bind by any stipulation, as he could an assignee chosen by himself, has created a new kind of assign such as was not in the contemplation of the parties when the contract was entered into. To hold the defendant responsible for the acts of such an assignee, is to make an entirely new contract for the parties. On the other hand, to confine the word " assigns " to those who take by the voluntary act of the assignor would not, as was suggested in argument, limit the operation of the covenant to his immediate grantee, because all those who take from the first assignee do so in consequence of the original voluntary act of the assignor, and it was his own fault that he assigned at all, or that he did not in the original conveyance guard against the acts of subsequent assignees. To exempt him from liability for such acts would be contrary to the intention of the parties to be collected from their words interpreted according to their known ordinary signification. It was indeed conceded on the argument by the plaintiff's counsel, that the defendant would not be liable for *all* acts of the railway company as he would have been for the acts of any other assign; but it was contended that the defendant was relieved from liability on his covenant as to those acts only which the company was required by the Act of Parliament to do, and not as to those which the company was merely empowered to do. We do not think that this distinction is well founded. The rule laid down in *Brewster* v. *Kitchell* (1 Salk. 198) rests upon the ground that it is not reasonable to suppose that

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the legislature, while altering the condition of things with reference to which the covenantor contracted, intended that he should remain liable on a covenant which the legislature itself prevented his fulfilling; but the covenantor in this case is equally disabled from preventing the railway company from doing those things which it is *empowered* to do as those which it is *required* to do. Why then should there be a difference in the liability of the covenantor with respect to the one and the other? But assuming that the imposing on the defendant by the legislature of assigns whom he could not control would, without more, free him from the engagements which he entered into with reference to assigns whom he could control, it remains necessary to deal with the argument that though the company was empowered to take the lands free from the restrictions upon building, this was only on condition of paying full compensation for what they got, and that it must be supposed that the defendant obtained from the company not only the value of the land as he held it, encumbered with a covenant not to build, but also what was deemed a fair consideration for the right to build. It appears to be assumed in this argument that the difference between the price of the land encumbered with the covenant not to build, and the price of it, freed from that covenant would be the amount of damages to be paid by the defendant to the plaintiff in the present action. But that is not so. The plaintiff, if entitled to recover at all in this action, would be entitled to the damage he had sustained by the breach of the covenant, even if those damages should exceed the whole value of the land taken. The argument in favour of the plaintiff to be derived from the enactments relating to compensation is no doubt this: The legislature has, in express terms, or by necessary implication from its language, given to persons in the defendant's situation a remedy over against the railway company in respect of acts done by the company: this would here indicate that the legislature did not intend that the defendant should be freed from liability on his covenant, although he was disabled from performing it. But we cannot find in the Railway Acts any express or implied enactment to this effect. It has already been pointed out that there is no relation between the compensation which the defendant would be entitled to for his land and the damages for which he would be liable to the plaintiff. How would it be possible for the defendant to lay before the compensation jury evidence of the extent of his liability on such a covenant as that under consideration? How could he, in an inquiry to which the plaintiff was no party, offer evidence of the injury which the plaintiff might by any possibility sustain in the uncertain event of the company erecting a station or other building on the land taken? Further, if the covenant of the defendant is to be considered as broken by the act of the railway company, so as to entitle the plaintiff to damages, it must be deemed to carry with it the other consequences of a breach of contract. Thus, if the situation of the plaintiff and the defendant in this case had been reversed, and the covenant not to build on land adjoining the demised premises had been entered into by a lessee with the usual proviso for re-entry in the event of breach of any covenant, the lessee would have been liable to forfeiture of his whole interest by reason of an act over which he had no control; and the railway company would be liable, if the plaintiff's contention be correct, to pay by way of compensation for a piece of land taken, the whole value of the interest of the lessee in the adjoining estate.

The solution of the case appears to be this: the plaintiff is one of a numerous class of persons injured by the construction of a railway for whom the legislature has not provided compensation. This may be illustrated by reference to the special damage claimed in the declaration. It is there alleged that the amenity and comfort of the land demised have been diminished by reason of the prospect therefrom being interfered with, and by being overlooked by the windows of the station with the appurtenances, including water-closets and urinals. These are heads of damage which railway companies are not, in ordinary circumstances, bound to give compensation for, but for which the defendant would be liable in an action on his covenant. We do not think that it was the intention of the legislature to make a railway company liable for such damages in the exceptional case of a person in the position of the plaintiff having taken a covenant from the

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lessor in the terms of that under consideration; or that if such had been the intention of the legislature so peculiar a head of compensation as that now suggested, namely, for liability to damages for breach of collateral covenants resulting from the taking of lands, would have been left to be conjectured from the vague language of the Lands Clauses Consolidation Act. For these reasons we are of opinion that our judgment ought to be for the defendant.

Judgment for the defendant.

IN THE QUEEN'S BENCH. Jan. 15, 1869.

SHEPHERD *v.* HARRISON AND ANOTHER.

38 L. J. Q.B. 105; L. R. 4 Q.B. 196: affirmed, [1869] E. R. A.; 38 L. J. Q.B. 177; L. R. 4 Q.B. 493 (Ex. Ch.): the latter decision affirmed, [1871] E. R. A.; 40 L. J. Q.B. 148; L. R. 5 H.L. 116; 24 L. T. 857; 20 W. R. 1 (H.L.).

Consignor and Consignee—Vesting of Property in Goods—Bill of Lading and Bill of Exchange forwarded together.

SALE OF GOODS. D.—*The plaintiff, a cotton-merchant at Manchester, sent to P, N. & Co. an order to purchase for him* 1,000 *bales of cotton, at or under* 8½*d. per pound, to include cost freight and insurance. P, N. & Co. were merchants at Pernambuco, and P. & Co. their correspondents at Liverpool. P, N. & Co. shipped two portions of the cotton on different vessels, and wrote to the plaintiff, inclosing the invoices, and saying "We have drawn upon you, as per note at foot, for the same, to which beg your protection." "The bills lading will be handed over to you by P. & Co." The invoices were headed "On account and risk of S. & Co." (the plaintiff). The bills of lading made the cotton deliverable to P. & Co.'s order or assigns, and were forwarded, together with bills of exchange for the price, to the plaintiff by P. & Co. The plaintiff returned the bills of exchange accepted, and complained that some of the cotton had not been bought according to his instructions. P, N. & Co. then shipped the residue of the cotton on another vessel, and wrote to the plaintiff saying, "Inclosed please find invoice and bill of lading of* 200 *bales of cotton. We have drawn upon you draft in favour of P. & Co., to which beg your protection." The invoice, like the former ones, was headed "On account and risk of S. & Co. (the plaintiff). The bill of lading was, however, forwarded by P, N. & Co. to P. & Co., together with the bill of exchange. The bill of lading made the cotton deliverable "to order or his or their assigns." P. & Co. wrote to the plaintiff inclosing the bill of lading, duly indorsed, and the bill of exchange, for which they requested protection, but the plaintiff retained the bill of lading and returned the bill of exchange unaccepted, and on the refusal of the shipowners to give up the cotton brought trover against them*:—Held, *upon a case stating these particulars, with power for the Court to draw inferences of fact, that the plaintiff was not entitled to recover, as the acceptance of the bill of exchange by him was a condition precedent to his right to the possession of the cotton.*

Per Cockburn, C.J.—*Assuming that the property in the cotton had passed to the plaintiff, it was the intention of the parties that P, N. & Co. should have a lien upon it until their draft for the price had been accepted by the plaintiff.*

Trover for the conversion of 200 bales of cotton.

Pleas—first, not guilty; secondly, that the goods were not the plaintiff's. Issue thereon.

The cause came on for trial, before Mellor, J., and a special jury, at the Manchester Spring Assizes, 1868, when a verdict was entered by consent for the plaintiff, for 1,251*l.* 13*s.* 8*d.*, subject to the opinion of the Court upon the following

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CASE.

The plaintiff is a cotton and general merchant, carrying on business at Manchester, under the style of John Shepherd & Co. The defendants are the owners of the screw steamer "*Olinda*" of Liverpool.

Paton, Nash & Co. are merchants at Pernambuco, in the Brazils, and George Paton & Co., who carry on business at Liverpool as merchants, are the Liverpool correspondents of Paton, Nash & Co.

Before April 23, 1866, several transactions had taken place between the plaintiff and Paton, Nash & Co. In all these (except on one occasion in 1865, when Paton, Nash & Co. purchased cotton for the plaintiff), Paton, Nash & Co. acted as agents for the sale of goods consigned to them by the plaintiff. The following letters relate to the purchase in 1865:—

Paton, Nash & Co. to plaintiff.

"Pernambuco, March 31, 1865.

"Cotton having given way a little, we have been able to buy for you 200 bags Pernams at your limit of 14*d*.; amongst them are a few Seconds at 1½*d*. less. We are shipping them per A 1 English brigantine '*Spray*,' Milhurst master, to sail in about ten days. It is just possible we may complete your order, but at present there are no more offering. By the English steamer of 13th prox., we shall send bill of lading and value on you for cost."

Paton & Co. to plaintiff.

"20, Castle Street, Liverpool, May 3, 1865.

"Herewith we beg to hand you bill lading of 240 bags cotton per "*Spray*." We presume our Pernambuco friends have made a mistake in sending it under cover to us. We also inclose draft on your good selves for 2,072*l*. 9*s*. 6*d*., which we will thank you to return with the needful."

On April 23, 1866, the plaintiff sent to Paton, Nash & Co. a letter, inclosing the accompanying order:

(Inclosure.)

"1,000 bales or any less quantity of Pernams if at or under 11½*d*. per lb. for Firsts, free of all charges in Liverpool."

To this letter Paton, Nash & Co. replied as follows:

"We wrote you under date of 12th inst., and are since in receipt of your favour of the 23rd inst., ordering 1,000 bales of Pernam cottons at or under 11½*d*. per lb. for Firsts, free of all charges in Liverpool: this we understand to mean free on board including freight, insurance and commission. This shall have our careful attention. You do not mention how we are to reimburse ourselves, whether we are to discount sales or draw on you. Please to mention this in future orders. If you had Pernam cotton last year at 12*d*. or under, your agents must have sacrificed their commission, which we are not inclined to do. There is no change in the cotton market yet, but we fear that the price will not go low enough to enable us to operate for you."

The order of April 23, 1866, was not executed by Paton, Nash & Co., and on September 7, 1867, the plaintiff wrote to them as follows:

"In your last you do not make any reference to our cotton order. We therefore do not know whether you consider it in force. At our limits to you cotton is now landing in Liverpool, and we question whether it will give cost, as the price is daily lowering. Our order now will stand as on the other side, but if you prefer not to give it attention, you will let us know by first post. Order for 1,000 bales, or any less quantity, if new crop, Pernams Firsts cotton, at or under 8½*d*. per lb., to include cost, freight and insurance. . . . Should prices continue to go down we may lower our limit by next mail.

(Signed) "Jno. Shepherd & Co."

To this Paton, Nash & Co. replied as follows:

"Pernambuco, September 28, 1867.

"Messrs. John Shepherd & Co., Manchester.

"Dear Sirs,—We had last this pleasure on the 12th inst., and are since in receipt of your esteemed favour of the 7th idem, giving us order to purchase on

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your account 1,000 bales First Pernams, including cost, freight and insurance, at 8½*d.* per lb. of the new crop. This order shall have our best attention; and we note that we may purchase also Seconds, which will be at a difference of 1½*d.* per lb. . . . You do not mention whether part of the order is to go against your funds lying here, but we suppose you intend it as a remittance.

(Signed) "Per pro. Paton, Nash & Co.,
"A. W. C. SOARES."

The case then set out some further correspondence between the plaintiff and Paton, Nash & Co., of which the following is part:

"Manchester, October 23, 1867.

"Paton, Nash & Co., Pernambuco.

"Dear Sirs,—Our last was on the 8th inst. We hope that before its receipt you had not made any purchase of cotton for us. Circumstances make it necessary for us still further to reduce our limit to 6*d.* for Firsts, and we hope you may be able to come in for us even under that, and we do not wish any purchase of Seconds or Mediums, as Mr. Nash informed us yesterday that there was no difficulty in buying Firsts by themselves. Refer to our letter of April 23, 1866. Pray don't make the mistake you did before about our funds in your hands; they never were intended to be applied to pay for cotton purchases, but to wait instructions.

(Signed) "JNO. SHEPHERD & Co."
"Pernambuco, October 25, 1867.

"Messrs. Jno. Shepherd & Co., Manchester.

"We had last this pleasure on the 15th inst., and we have now to advise having purchased on your account about 750 bales cotton, including the 150 bales advised 15th inst. . . . We have shipped on board the Norwegian brig '*Capella*' 339 bales, &c. . . . We are shipping per screw steamer '*La Plata*' 208 bales; they will go on board to-day, and we expect she will be with you before this conveyance. There will be about 200 bales still to ship, and we expect the '*Capella*' will take them. . . . On reading over your order again we are impressed that you wish us to draw for the amount of invoice, and not to deduct net proceeds in our hands, and we therefore shall value upon you on forwarding bills of lading. By the '*La Plata*' to-morrow we shall have again this pleasure.

(Signed) "Per pro. Paton, Nash & Co.,
"A. W. C. SOARES."
"Pernambuco, October 25, 1867.

"Messrs. John Shepherd, Manchester.

"We have already had this pleasure to-day, as per duplicate annexed, and beg now to inclose invoices of 339 bales per '*Capella*,' costing 1,616*l.* 8*s.* 8*d.*; 208 ditto '*La Plata*' 883*l.* 7*s.* 1*d.*

"We have drawn upon you as per note at foot for the same, to which beg your protection. We are afraid the '*Capella*' will not be able to take the 200 bales; therefore it will be as well to insure per steamer or sailing vessel.

"Note of drafts: No. 926, favour of Messrs. George Paton & Co., 90*s.*, 1,616*l.* 8*s.* 8*d.* No. 927, ditto, 883*l.* 7*s.* 1*d.* The bills lading will be handed over to you by Messrs. George Paton & Co.

(Signed) "Pro Paton, Nash & Co.,
"A. W. C. SOARES."

The first of the invoices inclosed was headed "Invoice of 339 bales of cotton shipped per Norwegian brig '*Capella*' for Liverpool, on account and risk of Messrs. John Shepherd & Co."; and the second, "Invoice of 208 bales, &c., on account and risk of Messrs. John Shepherd & Co."

On October 25, 1867, 747 bales had, in fact, been purchased by Paton, Nash & Co., on account of the plaintiff, and of these 339 ex "*Capella*," and the 208 ex "*La Plata*" (547 in all), described in the invoice of October 25, 1867, were afterwards received by the plaintiff under bills of lading, forwarded from Pernambuco.

These bills of lading, together with the two bills of exchange, No. 926 and

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No. 927, were forwarded by Paton, Nash & Co. to George Paton & Co. by the same mail by which the letters of October 25 were despatched, and on November 16, 1867, the bills of lading and bills of exchange were forwarded by George Paton & Co. to the plaintiff inclosed in the following letter:

"Liverpool, November 16, 1867.

"Messrs. John Shepherd & Co., Manchester.

"Gentlemen,—We beg to hand you herewith bills of lading for 339 bales cotton per '*Capella*' and 208 bales cotton per '*La Plata*,' received this morning from our Pernambuco friends. We also inclose bills on your good selves for 1,616*l*. 8*s*. 8*d*. and 883*l*. 7*s*. 1*d*., to which please do the needful, and return to us in course. (Signed) "George Paton & Co.,

"Per Wm. Fletcher."

These two bills of exchange were accepted by the plaintiff, and were returned by him in the letter of November 18, 1867, to George Paton & Co., who replied by the letter under the same date. The bills were paid by the plaintiff at maturity.

"Manchester, November 18, 1867.

"Messrs. George Paton & Co.

"Dear Sirs,—Your favour of the 16th inst. is to hand, bringing two bills for acceptance, which, as desired, we now return as accepted, but with the reservation as to the Mediums and Seconds not being bought according to our instructions. In case, therefore, of any loss arising from the sale of these we must claim against you.

(Signed) "John Shepherd & Co."

"Liverpool, November 18, 1867.

"Messrs. Jno. Shepherd & Co., Manchester.

"Dear Sirs,—Your favour of this date is received with bills accepted. We note your objections to our Pernambuco friends having sent you a portion of Mediums and Seconds cotton, and from the tenor of your letter inferred that these qualities had not been mentioned at all in your order of which you kindly sent us a copy on the 22nd ult. On reference to this we find that you allow 'one third or less of Seconds if at 1¾*d*. to 2*d*. under Firsts.' Our friends seem to have exceeded a very trifle your limits for Seconds, and as to 'Mediums,' they might easily have been classed as Firsts, in fact they frequently turn out so on this side. Moreover, the term 'Mediums' is an absurd one, which has crept into use only within the last few months; they are virtually Firsts. As to Seconds it is frequently impossible to avoid a few in order to facilitate execution of orders. Our friends, we find, have executed your order under your limits, and we hope on the whole you will consider they have consulted your interests. We therefore hope you bear us harmless as to results, for our position might have been altered by a different wording of our invoice.

(Signed) "George Paton & Co."

"Manchester, November 19, 1861.

"Messrs. Geo. Paton & Co.

"Dear Sirs,—Your favour of yesterday is to hand, and we note contents. With regard to the Seconds and Mediums referred to, we do not see that we could alter what we have said. We will be equally glad, if not more so than you will be, to find there will be no loss by them. In regard to the purchase of the Firsts we do not complain, but we do regret that the purchase has been so hastily made in so decidedly a falling market, and it would have given us pleasure had our dry goods been as keenly disposed of.

(Signed) "Jno. Shepherd & Co."

"Liverpool, November 20, 1867.

"Messrs. John Shepherd & Co., Manchester.

"Dear Sir,—Your favour of yesterday is received. Our letter to you of the 18th inst. was based on the supposition that our Pernambuco friends had bought Seconds cotton for you on the deferential limit mentioned in your order of April 23, 1866. . . . As to the Mediums, we again repeat that they could fairly have been classed as Firsts. We think our friends hardly deserve

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the remark you make about a 'falling market,' considering that on a former occasion you blamed them for not buying.

(Signed) "GEO. PATON & Co."

"Liverpool, November 22, 1867.

"Messrs. John Shepherd & Co., Manchester.

"Dear Sirs,—Your favour of yesterday is received. We have no copy of your letter to Paton, Nash & Co. of September 7, but we quote from a copy of their letter to yourselves of September 28 last, 'We had last this pleasure on the 12th inst., and are since in receipt of your esteemed favour of the 7th idem, giving us orders to purchase on your account 1,000 bales First Pernams, including costs, freight and insurance, at 8½*d.* per lb. of the new crop. This order shall have our best attention, and we note that we may purchase also Seconds, which will be at a difference of 1½*d.* per lb.'

(Signed) "GEO. PATON & Co."

A long correspondence ensued between the plaintiff, on the one hand, and Paton, Nash & Co. and George Paton & Co. on the other hand, the plaintiff contending that the 547 bales did not, and the other parties that they did, comply with the plaintiff's orders to Paton, Nash & Co.

The remaining 200 bales purchased by Paton, Nash & Co. were shipped by them on the defendant's screw steamer "*Olinda*," and they thereupon addressed the following letter to the plaintiff:

"Pernambuco, Nov. 12, 1867.

"Messrs. John Shepherd & Co., Manchester.

"Dear Sirs,—We annex duplicate of our last respects of the 28th ult., and are since in receipt of your esteemed favour of the 23rd idem, reducing your limit for the remaining 250 bales Pernam, 6*d.* per lb., including foreign commission and insurance, and that you only want Firsts. Inclosed please find invoice and bill of lading of 200 bales cotton shipped per '*Olinda*' S.S., costing 861*l.* 2*s.* 7*d.*, and which we hope may prove correct and satisfactory. We have advanced the captain of the brig '*Capella*' 55*l.* 6*s.* 6*d.*, as per receipt inclosed, to be deducted from the freight on your cotton, and on which you have 5*l.* per cent. commission and insurance, 2*l.* 15*s.* 4*d.*, to cover the advance. We have therefore drawn upon you for 916*l.* 9*s.* 1*d.* Draft No. 935, favour of Messrs. George Paton & Co., to which beg your protection.

(Signed) "Per pro. Paton, Nash & Co.,

"A. W. C. SOARES."

The invoice referred to was headed

"Invoice of 200 bales of cotton, shipped per '*Olinda*,' S.S., for Liverpool on account and risk of Messrs. John Shepherd & Co."

The sum of 916*l.* 9*s.* 5*d.* was arrived at by adding to the price of the 200 bales the sum of 55*l.* 6*s.* 6*d.*, which had been advanced by Paton, Nash & Co. to the captain of the "*Capella*," at Pernambuco. The "*Capella*" arrived at Liverpool in due course, and delivered to the plaintiff the 339 bales of cotton mentioned in the 8th paragraph; the plaintiff at the same time paid the freight due upon the cotton, less the said sum of 55*l.* 6*s.* 6*d.*

This letter and invoices were forwarded by Paton, Nash & Co. to the plaintiff direct from Pernambuco. The bill of exchange and bill of lading therein mentioned were forwarded by them, not to the plaintiff, but to George Paton & Co., who sent them forward to the plaintiff. The case then set out a copy of the bill of lading. It provided that the cotton should be delivered "unto order, or his or their assigns, he or they paying freights, &c.," and was indorsed "Per pro. Paton, Nash & Co.: A. W. C. Soares—Geo. Paton & Co."

On December 5, the "*Olinda*" arrived at Liverpool, and George Paton & Co. wrote the following letter to the plaintiff, inclosing the bill of exchange and bill of lading:

"Liverpool, December 5, 1867.

"Messrs. Jno. Shepherd & Co., Manchester.

"Dear Sirs,—Our Pernambuco letters to 12th ult. are just to hand, and

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we beg to inclose bill of lading for 200 bales cotton shipped by Messrs. Paton, Nash & Co., per '*Olinda*,' S.S. on your account. We hand also their draft on your good selves for cost of the cotton, to which we beg your protection. (916*l.* 9*s.* 1*d.*)

(Signed) "GEO. PATON & Co."

To this the plaintiff replied as follows:

"Manchester, December 6, 1867.

"Messrs. George Paton & Co.

"Dear Sirs,—Your favour of yesterday is received with inclosures. On reference to invoices and bills of exchange which we have accepted, we find that they have been drawn in excess of price mentioned in order; there is also a quality styled 'Mediums' that we did not order at all. These, with the hostile position you have taken with regard to the 208 bales ex "*La Plata*," stand in the way of our accepting the bill of exchange now inclosed. We shall place the 200 bales ex '*Olinda*' in another broker's hands, and soon as we learn we shall inform you of their opinion of them.

(Signed) "JNO. SHEPHERD & Co."

The plaintiff accordingly retained the bill of lading, and returned the bill of exchange unaccepted, and it was thereupon protested by G. Paton & Co.

The plaintiff forwarded the bill of lading for the 200 bales ex "*Olinda*" to his Liverpool brokers, Messrs. Eason, Barry & Co., with instructions to pay the freight and obtain the cotton.

On December 9, 1867, Messrs. Eason, Barry & Co. accordingly called upon the defendants with the bill of lading and with a delivery order for the 200 bales, signed by the defendants.

Messrs. Eason, Barry & Co. at the same interview paid the defendants the sum of 90*l.*, being the approximate freight for the 200 bales as then estimated by the defendants. At the time when the defendants signed the order they knew nothing of the circumstances under which the plaintiff held the bill of lading.

On December 10, 1867, Messrs. Eason, Barry & Co., on behalf of the plaintiff, applied to the defendants for the delivery of the 200 bales ex "*Olinda*," but the defendants, in consequence of a communication received from George Paton & Co., refused to deliver, and on the next day they wrote to Messrs. Eason, Barry & Co., the plaintiffs agents, as follows:

"18, Chapel Street, Liverpool,

"December 11, 1867.

"Gentlemen,—Messrs. G. Paton & Co. have notified to us that no consideration has been given for the bill of lading for 200 bales cotton, p. '*Olinda*,' from Pernambuco, claimed by you, and have demanded delivery to themselves under a duplicate bill of lading, and agreeing to indemnify us from all consequences. We have, under the circumstances, decided to deliver the cotton into the custody of their brokers pending litigation, and are prepared to return to you the amount of freight paid by you to us on the 9th inst. We are, yours respectfully, THO. and JAS. HARRISON."

It is true, as stated in the above letter, that George Paton & Co. held a duplicate bill of lading, under which they demanded possession of the 200 bales, and also that they had indemnified the defendants.

From the time when the order for the 1,000 bales was given, up to and at the time of the commencement of this action, Paton, Nash & Co. have always had in their hands at Pernambuco money or goods of the plaintiff's to the value of 3,000*l.*, or thereabouts.

After a formal demand of the cotton by the plaintiff, and a refusal by the defendants, this action was commenced.

It is agreed that the Court shall have power to draw any inferences of fact which a jury might draw from the above statement.

The question for the opinion of the Court is whether the plaintiff is entitled to recover in this action or no.

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If the opinion of the Court be in the affirmative, then the verdict entered for the plaintiff for 1,251*l.* 13*s.* 8*d.* is to stand.

If the opinion of the Court be in the negative, then a verdict is to be entered for the defendants.

Quain (*Jordan* with him). for the plaintiff.—The acceptance of the bill of exchange drawn by Paton, Nash & Co. upon the plaintiff was not a condition precedent to the vesting of the property in the cotton in him. It is plain from the letters in the earlier part of the case, that the course of business between the consignors and the plaintiff was not to insist upon the draft being accepted before the bill of lading was handed over. It appears from one of the first of these letters that it was the practice to send the bill of lading directly to the consignee, without the intervention of any agent. It further appears from the letter of November 12, 1867, that they had intended to inclose the bill of lading to the plaintiff. The heading of the invoices and the fact that the consignors had all along acted as the plaintiff's agents is sufficient to prevent any inference that they intended to preserve any rights over the cotton. In the leading and familiar cases upon questions like the present, the shipper of goods was never allowed to withhold them from the consignee except where there was additional evidence, such as is wanting here, to support the right of detention. In *Turner* v. *the Trustees of the Liverpool Docks* (6 Ex. Rep. 543; 20 L. J. Ex. 393), the shippers had not only drawn the bill of lading so as to make the goods deliverable to their order or assigns, but had pledged it with a bank to the knowledge of the consignee. In *Gurney* v. *Behrend* (3 El. & B. 622; 23 L. J. Q.B. 265), a case somewhat similar to the present, though the facts are more complicated, it was said by Crompton, J., p. 630, with reference to the argument that the bill of lading was only to be handed over on acceptance of the draft, "The course of business which you describe was common enough a few years ago. . . . It was common enough to insist on retaining the bill of lading till the draft was not only accepted, but paid. But I always understood this to be an exceptional course, adopted only in times of peril and suspicion." The dispute between the plaintiff and the consignors as to the limits within which the cotton was purchased cannot be entered upon by the Court, as the sole question is, in whom was the property vested at the time of bringing the action? *Wilmshurst* v. *Bowker* (7 M. & G. 882; 12 L. J. Ex. 475) is an authority in favour of the plaintiff. There, as here, the invoice stated that the goods shipped were "on account and at the risk of the vendee." The goods were to be paid for by bankers' drafts; yet it was held that the transmission of these drafts was not a condition precedent to the vesting of the property in the plaintiff. In *Gurney* v. *Behrend* (3 El. & B. 622; 23 L. J. Q.B. 265, previously cited, Lord Campbell, in his judgment, says: "It is contended on the part of the defendants that Collmann and Stolterfoht had no authority to part with the bill of lading till they had accepted the bill of exchange drawn for the price of the wheat. If this be so, they certainly exceeded their authority; for their promise to accept, which was not treated by the agents of the defendants as an acceptance, would not have been a performance of the condition on which the right to part with the bill of lading depended. The defendants might easily have imposed such a condition, had they suspected the solvency of the parties with whom they were dealing." In *Key* v. *Cotesworth* (7 Ex. Rep. 595; 22 L. J. Ex. 4), Parke, B. says, that where it is the intention of vendors to preserve their right in the property until the bills drawn against it are accepted, they ought to transmit the bills of lading drawn in blank to an agent, to be delivered over only in case the acceptance takes place. The Court will attach due weight to the fact that there seems to have been not the slightest ground for suspecting the solvency of the plaintiff, and that the consignors had funds in their hands belonging to him.

Holker, for the defendants.—The acceptance of the bill of exchange by the plaintiff was a condition precedent to his right to the possession of the cotton. The whole question in the case turns upon the intention of the consignors in shipping the cotton, and this intention is to be gathered from the form of the

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bill of lading and from the correspondence. In the cases relied on by the plaintiff the bill of lading had been indorsed to the consignee, or indorsed in blank and forwarded to him or his agent. This was particularly the case in *Key* v. *Cotesworth* (7 Ex. Rep. 595; 22 L. J. Ex. 4), where the agent of the person ordering the goods was the consignee under one of the bills of lading and the indorsee of the other. In *Maclachlan on Merchant Shipping*, p. 343, the law is thus laid down: "It may be the intention, as it is in the power, of the consignor, to divest himself of all property or risk by delivery of the goods to the master on board; or to vest the general property in the consignee, subject to a special property in some third person, or subject to its being divested on the non-performance of a condition subsequent, or he may retain the property and possession in himself, and convey to the vendee a right to both, subject to a condition precedent. This disposition of the property and possession may be varied still further by the correspondence between the parties, the contents of the invoice, but above all by the bill of lading. . . . The onus of proof lies on the person who asserts against the shipper an adverse right to the property in the bill of lading." In *Brandt* v. *Bowlby* (2 B. & Ad. 932; 1 L. J. K.B. 14) the dealing with the bill of lading was very similar to that in the present instance. The plaintiff, a Russian merchant, shipped a cargo of wheat and wrote to B. inclosing an unindorsed bill of lading, and saying, "We have much pleasure in waiting upon you with invoice and bill of lading of 770 chests wheat, shipped *for your account and risk* per the '*Helena*'," and stating that they had drawn for the amount. It was held that the property only vested in B. upon the condition of his accepting the bills of exchange. In *Wait* v. *Baker* (2 Ex. Rep. 1; 17 L. J. Ex. 307) the bill of lading made the goods deliverable to the shipper's orders or assigns. It was held that although these goods were shipped in pursuance of a previous contract of sale, the tenor of the bill of lading shewed that it was not the seller's intention that the property should pass on the shipment, and that all that could be implied was a contract on his part to assign the bill of lading. *Jenkyns* v. *Brown* (14 Q.B. Rep. 496; 19 L. J. Q.B. 286) is strongly in point. It was there held that the right of the plaintiff to the possession of corn sold to him did not attach until he had paid his acceptances for the price, though invoices and a letter of advice were forwarded to him stating that the corn was shipped on his account, and the Court expresses its opinion that the fact that the consignors took a bill of lading making the goods deliverable to their order was almost conclusive evidence that the property did not pass by the shipment. In the present case each of the three shipments making up the 1,000 bales of cotton was made out "to order or assigns," and not in favour of the plaintiff or his agents. The acts and intention of Paton, Nash & Co. are decisive in this case, whatever may have been the conduct of the Liverpool house. —He also cited *Van Casteel* v. *Booker* (2 Ex. Rep. 691; 18 L. J. Ex. 9); *Ellershaw* v. *Magniac* (6 Ex. Rep. 570, n.); and *Sheridan* v. *the New Quay Company* (4 Com. B. Rep. N.S. 618; 28 L. J. C.P. 58).

Quain, in reply.—In *Turner* v. *the Trustees of the Liverpool Docks* (6 Ex. Rep. 543; 20 L. J. Ex. 393), as well as in *Jenkyns* v. *Brown* (14 Q.B. Rep. 496; 19 L. J. Q.B. 286), there was the important fact that the consignor had pledged or otherwise disposed of the bill of lading, shewing that he never intended to pass the property in the goods consigned. Here the plaintiff has paid the freight on the consignment, so that the contract has been in part performed, and it is impossible to rescind it *in toto*. In *Brandt* v. *Bowlby* (2 B. & Ad. 932; 1 L. J. K.B. 14) the consignee had first refused to receive the goods, and had only an unindorsed bill of lading sent to him. In the present case the bill of lading was indorsed before the ship sailed from Pernambuco. No one of the consignor's letters goes to shew that the acceptance of the bill was regarded as a condition on which the right to the possession of the cotton depended.

COCKBURN, C.J.—I am of opinion that our judgment should be in favour of the defendants.—I agree that in one point of view this question is one of intention, that is, what was the intention of Paton, Nash & Co. in sending over the bill of lading and bill of exchange to their agents at Liverpool. This is a question

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which, as we have power to draw inferences of fact, we must decide; but I think we ought not to decide it independently of the authorities which have been cited during the argument. These authorities are, I think, conclusive as to the inference which we should draw, apart from our own opinion. Cases were pointed out by Mr. Quain for the purpose of inducing us to come to a different conclusion. These cases bear strongly on the matter before us, and are conclusive to shew that, where a consignor of goods sends them to this country, accompanied by bills of lading, and bills of exchange which are to be accepted as the consideration, and they are forwarded directly to the consignee, the only proper inference to be drawn is that the consignor intended the consignee to have at once the disposition of the property in the goods, leaving it to him as a matter of contract to return the bills of exchange accepted, not as a condition precedent to the vesting of the property, but simply a matter of personal obligation. But, on the other hand, to my mind, the cases equally shew that where the consignor sends the goods not to the consignee, but to an agent, with bills to be accepted by the consignee, this indicates a different intention, namely, that the handing over of the bills of lading and the acceptance of the bills of exchange should be concurrent acts and part of the same transaction. *Brandt* v. *Bowlby* (2 B. & Ad. 932; 1 L. J. K.B. 14) appears to me to be a decisive authority in favour of the defendants. In this case there were none of the additional circumstances pointed out in *Turner* v. *the Trustees of the Liverpool Docks* (6 Ex. Rep. 543; 20 L. J. Ex. 393), and other cases. There the bill of lading had not been pledged or sold, but the consignor of the goods sent to the consignee the invoices and an unindorsed bill of lading, an indorsed bill of lading being sent to the agents of the consignor, accompanied by bills of exchange, to be presented to the consignee for acceptance; and these circumstances were considered conclusive to shew that the consignor did not intend the property in the goods to vest at once in the consignee, but to vest only on the condition of the bills of exchange being accepted by him. It is true that in that case there was the circumstance of an unindorsed bill of lading being sent to the consignee, but that is not one which I consider material. Here we have no bill of lading sent to the consignee, but the indorsed bill of lading was sent to the agent of the consignors. I see no difference in principle between sending a bill of lading which is inoperative, and sending none at all. Then it was said that in the other cases cited by Mr. Holker there was the additional circumstance of the bill of lading being indorsed to a third party for a consideration; but I do not think that this makes any difference. The consignor makes over the right of holding the bill of lading until the bills of exchange have been accepted, to the third party; when they are accepted it is his duty not to retain the bill of lading; he is only put in the shoes of the consignor. As far as the merits of the case are concerned, it would be obviously unjust that while the bills of exchange have not been accepted the consignors should be prejudiced by having the bills of lading enforced against them. But the case might have arisen in another form. If it be that until the bill of exchange has been accepted, the property in the goods does not pass, and the goods perished at sea, it would be very questionable whether the consignor who bought them on his own credit by order of another would not have to stand the loss, and I should prefer to put the case on a different ground, which would equally secure the defendants from risk. It strikes me, that where an agent is ordered to buy goods, and, having bought them, ships them on account of and at the risk of the consignee, his principal, and calls on the principal to insure the goods, that it may well be contended that the property in the goods at once passes to the consignee; but inasmuch as the agent has paid the purchase-money of the goods for the principal, the case becomes analogous to that of buyer and seller, and the agent should have a lien on the goods, until he has been repaid the money which he has laid out in the purchase of them. On this ground, the agents in Pernambuco, having laid out their money in purchasing the cotton, are entitled to hold possession of it until this money is repaid, although the property in the cotton may have passed to the plaintiff. The case is the same where the

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parties have agreed to take bills of exchange instead of the price of the goods. In that point of view also I think the defendants would be entitled to say, "The property in the goods may have passed, but we who bought them have a right to hold them until we are recouped the money which we have laid out in their purchase." I think that, upon a consideration of the facts and the authorities, the defendants are entitled to judgment.

MELLOR, J.—I am also of opinion that our judgment should be for the defendants. It seems that Paton, Nash & Co. having bought the cotton with their own money, the substance of the transaction was that they should receive from the plaintiff as the consideration for their advances bills of exchange for the amount. The case may be disposed of by a reference to some of the main facts, such as the form of the bills of lading and the mode in which they were indorsed and forwarded. The fact that the bills of lading were indorsed in blank and sent to the agents of the consignors, together with the bills of exchange, can be explained only by supposing that they meant to have the bills of exchange accepted at the same time as the bills of lading were handed over to the plaintiff. In *Turner* v. *the Trustees of the Liverpool Docks* (6 Ex. Rep. 543; 20 L. J. Ex. 393) it is true that there were some additional facts, consisting of acts of ownership by the consignor over the bill of lading, but I think that the absence of these facts does not affect the grounds of the judgment, and that it proceeded upon the intention of the consignor in making out the bill of lading and shipping the cotton. From the fact that in this case the Liverpool agents sent the bill of lading indorsed to the plaintiff accompanied by the drafts, and that in their letter to him they say, "We beg to inclose bill of lading for 200 bales cotton, &c. We hand also their draft on your good selves for costs of the cotton, to which we beg your protection"; it may be fairly inferred that the parties were on terms of great confidence, and that the agents sent the bill of lading relying that the drafts would be returned accepted. When the plaintiff refused to accept the drafts the agent was justified in preventing the cotton from getting into his hands.

HANNEN, J. and HAYES, J. concurred.

Judgment for the defendants.

IN THE QUEEN'S BENCH. Nov. 17, 1868; Jan. 29, 1869.

PHILLIPS v. EYRE.

38 L. J. Q.B. 113; 9 B. & S. 343; L. R. 4 Q.B. 225; 19 L. T. 770: affirmed, [1871] E. R. A.; 40 L. J. Q.B. 28; 10 B. & S. 1004; L. R. 6 Q.B. 1; 22 L. T. 869 (Ex. Ch.).

Lex Loci—Action against Governor of Colony for Injury done there—Act of Indemnity by Colonial Legislature; Effect of on Proceedings in English Courts.

INTERNATIONAL LAW. K.—*The right of action in this country for an injury done in a colony may, before the commencement of proceedings, be taken away by an Act of Indemnity passed by the colonial legislature.*

In an action brought here against the governor of a colony for an injury done there, it was pleaded that by an Act of Indemnity passed by the legislature of the colony and assented to by the Crown, after reciting that a rebellion had broken out in the colony, and that the defendant, with the advice of a council of war, had proclaimed martial law, &c., and that it was expedient that all persons who in good faith and of loyal resolve had acted in crushing the rebellion should be indemnified and kept harmless for their acts of loyalty, it was enacted, that all personal actions and suits, indictments, informations, attachments, prosecutions and proceedings, present or future, against such authorities or officers, &c., for or by reason of any matter or thing commanded, ordered, directed or done

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since the proclamation of martial law should be discharged and made void; and every person by whom such act should have been advised, commanded, ordered or directed or done during the existence of martial law should be indemnified both against the Crown and all persons whomsoever. The Act went on to specially indemnify the governor and his officers from the consequences of acts done in order to put an end to the rebellion in districts in which martial law was proclaimed, and declared that such acts were thereby made lawful and confirmed. The plea concluded by stating that, by the laws and constitution of the island, the governor, legislative council and assembly had power and authority to pass the Act, subject to the assent of Her Majesty to it; that the Act duly received the assent of Her Majesty and became part of the law of the island of Jamaica; and that the defendant was governor, and the alleged grievances were measures used in the suppression of the rebellion:—Held, *that the plea afforded a good defence to the action. That the Jamaica legislature appeared to have full legislative powers to pass an Act taking away the right of action before the local tribunals of the island, and an Act lawful by the law of a foreign country could not be made the ground of an action in an English Court. That the same principle applied where an Act admitted to have been unlawful when done was legalized and divested of its tortious character by ex post facto legislation*:—Held, *also, that the validity of the Act was not affected by the fact that the governor who joined in passing it was thereby enabled to indemnify himself from the consequences of illegal acts committed by him.*

Declaration, that the defendant did, on October 24, 1865, assault, beat and imprison the plaintiff at the plaintiff's house, in the parish of Vere, in the county of Middlesex, in the island of Jamaica, within Her Majesty's dominions, and caused him to be then and there handcuffed and bound with rope, and forced him and compelled him to go, and caused him to be forcibly conveyed so handcuffed and bound, thence to a court-house in the parish of Vere, in Jamaica, and there caused him to be placed and held so handcuffed and bound in the custody of a guard of soldiers, and imprisoned for a long time. And that the defendant did, on October 25, 1865, and at the court-house in the parish of Vere, further assault, beat and imprison the plaintiff, and forced and compelled him to go, and caused him to be forcibly conveyed, handcuffed and bound with rope, thence along certain public streets and highways for a very long distance, to wit, 30 miles, to the defendant's house, at Spanish Town, in the parish of St. Catherine's, in Middlesex, in Jamaica, and there caused him to be held in custody and imprisoned for a long time. And that the defendant did, on October 25, 1865, at the defendant's house, in Spanish Town, further assault, beat and imprison the plaintiff, and forced and compelled him to go and caused him to be forcibly conveyed, handcuffed and bound with rope, in custody from the defendant's house in Spanish Town through and along certain public streets and highways for a long distance, to wit, 20 miles, to a certain other place, to wit, Uppark Camp, in the parish of St. Andrew, in the county of Surrey, in Jamaica, and there caused him to be held in custody and imprisoned and handcuffed and confined in a cell for a long time. And that the defendant did, on October 26, 1865, further assault, beat and imprison the plaintiff at Uppark Camp, and caused him to be placed in the custody of a guard of soldiers, and forced him and compelled him to go, and caused him to be forcibly conveyed, handcuffed and bound, from Uppark Camp through and along certain streets and highways for a long distance, to a certain place, to wit, the Ordnance Wharf, in the city and parish of Kingston, in Surrey, and there imprisoned him for a long time. And for that the defendant did, on the said October 25, 1865, further assault, beat and imprison the plaintiff at Ordnance Wharf, and thence caused him to be forcibly conveyed and put on board a certain ship, to wit, the "*Wolverine*," and there confined in shackles, and forcibly conveyed in the ship upon the high seas for a long distance, to wit, 40 miles, to a certain other place, to wit, Morant Bay, in the parish of St. Thomas, in Surrey, in Jamaica. And that the defendant did, on October 27, 1865, further assault, beat and imprison

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the plaintiff at Morant Bay, and did cause him to be forcibly landed and conveyed so shackled as aforesaid from the ship to a certain wharf at Morant Bay, and thence compelled him to go, and caused him to be forcibly conveyed through divers public streets and highways, to a certain building in Morant Bay, and there caused him to be further bound with cords, and forcibly placed and confined in a cell in the building, and to be therein held in custody and imprisoned for a long time. And that the defendant did, on November 4, 1865, at Morant Bay, further assault, beat and imprison the plaintiff, and caused him to be bound with ropes, and so bound to be cruelly beaten, flogged, wounded and tortured. By reason of all which assaults and beatings, flogging, wounding and imprisonment, the plaintiff suffered grievously in body and mind, and became and was sore, sick and disabled, and so remained for a long time, and was for a long time unable to attend to his affairs, and has been permanently injured in health, and was put to great expense for nursing and medical attendance in and about endeavouring to be cured of his wounds and the fever consequent thereon.

Second count, for seizing and taking the plaintiff's goods, that is to say, books, papers, writings, and articles of wearing apparel, and carrying away and disposing of them to the defendant's own use.

Second plea—That before and at the time of the committing of the alleged grievances in the declaration mentioned, the defendant was captain-general and governor-in-chief of the island of Jamaica and the territories depending thereon, the same then and still being a colony or dependency of the British Crown, by virtue of a commission from Her Majesty the now Queen of the United Kingdom of Great Britain and Ireland, under the great seal of the United Kingdom, and before the said time divers persons in the island of Jamaica had conspired by force to overthrow the constitution and government in the island by law established; and in pursuance of the conspiracy great numbers of the inhabitants of the island had broken out into open rebellion, and had committed many burglaries, robberies, arsons, murders and other felonies, and the civil powers of the island had been overpowered by the rebels; and the defendant, with the assistance and co-operation of the military and naval forces of the Queen and of Her Majesty's faithful subjects in the island had, by force of arms, arrested the progress of the rebellion, and afterwards, and after the rebellion had been so arrested, an Act of Parliament was made and passed by the governor, legislative council and house of assembly of the island of Jamaica, in the twenty-ninth year of the reign of the now Queen, for the purpose of indemnifying the defendant and all other officers and persons concerned in arresting rebellion in the island by such force of arms, which Act was and is in the words and figures following, that is to say: "Whereas, being seduced by the insidious counsel of wickedly designing persons, many of the Queen's subjects in this island conspired by force to overthrow the constitution and government here established by law, and in furtherance of such their purpose did, with force and in confederated multitude, commit, on October 11 in the present year of our Lord 1865, and on divers other days then following, in the parish of St. Thomas-in-the-East, burglaries, robberies, arsons, murders and other felonies, with treasonous purpose, in renunciation of their natural allegiance, and to the intent of the general massacre of all loyal and well-disposed subjects of the Queen here dwelling. And whereas, upon being informed of such the aforesaid atrocities, his Excellency Edward John Eyre, Esq., the governor of this island, with the advice of a council of war, and in order to prevent the extension of such rebellious outbreak, did proclaim that martial law should obtain and prevail throughout the county of Surrey, with the exception only of the city and parish of Kingston. And whereas under God's providence the military and naval forces of the Queen, with the loyal co-operation of others Her Majesty's faithful subjects in this island, have arrested the spread of this rebellion, and saved the lives of law-abiding citizens from imminent general sacrifice. And whereas military, naval or civil authorities necessarily employed in the prompt suppression of the atrocities aforesaid, may, according to the law of ordinary peace, be responsible in person or purse for acts done in good faith for the purpose

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of restoring public peace, and quelling the rebellion aforesaid. And whereas it is expedient that all persons whosoever, in good faith and of loyal resolve, have acted for the crushing of this rebellious outbreak, should be indemnified and kept harmless for such their acts of loyalty. Be it therefore, and it hereby is enacted, by the governor, legislative council and assembly of this island, first, that all personal actions and suits, indictments, informations, attachments, prosecutions and proceedings, present or future, whatsoever against such authorities or officers, civil, military or naval, or other person acting as last aforesaid, for or by reason of any matter or thing commanded, ordered, directed or done since the promulgation and publication of the proclamation of martial law aforesaid, whether done in any district in which martial law was proclaimed, or in any district in which martial law was not proclaimed, in furtherance of martial law, that is to say, on, from and after the 13th day of October last past, and during the continuance of such martial law in order to suppress the insurrection and rebellion, and for the preservation of the public peace throughout the island, shall be discharged and made void, and that every person by whom such act, matter or thing shall have been advised, commanded, ordered, directed or done for the purposes aforesaid, on, from and since the said 13th day of October, and during the existence of such martial law, shall be freed, acquitted, discharged and indemnified, as well against the Queen's most gracious Majesty, her heirs and successors, as against all and every persons and person whomsoever. Secondly, and it is hereby also enacted, that his Excellency Edward John Eyre, Esq., captain-general and governor-in-chief, and all officers and other persons who have acted under his authority, or have acted *bonâ fide* for the purposes and during the time aforesaid, whether such acts were done in any district in which martial law was proclaimed, or in any district in which martial law was not proclaimed, are hereby indemnified in respect of all acts, matters and things done in order to put an end to the said rebellion, and all such acts so done are hereby made and declared lawful, and are confirmed. Thirdly, in order to prevent any doubt which might arise whether any act alleged to be done under the authority of the governor, or to have been done *bonâ fide* in order to suppress and put an end to the said rebellion was so done, it shall be lawful for the governor for the time being to declare such acts to have been done under such authority, or *bonâ fide* for the purposes aforesaid, and such declaration by any writing under the hand of the governor for the time being shall in all cases be conclusive evidence that such acts were so done respectively."

Averment—That, by the laws and constitution of the island, the governor, legislative council and assembly of the island had power and authority to make and pass the Act, subject to the assent of her most gracious Majesty thereto, and that afterwards the Act duly received the assent of Her Majesty, and all conditions in that behalf to be performed having been performed, and all things necessary to be done having been done, and all times necessary to elapse having elapsed, the Act became and was and is part of the law of the island of Jamaica; and that the person in the Act called his Excellency Edward John Eyre, Esq., was and is the defendant, and that the alleged grievances in the declaration mentioned were committed in Jamaica after October 13, 1865, and during the continuance of the rebellion, and before the passing of the Act, and were measures used in the suppression of the rebellion, and were reasonably and in good faith considered by the defendant to be proper for the purpose of putting an end to the rebellion, and were matters and things *bonâ fide* done in order to put an end to the rebellion, and are included in the indemnity given by the Act.

Demurrer to the second plea, and joinder in demurrer.

New assignment to the second plea, that the plaintiff sued not only for the trespasses admitted, but also for that the defendant committed such trespasses as are complained of and not included in the Act on other occasions, for longer periods of time, and in other places than are attempted to be justified or excused, and in excess of the alleged right or excuse.

Replication to the second plea—so far as it related to divers of these trespasses committed on the high seas, and mentioned in the fifth count, that

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these trespasses were committed beyond the territorial limits within which the Jamaica legislature had at the times when, &c., or at the time when the Act was made and passed, jurisdiction or authority.

Further replication to the second plea—that the defendant, at the time of making and passing the Act in the plea set forth, was the governor of the island of Jamaica and the territories thereon depending, and was then present in the island, and was then acting in such capacity of governor of the island, and is the governor referred to in the Act in the words, " Be it therefore, and it is hereby enacted by the governor, legislative council and assembly of this island," and was by the law and constitution of Jamaica, himself a necessary party to the making and passing of the Act, and the Act, so far as it became the law of Jamaica, became the law of Jamaica by virtue of his consent as such governor, acting with the council and assembly, and could not have become the law of Jamaica without the consent of the defendant as such governor.

Rejoinder to the new assignment to the second plea, not guilty.

Demurrer to the last replication, and joinder in demurrer.

Quain (*J. H. Payne* with him), for the plaintiff.—The plea is bad. A personal action brought in this country cannot be defeated by the Act of a colonial legislature. Where an action is brought in this country for an injury done abroad, the Court will have regard to the law of the place where the cause of action arose. The defendant, however, admits that when the acts complained of were done they were illegal by the law of Jamaica, but proposes to shew that the legislature of the island have since passed an Act superseding this law. It cannot be doubted that this Act was passed by the governor and the legislature for the express purpose of defeating any proceedings like those commenced by the plaintiff: the question remains, how far is this *ex post facto* law binding on the English Courts? In the leading case of *Mostyn* v. *Fabrigas* (Cowp. 161; *Smith's Leading Cases*, last ed., vol. 1, 623) it seems to have been assumed, both by Lord Mansfield and the counsel who argued the case, that the governor of a colony during his government is not locally liable to any civil or criminal proceedings, and though this proposition is dissented from in the note to the case in 1 *Smith's Leading Cases*, 5th ed., p. 645, it is admitted that there must be some restrictions on the mode of bringing such an action against him. Lord Mansfield himself, in answer to an objection against an action in this country for injuries done abroad, says, 1 *Smith's Leading Cases*, 5th ed., p. 621, " In answer to which I say that, for many reasons, if it did not lie against any other man, it shall most emphatically lie against the governor." The reason for bringing such actions in this country is, no doubt, the fact that a fair trial is not likely to be obtained in the colony. It was on this account that the Acts 11 & 12 Will. 3. c. 12. and 42 Geo. 3. c. 85. were passed, enabling offences committed by officials beyond the seas to be tried in this Court. And there can be no difference in principle between such offences and causes of action. The question is, therefore, whether a vested right of action in the Courts of this country can be taken away by the Act of a colonial legislature.—(He was then stopped.)

Mellish (*Poland* with him), for the defendant.—The Act of Indemnity is a bar to this action. It has been suggested that this Act would interfere with the operation of the 11 & 12 Will. 3. c. 12; and it is necessary to refer to the recent statute relating to colonial laws, 28 & 29 Vict. c. 63. This Act, after reciting that doubts have been entertained respecting the validity of laws enacted by certain of Her Majesty's colonies, provides, by section 2, that " any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such laws may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order or regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative." And by section 3, " No colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order or regulation

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as aforesaid." The Act of Indemnity is, therefore, quite valid so far as it affects civil proceedings against the defendant. The House of Assembly had full power to make laws within the limits of the island of Jamaica, and if the Crown does not pronounce its veto against these laws they become as binding and effective as an Act of the Imperial Legislature. The Assembly, in the exercise of this power, might enact that what is here unlawful should be there lawful, and this power would of course enable them to pass statutes retrospective in their operation. It is true, that if proceedings were taken in this country for a cause of action in Jamaica the *lex fori* must govern the procedure; but a cause of action according to the law in Jamaica is the basis of these proceedings, and this cause can always be taken away by a retrospective Act. Nothing is more common in this country than for causes of action to be destroyed by Act of Parliament. At the present moment an attempt is being made to shew that a criminal was unlawfully tried before a Commissioner of the Central Criminal Court. If it be decided that the trial was irregular, who can doubt that Parliament will pass an Act indemnifying the Commissioner? Several illustrations might be given to shew that, if an Act is made lawful in Jamaica, it cannot be a cause of action here. In *Sommersett's Case* (20 St. Tr. 1) a slave brought to this country was ordered to be discharged, but slavery was then lawful in our colonies, and trespass could not have been brought for depriving the man of his liberty in the West Indies.

[COCKBURN, C.J.—You have to shew that rights of action in the Imperial Courts are taken away by this Act of a colonial legislature.]

They cannot affect the course of procedure in this country, but they can take away the cause of action. It is impossible to say that they had not in this case the power of legislating finally. The indemnity is in the nature of the by-law of a corporate body, and such a by-law is binding everywhere if warranted by the charter under which it is passed.

[COCKBURN, C.J.—If this Act had been passed earlier the cause of action would have been taken away. But had not a right of action in the superior Courts already vested in the plaintiff?]

In the case of a colonial bankruptcy such rights of action are taken away.

[LUSH, J.—The Imperial legislature has directed that British subjects should be tried here for murders committed abroad. Might a colonial legislature enact that if murder were committed in the colony it should only be tried there?]

That question only involves matter of procedure. In *Mostyn* v. *Fabrigas* (Cowp. 161; *Smith's Leading Cases*, last ed., vol. 1, 623) it was assumed that the legality of an act ought to depend upon the law of the country where it was committed. Acts of Indemnity have been frequent in this country. One of the earliest is 1 Edw. 3. c. 1, "None shall be impeached which took part with the king against his father." 5 Ric. 2. c. 5, and other Acts passed in the reigns of Henry the Fourth, Henry the Eighth and Elizabeth are similar instances. Acts of Indemnity were also passed by the Irish Parliament before the union of that country with England. Upon an appeal to the Privy Council the validity of the colonial Act would be recognized. Is the law to be different at Whitehall and at Westminster?

[HAYES, J.—With reference to your argument as to the foreign bankruptcy laws, I find that it is said in *Story's Conflict of Laws*, sect. 338, "When we speak of the discharge of a debt in the country where it is contracted being a discharge thereof everywhere, care must be taken to distinguish between cases where by the *lex loci contractus* there is a virtual or direct extinguishment of the debt itself, and where there is only a partial extinguishment of the remedy thereon. By the bankrupt laws of England, and by the corresponding insolvent laws of some of the United States, an absolute discharge from all rights and remedies of the creditors is provided for as part of the system; and therefore the whole obligation of the contract is deemed *ipso facto* extinguished."]

The necessity of obtaining the royal sanction for their acts is a sufficient check upon any arbitrary exercise of authority by the colonial legislature. The

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existence of this check makes the case even stronger than those where this country recognizes a foreign law. In several of the colonies *ex post facto* laws have been made so as to legalize marriages which were previously invalid. These marriages would be regarded as legal in this country in any question respecting the title to property. In *Scott* v. *Seymour* (1 Hurls. & C. 219; 32 L. J. Ex. 61) the ground of the decision was, that the difference between the law of Naples and that of this country related only to matter of procedure.

[COCKBURN, C.J.—In actions by English subjects against English subjects for torts committed abroad, has it ever been necessary to do more than prove that the acts were tortious in this country?]

The answer to that question does not affect the argument as to the powers of the colonial legislature.

Quain, in reply.—The counsel for the defendant has not succeeded in shewing that the Colonial Act of Indemnity is consistent with 42 Geo. 3. c. 85. The chief object of the latter statute was to have offences committed by persons employed in the public service abroad tried in this country. But, if it is to be in the power of the governor of a colony to pass an Act protecting himself from the consequences of any such offences, the Imperial Act may as well be repealed at once.

[COCKBURN, C.J.—This Act only relates to criminal proceedings.]

The indemnity comprises all proceedings, civil as well as criminal.

[COCKBURN, C.J.—This will only make the colonial Act, *pro tanto*, repugnant to 42 Geo. 3. c. 85. The object of the English Act was simply to enable the prescribed offences to be tried in this country.]

It is submitted that the Act 28 & 29 Vict. c. 63, intended to do no more than provide for the validity of colonial laws within the limits of the colony itself. But, looking at the question in a more general point of view, it is very doubtful whether this Court is justified in taking any notice of the *lex loci* as to torts. In "*The Halley*" (37 L. J. Adm. 35) it was held by the Privy Council, reversing the decision of Sir Robert Phillimore, that where the owner of a ship by which damage was caused was compelled by the Belgian law to employ a pilot, he could not be made liable in an English Court upon proof that, by the Belgian law, the employment of the pilot afforded no protection to the owner of the vessel which did the mischief. The ground taken was that, although the English Courts admit proof of a foreign law as part of the circumstances attending the execution of a contract, or as one of the facts upon which the existence of the tort or the right to damages may depend, they will not enforce a foreign municipal law and give a remedy in respect of an Act which, according to their own principles, imposes no liability on the person from whom the damages are claimed. This case may be said to be the converse of the present one. *Scott* v. *Seymour* (1 Hurls. & C. 219; 32 L. J. Ex. 61) was decided upon similar grounds. With regard to the foreign bankruptcy cases, there is no reason why a foreign bankrupt law should have an extra-territorial operation after a cause of action has once vested in England. It can make no difference whether the plaintiff has actually issued a writ in this country or not, as all the defendant would have to do would be to plead the indemnity as matter arising after action brought. In *Westlake's Private International Law*, p. 237, it is said: "The plaintiff cannot object that the exercise of discharging authority founds a plea which is *ex post facto* as regards his right, because the exercise of such authority must be considered as always reserved by a sovereign whose code includes a law of bankruptcy whenever he imposes an obligation on a contract. It has accordingly long been settled by the English cases that an obligation is extinguished by a discharge of this nature, under the laws of the country of the contract." And in *Story's Conflict of Laws*, s. 337, are these words: "And even in regard to common contracts of a different nature, the general rule as to the consequences of them must receive many qualifications and limitations resulting from the public policy or the domestic laws of other states where they are sought to be enforced, and the right and duty of self-protection against unjust foreign legislation. . . . Nor are the Courts of any state

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under any obligation to give effect to the discharge of a foreign debtor, where, under its own laws, the creditor had previously acquired a right to proceed against his property within its own territory." This limitation is further explained in *Phillimore's International Law*, vol. 4, p. 563. Nothing can be more strange than that an *ex post facto* law of foreigners should deprive an Englishman of his privileges in this country. Suppose the French government were to proclaim duelling lawful: might any two Englishmen be safe in this country after fighting a duel in France?

[COCKBURN, C.J.—Your illustration has no analogy to the case before us. Our government has done nothing to recognize the right of the French legislature to pass laws affecting the inhabitants of this country. LUSH, J.—If the power of making laws is delegated to a colonial legislature, has it not the same power with reference to bygone and future acts?]

Lastly, the Act of Indemnity is objectionable because the governor is a party to the enactment which exonerates him from liability, and it is therefore contrary to natural justice.

[LUSH, J.—The governor acts in two capacities, as a member of the House of Assembly and as a private citizen. Suppose a majority of the House of Assembly had been implicated in this arrest of the plaintiff, would this have made the Act they joined in passing invalid?]

The ordinary members are only a fluctuating body. But the governor is a permanent officer; and although he may very well give his sanction to an Act granting him a sum of money, it is quite a different thing that he should be allowed to make laws which take away the rights of others.

Cur. adv. vult.

The judgment of the Court (Cockburn, C.J., Lush, J., and Hayes, J.) was delivered, on January 29, by

COCKBURN, C.J.—This is an action for assault and false imprisonment and other personal injuries of a very grievous character, committed by the defendant on the plaintiff in the island of Jamaica.

The plea on which the present question turns, admitting, as for the present purpose it must do, the fact of such acts having been done, and of their having been wrongful when done, sets forth an Act of Indemnity since passed by the legislature of Jamaica, and afterwards assented to by the Crown, of which the defendant claims the protection in bar of this action. The Act in question being set forth at length in the plea, it is only necessary for the present purpose to state the substance and effect of it. After reciting that a rebellion had broken out in the island, that the governor, with the advice of a council of war, had proclaimed martial law throughout the county of Surrey, with the exception only of the city and parish of Kingston; and that the military and naval forces, with others, had arrested the spread of the rebellion; and after further reciting that the military, naval and civil authorities necessarily employed may, according to the law of ordinary peace, be responsible in person or purse for acts done in good faith for the purpose of restoring public peace and quelling the rebellion, and that "it is expedient that all persons who in good faith and of loyal resolve have acted for the crushing of this rebellious outbreak should be indemnified and kept harmless for their acts of loyalty," the statute goes on, in substance, to enact—first, that all proceedings, civil or criminal, present or future, against such authorities or officers, civil, military or naval, or other persons, for anything commanded or done since the publication of martial law, that is, from October 13, 1865, and during its continuance, whether within any district in which martial law was proclaimed or without, in furtherance of martial law, in order to suppress the insurrection and rebellion, and for the preservation of the public peace throughout the island, shall be discharged and made void; and that every person by whom any such act, matter or thing shall have been advised, ordered, directed or done for the purposes aforesaid, during the existence of such martial law, shall be freed and indemnified both against the Crown and against all other persons.

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The second provision of the Act has special reference to the present defendant. It is in these terms: "That his Excellency Edward John Eyre, Esq., captain-general and governor-in-chief, and all officers and other persons who have acted under his authority, or have acted *bonâ fide* for the purposes and during the time aforesaid, whether such acts were done in any district in which martial law was proclaimed, or in any district in which martial law was not proclaimed, are hereby indemnified in respect of all acts, matters and things done in order to put an end to the said rebellion, and all such acts so done are hereby made and declared to be lawful, and are confirmed." To this enactment is appended the following remarkable provision: "In order to prevent any doubt which might arise whether any act alleged to have been done under the authority of the governor, or to have been *bonâ fide* in order to suppress and put an end to the said rebellion was so done, it shall be lawful for the governor for the time being to declare such acts to have been done under such authority, or *bonâ fide* for the purposes aforesaid; and such declaration, by any writing under the hand of the governor for the time being, shall, in all cases, be conclusive evidence that such acts were so done respectively." After thus setting forth the Indemnity Act, and averring that such act had duly received the royal assent, and had become part of the law of Jamaica, the plea concludes by averring "that the alleged grievances in the declaration mentioned were committed in the said island of Jamaica after the said October 13, 1865, and during the continuance of the rebellion and before the passing of the Act, and were measures used in the suppression of the said rebellion, and were reasonably and in good faith considered by the defendant to be proper for the purpose of putting an end to the said rebellion, and are included in the indemnity given by the said Act." To this plea there was a demurrer. There was also a new assignment and a further replication: first, that the trespasses complained of were committed beyond the territories within which the Jamaica legislature had jurisdiction and authority; secondly, that at the time of the passing of the Act of Indemnity the defendant was governor of Jamaica, that his assent to the Act was necessary, that his assent had been given, and that by virtue of it the Act had become the law of Jamaica. To the latter replication the defendant demurred. We have first to consider the validity of the defendant's plea.

The plea admits, as it necessarily must do, that the acts complained of were done, and when done were wrongful. On the other hand, it cannot be disputed that the Jamaica legislature, having full legislative authority within the limits of the colony, subject only to the assent of the Crown, had full power to pass the Act in question so far as to take away the right of action before the local tribunals of the island. But it is contended, on the part of the plaintiff, that a right of action being given before the Courts here in respect of personal wrongs committed in a colony, this right cannot be taken away by an Act having no legislative effect beyond the limits of the local authority. The argument for the plaintiff may be thus put. Upon every wrongful act inflicting a personal injury, a right of action immediately accrues to the party wronged, and becomes a vested right. In the case of a wrong suffered in a colony a twofold, or at all events an alternative right of action arises, namely, a right not only to sue for redress in the Courts of the colony, if redress can be there obtained, but also to sue in the Courts of this country, if the wrongdoer can be found within the jurisdiction of the latter. And though the local legislature may take away the right of action within the limits of its authority, it cannot take away the right of action here, inasmuch as no authority, save that of the imperial legislature, can take away the jurisdiction of the Queen's Courts here, or deprive the subject of his right to redress afforded, not by virtue of the local law, but by virtue of the law of England, which gives a right of action in respect of personal injuries suffered in other countries. We were much struck with this view of the case, and the question being one of great importance, we took time to consider our judgment; but on the fullest consideration we can give to the case, we have come to the conclusion that the foregoing reasoning is unsound, and that on this demurrer the defendant is entitled to our judgment.

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It may be useful to consider what would have been the effect if, instead of legislating *ex post facto*, the legislature of Jamaica, in anticipation of future events, had passed a statute authorizing the acts which have given rise to this action. We cannot doubt that in such a case no right of action would arise here. It appears to us clear that where by the law of another country an act complained of is lawful, such act, though it would have been wrongful by our law, if committed here, cannot be made the ground of an action in an English Court The rule which obtains in respect of property and civil contracts, namely, that an act, unless intended to take effect elsewhere, shall, as regards its effect and incidents if a conflict of law arises between the *lex loci* and the *lex fori*, be governed by the former, appears to us to be applicable to the case of an act occasioning personal injury. To hold the contrary would be attended with the most inconvenient and startling consequences, and would be altogether contrary to the comity of nations in matters of law to which effect should, if possible, be given. An Act might not only be lawful, but might even be enjoined by the law of another country which would be wrongful and give a right of action by our law; and it certainly would be in the highest degree unjust that an individual who has intended to obey the law binding upon him should be held liable in damages in another country where a different law may prevail. Thus, an arrest and imprisonment might be perfectly justifiable by the law of a foreign country under circumstances in which it would be actionable here. It would be impossible to hold that in such a case an action could be maintained in an English Court. The same reasoning will apply where an act, though not enjoined, is yet authorized and rendered lawful by the law of the country where it is done. There will have been no intention to inflict a wrong in such a case, nor, according to the law of the particular country, will any right have been infringed.

It may be that where an act which, though not authorized by the *lex loci*, yet gives no right of action—as where that act is punishable by criminal proceedings, but gives no right to damages; but such act, by the law of this country, would give a right to damages—as in such a case no conflict of laws would arise, an action might be maintained in an English Court. The latter question arose in the case of *Scott* v. *Lord Seymour* (1 Hurls. & C. 219; 32 L. J. Ex. 61), but was not decided. Wightman, J., indeed, when the case was before the Court of Exchequer Chamber, expressed an opinion that though no damages might be recoverable in the foreign country where the cause of action arose, damages might be recovered in an English Court. But the other Judges declined to rest their decision in favour of the plaintiff on this view, but proceeded on the narrow ground that the plea failed to shew that by the law of Naples damages might not be recoverable as incidental to the criminal proceedings alleged by the plea to be then pending in the Neapolitan Court. The case of *Scott* v. *Lord Seymour* (1 Hurls. & C. 219; 32 L. J. Ex. 61) therefore renders it doubtful whether damages can be recovered in an action here when damages would not be recoverable by the *lex loci*. It would be going much further to hold that an action would lie here in respect of an act warranted by the *lex loci*. The case of *The Queen* v. *Lesley* (Bell's C.C. 220; 29 L. J. M.C. 97) is more directly to the purpose. In that case the defendant was convicted on a charge of assault and false imprisonment, the facts being that the defendant, the master of an English vessel lying at Valparaiso, had engaged with the Chilian government to bring to this country certain prisoners condemned to be banished to England, and in the course of carrying out this employment had committed the assault and imprisonment complained of. On a case reserved, the Court of Criminal Appeal held that while the conviction might be supported as to so much of the alleged matters of complaint as had occurred when the ship had left the Chilian waters, and might therefore be considered as English territory and subject to English law, yet it could not be upheld in respect of what had been done within those waters, inasmuch as the defendant was there acting under the authority of the Chilian government, and it must be presumed that the latter had exercised its authority according to law, and that what took

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place within the limits of the Chilian territory was consequently lawful. In delivering judgment Chief Justice Erle says: "Can the conviction be sustained for that which was done within Chilian waters? We answer no. We assume that in Chili the act of the government towards its subjects was lawful, and although an English ship in some respects carries with her the laws of her country in the territorial waters of a foreign state, yet in other respects she is subject to the laws of that state as to acts done to the subjects hereof. We assume that the government could justify all that it did within its own territory, and we think that it follows that the defendant can justify all that he did there as an agent for the government and under its authority. In *Dobree* v. *Napier* (2 Bing. N.C. 781; 5 L. J. C.P. 273) the defendant, on behalf of the Queen of Portugal, seized the plaintiff's vessel for violating a blockade of a Portuguese port in time of war. The plaintiff brought trespass, and judgment was for the defendant, because the Queen of Portugal, in her own territory, had a right to seize the vessel, and to employ whom she would to make the seizure; and therefore the defendant, though an Englishman, seizing an English vessel, could justify the act under the employment of the Queen. We think that the act of the defendant in Chili became lawful on the same principle, and therefore that there is no ground for the conviction." This case, as well as that of *Dobree* v. *Napier* (2 Bing. N.C. 781; 5 L. J. C.P. 273), referred to in the judgment, is an authority to shew that an act authorized by the law of the country in which it takes place cannot be the subject of a legal proceeding here. In this view, upon principle as well as upon these authorities, we entirely concur.

It remains to be seen how far this principle will apply where an act admitted to have been unlawful where done, is legalized and divested of its tortious character, and immunity is afforded to the wrongdoer in respect of it by *ex post facto* legislation. And this, no doubt, is a question of greater difficulty than the one with which we have just been dealing. We are, however, of opinion that the same principle which we have stated to be applicable to an act made lawful by prior legislation is equally applicable to an act originally wrongful, but legalized by an *ex post facto* law. Local legislatures having been established in our colonies, with plenary power of legislation, the same comity which obtains between nations should be extended to them by the tribunals of this country when their law conflicts with ours in respect of acts done within the ambit of their jurisdiction. The same inconvenience as that which we have before adverted to might otherwise arise in every instance of an Indemnity Act. An unseemly conflict of jurisdiction would occur, and the legislative authority of the local legislature in a matter undoubtedly within their competence would be practically defeated, and the extraordinary anomaly would arise, that an inhabitant of a colony, or it might be of a foreign country owing allegiance to its law, and whose rights arise from and are determined by such law, would be able to enforce rights which, by the law of the country to which he more immediately belonged, had been taken away from him by a law binding upon him. It is unnecessary in the present instance to decide whether to found an action before an English Court an act must be tortious according to the law of the particular country as well as of this; or whether the act, if unlawful by the *lex loci*, must give a claim to damages by the latter as well as by our law in order to give a right to damages here. It is enough for the present purpose to say that we are of opinion that the true rule in such a case as the present is, that where the right of action in respect of an act otherwise wrongful is taken away, before an action has been brought in this country, by a law binding where such wrongful act was done, no action can be maintained here. We were much pressed on the argument with the objections which readily present themselves, and the force of which it is impossible not to feel, against legislation of this nature. There can be no doubt that every so-called Indemnity Act involves a manifest violation of justice, inasmuch as it deprives those who have suffered wrongs of their vested right to the redress which the law would otherwise afford them, and gives immunity to those who have inflicted those wrongs, not at the expense of the community for whose alleged advantage the illegal acts were done, but at the

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expense of individuals who, innocent, possibly, of all offence, have been subjected to injury and outrage often of the most aggravated character. It is equally true, as was forcibly urged on us, that such legislation may be used to cover acts of the most tyrannical, arbitrary and merciless character—acts not capable of being justified or palliated, even by the plea of necessity, but prompted by local passions, prejudices or fears—acts not done with the temper and judgment which those in authority are bound to bring to the exercise of so fearful a power, but characterized by reckless indifference to human suffering and an utter disregard of the dictates of common humanity. On the other hand, however, it must not be forgotten that, against any abuse of the local legislative authority in such a case, protection is provided by the necessity of the assent of of the sovereign, acting upon the advice of ministers, themselves responsible to parliament. We may rest assured that no such enactment would receive the royal assent unless it were confined to acts honestly done in the suppression of existing rebellion and under the pressure of the most urgent necessity. The present indemnity is confined to acts done in order to suppress the insurrection and rebellion; and the plea contains consequently the necessary averment, that the grievances complained of were committed during the continuance of the rebellion, and were used for its suppression, and were reasonably and in good faith considered by the defendant to be necessary for the purpose; and it will therefore be incumbent on the defendant to make good these averments in order to support his plea. As was observed by Mr. Mellish in his most able argument, Indemnity Acts have on several occasions been passed by colonial legislatures, after insurrections or disturbances of natives or slaves, and have received the assent of the Crown by the advice of its ministers. In ancient periods of our history more than one such Act has been passed by the English parliament; and at the close of the last century Indemnity Acts were repeatedly passed by the parliament of Ireland during the continuance of the rebellion. Lastly, the Acts of the 43 Geo. 3. c. 117, and 3 & 4 Will. 4. c. 4, both having reference to the state of Ireland, while authorizing martial law under given conditions, gave indemnity by anticipation for acts done in the exercise of it. After this frequent resort to Acts of Indemnity, and the sanction thus given to them, it is obvious that although the objections referred to may afford cogent reasons why this species of legislation should not be unduly resorted to or encouraged, they cannot have any influence on our judgment as to how far effect should be given to the Indemnity Act now in question. As we have already said, plenary power to make laws having been conferred on the local legislature, subject to the assent of the sovereign, it cannot be disputed that it was within its competence to pass the law referred to in the plea; and the only question is, whether the effect of it is to deprive the plaintiff of the right which he would otherwise have had of maintaining an action in this country. For the reasons we have given, we are of opinion that such is its effect, and consequently that on this demurrer to the plea our judgment must be for the defendant.

It remains only to dispose of the demurrer to the plaintiff's last replication. We have no hesitation in holding such replication to be bad. There is no ground whatever for saying that a governor of a colony cannot give his official consent to a legislative measure in which he may be individually interested. It might as well be asserted that the sovereign of these realms could not give assent to a bill in parliament in which the sovereign was personally concerned. On both demurrers, therefore, our judgment must be for the defendant.

Judgment accordingly for the defendant.

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IN THE QUEEN'S BENCH. Feb. 1, 1869.

THE QUEEN v. OLDHAM.

38 L. J. Q.B. 125; 10 B. & S. 193; L. R. 4 Q.B. 290.

Quo Warranto—*Town Councillor—Disqualification—Dissenting Minister—5 & 6 Will. 4. c. 76. s. 28.*

ELECTION LAW. B.—*By the 28th section of 5 & 6 Will. 4. c. 76. it is provided "that no person being in holy orders, or being the regular minister of any dissenting congregation, shall be qualified to be elected a councillor," &c.*

The defendant was elected a town councillor on November 2, 1868. He was a minister of a Baptist congregation in the borough, and had been, in September, 1867, invited to become the minister of a Pædo-Baptist congregation at the neighbouring village of P. He agreed to go over to P. and preach on Sundays, and he did so, going in the morning and returning in the evening. He agreed also to conduct the service for the year 1869, but the congregation were unable by the terms of the trust deed of this chapel to appoint him their regular permanent minister, and they requested him to conduct their public services till they could meet with a suitable permanent minister:—Held, *upon a motion for information in the nature of a* quo warranto, *that he was not a "regular minister" of a dissenting congregation so as to be disqualified under the above 28th section.*

Rule calling upon the defendant to shew cause why an information, in the nature of a *quo warranto*, should not be filed against him to shew by what title he claimed to hold the office of a town councillor of the borough of Wallingford.

It appeared from the affidavit upon which the rule was granted that upon November 2, 1868, when the election of town councillors for the borough took place and the defendant was elected, he was the regular minister of a dissenting congregation at the chapel of Independents at Pangbourne, in the county of Berks, and was not engaged in any other occupation, trade or profession.

In the affidavits used in shewing cause against the rule it was sworn that the defendant had resided and carried on business in the borough for several years; that he had for three or four years been a town councillor; that he was a member and deacon of the Baptist church in the borough, and that he had for some years been in the habit of preaching on Sundays at Pangbourne and other villages in the neighbourhood.

That in September, 1867, the members of the church at Pangbourne, hearing that he was about to give up his business, invited him to become their minister; that he refused to do so, though he subsequently agreed to preach for them every Sunday from March 25 to June 24, 1868, and, at the end of that time, he agreed to continue to preach until the end of the year 1868.

That on December 29, 1868, the church passed the following resolution: "That Mr. Oldham be requested to conduct the services for the coming year 1869," to which he agreed. After passing this resolution the members of the chapel referred to their trust deed, and found that as it was an Independent or Pædo-Baptist congregation it was necessary that the minister should be of that denomination, and accordingly the above-mentioned resolution was rescinded; and it was, on January 7, 1869, resolved, "That our attention having been called to the wording of the chapel deed, we find we cannot invite Mr. Oldham to become our regular permanent minister; we do therefore respectfully request him to conduct the public services at Pangbourne Chapel until we can meet with a suitable permanent minister."

That the defendant gave up his business on September 1, 1868, and while he preached at Pangbourne went over there on the Sunday mornings and returned in the evenings.

Thesiger shewed cause against the rule.—It is submitted that the defendant was not a "regular minister" of a congregation so as to be disqualified

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from holding the office of town councillor. The 4 & 5 Will. 4. c. 76. s. 28, being a disqualifying statute, must be considered strictly, not like the Five Mile Act (17 Car. 2. c. 2.) or the 52 Geo. 3. c. 155. s. 9, which are exempting statutes.

[BLACKBURN, J.—The 52 Geo. 3. c. 155. s. 9. is pointed at a man who preaches and has no other business or calling. He is to be exempt from liability to serve in certain offices and services, like a person in orders; but the present statute points at the minister being disqualified like a beneficed clergyman.]

It is clear that the defendant was not a regularly appointed minister at the time of the election, for the congregation were about to appoint him at the end of 1868, and would have done so if they had not discovered that the minister must be a Pædo-Baptist.

[BLACKBURN, J.—The question is simply this, whether at the time of the election the mere fact of his supplying the pulpit was enough to shew that he was a "regular minister." I do not think that upon such facts we should allow the information to be filed.]

Francis, in support of the rule.—The meaning of the word "regular" is opposed to "occasional." No doubt if a tradesman was to preach occasionally in a dissenting chapel it could not be said that he was the regular minister, even although there was, for the time, no other minister; but here there is quite enough to satisfy the words of the 28th section. The defendant had given up his business and performed the duties of the chapel regularly on Sundays.

BLACKBURN, J.—I am of opinion that this rule must be discharged. The words of the section point to a person who is not merely a clergyman of the dissenting body, but to one who is *de facto* the minister of the congregation, in a position analogous to that of a beneficed clergyman. The affidavits upon which the rule was granted state generally that the defendants was the regular minister. That was enough to justify the rule being granted; but then the answer which is now made is that he was merely asked to supply the pulpit, and that he agreed to do so. I do not attach any importance to the statements as to the trust deed. If there had been any salary attached to the office, or if there had been anything amounting to a contract so that he would have been entitled to something if the congregation had turned him out, that would have gone far to shew that he was the regular minister; but upon the affidavits I do not think that any case is made out upon which we ought to allow an information to be filed on the ground that he was disqualified from being elected. I think, therefore, that the rule must be discharged.

MELLOR, J.—I am of the same opinion. The object which the legislature had in view is shewn by their using the word "regular." They mean to attach importance to that word; and I take the words "regular minister" to mean a minister who is regularly invited by the congregation to accept the office of their minister, and who accepts that office,—something quite different from a man who merely temporarily holds the office. I place some reliance upon what the affidavits disclose as to the terms of the deed. When the congregation were about to make a regular appointment they would refer to that deed to see whether the opinions of the person were such as would enable him to hold the appointment. There is nothing upon the affidavits to shew that any salary was actually paid; and I do not think that the defendant can be looked upon as anything more than a person nominated to supply the pulpit temporarily, though I happen to know that it is the practice that persons in that position do receive a present from the congregation.

HAYES, J.—I quite agree. At the time of the election the congregation at Pangbourne had no regular minister. I think that in making this enactment the legislature intended that the appointment should be one of a permanent character, incompatible with the performance of the duties of the office of town councillor.

Rule discharged, but without costs.

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IN THE QUEEN'S BENCH. Feb. 12, 1869.

ELLIS v. M'CORMICK.

38 L. J. Q.B. 127; L. R. 4 Q.B. 271; 20 L. T. 223.

In re Athlumney, [1898] E. R. A.; 67 L. J. Q.B. 935; [1898] 2 Q.B. 547; 79 L. T. 303; 47 W. R. 144 (Q.B. D.).

Debtor and Creditor—Bankruptcy Act, 1861, *Section* 198.—*Assignment to Trustees—Certificate of Registration—Protection*—Ca. Sa.—*Staying Proceedings—The Bankruptcy Amendment Act*, 1868 (31 & 32 *Vict. c.* 104), *Section* 3.

BANKRUPTCY. N.—*The provision in the* 3rd *section of the* 31 & 32 *Vict. c.* 104. *that, in the computation of the requisite value of the creditors who execute a deed under the arrangement clauses of the Bankruptcy Act*, 1861, *the amount due to each creditor, after deducting the value of the securities held by him on the debtor's property, shall alone be reckoned, has not any retrospective effect.*

A deed, dated September 30, 1864, *was executed by certain creditors of the defendant whose debts were not sufficient to make the deed valid under the Bankruptcy Act*, 1861, *although, under the provision in the* 31 & 32 *Vict. c.* 104. *s.* 3, *the amount of the debts would have been sufficient. The deed was registered on October* 13, 1864, *and the defendant received the certificate of registration. The plaintiff brought an action in respect of a cause of action which accrued before the execution of the deed. The defendant pleaded to the action, and upon a reference to an arbitrator contested the plaintiff's right to recover. The arbitrator having made his award in favour of the plaintiff, a ca. sa. was issued to the sheriff. This Court refused to stay the proceedings upon the ca. sa., on the ground that the deed was insufficiently executed under the Bankruptcy Act*, 1861, *and that the defect was not cured by the above-mentioned provision of the* 31 & 32 *Vict. c.* 104. *s.* 3.

Semble—*That the Court would also have refused to stay proceedings on the ground that the application was simply made* quia timet, *the plaintiff not having actually attempted to oppose the execution.*

This was a rule calling upon the plaintiff to shew cause why the writ of *capias ad satisfaciendum* issued in this cause should not be set aside, and all proceedings to execute the same be stayed, unless the plaintiff obtained leave to execute the same from the Court of Bankruptcy, upon the ground that the defendant was protected from execution by virtue of the certificate of registration of a deed, dated September 30, 1864.

It appeared from the affidavits that the cause of action accrued before the execution of the deed, which was registered on October 13, 1864. The plaintiff was not mentioned as a creditor. A certificate of registration was given in due course. The action was commenced on July 4, 1867, and was referred by Judge's order, under the provisions of the Common Law Procedure Act, 1852. The defendant pleaded, and appeared before the arbitrator, who made his award in favour of the plaintiff for 674*l.* 17*s.* 9*d.* On May 11, 1868, the plaintiff signed judgment for the debt and for the costs, which were taxed at 112*l.* 19*s.* A writ of *ca. sa.* was issued to the sheriff of the town and county of Kingston-upon-Hull, and a summons was taken out before Pigott, B. at chambers to set the writ aside, but the learned Judge refused to do so, on the ground that the Court has no power to make such an order on the application of a person *quia timet*.

It appeared that the deed was not signed or assented to in writing by a majority in number representing three-fourths in value of the creditors of the defendant whose debts amounted respectively to 10*l.* and upwards, as provided by the Bankruptcy Act, 1861.

It further appeared that if the amount due to each of the creditors had

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been reckoned after deducting the value of the securities held by him on the debtor's property, in the manner pointed out by the 31 & 32 Vict. c. 104. s. 3, the majority would have been sufficient.

Quain and *R. G. Williams* shewed cause against the rule.—The defendant has not only pleaded to the action, but has contested the plaintiff's right to recover before the arbitrator, and has forced the plaintiff to incur a large amount of costs in obtaining the award in his favour. It would be most strange if he could now defeat the claim of the plaintiff by setting up a deed which he admits could not be pleaded. *Rossi* v. *Bailey* (37 L. J. Q.B. 204) shews that when a deed can be pleaded, and is not pleaded, the defendant is estopped from setting it up afterwards as a protection from the execution. That case shews that you may go behind the certificate, and look into the deed; and it would be very strange to say that although the validity of the deed might be looked into if it had been pleaded, the Court is prevented from looking into it upon this rule. Here the deed is one which could not be pleaded. The affidavits in answer to the rule shew that it was not signed by the requisite majority. It is therefore void—see *Baker* v. *Painter* (L. R. 2 C.P. 492). It is true that since the passing of the 31 & 32 Vict. c. 104. the majority of creditors executing the deed would have been sufficient, because that Act, by section 3, enacts that, "In the computation of the requisite value of such creditors, and for all other purposes of the deed, the amount due to each creditor, after deducing the value of the securities held by him on the debtor's property, shall alone be reckoned"; but that enactment has no effect upon this deed, which was made in the year 1864. If, therefore, the deed had been pleaded the necessary averments could not have been proved. In fact, the defendant does not rely upon the deed, but upon the certificate of registration under the 98th section above referred to. *Ex parte Banfield* (35 L. J. Bk. 12; L. R. 1 Ch. Ap. 154) shews that where a deed is not executed by the requisite majority the legal rights of the creditors are saved. The certificate of registration cannot, therefore, be any protection. The effect of the certificate was much considered in *Lloyd* v. *Harrison* (35 L. J. Q.B. 153), where the action was against the sheriff for letting the execution debtor go at large—see also *Ilderton* v. *Jewell* (32 L. J. C.P. 256) and *Leigh* v. *Pendlebury* (33 L. J. C.P. 172). As to the costs, they referred to *Williams* v. *Rose* (37 L. J. Ex. 12; L. R. 3 Ex. 5); *Dignam* v. *Bailey* (37 L. R. Q.B. 71); and to *Simpson* v. *Maravita* (38 L. J. Q.B. 76).

W. H. Harrison, in support of the rule.—It must be admitted that the affidavits shew that as the law stood before the 31 & 32 Vict. c. 104. s. 3. passed, the deed would have been invalid in consequence of not being executed by the required majority of the creditors. But it is also clear that if the value of the securities held by the creditors had been deducted the majority would have been sufficient. It is submitted that the effect of the 31 & 32 Vict. c. 104. is to make the deed valid, for that Act has a retrospective effect. It is true that by section 15. it is "to commence and take effect on October 11, 1858," but by the same section it is to be read as one Act with so much of the Bankrupt Law Consolidation Act, 1849, the Bankruptcy Act, 1854, and the Bankruptcy Act, 1861, as is in force. Section 4. must apply to past deeds, not to those which are made after October 11. The present proceeding is by way of appeal to the equitable jurisdiction of the Court to stay the proceedings of the plaintiff. The part of the rule which referred to setting the writ aside may be abandoned—*Ex parte Thatcher* (36 L. J. Bk. 14).

[MELLOR, J.—Is there any instance of this Court interfering *quia timet?* The 198th section simply states that no process against the person of the debtor shall be available. There is nothing in this case to shew that the defendant needs protection.]

The section goes further than that, and provides that the certificate shall be available to the debtor for all purposes as a protection in bankruptcy.

[*Quain* stated that he was willing to waive the point that this was an application *quia timet*, it being desirable that a decision upon the merits should be obtained.]

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MELLOR, J.—For the purposes of this rule, the question seems to be whether or not the 31 & 32 Vict. c. 104. s. 3. has a retrospective effect, and can be construed as making good this deed, which would have been bad under the provisions of the old Acts. I am of opinion that the rule must be discharged. If the point which has occurred to us, that it might be that the plaintiff would never proceed with the execution against the defendant, had been taken by Mr. Quain, I think that we should have refrained from making the rule absolute so as to interfere with the execution; but he waives that point, and the question now is that which I have stated already. Our decision upon that ground must not be considered as establishing a precedent that we should interfere where the defendant simply fears that the plaintiff will proceed upon the execution against him[1]. The question is of considerable importance, as it involves the necessity of giving our opinion upon the construction of section 3. of the 31 & 32 Vict. c. 104, but we must not avoid giving our opinion upon it. I am of opinion that it has not any retrospective effect. It is true that the 11th section may have such an effect, for it refers to affidavits, declarations and affirmations required to be sworn or made under the Act now in question, as well as under the Bankruptcy Act, 1861. But the 1st, 2nd, 3rd, 4th, 5th and 7th sections admit of no other construction besides this, that they are not intended to have a retrospective effect. I cannot find in the words used anything to shew that it was the intention of the legislature that they should have any such effect.—[His Lordship went through those sections, and then continued:]—When we look to the 15th section we find that the Act is to commence and take effect on October 11, 1868, and if the contention of Mr. Harrison were correct it would be impossible to understand why that provision is inserted. I think, therefore, that the 3rd section cannot apply to any deeds except such as are executed after October 11, 1868, when the Act first takes effect.

HANNEN, J.—It is a well-settled maxim that new legislation is to be construed as relating to future matters, and not to such as are past, unless there be very clear language to shew that the latter was the intention of the legislature. It has been contended that some of the provisions of the Act are prospective; but that others are retrospective; and that even as to deeds which were executed before the Act took effect, the amount to be reckoned in the computation of the requisite value of the creditors is to be so reckoned after deducting the value of the securities held by him on the debtor's property. But this would be so great a change that if it had been intended by the legislature they would not have left it to be inferred merely from vague legislation. The effect of such a construction would be not only to make some deeds valid which were invalid before October 11, 1868, but also to make some invalid which previously had been valid, and it would be very strange if that could be done except by clear language. I think it is not made out that this was the intention of the legislature, and therefore I think that the rule must be discharged.

Rule discharged.

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(1) No reference was made by counsel to *Harding* v. *Inskip* (4 L. J. N.C., p. 9), where the Court of Exchequer discharged a rule on the ground that it was simply an application *quia timet*.—See the case *post*, Ex. 81.

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IN THE QUEEN'S BENCH. Feb. 11, 1869.

LAWLESS *v.* THE ANGLO-EGYPTIAN COTTON AND OIL COMPANY.

38 L. J. Q.B. 129; 10 B. & S. 226; L. R. 4 Q.B. 262; 17 W. R. 498.

Referred to, *Henwood* v. *Harrison*, [1872] E. R. A.; 41 L. J. C.P. 206; L. R. 7 C.P. 606; 26 L. T. 938; 20 W. R. 1000 (C.P.). Applied, *Edmondson* v. *Birch*, [1907] E. R. A.; 76 L. J. K.B. 346; [1907] 1 K.B. 371; 96 L. T. 415 (C. A.).

Libel—Joint-Stock Company—Privileged Communication—Publication of Auditors' Report—Evidence of Malice.

LIBEL AND SLANDER. E.—*The plaintiff was the agent of the defendant, a trading company, and it was part of his duty to furnish them with an account of his transactions, to enable them to prepare the balance-sheet for the inspection of the shareholders. This balance-sheet was prepared and duly referred to the auditors, who reported that there was a deficiency for which the plaintiff was responsible, and that his accounts had been badly kept. There was evidence that an explanation had been offered to the auditors, which they had disregarded; but no evidence that the directors had any knowledge of this explanation. The directors, after laying the accounts before a general meeting of the shareholders, caused a letter containing the part of the report which affected the character of the plaintiff to be printed and forwarded to the absent shareholders*:—Held, *first, that this letter was published on a privileged occasion, as it was the duty of the defendants to communicate to all the shareholders any part of the report of the auditors which materially affected the accounts of the company; secondly, that there was no intrinsic or extrinsic evidence of malice to be left to the jury, as the report of the auditors was published without comment, and the explanations offered to the auditors did not come before the defendants; and that causing the letter to be printed was a reasonable and necessary mode of publishing it to the absent shareholders.*

Declaration—that, before and at the time of the committing of the grievances by the defendants hereinafter mentioned, the plaintiff had been and was manager of the company, at wages or salary payable to him in that behalf, and the occupation and business of a manager of companies used, exercised and carried on thereby, and derived great gains and profits, yet the defendants falsely and maliciously printed and published of the plaintiff, and of him as such manager of the company, in a printed report of the trade finances and affairs of the company, the words following (that is to say): "The shareholders will observe that there is a charge of 1,306*l.* 1*s.* 7*d.* for deficiency of stock which the manager (meaning the plaintiff) is responsible for. His accounts (meaning the plaintiff's accounts as such manager in the company) have been badly kept and have been rendered to us very irregularly," the defendants meaning thereby that the plaintiff, whilst he was so employed as such manager of the company, had been guilty of improper conduct as such manager in the company, and that by reason thereof the defendants had incurred and sustained loss to the amount of 1,306*l.* 1*s.* 7*d.*; and further, that the plaintiff had, in breach of and contrary to his duties as such manager in the company, kept and rendered his accounts in a careless, irregular, inaccurate and improper manner. The declaration concluded by alleging special damage to the plaintiff in his occupation and business as manager.

Plea—not guilty, on which issue was joined.

At the trial, before Kelly, C.B., at the Lancashire Summer Assizes, 1868, it appeared that the defendants were a company established for the purpose of growing cotton in Egypt and shipping it to this country for sale. The plaintiff was the manager of their factory in Egypt; and it was part of his duty to send to the company an account of his transactions, so as to enable the directors to furnish the shareholders with an account of the profits of the undertaking. The

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libel complained of was an extract from the auditors' report to the company, annexed to the balance-sheet, ending March 31, 1867. This extract appeared in a letter addressed to the shareholders by the directors, calling their attention to the report of the directors at their annual meeting, the balance-sheet, and the report of the auditors. It was in the terms set out in the declaration: "We certify that the accounts as above stated are correct. The shareholders will observe that there is a charge of 1,306*l.* 1*s.* 7*d.* for deficiency of stock, which the manager is responsible for. His accounts have been badly kept and have been rendered to us very irregularily." This letter was printed by the authority of the board of directors and sent to each shareholder, together with the invitation to the annual meeting. It appeared that there was no ground whatever for the charges against the plaintiff; and a Mr. Bell, who had been the assistant of the auditor of the company, stated that he had explained to the auditors that the alleged deficiency arose from a depreciation in the value of the company's stock in Egypt; but found it impossible to obtain a hearing. It also appeared that a meeting of the directors had resolved that the auditors' report and the balance-sheet should be printed and distributed among the shareholders.

It was objected by the counsel for the defendants, first, that there was no evidence of a publication of the libel, as the company appeared to have merely printed the letter and sent it to their shareholders. Secondly, that the letter was a privileged communication, as it was the duty of the company to inform the shareholders of any matter affecting the accounts of the undertaking. The Chief Baron expressed his opinion that there was sufficient evidence of the publication of a libel, but reserved the points, giving the defendants leave to move, and the jury found for the plaintiff.

Pope having obtained, in Trinity Term, 1868, a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a nonsuit or verdict for the defendants entered instead, upon the ground, first, that there was no evidence of publication; secondly, that the communication was privileged,—

Holker and *Gorst* shewed cause.—The plaintiff is entitled to maintain this action against the defendants. Admitting that the report affecting the plaintiff might have been published on a privileged occasion, there was evidence of malice for the jury, if the publication was made with a wanton and reckless disregard of the good name and reputation of the plaintiff—*Addison on Torts*, 2nd edit. 691. It makes no difference that the defendants are a corporation—*Whitfield* v. *the South-Eastern Railway Company* (El. B. & El. 115; 27 L. J. Q.B. 229).

[MELLOR, J.—Did you submit to the Chief Baron that there was evidence of express malice?]

It would not have been proper to do so after his Lordship had ruled in the plaintiff's favour. There is, however, ample evidence of malice in the fact that the report was printed, which was an unnecessary mode of publication. And this evidence ought to have been left to the jury. The report ought merely to have been read at a meeting of the shareholders according to the law and practice of joint-stock companies. In the first schedule to The Companies' Act, 1862, 25 & 26 Vict. c. 89, containing regulations for the management of limited liability companies, it is provided (section 83), that once at least in every year the accounts of the company shall be examined, and the correctness of the balance-sheet ascertained by one or more auditors; and (section 94.) that the auditors shall make a report to the members upon the balance-sheet and accounts; and in every such report they shall state whether the balance-sheet is, in their opinion, a full and fair balance-sheet, &c.; and such report shall be read together with the report of the directors at the ordinary meeting. There is, therefore, a particular mode of presenting the report prescribed by the legislature, and if the company choose to depart from it they must abide by the consequences, just as in *Cooke* v. *Wildes* (5 E. & B. 328; 24 L. J. Q.B. 367), where the defendant, who was deputy-clerk of the peace for the county of Kent, had written a letter to the finance committee of the county, giving reasons why he had taken away from the plaintiff the business of printing the register of

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voters for the county, instead of merely stating the facts; and it was held that the occasion of writing the letter rebutted the presumption of malice and rendered it a privileged communication; but that the concluding part imputing improper motives to the plaintiff ought to have been left to the jury as affording evidence of express malice. The same rule is laid down in *Toogood* v. *Spyring* (1 Cr. M. & R. 181; 3 L. J. Ex. 347); *Blagg* v. *Sturt* (10 Q.B. 899; 16 L. J. Q.B. 39); and *Jackson* v. *Hopperton* (16 Com. B. Rep. N.S. 826).

Manisty (*R. C. Fisher* with him), in support of the rule.—There was no evidence of malice which the Chief Baron could have submitted to the jury. Affirmative evidence of malice must be given, and where the inference of malice from the publication of defamatory matter is rebutted the occasion is privileged. The report presented by the defendants was a communication made *bonâ fide* upon a subject-matter, in which the party communicating had an interest, or in reference to which he had a duty, and it was made to persons having a corresponding interest or duty. It was therefore privileged—*Somerville* v. *Hawkins* (10 Com. B. Rep. 583; 20 L. J. C.P. 131), the case of a memorial addressed to a Secretary of State.

[MELLOR, J.—Was there any extrinsic evidence of malice?]

There was no such evidence. The report was one which the auditors were bound by Act of Parliament to make, and printing the report is not a publication to those who print it. In *Taylor* v. *Hawkins* (16 Q.B. 308; 20 L. J. Q.B. 313), where a master, who was about to dismiss his servant for dishonesty, called in a friend to hear what passed, it was held that the presence of the third person did not render the occasion unprivileged. In the present case there was every reason for presuming an absence of malice.

Holker was again heard.—The recklessness of the defendants in printing and publishing the report, after an explanation of the deficiency had been received, was evidence of express malice. In *Manley Smith on the Law of Master and Servant*, 2nd ed. p. 266, there is a note to two American cases—*Gassett* v. *Gilbert* (6 Gray's Rep. 94), where the publication by the directors of an incorporated society for promoting female medical education, in their annual report of a "caution to the public" against trusting a person who had formerly been employed to obtain and collect subscriptions in their behalf, but had since been dismissed, was held to be justified so far only as it was made in good faith, and required to protect the corporation and the public against false representations of that person; and that it was for the jury to say whether the directors had acted in good faith, and had not exceeded their privilege; and *The Philadelphia, Wilmington and Baltimore Railroad Corporation* v. *Quigley* (21 How. Rep. 202), where a railroad corporation was held liable, in its corporate capacity, for a libel published by its agents in the course of its business and of their employment; and it was held to be within the course of its business and the employment of the president and directors for them to investigate the conduct of their officers and agents, and report the result to the stockholders. It was also held, that in the absence of malice or bad faith, a report to the shareholders was privileged, but that such privilege did not extend to the preservation of the report and evidence in a book for distribution amongst the persons belonging to the corporation; and the corporation was held liable in damages for publishing it in that form.

MELLOR, J.—I think that the rule must be made absolute to enter a nonsuit or a verdict for the defendants. If I could see that substantial injustice was done by the omission to leave those questions to the jury which I think it would have been better to have put to them, I should be willing to have the case sent down for a new trial, on terms. But I think that there is nothing in the questions which it is said that the Chief Baron ought to have left to the jury. It appears that the defendants are a company established for the purpose of growing cotton in Egypt, and that the plaintiff was their manager in that country. It was the duty of the plaintiff to furnish the defendants with an account of his transactions to enable them to supply their auditors with a balance-sheet and the accounts relating to it. The auditors were of opinion

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and reported that a depreciation in the stock of the company was owing to the mismanagement of the plaintiff. It appears that they came to this opinion after hearing explanations which were offered to them by one Mr. Bell, but these explanations were offered to them only, and not to the directors. A general meeting of the shareholders was then summoned, and at this meeting the directors laid before the company a statement of the accounts, and in this statement repeated what had been reported to them by the auditors. There is nothing whatever to shew that they had any reason to doubt the truth of this report, nor is there in what happened at the meeting any extrinsic evidence of malice on their part. I think, therefore, that the Chief Baron was right in not leaving the question of malice to the jury. I think that no such evidence is to be found in the report itself. It was a report which the directors had a right to believe correct, and there is nothing to shew that they had any other object than a *bonâ fide* communication of the report of the auditors to the company. Now, it was ingeniously argued by Mr. Gorst that there is a rule prescribing the mode in which reports like the present one are to be made, because the company are directed to lay their statement before the company in general meeting. It is true that for certain purposes those persons who are absent from a meeting are bound by the acts of those who are present, and a mode is therefore prescribed in which the report is to be made and acted upon. But all the shareholders are interested in the prosperity or adversity of the company. They are interested in any report touching the conduct of the officers of the company as upon their conduct the success of the company must depend. And I think that the printing of this report was a reasonable and proper mode of having it circulated among the members of the company, as there is no evidence of the number of the shareholders. The Chief Baron says that it was a report of the directors to a numerous meeting of shareholders, and that he was of opinion that it was not a privileged communication, independently of any evidence of malice which might appear in the document itself. But it appears to me that the case is not within the rule laid down in *Cooke* v. *Wildes* (5 El. & B. 328; 24 L. J. Q.B. 367), though I was at first inclined to think that it was, because, in *Cooke* v. *Wildes* (5 El. & B. 328; 24 L. J. Q.B. 367), what induced the Court to say that it was a question for the jury was that the letter contained defamatory expressions which were unnecessary for the purposes of the communication. It was quite proper and right in that case that the Justices of the Finance Committee and the Quarter Sessions should be judges of the facts, but the defendant was not content with stating them, or anything which he had heard, but made observations of his own, and put a gloss on the conduct of the plaintiff which was libellous and calumnious. This being so, there was in that case intrinsic evidence of malice, and that the communication was not made *bonâ fide*, and this evidence was proper to be left to the jury. But I think that the authorities cited by Mr. Manisty, the two judgments of Lord Campbell, in *Somerville* v. *Hawkins* (10 Com. B. Rep. 583; 20 L. J. C.P. 131) and *Taylor* v. *Hawkins* (16 Q.B. 308; 20 L. J. Q.B. 313), shew that the case ought not to be left to the jury unless there be intrinsic evidence of malice in the document itself. If there by any such evidence it is for the jury to say whether the defendant was acting maliciously or not, but if the words are consistent with an absence of malice the Judge ought not to leave the case to the jury, unless there is in the document itself intrinsic evidence of malice, or unless there is some extrinsic evidence of malice. In this case I see nothing which is inconsistent with an absence of malice; and when you come to consider the circumstances, they negative malice on the part of the directors. So that, in the absence of intrinsic evidence, I am satisfied that there was nothing to go to the jury. Assuming as we may from the terms of the reservation and the fact that there was no application to have questions left to the jury that the communication was *bonâ fide*, so far as the directors were concerned, I think that the printing of the report was a reasonably necessary mode of making a communication which, as it appears to me, they were bound to make to their shareholders. I think that we should be going against the progress of the age,

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if we were to hold that the necessary publication of the manuscript to the printer, from the fact that the directors in making this communication to the great body of the shareholders adopted printing instead of employing confidential clerks to write a letter to each shareholder, rendered the communication unprivileged. I am, therefore satisfied that there was no evidence of malice in the mode in which this communication was made. The only remaining question is, had the shareholders an interest in receiving this report? I think that there was a duty on the part of the directors to communicate it to them. I do not think that the report should be confined to the shareholders present at the meeting. Each shareholder has his interest in receiving the news, and the directors are justified in making it known to him. I am rather glad that Mr. Holker has drawn our attention to the American authorities on this subject, because, in one of those cases, it was held to be within the course of the business and employment of the president and directors, to investigate the conduct of their officers and agents, and report the result to the shareholders. It was also held that in the absence of malice and bad faith the report to the shareholders was privileged. So far therefore as it is necessary to go in this case, we appear to have a direct authority. But, independently of this authority, I should have been prepared to hold that in the case of a company with a large number of shareholders all interested in the conduct of their officers and servants, it is justifiable to make a communication like the one in question to all the shareholders, present or absent. Thinking, therefore, that the communication was *primâ facie* privileged, and that there was no evidence of malice in the report or in the circumstances of which evidence was given, I am of opinion that the rule must be made absolute. I express this opinion with diffidence, as it is in conflict with that of the Chief Baron. But even if this opinion had been not merely a decision at Nisi Prius, but one delivered after a better opportunity of consideration, I do not think that I could have concurred with it.

HANNEN, J.—I am of the same opinion. I feel strongly that I ought to express my opinion with diffidence, as it is opposed to that of the Chief Baron, for whom I entertain a profound respect; but I think that the occasion was privileged, and that the malice which might be *primâ facie* supposed to exist cannot be inferred. I cannot understand how it can be thought that the directors of a company who have been obliged by Act of Parliament to employ auditors to investigate their accounts, and to receive from those auditors a report expressing their opinion upon the state of those accounts, can be held to be acting beyond the scope of their duties in communicating *simpliciter* to the shareholders this report, without one word of comment of their own. I confess that I go so far as to say that it was the duty of the directors to do so. It must be present to the minds of many who hear me that the failure of directors to report to the shareholders a statement made by auditors as to the accounts, may lead the directors themselves into a position of very great difficulty. It seems to me, therefore, that the mere fact of communicating the report to the shareholders was itself privileged. Now, it is perfectly clear that express malice was not relied upon at the trial, or it would have been the duty of the plaintiff's counsel, when it was urged that the plaintiff ought to be nonsuited, to have said that he had a case behind, which might render the consideration of the question, whether the communication were privileged or not, unnecessary. Instead of this he acquiesced in the reservation of the point, whether there should be a nonsuit or not, upon the question whether the Chief Baron was wrong in holding the communication privileged. It was evident that he did not think that a case of express malice could be established, and I think that his judgment was a sound one, as, according to what I have said, there appeared to be no intrinsic evidence of malice. As for the extrinsic evidence two points are relied upon, first, that the communication was made by means of a printer. This point does not appear to have been made at the trial, and I think that there is nothing in it, as it is obvious that the company itself cannot communicate by writing, but must depute to some person the duty of making the communication, and if Mr. Holker's argument were pushed to its logical

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limits, it would amount to this, that a company must employ one of the shareholders to write, or if he were a printer to print the reports, which they make to the rest of the shareholders. I think that the mode of communication might under some circumstances be evidence for the jury of express malice; but it was not suggested at the trial that the directors had departed from the usual course, having regard to the exigencies of business, and the means of making known to the shareholders that which they thought necessary to be known. As to the observations made by Mr. Bell, which it was said ought to have put the company on inquiry, it is to be observed that they had already been made to the auditors, who still thought it their duty to make their report to the directors. How then could the directors assume that what Mr. Bell had spoken in vain to the auditors, was the true story? The proper course for them to adopt was to let the shareholders know what the auditors had said, and then it would become a proper subject of investigation by all parties interested.

I need not add anything with reference to the authorities. I concur with my Brother Mellor in thinking that the American case relied on is directly adverse to the plaintiff. It could only apply to a case which does not exist here, that is, if the report, after it had served its purpose by making known to the shareholders that which it was their interest to know, had been put on record in the books of the company, to stand for ever as proof that an accusation had been made against the plaintiff. This would have been independent evidence of malice, but, in the absence of it, it simply remains that the defendants have done what the American Court thought a privileged act. For these reasons, I think that the rule should be made absolute.

Rule absolute.

IN THE QUEEN'S BENCH. Nov. 19, 1868; Feb. 15, 1869.

LEVI *v.* SANDERSON.

38 L. J. Q.B. 135; 9 B. & S. 410; L. R. 4 Q.B. 330; 17 W. R. 443.

Costs, Plaintiff's Right to—County Court Acts—Cases of Concurrent Jurisdiction—Statute of Gloucester.

COSTS. I.—*An action, in a case where there would have been concurrent jurisdiction under the County Courts Act, 9 & 10 Vict. c. 95. s. 128, having been commenced before the passing of the County Courts Act, 1867, 30 & 31 Vict. c. 142, was tried by order, after the passing of the Act, before a County Court Judge, and a verdict obtained for 5l. only*:—Held, *following* Mount *v.* Taylor, 37 L. J. C.P. 325, *and explaining* Restall *v.* the London and South-Western Railway Company, 37 L. J. Ex. 89, *and* Butcher *v.* Henderson, 37 L. J. Q.B. 133, *that the plaintiff was entitled to his costs, as the right to judgment did not accrue until after the passing of* 30 & 31 *Vict. c.* 142, *and the repeal of the former County Court Acts, and that as the former County Court Acts did not substantially affect the right to costs in cases of exclusive or concurrent jurisdiction, this right given by the Statute of Gloucester must be considered as still in force.*

This was a rule calling on the defendant to shew cause why the plaintiff should not be allowed his costs, to be taxed by one of the Masters.

The facts of the case are stated in the introductory part of the judgment.

Patchett shewed cause, and contended that the case could not be distinguished from *Butcher* v. *Henderson* (37 L. J. Q.B. 133), which was a decision binding on the Court.

Pinder, in support of the rule, cited *Mount* v. *Taylor* (37 L. J. C.P. 325), and contended that the judgment of the Court in *Butcher* v. *Henderson* (37 L. J. Q.B. 133) proceeded upon a misunderstanding of the effect of Lord Brougham's Act, 13 & 14 Vict. c. 21.—He also referred to the *Bishop's case*

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(12 Rep., p. 7) and *Tattle* v. *Grimwood* (3 Bing. 496; 4 L. J. C.P. 174, per Best, C.J.).

Cur. adv. vult.

The judgment of the Court (Lush, J., Hannen, J. and Hayes, J.) was read, on Feb. 15, by—

MELLOR, J.—This case was an action for goods sold, commenced before the passing of the last County Courts Act (30 & 31 Vict. c. 142), and it continued pending for some time after that Act came into operation. In July, 1868, it was ordered to be tried before a County Court Judge, and a verdict was obtained for 5*l.* only, but it was a case of concurrent jurisdiction under section 128. of the 9 & 10 Vict. c. 95, and therefore if the provisions of the former County Courts Acts had remained in force, the plaintiff would have been entitled as of right to obtain a rule or order for his costs. Under these circumstances, the Master having declined to tax the costs, a rule was obtained on behalf of the plaintiff for this purpose; and it was contended for him that, as all the restrictive enactments as to costs in the former County Courts Acts were repealed before the trial, and as the case stood unaffected by the new restrictions introduced by the last Act, the plaintiff was entitled to his costs under the Statute of Gloucester. The cases of *Restall* v. *the London and South-Western Railway Company* (37 L. J. Ex. 89) and the late case of *Mount* v. *Taylor* (37 L. J. C.P. 325) were relied on as authorities in his favour. On the defendant's part it was contended that the repeal of the former restrictions of the County Courts Acts as to costs did not revive the Statute of Gloucester, and *Butcher* v. *Henderson* (37 L. J. Q.B. 133) was cited as an authority on his behalf. It is true that in *Butcher* v. *Henderson* (37 L. J. Q.B. 133) this Court declined to follow the decision of *Restall* v. *the London and South-Western Railway Company* (37 L. J. Ex. 89), but it was expressly pointed out in the judgment of the former case that there the plaintiffs had become entitled to sign judgment, and that the transaction was therefore complete before the last Act came into operation, while in *Restall* v. *the London and South-Western Railway Company* (37 L. J. Ex. 89) the plaintiff was not entitled to sign judgment, and the transaction remained incomplete until after that period; and though this point was not relied on by the Court of Exchequer, it certainly formed a main ground of the judgment of this Court in *Butcher* v. *Henderson* (37 L. J. Q.B. 133). The case of *Mount* v. *Taylor* (37 L. J. C.P. 325) was a case of exclusive jurisdiction in the superior Court, which the Court there considered to stand on the same footing as a case of concurrent jurisdiction like the present; and there, as here, the transaction remained incomplete until after January 1, 1868. The Court of Common Pleas in that case held that, in cases of exclusive or concurrent jurisdiction, where the right to costs was substantially preserved by the former County Courts Act, the Statute of Gloucester could not be considered as repealed with regard to such cases; and on this ground, and because the transaction was incomplete before the repeal of the former County Courts Acts took effect, they held the plaintiff entitled to costs, as the Court of Exchequer had done in *Restall* v. *the London and South-Western Railway Company* (37 L. J. Ex. 89), though on a different ground. Looking to these authorities, and having regard to the desirableness of uniformity of decision in cases of this nature, we are not disposed to dissent from the view taken in the case of *Mount* v. *Taylor* (37 L. J. C.P. 325), and we therefore are of opinion that the plaintiff is entitled to his costs in this case, and that the rule should be made absolute.

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IN THE EXCHEQUER CHAMBER. Feb. 2, 1869.

(Error and appeal from the Court of Queen's Bench.)

BAXENDALE AND OTHERS *v.* THE GREAT EASTERN RAILWAY COMPANY.

38 L. J. Q.B. 137; 10 B. & S. 212; L. R. 4 Q.B. 244; 17 W. R. 412.

Followed, *Shaw* v. *Great Western Railway*, [1894] E. R. A.; [1894] 1 Q.B. 373; 70 L. T. 218; 42 W. R. 285 (Q.B.D. Div.).

Common Carriers, Liability of—Special Contract—Goods of the Value of more than 10l.—Carriers' Act (11 *Geo.* 4. *&* 1 *Will.* 4. *c.* 68.) *ss.* 1, 6.—*The Railway and Canal Traffic Act*, 1854 (17 *&* 18 *Vict. c.* 31), *s.* 7.

CARRIERS. E.—*To a declaration alleging a contract by the defendants, a railway company, to carry from Rotterdam to Harwich and London, goods of the plaintiff delivered to them for that purpose, and also alleging the loss of such goods, the defendants pleaded, in substance, that the goods were articles and property of the description mentioned in the 1st section of the Carriers' Act, and were delivered by the plaintiffs to the defendants, then being common carriers by land for hire between Harwich and London, to be by them, as such carriers by land, carried from Harwich to London; that the goods were in one parcel and exceeded in value 10l.; that the value and nature of the goods were not declared to the defendants at the time of delivery to them; that the goods were lost while in the course of being carried from Harwich to London, and whilst the same were in the possession of the defendants as such carriers, &c.*:—Held, *that the plea was a good answer to the declaration.*

The defendants were owners of a railway from Harwich to London, and also of a ship, the "Avalon," *lying at Rotterdam. They carried on the business of carriers between Rotterdam and London, via Harwich. A case of pictures was delivered to their agents at Rotterdam and a bill of lading was signed by them, the goods "to be delivered at the port of London, via Harwich (the act of God . . . . . as also railway accidents, being excepted), and the owners being in no way liable for any consequences of the causes above excepted." The case was placed on board the ship, unshipped at Harwich, and was sent off by the defendants' railway to London, but was lost in the course of transit from Harwich to London. No declaration of the value of the pictures was ever made, but they were found at the trial to have been of above the value of 10l.*:—Held, *that the bill of lading contemplated a conveyance of the case partly by land, and that the fact of there being such a bill of lading was no ground for saying that the fifth plea referred to above was not proved.* Held, *also, that although the bill of lading constituted a special contract between the plaintiffs and the defendants, it was not such a special contract as would, under section 6. of the Carriers' Act, deprive the defendants of the protection afforded to them by the neglect to declare the value of the case at the time of delivery.* Held, *also, that the proviso in section 7. of the Railway and Canal Traffic Act*, 1854, *that no special contract shall be binding upon or affect any party unless the same be signed by him or by the person delivering, &c., only applies where the company are seeking to exempt themselves from liability by reason of there being a special contract.*

The first count of the declaration stated that the defendants were carriers of goods for hire, from a place beyond the seas called Rotterdam, by steam vessels across the sea to Harwich in this kingdom, and from Harwich to London, and the defendants received as such carriers certain goods of the plaintiffs, to wit, a case containing pictures and paintings, to be by the defendants taken care of, and safely and securely carried from the place aforesaid by a steam vessel across the sea to Harwich aforesaid, certain dangers and casualties excepted, and from Harwich aforesaid to London as aforesaid, and there delivered to the plaintiffs for reward to the defendants, and a reasonable time

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for carrying and delivering the same as aforesaid elapsed, yet the defendants, although not prevented by any of the perils, dangers or casualties aforesaid, did not safely and securely deliver the said goods to the plaintiffs as aforesaid, whereby the same were lost to the plaintiffs.

The second count stated that the defendants were carriers of goods for hire from Harwich to London, and the defendants received as such carriers certain goods of the plaintiffs, to wit, a case containing pictures and paintings, to be by the defendants taken care of and safely and securely carried from Harwich to London aforesaid, and there delivered to the plaintiffs for reward to the defendants, and a reasonable time for carrying and delivering the same as aforesaid elapsed, yet the defendants did not take care of the said goods and safely and securely deliver the same to the plaintiffs as aforesaid, and so negligently conducted themselves with respect thereto that by and through the negligence, carelessness and default of the defendants in that behalf the said goods were wholly lost to the plaintiffs.

The third count stated that at and after the delivery to the defendants aforesaid of the goods as hereinafter mentioned, the defendants were the owners of a certain ship or vessel called the "*Avalon*," then lying at anchor at Rotterdam and bound for Harwich, and the plaintiffs caused to be shipped and delivered to the defendants, and the defendants received on board the said ship certain goods, to wit, pictures and paintings, on the terms, amongst others, agreed on between the plaintiffs and the defendants, that the defendants should carry the same on board the said ship or vessel from Rotterdam to Harwich, with liberty to tranship the said goods on board any other craft, steamer or railway and deliver the same unto the plaintiffs at the port of London, *via* Harwich, aforesaid, certain perils, dangers and casualties excepted, for certain freight and other moneys in that behalf to be paid by the plaintiffs to the defendants, and although a reasonable time for the carriage and delivery of the said goods as aforesaid has elapsed, and although the plaintiffs have done all things and all things have happened and exist and times have elapsed to entitle the plaintinffs to have the said goods delivered as aforesaid, and although the defendants have not been prevented from carrying and delivering the said goods as aforesaid by any of the perils, dangers or casualties aforesaid, yet they have not delivered the same as aforesaid or otherwise to the plaintiffs, and thereby the same were wholly lost to the plaintiffs.

Fifth plea—As to the said first, second and third counts, that the said goods in the said second count mentioned were articles and property of the description mentioned in the 1st section of the Act, passed in the first year of the reign of King William the Fourth, commonly called the Carriers' Act, and were delivered or caused to be delivered by the plaintiffs to the defendants, then being common carriers by land for hire between Harwich and London, to be by them, as such carriers by land, carried from Harwich to London, and delivered to the plaintiffs in London, and that the said goods were contained in one package or parcel, and exceeded in value 10*l*. And the defendants say, that the said delivery was made to the servants of the defendants, and that at the time of such delivery the value and nature of the said goods were not declared by the plaintiffs, or the person or persons sending or delivering the same; and that the non-delivery of the said goods to the plaintiffs, in the said counts complained of, was, by reason of the same being lost by the defendants out of their possession, while the same were in course of being carried by the defendants from Harwich to London, and delivered to the plaintiffs in London as aforesaid, and while the same were in their possession and under their care as such carriers by land as aforesaid.

Upon demurrer, this plea was held good by the Court of Queen's Bench, and error was brought upon that judgment.

Issue was also joined upon the plea.

The action was tried and the verdict entered for the plaintiffs for 84*l*., leave being reserved to set that verdict aside and enter one for the defendants instead thereof. The Court of Queen's Bench made a rule absolute to that effect, and the following CASE was stated upon appeal to this Court.

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1. The cause was tried, before Shee, J., on February 14, 1867, when the following facts were admitted or proved.

2. The plaintiffs are members of the firm of Pickford & Co., and carry on the business of carriers at Wood Street, London. The defendants were on October 16, 1865, owners of a railway from Harwich to London, and also of a steam-ship called the "*Avalon*," then lying at Rotterdam. The defendants also carried on the business of carriers between Rotterdam and London, *via* Harwich, the sea portion of the journey being performed by their steam-ships, and the land portion, viz., between Harwich and London, by the said railway.

3. On October 16, 1865, one Joseph Marcus Parser, through Messrs. G. P. Ittman & Son, caused to be delivered to the agents of the defendants at their office at Rotterdam, the case of pictures which is the subject of the action, for carriage to London, and the defendants, by their agents there, signed a bill of lading, of which the following is a copy, in respect of the carriage of the pictures:

"Shipped in good order and well conditioned, by G. P. Ittman & Son, in and upon the good steam-ship called the "*Avalon*," whereof is master for this present voyage, Fontaine, and now lying in this port, and bound for Harwich, with leave to sail with or without pilots, or to tow or assist vessels in all situations without being deemed a deviation.

"Address—

"Lewis B. Cowper, Lowestoft. } One small case pictures.

"Disbursement £

for D. Y. being marked and numbered as in the margin, with liberty to tranship the said goods or specie on board any other craft, steamer or railway, and are to be delivered in the like good order and condition at the port of London, *via* Harwich, (the act of God, the Queen's enemies, pirates, restraint of princes, rulers and people, vermin, jettison, barratry and collision, fire on board, in hulk or craft or on shore, and all accidents, loss and damage whatsoever from machinery, boilers and steam and steam navigation, or from perils of the seas and rivers, or from any act, neglect or default whatsoever of the pilot, master or mariners in navigating the ship, as also railway accidents, being excepted, and the owners being in no way liable for any consequences of the causes above excepted,) unto Messrs. Pickford & Co., or his or their assigns, he or they paying freight for the said goods smal 3/ del. incl., and disbursements as in the margin. In witness whereof the master, agents or purser of the said ship has signed three bills of lading, all of this tenor and date, one of which being accomplished the others to be void.

"Weight, contents, measure, quantity and value unknown, and not answerable for leakage, lighterage, breakage, corruption, rust, torn wrappers, decay or mortality, and the wrong delivery of goods caused by error, or by insufficiency in marks or numbers. The goods to be taken from the ship or railway, by the consignees, immediately after arrival, or the same will be transhipped into lighters, landed on the quays, or warehoused at the expense and risk of the owners of such goods. If the discharging of the goods is detained by the entry not being passed, the agents of the steamer or railway will have the power to enter them for account and risk of the owners of such goods. All goods shipped on deck at shipper's risk. The customs registration tax to be borne by the receivers.

"For the master,
"J. WILTSCHUT.

"Dated in Rotterdam, Oct. 16, 1865."

The case containing the pictures was placed on board at Rotterdam, and unshipped at Harwich, and was about October 18 loaded upon a train of the defendants and despatched by them to London. It never was delivered by the defendants to Messrs. Pickford & Co., having been lost in course of transit between Harwich and London. No declaration of the value of the case was ever made. There was no notice affixed in the defendants' office at Rotterdam

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requiring a higher rate to be paid in the case of articles of value. Evidence was given at the trial of the value of the pictures, and in the end the verdict was entered for the plaintiffs for 84*l.*; leave being reserved to the defendants to move to enter the verdict for them upon the fifth plea.

A rule *nisi* having been subsequently obtained by the defendants for this purpose on the ground that the fifth plea was proved, the Court of Queen's Bench on April 21, 1868, made the rule absolute.

It was contended, on the part of the plaintiffs, that on the goods having been carried under a bill of lading, the fifth plea, which, in substance, avers that they were carried by the defendants, as common carriers, is disproved.

The question for the opinion of the Court was, whether or not the rule should have been made absolute.

It was arranged that the demurrer and the case on appeal should be argued together.

Murphy (*Edwyn Jones* with him), for the plaintiffs.—First, as to the demurrer. The judgment of the Court below was wrong. The plea is pleaded to all the three counts, and cannot be any answer if it sufficiently appears on one or other of those counts that the goods were to be carried on a special contract. It is submitted that this does sufficiently appear upon all the counts, but at any rate it appears on the third count. It alleges that "certain perils, dangers and casualties" are "excepted," which shews that there must have been a special contract. That being so, the plea alleges that the goods were articles and property of the description mentioned in the 1st section of the Carriers' Act, 11 Geo. 4. & 1 Will. 4. c. 68, and were delivered to the defendants, then being common carriers by land, to be by them, as such common carriers by land, carried, &c. But the plea does not deny the special contract as alleged in the third count to carry from Rotterdam to Harwich and to deliver at London, and therefore the defendants cannot avail themselves of the protection afforded by the Carriers' Act. By the 6th section of that Act it is provided, "that nothing in this Act contained shall extend or be construed to annul, or in anywise affect any special contract between such mail contractor, stage-coach proprietor or common carrier, or any other parties for the conveyance of goods and merchandises." If a common carrier chooses to make a special contract, he loses the protection conferred upon him by the Carriers' Act; the defendants free themselves from certain perils in respect of which they would have been liable as common carriers, but having done so, they can no longer insist that the goods were within the 1st section of the Carriers' Act, and therefore that, in the absence of a declaration of the value, they are not liable. In *Walker* v. *the York and North Midland Railway Company* (2 El. & B. 750; 23 L. J. Q.B. 73) the defendants had served the plaintiff with a notice that they would not carry fish except upon terms that they were to be relieved of all liability; the plaintiff sent fish to be carried by the defendants, and it was held that the jury might infer that they were carried on such terms, and not by the defendants as common carriers. Next, as to the appeal. It is submitted that the fifth plea was not proved, and that the plaintiffs were entitled to recover. A similar plea was pleaded in *Pianciani* v. *the London and South-Western Railway Company* (18 Com. B. Rep. 226), but there the declaration charged the defendants as common carriers simply, while here the declaration shews that there was a special contract. That case was followed by *Le Couteur* v. *the London and South-Western Railway Company* (35 L. J. Q.B. 40; L. R. 1 Q.B. 54). At the trial, the plaintiffs produced the bill of lading, a marine contract, which disproved the allegation that the goods were delivered to the defendants to be carried by them as common carriers by land. The freight was to be paid by the plaintiffs in London, and the defendants have narrowed their liability almost to a minimum.

C. Wood, for the defendants.—First, as to the demurrer. The statement in the fifth plea, that the goods were delivered to be carried by the defendants as common carriers by land, is admitted by the demurrer. The Court below was, therefore, right in holding that the plea was good. *Le Couteur* v. *the*

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London and South-Western Railway Company (35 L. J. Q.B. 40; L. R. 1 Q.B. 54) shews that it is a good plea. The contract was divisible, the special contract related to the passage by sea, but the carriage by land was by the defendants as common carriers, and they are entitled to the protection afforded by the Act. In *Le Couteur* v. *the London and South-Western Railway Company* (35 L. J. Q.B. 40; L. R. 1 Q.B. 54) Lush, J. said, "It was contended that because the contract is entire, partly by land and partly by water, it is out of the protection of the Act—that is, because the company is obliged to make a special contract for that part of the journey which is by sea, it is therefore obliged to make another for the residue of it, which is by land. That is reasoning in which I cannot bring myself to concur."

[KELLY, C.B.—The plea seems to be good.]

Next, as to the appeal. The plea was proved. The bill of lading contains the words "as also railway accidents being excepted. It is said that the bill of lading being produced disproved the plea, as shewing that the goods were carried by special contract; but the bill of lading was not such a special contract as is intended by the 6th section of the Carriers' Act. It is not signed by the sender of the goods, as was done with regard to the railway ticket, which, in *The Great Northern Railway Company* v. *Morville* (21 L. J. Q.B. 319), was held to constitute a special contract between the company and the respondent who had sent a horse by the railway. Further, such signature is necessary, since the 17 & 18 Vict. c. 31. (the Railway and Canal Traffic Act, 1854) came into operation. By the proviso in section 7. of that Act it is enacted, that "no special contract between such company and any other parties respecting the receiving, forwarding or delivering of any animals, articles, goods or things as aforesaid, shall be binding upon or affect any such party, unless the same shall be signed by him, or by the person delivering such animals, articles, goods or things respectively, for carriage."

[CHANNELL, B.—Does not that mean that it is not to be binding upon the sender unless signed by him, though it may be binding upon the company?]

No; the words are, "affect any such party"; there is nothing, therefore, by means of which the plaintiffs can avail themselves of the provision in section 6. of the Carriers' Act so as to deprive the defendants of the protection afforded by that Act. The defendants knew that they were protected by that Act; and they then make a special contract, by which they further seek to protect themselves from liability in respect of other matters.

[KELLY, C.B.—The only point which presses against the defendants is, that they have made a special contract by means of the bill of lading by which they protect themselves from liability in respect of railway accidents.]

The second paragraph of the case shews that they were carriers, and the contract is divisible, to carry by sea and by land; as to the latter, the defendants are protected by the Carriers' Act, because the plaintiffs have not declared the value of the goods.

Murphy, in reply.—The plain meaning is, that the defendants, by making a special contract in order to protect themselves from liability in respect of railway accidents, deprive themselves of the protection given by the Carriers' Act. Further, even if the Railway and Canal Traffice Act, 1854, required that the sender should sign the contract before he can be allowed to insist upon there being a special contract, which, it is submitted, is not the proper construction, it appears from the third paragraph of the case that the defendants, by their agents, did sign the bill of lading. The point is quite novel, and would have been taken in *De Rothschild* v. *the Royal Mail Steam Packet Company* (7 Ex. Rep. 734; 21 L. J. Ex. 273) if there had been anything in it.

KELLY, C.B.—We are of opinion that the judgment should be affirmed. The question before us is raised in two ways—first upon the demurrer, and secondly upon the special case. Upon the demurrer the question is, whether the fifth plea is a good plea and an answer to the whole declaration. The declaration in the first and third counts alleges a contract, which contract is twofold. It is a contract to convey from Rotterdam to Harwich, and to convey

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from Harwich to London. The second count alleges a contract to convey from Harwich to London only. The plea, in effect, says that, according to the contract stated in these three counts, the goods were delivered to the defendants in their capacity of common carriers as far as relates to that part of the contract which was for the conveyance of the goods from Harwich to London, and that the goods being of the value of more than 10*l.*, they were entitled under the statute, as common carriers, to a notice, and that no notice having been given, they are not liable for the loss of the goods. The plaintiffs object that that is no answer to the action founded on the contract stated in the first and third counts. It is quite enough to say, without reference at all to that part of the contract which relates to the conveyance from Rotterdam to Harwich, that the contract in each of the three counts expressly states that the goods were to be conveyed by the railway company, *via* Harwich, to London; therefore we may assume it means by railway or by land from Harwich to London; and the answer set up by the defendants is, that the goods were to be conveyed under that contract; but that the contract was, that they were to be conveyed by them, in their character of common carriers, from Harwich to London, and then the exemption or non-liability arises under the statute. We think, therefore, the fifth plea is a good answer to the whole declaration.

Then a more serious question arises, whether the fifth plea was proved. Now, looking at the whole of it, the only important point upon which any question can be raised is, whether the allegation that these goods were delivered to the defendants as common carriers by land, to be conveyed by them, in their capacity of common carriers, from Harwich to London, is proved upon the evidence that appears upon the special case. It has been insisted, upon several grounds, that the plea is not proved. The first ground is, that the contract under which these goods were delivered to the defendants, and were to be conveyed by them in effect from Rotterdam to London, is a contract by means of a bill of lading, and that that bill of lading, which is a marine contract, imports that they were to be conveyed by the defendants in their capacity of carriers by water. Now, it is quite enough to say that, upon looking at the bill of lading itself, it is perfectly clear that it contemplated, not only the conveyance by water from Rotterdam to Harwich, but the conveyance by railway from Harwich to London. It is true that, upon the terms of the bill of lading, it would have been competent to the defendants to tranship these goods at Harwich from the "*Avalon*" into another vessel, and to convey them by sea and by river from Harwich to London; but it is equally clear, upon looking at the bill of lading, and the words which are the foundation of the chief argument in the case, viz., "as also railway accidents being excepted," that the bill of lading contemplated also the possibility at least, in the performance of the contract, of a conveyance by railway for some portion of the transit, and it must have been by railway from Harwich to London. The contract, therefore, contemplates a conveyance partly by land; and the contract being divisible, the first objection falls to the ground.

The next objection is, that the bill of lading constitutes a special contract within section 6. of the Carriers Act. To this objection, one answer which was given on behalf of the defendants was, that the Railway and Canal Traffic Act (17 & 18 Vict. c. 31.) applied, and the plaintiffs have not made out that there was any special contract within section 7, by reason of the bill of lading, which constitutes the special contract, not having been signed by the consignors of the goods; but when we look at the clause, we find it applies only to cases in which the railway company are seeking to exempt themselves from liability by reason of there being a special contract, and in such a case the statute says the other party shall not be bound by any contract which they or the person delivering the goods have not signed; therefore the statute has no application to the present case. And that being so, there is a special contract; and the question is, whether that is a special contract within section 6. of the Carriers Act. Now, the Carriers Act, which by the 1st section exempts carriers from liability by reason of the loss of goods

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of greater value than 10*l.* where they have not had notice of the nature and value, provides in the 6th section that nothing in the Act shall extend, or be construed to annul, or in anywise affect, any special contract under which goods are carried: and it is said that this is a special contract within the meaning of section 6. But it is clear that the 6th section applies only to contracts the provisions of which are inconsistent with the exemption claimed by the carriers under the 1st section. Any contract which would render the carriers liable for the loss of goods beyond the value of 10*l.*, whether they shall have had notice of the value or not, is a special contract which is not to be affected at all, but shall have full force and effect, notwithstanding the exemption conferred upon them as common carriers by the 1st section.

It is further said, that when we look at this contract by the bill of lading, it is clear that it is not a contract at all with the defendants in their capacity of common carriers; that the terms of the contract are such as to obliterate and destroy their character of common carriers, and to shew that it is upon the particular contract contained in the bill of lading alone that the goods are carried, in which their capacity of common carriers could form no part, and in which that character could be no element in the consideration and construction of the contract. Looking at the bill of lading, it is found to contain these words,—after excepting a great variety of sources or causes of loss or mischief which are entirely of a marine nature, and which apply only to so much of the transit as was between Rotterdam and Harwich, the bill of lading proceeds: "Also railway accidents being excepted, and the owners being in no way liable for any consequences of the causes above excepted." Therefore the plaintiffs say, that inasmuch as the defendants, as common carriers, are undoubtedly liable for loss by railway accidents, whereas by this contract they are exempted from any such loss, the very contract itself shews that the goods were not delivered to them in their capacity of common carriers. It is an answer to that objection to say the contract amounted to this: "We (the plaintiffs) deliver these goods to you (the defendants) to be conveyed from Harwich to London in your capacity of common carriers; but whereas you would, as such carriers, be liable to loss arising from railway accidents, we will specially exempt you from that liability." It is merely a particular exception engrafted on the contract, which, as to all else, is a contract with the defendants in their character or capacity of common carriers. But the bill of lading goes further, and says the defendants are also exempted from liability in case of breakage. To that the same observation applies. Still further on we find that they are also not to be liable for the wrong delivery of goods caused by error or by insufficiency in marks or numbers. To read these words according to their strict grammatical construction, would be to say that the defendants were to be exempt from any liability by reason of a wrong delivery caused by any error, which would be any error of their own. That would be something very extravagant indeed, and might, for aught I know, do away altogether with their character of common carriers. But when we look at the whole sentence, it seems clear that the meaning is, they are not to be liable for a wrong delivery of goods caused by error,—and although the word "by" is inserted again, we must read it as if the words were "caused by error or insufficiency in marks or numbers." If there be any error or insufficiency in marks or numbers by reason of which the defendants are misled, and so a wrong delivery takes place, they are not to be liable in such case. All these exceptions are introduced by the special provisions of the contract, and the further exception of goods beyond the value of 10*l.*, not declared, is superadded by the statute.

Under these circumstances it appears to us all, that the true effect of this contract by means of the bill of lading is, that these goods were delivered, as far as relates to the conveyance of them from Harwich to London, to the defendants in their character of common carriers; and they were to have all the liabilities of common carriers, except only those which are excepted in the bill of lading; and they are also entitled, as common carriers, to the protection from liability which was conferred upon them by the Act of Parliament.

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We think, therefore, the judgment of the Court of Queen's Bench was right, and must be affirmed.

CHANNELL, B., PIGOTT, B., and CLEASBY, B., BYLES, J., KEATING, J. and MONTAGUE SMITH, J. concurred.

Judgment affirmed.

IN THE QUEEN'S BENCH. April 20, 23, 1869.

DENT *v.* SMITH.

38 L. J. Q.B. 144; L. R. 4 Q.B. 414; 20 L. T. 868; 17 W. R. 646.

Followed, *Messina* v. *Petrococchino*, [1872] E. R. A.; 41 L. J. P.C. 27; L. R. 4 P. C. 144; 26 L. T. 561; 20 W. R. 451 (P.C.). Referred to, *Harris* v. *Scaramanga*, [1872] E. R. A.; 41 L. J. C.P. 170; L. R. 7 C.P. 481; 26 L. T. 797; 20 W. R. 777 (C.P.); *R. (Arlidge)* v. *Local Government Board*, [1914] E. R. A.; 83 L. J. K.B. 86; [1914] 1 K.B. 160; 109 L. T. 651 (C. A.): reversed, [1914] (H.L.).

Marine Insurance—British Ship sold to Foreigner—Wreck—Salvage—Judgment of Foreign Court.

MARINE INSURANCE. F. J.—*The plaintiff, on behalf of the Finance Minister of the Sultan of Turkey, on November 26, 1858, effected an insurance with the defendant, in London, upon a quantity of gold in a ship called the "Dutchman," belonging to Waterford, and in the port of London. The next day she was sold by her owners to a Russian company, her name being changed to the "Dnieper;" and an entry of the sale was made in the registry at Waterford, but neither the plaintiff nor the defendant knew of the sale, or of her name being changed until the termination of her voyage. The gold was put on board on December 4, and while the ship was on her way to her destination at Constantinople she grounded on a shoal within the jurisdiction of that port. The gold was sent on shore before any expense was incurred in respect of saving the cargo, and the ship became a total wreck. The gold was deposited with the Russian Consul, and the owner was forced, in order to get possession of it, to give security for the payment of any claim which might be made upon it according to the law which prevailed at Constantinople. The ship being Russian was subject to Russian law, which authorizes the determination of maritime causes at Constantinople by reference to the French Code de Commerce. A Court was duly appointed by the Consul-General, and it was adjudged that the case was one which required a settlement of salvage, and ordered that the gold should contribute the sum of 7,149l. 6s. 1d. towards the expense of saving the cargo. Under English law the owner of the gold could not have been called upon to pay a great part of that amount, nor would he have had to pay it if the ship had been under an English flag; but the assured was forced to pay it*:—Held, *in an action to recover from the defendant the amount of his proportion of the sum so paid, first, that this Court could not consider whether the decision of the Court at Constantinople was correct or not. Secondly, that there being no statement in the policy that the ship was an English ship, or that she would remain so, the defendant was not discharged from liability upon the policy by reason of the change in the nationality of the ship. Thirdly, that the loss was incurred by the wreck of the ship, by a peril of the sea insured against; that the owners, having been obliged to pay, were able to recover from the defendant his proportion of the amount paid.*

SPECIAL CASE stated by consent for the opinion of this Court[1].

The plaintiff acting on behalf of Teffik Pasha, the Finance Minister of the Sultan of Turkey, in November, 1858, made arrangements with the owners

(1) The case with the appendix was of great length, but it is believed that enough of it is set out to make the decision of the Court intelligible.

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of the British ship the "*Dutchman*," then in the port of London, and about to sail to Constantinople, for the conveyance on board the ship of five cases of bar gold to the said Teffik Pasha, at Constantinople. The plaintiff thereupon effected with the defendant's company, on behalf of the Pasha, a policy of insurance upon the said gold for the said ship the "*Dutchman*," dated November 26, 1858. The ship had been entered out, on the 22nd, as a British ship, by the name of the "*Dutchman*" for the ports of Malta, Smyrna, Constantinople and Odessa. The action was brought upon this policy to recover the sum of 1,108*l.* 3*s.* 3*d.*, the proportion payable by the Marine Insurance Company, the defendant's company. He paid into Court the sum of 384*l.* 12*s.* 8*d.*, and the plaintiff replied that that sum was not sufficient.

On November 27, the owners of the "*Dutchman*" executed a bill of sale purporting to transfer her to a Russian company, the principal office of which was at Odessa. There exist no means in England of registering as a Russian ship, a ship bought in England by a Russian subject, and in such case, according to Russian law, a certificate is given to the purchaser by the Russian Consul-General in England, entitling such ship to all the privileges of the Russian flag. Such a certificate was given between November 29, and the sailing of the ship, whose name was declared in the certificate to be the "*Dnieper*." On December 1, an entry of this certificate was made in the Registry Book at Waterford, to which place the ship belonged. On December 4 the gold was put on board. Neither the plaintiffs nor the defendant knew, until after the termination of the voyage, that the ship had ceased to be a British vessel; she was cleared outwards under her old name. She sailed on December 8, and on January 4, 1859, whilst proceeding on her voyage, was stranded on the Dohan Aslan Shoal, about 110 miles from Constantinople, and 2½ miles from Gallipoli. The fore compartment immediately commenced filling; whereupon the captain, within two hours after she struck, sent off the chief officer, with two female passengers and the gold, to Gallipoli, in order to seek assistance from the Russian Consul. The gold was deposited on the same day with the Consul, and remained in his charge for twelve days, the fees demanded upon delivering it up being 2½ per cent. on its value. The captain also sent a letter to a Mr. Lamb, who had been agent at Constantinople for the former owners of the ship, and to the Russian Consul. At the time the gold was deposited with the Vice-Consul no expenses had been incurred in saving the ship, or any part of her cargo. A tug was sent to the assistance of the ship, and on January 8, Mr. Lamb, the Russian harbour-master at Constantinople, and Lloyd's agent at the same place, arrived. On the 11th a survey was held, and an agreement was entered into between the captain, Mr. Lamb and the commander of the tug, for the latter to save the cargo. On the 14th Mr. Lamb wrote to the Russian Consul-General at Constantinople, stating that he had landed a quantity of goods, including the gold, that he had deposited the same with the Vice-Consul at Gallipoli, and requesting that the Vice-Consul might be authorized and enjoined to hold the goods and the gold at the disposal of him, Mr. Lamb, or of the captain. In point of fact, the gold had been landed and deposited at Gallipoli without any intervention on the part of Mr. Lamb. The gold was soon afterwards deposited with the Russian Consul-General, and Mr. Lamb was appointed curator of the ship and cargo. In order to obtain possession of the gold, the Ottoman Minister of Finance gave instructions to the Ottoman Bank, to whom Mr. Lamb delivered the gold, which was valued at 50,500*l.*, on the terms that the bank should hold at his disposal 10,000*l.*, being 20*l.* per cent. on the amount, as provisional contribution on the value of the gold, "such contribution to be ascertained and settled on the adjustment of the general average." The whole of the expenses incurred in relation to the gold, from the time of its being set ashore in the ship's boat to the time of its being so duly delivered to the bank, amounted to 1,183*l.* 11*s.*

On March 4, the Russian Consul-General appointed three experts to "classify and determine the averages" of the ship and cargo,—that being the practice at Constantinople in case of a wreck of any ship not being an English

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ship. The first information relative to the ship arrived in England in February, 1859, and the plaintiffs immediately communicated the information to the underwriters, when notice was given that the claim of 20*l.* per cent. would be resisted, and that no adjustment would be recognized unless made out according to English law and practice. On February 22, 1861, the experts who had been appointed as above stated made a statement by which they found that the value of the cargo saved, other than the gold, amounted to 12,154*l.* 7*s.* 2*d.*, and that the total expenses of saving the cargo, in which they included the expenses relating to the gold before set out, and a commission of 1*l.* per cent. to Mr. Lamb, on the value of both the gold and the other cargo, amounted to the sum of 5,381*l.* 16*s.* 7*d.*, and to this sum they added, under the head of legal expenses, 1,767*l.* 9*s.* 6*d.*, making a total of 7,149*l.* 6*s.* 1*d.* The experts further decided that the gold should form a contributory interest in the same manner as the rest of the cargo, and they assessed the sum of 5,762*l.* 8*s.* 7*d.* as the rateable proportion of the said sum of 7,149*l.* 6*s.* 1*d.* payable by the gold. This decision was afterwards ratified by the embassy at Constantinople.

It was admitted, for the argument of the case, that had the ship remained under the English flag the adjustment of any general average or salvage charges would have been made out according to English law and practice, and one of the percentage commissions charged under the head of legal expenses would have been incurred. These percentage commissions were charged upon the value of such interests as the experts found to be contributory interests.

The ship was stranded within the jurisdiction of the port of Constantinople. A petition was presented to Her Britannic Majesty's Supreme Consular Court at Constantinople, against Mr. Lamb, by the Russian Consul-General, and it was ordered by the Court, on November 16, 1863, that the verdict be entered for the plaintiff for the sum of 5,700 piastres (to be calculated in metallic at the rate of the exchange on December 27, 1859) and 2,711*l.* 17*s.* 3*d.* sterling.

The balance of 10,000*l.* remaining in the hands of Mr. Lamb was paid over by him to the Minister of Finance, the said Teffik Pasha. The Court was to be at liberty to draw any inference of fact that a jury might have drawn. The proportion, in respect of the sum insured by the defendant's company, of the money charged upon the gold and paid by Henry Lamb, is 1,108*l.* 3*s.* 3*d.* which, after deducting the sum of 384*l.* 12*s.* 3*d.* paid into Court, leaves a balance of 723*l.* 11*s.* still claimed by the plaintiffs, and unpaid, together with interest.

The question for the opinion of the Court is, whether the defendant's company are liable under the said policy for the said sum of 723*l.* 11*s.*

If the Court should be of opinion in the affirmative judgment was to be entered for the plaintiff for the said sum of 723*l.* 11*s.*, with such interest, if any, as the Court might direct, and costs[2].

(2) The judgment of the experts contained the following passage: "Whereas, the disaster which befell the steamer "*Dnieper*," alias "*Dutchman*," at Dohan Aslan, near Gallipoli, so far from constituting a case for an arrangement of averages, is one requiring a settlement of salvage, inasmuch as the vessel being entirely lost, all the steps and trouble taken, and all the expenses incurred could have no other object in view than that of recovering the cargo and the remains of the vessel, after the attempts to set it afloat again; that consequently the general amount of the salvage expenses should be divided into three heads, one comprising the expenses proper of the salvage of the effects and remains of the vessel, the other those exclusively incurred for the salvage of the cargo, and the third, the expenses in common, that is to say, those incurred at the moment of the mishap, with the view of saving the ship and the cargo, the expenses referred to under the third head to be divided in due proportion, and to be added partly to the expenses of the first head, namely, to the charge of the remains of the vessel; and partly to those of the second head, namely, to the charge of the goods recovered."

The material part of the policy was as follows: "This policy of insurance witnesseth, that in consideration of the premises, and of the said sum of 50*l.*, we do for ourselves and each of us promise and agree with the said Dent, Palmer & Co., executors, administrators and assigns, that the capital, stock and funds of the said company shall, according to the provisions of the deed of settlement of the said company, be subject and be liable to pay and make good, and shall be applied to pay and make good all such losses and damages hereinafter expressed as

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The following interrogatories and answers will shew the practice and law at Constantinople with regard to such cases as the present.

Interrogatories for plaintiff.

1. What is your business, profession or occupation, and how long have you been engaged in the same, and where?

16. Is there any public law or usage in force in the district in which the said ship was wrecked and the said cargo saved regulating or relating to the mode of statement and adjustment of average losses and salvage amongst the parties interested therein; and if so, is it the Turkish law or usage, or what other law or usage, and where and in what tribunals is the same administered?

17. Is there according to the said law or usage an established and authorized mode of proceeding to have the said average statements adjusted according to the law applicable to the particular case? And if so, state what that mode of proceeding is, how and where commenced and terminated, and what is the force and effect of the judgment, statement or decision arrived at.

23. Assuming the said ship to have been Russian owned at the time of the said wreck, and that the port of destination of the said bullion was Constantinople, according to the rules of what law is the average statement made and the liabilities of the various parties interested regulated at such port of Constantinople?

25. Direct your attention to the judgment and statement of average put in evidence under this commission, and state whether in your opinion the law as stated therein is correct, and add thereto any further explanations as to that law applicable to the case of the said ship "*Dnieper*" or "*Dutchman*."

Interrogatories for defendant.

6. In what book or books is any such law as that which you have stated in your evidence in chief to be found? And state whether such law is uniform and applicable alike to all ships.

7. In what country or countries does the law of which you have spoken prevail?

A number of witnesses were examined upon these interrogatories, and, amongst others, John Antoine Sivori, whose evidence was set out in the special case.

John Antoine Sivori, of Galata, Constantinople, aged fifty years and upwards, being produced, sworn and examined on behalf of the plaintiffs, deposeth as follows:

To the first interrogatory the deponent saith: I am an *avocat*, and have practised as such for the last three years in Constantinople. I have practised as

may happen to the subject-matter of this policy and may attach to this policy in respect of the sum of 10,000*l.* hereby insured; which insurance is hereby declared to be upon

D. P. & Co. 61/5	Five boxes, containing bar gold.	Value 52,000*l.*;

the ship or vessel called the '*Dutchman*,' whereof J. Kavanagh is at present master, or whoever shall go for master in the said ship or vessel, lost or not lost, at and from London to Constantinople, with leave to call at Havre and intermediate ports, including all risks, from the Bank of England until safely delivered to the consignees at Constantinople. And we do promise and agree that the insurance aforesaid shall commence upon the said ship at and from , and shall continue until she hath moored at anchor in good safety at , her place of destination, and for such period afterwards, not exceeding twenty-four hours from such mooring, and upon the freight and goods or merchandise on board thereof, from the loading of the said goods or merchandise on board the said ship or vessel at London, and until the said goods or merchandise be discharged and safely landed at Constantinople, and that it shall be lawful for the said ship or vessel to proceed to, sail to, and touch and stay at any ports or places whatsoever, in the course of her said voyage for all necessary purposes, without prejudice to this insurance, and touching the adventures and perils which the capital, stock and funds of the said company are made liable unto, or are intended to be made liable unto, by this insurance, they are of the seas," &c. "And in case of loss or misfortune it shall be lawful to the insured, their factors, servants and assigns, to sue, labour and travel for or in and about the defence, safeguard and recovery of the aforesaid subject-matter of this insurance, or any part thereof, without prejudice to this insurance, the charges whereof the capital, stock and funds of the said company shall bear in proportion to the sum hereby insured."

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such elsewhere since 1838. I have been partner with the late Mr. Tacchella, who drew the "*Jugement de Sauvetage*" of the "*Dnieper*," and who died on Saturday, November 25.

To the 16th interrogatory the deponent saith: Gallipoli is a dependency of Constantinople; and at Constaninople, the subjects and vessels of each nation are by the Capitulations with Turkey subject to the jurisdiction and procedure of the consulate to which each belongs. By the terms of the Capitulations it is established that every power exercises general jurisdiction over its own subjects and vessels. Civil and commercial questions between Turks and Franks are judged in the Turkish Court before a mixed commission of Turks and Franks. In maritime cases, such as salvages and averages, since the representation of the Europeans in Turkey, the Turks have submitted themselves, except in their own vessels, to the decisions of the European tribunal of the Consulate of the flag of which the ship belongs. In questions between Franks and Franks disputes are settled in the Consular Court of the defendant.

To the 17th interrogatory the deponent saith: Each Consulate has its own jurisdiction and procedure; the Turks and all the Consulates, with the exception of the English, adopt the *Code de Commerce Maritime de France* as the basis of their judgments. The general mode of procedure, and that adopted in the Russian Court, is, first, a protest and an extended protest, then survey or surveys, after which a curator is appointed, who pays expenses and does what is best to save ship and cargo or realize the same. The documents and accounts are then placed in the hands of three adjusters (or *régulateurs*) appointed by the Consul of the flag to regulate the average or salvage, which statement is charged *pro rata* upon the ship and cargo. The judgment is then deposited in the Consulate, homologated by the authority, and sent for execution with all the authority of a judicial sentence. Upon being served upon the parties interested or their representatives they have, in a Russian case, eight days within which to give notice of appeal should they feel themselves aggrieved, and then six months within which they must file a petition at St. Petersburg. In case of no appeal, the sentence or judgment is definitive and binding upon all parties.

To the 23rd interrogatory the deponent saith: Assuming the ship to have been Russian owned, it is the custom of the Russians in all such cases happening at Constantinople to adopt the French law, with the mode of procedure used in the Russian Consulate. The French and Russian Codes are nearly one and the same thing.

To the 25th interrogatory the deponent saith: I have seen the *règlement* or judgment of "*The Dnieper*," and so far as the law is concerned it is correct, in my opinion, and they applied the correct law. The articles which govern the case are 350, 369, and 381 in the *Code de Commerce Maritime de France*, as well as the 385th, mentioned in the judgment. These articles have been applied because, in my opinion, it is a case of salvage and not of average. The agent of the insurers having interfered for the salvage of the goods, the underwriters have virtually accepted the abandonment and have accepted the consequences of the salvage. For further explanation of my meaning I refer to the law as stated in the judgment.

Cross-Interrogatories.

To the 6th cross-interrogatory the deponent saith: in the *Code Napoléon*, "On Maritime Law," except in English vessels, it is the customary law applied to all ships at Constantinople and the Levant.

To the 7th cross-interrogatory the deponent saith: In France it prevails as their own law, and here by usage and custom specially for maritime cases, and this for want of any local law with the exception of English vessels.

Viva Voce Cross-Examination.

Question. Referring to your answer to the 16th interrogatory, by what law and authority is your statement as to the settlement of maritime cases in Turkey founded?

Answer. There was no Turkish law or authority applicable to Turkish

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vessels. By general usage and custom, and to facilitate business, the French law is generally adopted in the settlement of all maritime cases except English.

Q. Why do Russians adopt the French law in regulating average and salvage? and give instances of such being applied in similar cases to the "*Dnieper.*"

A. Because there is a very slight difference between French and Russian maritime law, and there is a tacit convention in Constantinople to apply French law. I cannot quote any special case similar to the "*Dnieper,*" being here only since 1862; but I know it from general information. I had to regulate the average by an Austrian vessel last month, when French law was adopted.

Q. Referring to your answer to interrogatory No. 25, what are the consequences referred to, and especially as to the goods saved, and whose expenses are known and separate from all others?

A. These goods must contribute to the salvage expenses as well as all others, because, according to jurisprudence in cases of wreck, a natural partnership is formed between the goods, and all have to contribute, one with the other.

Q. In what books of law and authority is such doctrine of jurisprudence contained?

A. Generally in all writers on French law, and especially in *Pardessus: Boulay-Paty.*

Q. Had the "*Dnieper*" been under the English flag, by what law would the average or salvage have been regulated?

A. It would be by English, and in the English Court; but, in my opinion, the French law being adopted as the local maritime law, it ought to be regulated by it.

Q. To what country do you belong, and of the laws of what country have you any and what experience?

A. I am an Italian, and am acquainted with the Italian, French and Austrian law, and generally of the concordance of the laws based on French jurisprudence.

Q. What is the law of Turkey as to salvage?

A. I do not know.

Q. What is the law of Turkey as to general average?

A. Generally the Turkish, as now published, is an extract from the French Code.

Q. What is the Russian law as to general average and salvage?

A. It is nearly the same as the French law.

Q. Is an Englishman, Frenchman, Turk or Italian bound to submit to the jurisdiction of the Russian Consul at Constantinople? and give the law by which he is so bound.

A. Yes, if it is a Russian ship, by the Capitulations and by the Roman principle, *actor sequitur forum rei.*

Q. What is the difference between general average and salvage? Describe the law applicable according to each and every country of which you are acquainted.

A. General average is when the goods remain the property of the shippers, whereas in salvage, by the abandonment, they become the property of the underwriters. This is according to the spirit of the arts. 369. and 401 of the *Code de Commerce Maritime de France*, and all laws based on the Roman law.

Q. Had a box of bullion ex "*Dnieper*" been lost whilst saving it from the ship, would the rest of the cargo be considered to have to make good the same?

A. Certainly it would.

A. G. A. Sivori.

It was also stated by another witness that "in case of wreck occasioning a case of salvage, the Russian Chancellerie appoints a curator, whose duty is to superintend the salvage operations, and to pay all the expenses incurred; to sell the goods; if necessary, to deliver to the consignees their goods, if the consignees will accept them, on their undertaking to pay the contribution to the expenses which shall be fixed by the *règlement* against the merchandise."

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Watkin Williams (*English Harrison* with him).—It will be contended, on behalf of the defendant, that the change of nationality which took place when the ship was sold, subsequent to the date of the policy, so materially altered the burden borne by the underwriters as to vacate the policy. It is submitted that that is not so. The ship was advertised to go to certain places, and it is a fallacy to say that if the owners altered their intention and sent her to some other place different from those which had been named, that fact taken alone would vacate the policy. The way to look at the question is to consider whether the deviation is allowed by the policy; if it is, the policy is not vacated. No doubt, if a ship was insured as a neutral ship, and then she was sold to a belligerent power, the policy might be vacated, because such a deviation would not be within the policy. But here there is nothing to shew that the ship at the date of the policy was not a Russian, or that, being an English ship, she might not become a Russian. *Clapham* v. *Cologan* (3 Campb. 382) shews that the fact of insuring a ship as an English ship does not amount to a warranty that she is so. And here there is no warranty that she was of any particular nationality.

[LUSH, J.—There is no express warranty that she should not change hands.]

None at all. The question whether a policy was vacated by reason of a neutral ship having been captured, hostilities having commenced after the insurance was effected, was raised in *Eden* v. *Parkinson* (2 Dougl. 732, a), and it was held that there was no warranty that she should continue a neutral through the whole voyage.

[*Sir G. Honyman, contra*, pointed out that in the note to *Arnould on Marine Insurance*, edited by Maclachlan, p. 572, the learned editor remarks that *Eden* v. *Parkinson* (2 Dougl. 732, a) is no longer law.]

The next question is, what law is to govern the interpretation of this policy? The Court must bear in mind that there is a distinction between the law which is to govern the policy and the law which is to govern the ascertaining of the extent of the loss. It must be admitted that the interpretation of the contract which is entered into in England must be by the English law; but the extent of the loss must be ascertained by the law of the land where the loss insured against takes place.

[LUSH, J.—The gold was actually in the possession of the Russian authorities, and the plaintiff could not get it again without paying the money which, by the judgment, he was condemned to pay. Suppose, after the ship was wrecked, wreckers had come and had seized the gold, and the plaintiff had been forced to pay this money by way of ransom, could he not have recovered it? If so, why should he not be able to do so now? The gold has been taken possession of, though under legal forms.]

Just so; it is a loss within this policy. There is no occasion to dispute the law laid down in *Don* v. *Lippmann* (5 Cl. & F. 1) or in *The Peninsular and Oriental Steam Navigation Company* v. *Shand* (3 Moo. P.C. N.S. 272),—see also *Story's Conflict of Laws*, s. 280. In the present case, the contingency which has happened must have been in the contemplation of the parties. The policy covers losses till the gold was delivered at Constantinople. Upon this point he also referred to 9 *Pothier*, 282; *The Great Indian Peninsula Railway Company* v. *Saunders* (1 Best & S. 41; 30 L. J. Q.B. 218); *Booth* v. *Gair* (33 L. J. C.P. 99). The case of *Mumford* v. *the Commercial Insurance Company* (5 Johns. 262), decided in the Supreme Court of the State of New York, is in favour of the plaintiff. There goods insured were captured during the voyage and were detained, and afterwards restored to the owner on payment of the full freight. The vessel had been released, and the owner of the goods was obliged to hire another to carry the goods to their place of destination; and it was held that the insurer was liable to pay this additional freight, it being an expense necessarily incurred in consequence of the capture. Next, it is submitted that this loss is covered by the policy. The maritime law compels all the owners of goods, by reason of the community of danger, to contribute towards the expense of saving the cargo; and the plaintiff was bound to make his contribution according to the maritime law which prevailed at Constantinople. The underwriters have no

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more right to complain that the law which prevails there is different from English law than they would have to complain that the weather was different from English weather. It is very difficult to understand the judgment which was delivered by the experts at Constantinople, owing to the extreme intricacy of the accounts; but the Court appears to have been lawfully formed, and the judgment given in accordance with the French law; which, by the regulations of the Russians, is to prevail in the case of an inquiry about a Russian ship. In *Walpole* v. *Ewer* (*Park on Insurance*, 629) the plaintiff, as holder of a *respondentia* bond, was allowed to recover for an average loss sustained upon goods in a Danish ship insured in England. Under the English law, a lender upon *respondentia* is not liable to average losses, as stated by Lord Kenyon, C.J.; but he is so by the law of Denmark, and the plaintiff was held entitled to recover. In *Newman* v. *Cazalet* (*Park on Insurance*, 630) there was evidence that it was the custom in London to pay according to the calculation of the sentence of the Court at Pisa, although the underwriters would thus become liable for more than they would be under the English law. In *Power* v. *Whitmore* (4 M. & S. 141) the goods insured were on board a ship, and were insured, on account of a Portuguese subject, at and from London to Lisbon; the ship was obliged to put into Cowes, and incurred great expense there. When she arrived at Lisbon, the master instituted proceedings in a Court of justice against the proprietors of the cargo and the owners and underwriters of the ship for a contribution by way of general average, to make good the damages and extraordinary expenses incurred on the voyage. The Court gave judgment in favour of the master's claim, and the owner of the goods was obliged to pay 6*l.* 12*s.* 10*d.* per cent. on the value of the goods insured. The action in this Court was brought to recover that sum, and the Court ordered a nonsuit to be entered, refusing to give effect to the judgment. It is very difficult to understand how this decision can be right; but whether it be so or not, it is not conclusive upon the present case, which contains a mass of evidence, to shew that the Court which decided the matter had full power to do so.

[LUSH, J.—And further, in *Power* v. *Whitmore* (4 M. & S. 141) there was no sacrifice of anything for the general benefit.]

Loring v. *the Neptune Insurance Company* (20 Pickering's Rep. 411), decided in the Supreme Court of Massachusetts, is an authority in favour of the plaintiff, deciding that where a general average loss is adjusted at the port of destination conformably to the law and usage of such port, and the assured pays his contributory portion thereof, he is entitled to recover the same from the insurers, although the contributory interests have been estimated upon principles differing from those which prevail at the place where the policy was underwritten. *Strong* v. *the New York Firemen Insurance Company* (11 Johns. 323) is to the same effect.

[COCKBURN, C.J.—I do not see that the articles in the French *Code de Commerce*, referred to by the persons who have answered the interrogatories, bear out their conclusions; but the strength of the position of the plaintiiff is, no doubt, that he could not get the gold without paying the money which the Court decided he was bound to contribute.]

Yes; and upon that point *Strong* v. *the New York Firemen Insurance Company* (11 Johns. 323) is a very clear authority. The cases and the whole subject may be found summed up in Phillips's edition of *Benecke and Stevens*, 271.

Sir G. Honyman (*Lodge* with him), for the defendant.—The defendant is not liable in this action. The gold was sent on shore before any expense was incurred. The claim is made out by adopting the Russian scale of charges, and enforcing that scale by French law against the defendant, who had insured the gold to be carried in an English ship. According to English law there would be no liability. *Simonds* v. *White* (2 B. & C. 805) shews what the principle is. Lord Tenterden said, "The principle of general average, namely, that all whose property have been saved by the sacrifice of the property of another shall contribute to make good his loss, is of very ancient date, and of universal reception among commercial nations." So, in *Arnould on Marine Insurance*, by

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Maclachlan, 799, it is stated, " Goods landed or sold for the necessities of the ship before a jettison, do therefore not contribute, because they were not exposed at the time of the jettison to a community of risk, and were not saved thereby."

[COCKBURN, C.J.—This cannot be said to be a case of jettison. The ship was wrecked and went to pieces. Both the Russian and the French Codes agree that, in a case of jettison, the captain of the ship has a discretion to determine which part of the cargo shall be thrown overboard first; but here it was the duty of the captain to send on shore that part of the cargo which was most valuable and most easy to be saved. That being so, it seems reasonable that the person whose goods are not saved, should participate in the advantage received by him whose goods are so saved.]

Emerigon, c. 12. ss. 41, 42, confirms the principles already referred to.

[LUSH, J.—To make a case of average, there must be a sacrifice for the purpose of averting danger, and also the danger must be averted thereby; here the ship was lost, and therefore the danger was not averted.]

An underwriter insuring a ship in England cannot be liable to the assured in respect of something which, in England, would not be average, merely because a foreign Court has declared it to be so. The contribution is only towards expenses from which the owner of the goods gets some benefit. It is a common thing to insert in policies that payment of average is to be made " as per foreign statement"; and then the liability would be the same as in *Newman* v. *Cazalet* (*Park on Insurance*, 630). This seems to shew that, unless such a clause is inserted, the underwriter would not be liable. *Power* v. *Whitmore* (4 M. & S. 141) decides that it is not enough to shew that there is the judgment of the foreign Court, but the plaintiff must go on to shew that the person who makes the payment was legally compellable to do so. In *Benecke and Stevens*, by Phillips, which was referred to by the other side, the following passage occurs: " On the other hand, it cannot be denied that in many places statements of general average are made, not only by individuals, but even by persons authorized for that purpose, and by tribunals of commerce, which are in direct opposition not only to the general principles, but even to the very laws of the country where they are made; and the parties too easily acquiesce in such adjustments when the loss arising from them falls not upon themselves but upon the underwriters." The plaintiff must shew that he was rightly compelled to pay. It is said on the other side that it is difficult to understand *Power* v. *Whitmore* (4 M. & S. 141), but that decision was recognized in *Simonds* v. *White* (2 B. & C. 805), although Lord Tenterden said it would not govern that case.—[He also referred to *Phillips on Marine Insurance*, s. 1415, and to 2 *Parsons' Marine Insurance*, 360.]—Further, it is not clearly shewn that the defendant is liable according to the Russian law. In *Arnould on Marine Insurance*, already referred to, p. 821, it is stated, " With regard to the second question, namely, whether the underwriter in this country is bound by a foreign adjustment, there is not the same unanimity; but still, upon general reasoning, and from the tenor of the few judicial claims upon it in this country, the true rule appears to be this: 1. That the underwriter is in all cases bound by a foreign adjustment of general average, when it is rightly settled according to the laws and usages of the foreign port. 2. But that unless it is clearly proved to have been settled in strict conformity with such laws and usages, he is not bound thereby in any case in which he would not be bound in this country." Therefore the onus is on the plaintiff to shew it, and it is submitted that he does not.—[He went through some of the evidence.]—This Court must look into the law to see whether the plaintiff was rightly compelled to pay.—*Trimbey* v. *Vignier* (1 Bing. N.C. 151).

[COCKBURN, C.J.—I have been informed that the Russian code is amended and supplemented from time to time; it is impossible for us to say whether the decision of the Court sitting in Constantinople is correct or not; we are not sitting as a Court of appeal. Even if a mistake was made the assured could not get the gold without paying the money.]

The assured might have appealed against the judgment. Next, what is

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the effect of the change of nationality? The policy perhaps may not become void by reason of such change, but there is an implied contract by the assured that the underwriters shall not be called upon to pay upon a greater liability than was incurred by them at the time the policy was made. The change was made without communicating with the underwriters. The only contract was to insure goods carried on a British ship. "Any unnecessary or unsanctioned change of the ship produces an alteration of the risk underwritten"—see 1 *Arnould on Marine Insurance*, p. 331; see also *Clapham* v. *Cologan* (3 Campb. 382). If the owner had not sold the ship, the gold could have been obtained without paying this heavy charge. Next, the Court was only appointed to settle the average, but they have treated it as a case of salvage. There can be no liability to pay to the owners of other goods—see *De Vaux* v. *Salvador* (4 Ad. & E. 420; 5 L. J. K.B. 134).

[LUSH, J.—In that case the plaintiff could not recover because the damage was too remote. Here, by reason of the wreck, the gold got into the hands of the Russian authorities, and the owner could not get it without paying the money.]

W. Williams replied.

COCKBURN, C.J.—I am of opinion in this case that our judgment should be for the plaintiff. The case has been extremely well argued on both sides, and all that could be said has been said. I do not think that we should gain anything by taking time to consider the matter; the principles on which we ought to decide are, to my mind, quite clear, and the facts are now sufficiently ascertained. The plaintiff, on behalf of the assured, insured a quantity of gold, to be conveyed to Constantinople by the ship called the "*Dutchman*," and he has, in consequence of that ship having been wrecked, and the gold having thus got into the hands of the Russian authorities, been compelled to pay a large percentage in order to get the gold which was the subject-matter of the insurance. The argument in favour of the defendant divides itself into two main grounds. It is said, in the first place, that the insurance upon this gold was affected at a time when this vessel was an English ship, and that after the insurance was effected her nationality was changed: she was sold to Russian owners and became a Russian ship; the consequence of which was, that when she was wrecked within the Turkish jurisdiction, she and her cargo came under the jurisdiction of the Russian Consulate at Constantinople, by virtue of the existing treaties between Russia and Turkey.

Now, upon turning to the policy of insurance, we find that it is an insurance generally upon the gold to be conveyed to Constantinople by this particular ship; but there is no assertion that the vessel is an English vessel, or any stipulation that she shall be such or continue to be such.

Now, there being no such express condition, it seems to me that we are not called upon to imply one. The change of the nationalty of the vessel was not a matter within the control of the plaintiff, neither was it his act. It was a thing which might take place without any intention on the part of either the assured or the insurer. It must be taken to be one of those things that, unless there is an express stipulation with respect to it, is a thing possible and incidental in the case of such a policy; and we are not called upon, therefore, to imply such a condition, it not being stated.

Then we come to the second branch, and here I agree with the learned counsel for the defendant, that we must construe this policy according to the law of England; but then, by the policy, as interpreted by the law of England, the insurer is liable to pay in respect of any loss occasioned by any of the perils insured against, and we come to the question, which is the question in this case, whether the loss upon this gold by reason of the percentage which the owners of the gold had to pay, is a loss by any of the perils insured against.

The facts are simply these, and they lie in a very small compass: The ship having become a Russian ship is wrecked in Turkish waters. The gold, the subject-matter of this insurance, is saved by being immediately sent on shore, the captain taking advantage of having to send his boat, and thinking it best

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to save this portion of the cargo, which of course, relatively to its value, was by far the most valuable part and the part most easily saved. He deposited it, or caused it to be placed in the hands of the Russian Consul. It is unnecessary to follow these proceedings in any detail through their course; but afterwards a claim is made in respect of the expenses which were incurred in endeavours to save the ship and the rest of the cargo on the gold in the consul's hands; and in the end, the matter having been investigated by persons appointed by the Russian Consul, judgment is given as to the amount which shall be contributed by the owners of the gold to satisfy this claim for contribution in respect of the expenses. That judgment is ratified, as it was necessary that it should be, by the embassy at Constantinople, and being ratified by the embassy at Constantinople, the judgment not being appealed against within a certain time, it became a binding judgment upon the parties concerned. That being so, the owners of the gold being shewn to have no alternative to get the gold but to submit to the payment of this percentage, in the meanwhile they, or some one, had given security, and in the end they were obliged to provide it themselves.

Now, it has been contended on the part of the defendant, that the proceedings of the tribunal by whom this judgment was given were wrongful in many respects. In the first place, that having to apply the Russian commercial code, they applied the French. I think the answer to that is quite sufficient. It appears that in matters relating to maritime law in which the jurisdiction of the consulate has to be exercised, inasmuch as they are for the most part between natives, and they have not at Constantinople the presence and assistance of Russian advocates to explain the law, whereas there are French advocates resident there, the laws of the two countries being with reference to these matters almost the same, they have recourse to the French law, and applied it in this instance. Whether that is right or wrong I do not take upon myself to pronounce, for I think it is a matter with which we have nothing to do; but if, in this case, they applied the French law as a substitute for the Russian, I think we must take it that they did it with proper authority.

Then it is said that they applied the law erroneously. Again I think we have not to deal with that. We are not to sit here as a Court of appeal against any judgment pronounced by a Court which must be taken to be one of competent jurisdiction in the administration of Russian laws. Whatever was substituted for it became for the time a Russian law in respect of matters of maritime law. The proper tribunal to appeal to, if there was any ground for an appeal, was to the Court at St. Petersburg. There is no appeal here, and the only question, as it seems to me, that we have to consider is, whether the assured, in order to get the subject-matter of the insurance, the gold, could do otherwise than that which they have done. When it is said they ought to have appealed to St. Petersburg, I agree that when we are considering the question of whether there has been a loss of the subject-matter of the insurance, so as to call upon the underwriters to make it good, if there is anything to prevent the subject-matter of the insurance being totally lost, which the assured, if uninsured, would as reasonable men have felt themselves called upon to do, it might very well be said that the subject-matter of the insurance has not been lost so long as that which a reasonable man ought to have done has not been done; but as I can see no reason for supposing that the tribunal at Constantinople administered any other law than that which they were entitled to administer, and as I cannot see that, under the circumstances, a sufficient case has been made out to shew that they did erroneously apply the law either in respect of the law or the facts, I cannot come to the conclusion, at least not necessarily, that the assured ought reasonably, instead of submitting to the loss in the first instance, to have run the risk of losing that which would have been undoubtedly a considerable addition to the expenses already incurred, by appealing to St. Petersburg, where very possibly the judgment of the Court would have been upheld.

Then we come to this, that it all centres upon this question, that as it was impossible for the owners to get the gold except by submitting to the judgment,

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unless they succeeded in reversing it, which I do not think, as reasonable people, they were called upon to do, is that a loss by one of the perils insured against? By reason of the wreck the gold is shifted from the ship and transferred, not to Constantinople, the place of its destination, where it was to be delivered to the consignor, but it gets into the hands of the Russian authorities; the authorities refuse to part with it; it becomes the subject-matter of litigation in which there is a judgment, and by virtue of that judgment the owners cannot get possession of it unless they pay certain expenses. The owners cannot get it but by that payment. The necessity for that payment arises out of the fact that the gold has got into hands there from which it could not be recovered, except by conforming with the judgment of the tribunal in their favour. It seems to me, therefore, that the loss was an immediate, necessary, and by no means too remote a consequence of the wreck, and therefore the consequence of one of the perils insured against; and therefore the underwriter is bound to indemnify the owners for it. It seems to me that the whole case lies in the narrow compass I have referred to—that there has been a loss, an undoubted loss, a loss which the assured could not by reasonable means prevent, and that that loss flowed immediately from the wreck, the wreck being occasioned by the perils of the seas, which were insured against by the underwriters.

MELLOR, J.—I am of the same opinion. As to the first point to which my Lord has referred, which was raised by Sir George Honyman, that by a change of ownership and change of nationality there was an increase of risk which therefore rendered the policy invalid, it is necessary that he should contend that though there is no express stipulation, there are expressions which amount to an express stipulation, or that there is an implied stipulation, that no change of ownership should occur so as to affect the nature of the risk, as he contends it would be affected by such change of ownership.

Now, I think, as a general rule, one ought never to imply a contract in a case where the party against whom the contract is to be implied had no power over the subject-matter, and could not by possibility, by any express power of his own, affect or perform any such contract implied against him. Therefore, it is always necessary, in judging of implied contracts, to keep in mind what is the power of the parties before you imply a contract. But what is the change and increase of risk, which, it is contended, took place? The ship is the same, the voyage is the same, and as far as I can see, the captain and the crew are the same; and the only difficulty which may arise is, that the underwriters in one case would come under the jurisdiction of the English Consular Court, which was established by virtue of the capitulations, instead of coming under the Russian Consular Court. Every one knows that when a ship meets with an accident by perils of the seas, and she belongs to any particular nationality, you must see what the nationality is, in order to ascertain the jurisdiction to determine the question of the liability of the underwriters, or the extent of it.

But it seems to me that no such thing entered into the contemplation of either party: neither of them ever contemplated that matter, and, in truth, it was one of those things which either they did not attach importance to, or it did not enter into their minds to attach importance to. For the future, if they do, it will be quite necessary and proper to introduce into these policies stipulations which will limit the insurance to places in which the nationality of the ship shall be the same throughout. By the accident of the shipwreck happening within the Turkish waters, the ship comes under the jurisdiction of the Russian tribunal, having changed its nationality and become a Russian ship. Then, as far as I can see, so far as the proceedings are concerned, I do not find there is any fault in them; but then it is said that the Russian Court at Constantinople did not in a regular and proper way administer the law so as to render the parties liable to its jurisdiction; in fact, that it was an erroneous judgment, that the facts were misapplied, or the law was misapplied, or was not the law which according to the Consular Court ought to have been applied.

Now, if there was any such ground of objection, it was matter of appeal, and with reference to that point I would only say, that I suppose it must be deter-

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mined by this consideration, would a party uninsured have brought such appeal to the Court of St. Petersburg? It appears now, upon the facts as stated, that in the course of the litigation the underwriters had the fullest knowledge of what was going on, that they were fully aware of the course of the proceedings from first to last, and fully aware of the result of the proceedings, and, as I understand, there was no suggestion ever made by the underwriters or the persons representing them, that it would be a prudent or proper course to appeal to the Court of St. Petersburg. I think that is the strongest possible evidence to shew that an uninsured owner would not have instituted such an appeal, because he would have thought it useless. I think, if there were anything in that, the suggestion would have come from those who represented the underwriters. It did not, and therefore, I think, the appeal must be put out of the question. That being so, I agree with the Lord Chief Justice that, as it was the judgment of a competent Court, having jurisdiction over the matter in dispute, and was not appealed against, the plaintiffs could not get this gold without paying. I have no doubt it does appear a very extraordinary and very large exaction indeed, but without paying it they could not possibly get the gold. Then, what were they to do in the interest of all parties? Surely, if it was not a prudent thing to appeal, there was no other mode of getting the gold. Therefore, I think the judgment of this Court should be for the plaintiff for the amount stated.

LUSH, J.—I am of the same opinion. As to the first question, I am not aware that it has ever been raised before, and as far as I know nothing is said in the books on the subject. I think that affords a very strong argument against the validity of that point as a ground of defence to this action. The point is, that the vessel being an English one at the time the policy was made, was passed over after that time into the hands of Russian subjects, and so became a Russian vessel. Being bound to Constantinople, I think it is clear, looking at the peculiar jurisdiction which prevailed there, that by reason of her having changed her nationality, the insurers, the underwriters, although their risk was not increased by that circumstance, did come under a heavier liability, in the events that happened, than they would have done if the nationality had remained as it was, at the time the policy was effected. But that cannot effect the assured, unless there is a warranty, express or implied, in his policy that that event should not take place.

Nothing is expressed in the policy itself about the nationality of the vessel. There is no stipulation that the vessel shall not change hands or change her national character. The shipper has no control over the vessel, and no power to prevent the owner from selling her. It would be absurd therefore for us to hold that a shipper of goods enters into an implied contract that the owner of the ship shall not, during the voyage, change the nationality of the ship. I think it would be against common reasoning for us to hold that any such understanding could be in the minds of either the assured or the underwriters, and as there is an entire absence of authority to support any such contention, I think that ground of defence must fail.

Then comes the next question, whether the amount claimed can be properly said to be a loss occasioned by one of the perils insured against, namely, by the perils of the seas.

It has been argued that this is analogous to a loss under general average, and cases have been cited on that subject which at first sight appear to give countenance to the argument raised on them; but I cannot help observing at the outset that this is not a case of average contribution at all. No goods were put overboard here to save the vessel; no part of the vessel was voluntarily sacrificed in order to save the cargo; but before any of the events out of which the litigation arises happened the vessel had become a perfect wreck. This is really a case of salvage, not of average loss; but a case has been cited by Mr. Williams first, and afterwards by Sir George Honyman, *Power* v. *Whitmore* (4 M. & S. 141), and I think it necessary to make a few observations upon it, in order to distinguish this case from anything to be found in that. That

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was a case where the underwriters were sued for the contribution which the shipper was bound to pay pursuant to a decree of the Court of Lisbon in a suit instituted by the master. The vessel was on a voyage from London to Lisbon, and got into difficulties on its way, and put into Cowes, and there incurred considerable expense, being chiefly the wages of the crew during her stay there, and the cost of provisions consumed during the time. Those are items which would not be allowed by any average-stater in this country, and when the master got to Lisbon he libelled the shippers for contribution towards what he alleged to be the general loss, and the Court of Lisbon decreed against the plaintiff as owner of the cargo for his contribution. The question was whether that was a loss by the perils of the seas. It is perfectly clear, according to the English law, that those charges could not be the subject-matter of general average here, and there was no proof that those items were allowed under general average by the law of Portugal. There was nothing more than the judgment, and the case was disposed of on that ground. It was not average according to the principles of the law of England, and there was no proof of its being average by the law of that country, and that being so, it was not a loss within the policy at all. The Court there was not in the position which the parties were in here, viz., in possession of the goods as salvors; but the claim arose out of the judgment of the Court of Portugal against the owner of the goods to enforce an average contribution.

I cannot distinguish this case in principle from that of *Bondrett* v. *Hentigg* (Holt's N.P. 149). The facts here are that the vessel having got within the dominions of the Turkish empire, and being according to the evidence a Russian vessel, the Russian authorities at Constantinople had immediate jurisdiction over the whole wreck, both the vessel and the cargo. The statement of one of the witnesses, which we must take I think for the purpose to be a correct statement of the law prevailing there, is, that " in case of wreck occasioning a case of salvage the Russian Chancellerie appoints a curator, whose duty it is to superintend the salvage operations and to pay all the expenses incurred, to sell the goods, if necessary, or to deliver to the consignees their goods, if the consignees will accept them, on their undertaking to pay the contribution to the expenses which shall be fixed by the *règlement* against the merchandise "— so that, as soon as the vessel became a wreck there, the Russian authorities acquired jurisdiction over the matter. They had the power to take possession of the goods there, and hold them until an undertaking was given for payment of the salvage expenses which should be afterwards decreed against the owners. In *Bondrett* v. *Hentigg* (Holt's N.P. 149) the vessel had become wrecked near the Isle of France, and some of the cargo was saved and got on shore, and then the inhabitants of the island came down and overpowered the crew and took possession of part of the goods which had been so saved from the wreck, and that was held to be a loss; and Gibbs, C.J., says, " The cause of the loss was the perils of the seas, and the portion of the goods which was saved from the wreck, though got on shore, never came again into the hands of the owners. It is, therefore, a total loss to them from the perils stated in the declaration." That case was observed on and approved by my Brother Willes, in the case of *Ionides* v. *the Universal Marine Insurance Company* (14 Com. B. Rep. N.S. 259; 32 L. J. C.P. 170), in which he gives several illustrations of what would constitute a total loss; and he says, " Where there is a wreck of a vessel without hope of recovery, the cargo may be treated as also lost, if the circumstances are such that no part of it can be recovered for the benefit of the party insured."

Now here, the vessel having become a total wreck, the Russian authorities, having acquired jurisdiction, took possession of that wreck, and demanded salvage charges for having done what they did. They get possession of this gold and they appoint a curator. It is true they did not get possession of it by actually taking it out of the wreck, because the master, in order to save the most precious part of the cargo, when he saw it was hopeless to rescue the vessel, sent it on shore for safe custody, and put it into the hands of the Russian Consul there, but in this way it got into the very hands which afterwards

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would have taken it out if it had been left on board the ship, and they had as much control over it as if the Russian curator had taken it himself out of the vessel. The curator was appointed, and so much of the cargo as could be saved was got out of the vessel, and the whole of it was in the hands of the Russian authorities, and they had physical power at all events to withhold that from the owners until the owners chose to pay what they considered right to charge for salvage, and, rightly or wrongly, the statement was made out, the aid of the Consulate Court was invoked, and that Court determined that the owner should contribute his proportionate part of the salvage, though, according to the English law, he would not be bound to do so. They had the entire power in their hands to withhold it, and to exact any terms they thought proper, and it was therefore under that influence and *vis major* that the money was paid by the owner of the goods. He paid, therefore, under compulsion, in order to get possession of the goods which were *primâ facie* lost, or would have been if he had not those means of getting them back again. Therefore, I think that this was a loss by the perils of the seas, and a salvage loss within the terms of the policy.

Then comes the question, whether the assured ought, as a reasonable person, to have applied to the superior Court to endeavour to reverse the decision of the Consular Court? because if he ought, and had a reasonable ground for supposing that he could reverse it, then he may be said to have paid the money in his own wrong. But, looking at the facts, I do not think that, acting as a reasonable and prudent man, he would have taken upon himself that expense. There is nothing in this case to shew that the law administered by that Court was not the law prevailing there or the usage of the place, nor that there was any hope of getting that decision reversed by appealing to the Court of St. Petersburg. And the argument is the stronger against the underwriters, because, although they were represented by a person there, they never suggested that the assured should endeavour to reverse the judgment. I come, therefore, to the conclusion that this money was necessarily paid by the owner of the goods insured, for rescuing property from what otherwise would have been a total loss, and therefore he is entitled to recover it against the underwriters.

HAYES, J.—The only authority that has been relied on with regard to the particular question in this case has been that of *Power* v. *Whitmore* (4 M. & S. 141). I agree with what has been said by Mr. Williams, that it is not so easy, I will not say to understand, but to distinguish that case from this—that is, with regard to the ground of the decision, which is, that there shall not only be the decision of a Court of competent jurisdiction where the fact of the loss and the amount are ascertained, but that the law shall be shewn to be in accordance with that which has been pronounced by a competent authority to be the law of the country. That seems to be rather an infringement of general principles, because one would think that the decision of a Court is about the best evidence you can have of the law of a country, the decision of a Court from which you can appeal there; and one can understand that that would account for a good deal that is said to have taken place on the subject. Where you are to take an average statement which is made in a foreign country, by a foreign average-stater, not a lawyer, it should be accompanied by evidence of what the law really is; that seems perfectly reasonable, I think, and is shewn by many of the extracts from the American books. However, there is a distinction here, for if it were necessary to shew what the law of the country is, there is abundant evidence in the depositions, first of all, to shew that the law set forth in the case, and which was administered by the Russian Consul, was the French Code. We have it stated in express terms, and there is also the evidence given by Sivori, who seems to be the only competent witness to know, and has practised for a considerable period of time, that the judgment of this Consular Court is in truth in accordance with the law to be administered by the Russian Consul. Therefore, putting those two together, it entirely supplies the want which was said to exist in the case of *Power* v. *Whitmore* (4 M. & S. 141), namely, that there was no evidence of what the law was. Here, I think, that

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is a clear distinction, which, at all events, does withdraw the case from *Power* v. *Whitmore* (4 M. & S. 141), and on the express ground mentioned by the learned Judge who tried that case.

Judgment for the plaintiff.

IN THE QUEEN'S BENCH. May 6, 1869.

DOUST *v.* SLATER.

38 L. J. Q.B. 159; 10 B. & S. 400; 20 L. T. 525.

Metropolis Local Management Act, 18 *&* 19 *Vict. c.* 120. *ss.* 69, 73; 25 *&* 26 *Vict. c.* 102. *s.* 106.—*Notice of Action.*

PRACTICE. A.—*A person who has received notice from a Local Board of Health to drain his house, and in course of doing so commits a trespass by laying the drain-pipe in the land of another person, who thereupon brings an action against him, is not entitled to notice of action under s.* 106. *of* 25 *&* 26 *Vict. c.* 102.

The declaration was in trespass for breaking and entering land of the plaintiff, in the High Street, Deptford.

The defendant pleaded, not guilty, by statutes 18 & 19 Vict. c. 120. ss. 69, 73; and 25 & 26 Vict. c. 102. s. 106.

Issue was joined on this plea.

At the trial, which took place at the Maidstone Spring Assizes, 1868, before Cockburn, C.J., it appeared that the defendant had laid a drain-pipe in and through some premises of the plaintiff, which lay at the back of his house. It was alleged by him that he had received notice from the local board of works to drain his house by making a drain into the common sewer, and that he had laid the drain-pipe in obedience to such notice. It was contended at the trial that he was entitled to notice of action under s. 106. of 25 & 26 Vict. c. 102, on the ground that he was a person acting under the direction of the board. No such notice had been given, and the Lord Chief Justice held that none was necessary.

The jury returned a verdict for the plaintiff, damages one farthing, and a rule was subsequently obtained, pursuant to leave reserved, calling upon the plaintiff to shew cause why that verdict should not be set aside and a nonsuit entered, on the ground that the defendant was entitled to notice of action under the statutes referred to in the margin of the plea.

Wharton shewed cause against the rule.—The defendant was not entitled to notice of action. The work which he had received notice to do he was bound to have done, and he cannot say that he was acting under the direction of the board in committing this trespass. He must say so in order to be entitled to notice of action. The question arises under the 69th and 73rd sections of 18 & 19 Vict. c. 120, and under section 106. of 25 & 26 Vict. c. 102. Under the former Act the board had power to order the defendant to make the drain, and by the 106th section of the latter Act it is enacted that "no writ or process shall be sued out against or served upon, and no proceeding shall be instituted against the Metropolitan Board of Works, or any vestry or district board, or their clerk, or any clerk, surveyor, contractor, officer or person whomsoever, acting under their or any of their directions, for anything done or intended to be done under the powers of such board or vestry under the said Acts or this Act, until the expiration of one calendar month next after notice in writing shall have been served," &c. The words "any person whomsoever" are intended to apply to persons *ejusdem generis* with those named—clerks, surveyors, &c.: see *Williams* v. *Golding* (35 L. J. C.P. 1; L. R. 1 C.P. 69). Further, the defendant was not acting under the direction of the board in committing the trespass upon the land of the plaintiff.

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E. Thomas, in support of the rule, referred to *Poulsum* v. *Thirst* (36 L. J. C.P. 225; L. R. C.P. 449). The defendant was acting not only *bonâ fide*, but also he believed that he was acting under the direction of the board. He is, therefore, entitled to notice of action.

COCKBURN, C.J.—I do not see that the belief which he entertained has anything to do with the matter. He was not acting under the orders or direction of the board, but was performing a duty which is thrown upon him by the statute of draining his house efficiently. Notice was given to him to make the drain, but not to commit a trespass in doing so.

LUSH, J.—If he had refused to do the work, and the board had ordered one of their people to do it, and that person had, while acting under their directions, committed the trespass, he would, under the 106th section, have been entitled to notice of action; but the present defendant is not entitled to receive any such notice.

HAYES, J. concurred.

Rule discharged.

IN THE QUEEN'S BENCH. May 4, 1869.

DE ROSAZ *v.* THE ANGLO-ITALIAN BANK (LIMITED).

38 L. J. Q.B. 161; L. R. 4 Q.B. 462; 17 W. R. 724.

Joint-Stock Company—Winding-up—Transfer of Business to New Company —Dissentient Shareholder—Purchase of Interest—Arbitration—Power to appoint Umpire—Common Law Procedure Act, 1854—*Action—Companies' Act*, 1862, 25 & 26 *Vict. c.* 89. *ss.* 161, 162.

COMPANY. M.—*The plaintiff, a shareholder in a joint-stock company, incorporated under the Companies' Act*, 1862, *expressed his dissent from a resolution duly passed for the voluntary winding-up of the company and the transfer of the business to another company, and required the liquidators either to abstain from carrying the resolution into effect, or to purchase his interest at a price to be determined as in the statute provided. By the* 196*th clause of the articles of association of the company, differences arising between the company and the shareholders were to be referred to the arbitration of two persons. By the* 197*th clause, one of the arbitrators was to be appointed by each party. By the* 200*th clause, the arbitrators were to appoint an umpire. By the* 201*st clause, if the arbitrators did not within fourteen days after their appointment appoint an umpire, then, on the application of the parties in difference, or either of them, an umpire might be appointed by the governor of the Bank of England, or by a Judge under the Common Law Procedure Act*, 1854. *And by the* 203*rd clause, the award was to be binding. Arbitrators were appointed by both parties respectively, but they did not, within the time required, appoint an umpire, and upon the application of the plaintiff, an umpire was appointed by a Judge. The umpire made his award that the price to be paid for the purchase of the plaintiff's interest was* 2,100*l.*, *which sum, with costs, he directed the company to pay to the plaintiff*:—Held, *on demurrer to a declaration setting out the above facts and articles, that the umpire was properly appointed under such articles, and that under the* 161*st and* 162*nd sections of the Companies' Act*, 1862, *an action would lie against the company to recover the amount awarded.*

The defendants pleaded, on equitable grounds, that, before the resolution was passed, the plaintiff was indebted for calls upon his shares, whereby an action accrued to the defendants, and the shares were liable to be forfeited; that he and the defendants agreed that, in consideration that the defendants would give him time and would abstain from forfeiting the shares, he would consent to the proposal of the directors, and would not dissent from the resolu-

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tion; that they did give him time, and did abstain from forfeiting his shares, &c.:—Held, *that the plea disclosed no defence to the action, and that it was bad.*

The declaration stated, that the defendants were a banking company, formed and incorporated under the Companies' Act, 1862, and that a special resolution was passed at a meeting of the said banking company, on September 26, 1866, and confirmed at a meeting of the said banking company on October 24, 1866, for the voluntary winding-up of the said company, the appointment of liquidators, and the transfer of the business of the said banking company to another company; and that the plaintiff at the respective times of the making and confirmation of the said resolution was a member of, and a shareholder in the said first-mentioned company, who did not vote in favour of the said resolution at either of the said meetings, and who duly, and within seven days after the date of the meeting at which such resolution was passed, expressed his dissent therefrom, in writing addressed to the liquidators of the said banking company, and left at the registered office of the said banking company, pursuant to the provisions of the 161st section of the said statute, and thereby required the said liquidators to abstain from carrying the said resolution into effect, or to purchase the interest held by the plaintiff in the said banking company, at a price to be determined as in the said statute provided. That it was and is provided in and by the articles of association of the said banking company as follows: that is to say, by the first of the articles, that in the interpretation of the said articles, the words and expression " the statutes " shall, unless excluded by the subject-matter or contract, mean and include the Companies' Act, 1862, and any and every other Act from time to time in force concerning joint-stock companies and necessarily affecting the company; and by the 196th of the said articles, " That whenever any differences shall arise between the said banking company on the one hand, and any of the shareholders, their heirs, executors, administrators or assigns on the other hand, touching the true intent, or construction, or the incidents or consequences of these presents, or of the statutes, or touching anything then or to be thereafter done, executed, omitted or suffered in pursuance of these presents, or of the statutes, or touching any breach, or alleged breach of these presents, or any claim on account of any such breach, or alleged breach, or otherwise relating to the premises, or to these presents, or to the statutes, or to any of the affairs of the said company, every such difference shall be referred to the arbitration of two persons." And by the 197th of the said articles, " That one of the said arbitrators shall be named by each of the parties to the difference, and as regards any such party, whether consisting of one person or more persons than one." And by the 200th of the said articles, " that the arbitrators before entering on the business of the reference shall, by writing under their hands, appoint an impartial and qualified person to be their umpire." And by the 201st of the said articles, " That if the arbitrators do not, within fourteen days after their appointment, appoint an umpire, then, on the application of the parties in difference, or either of them, an umpire may be appointed by the Governor of the Bank of England or by a Judge, under the Common Law Procedure Act, 1854." And by the 202nd of the said articles, " That if the arbitrators do not, within thirty days next after the matter in difference is referred to them, agree on their award thereon, then it shall be referred to the umpire." And by the 203rd of the said articles, " That the award of the arbitrators or of the umpire, if made by writing under their or his hands or hand, and ready to be delivered to the parties in difference, or such of them as desire it, their heirs, executors, administrators or assigns, within thirty days next after the matter in difference is referred to the arbitrators, or, as the case may be, to the umpire, shall be binding and conclusive on all parties interested, their heirs, executors, administrators and assigns, and all such things shall be forthwith thereafter done, omitted and suffered, as the award requires." And by the 208th of the said articles, " That the umpire shall have full power from time to time, by writing under his hand, to extend the time within which his award is to be made, and if it be made and ready to be delivered as aforesaid

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within the extended time, it shall be as valid and effectual as if made within the thirty days." And by the 209th of the said articles, "That the costs of and incident to the arbitration and award shall be in the discretion of the arbitrators and umpires respectively." And the plaintiff says that the said requisition of the plaintiff not to carry the said resolution into effect not having been complied with, the plaintiff duly gave notice to the said liquidators that he had appointed, and he did appoint, one Cyrus Martin Fisher an arbitrator on his behalf, by whom the disputes and differences existing between him and the said liquidators respecting the purchase of his said shares, and the amount to be paid to him for them, should be determined, and required the said liquidators to appoint an arbitrator on their behalf. That the said liquidators afterwards appointed one John Francis Holcombe Read an arbitrator on their behalf, by whom the disputes and differences aforesaid should be determined. That the said arbitrators did not within fourteen days after their appointment, appoint an umpire; and thereupon, on the application of the plaintiff, by an order duly made under the provisions of the statute in that behalf, by the Hon. Mr. Justice Lush, dated February 5, 1867, Henry Macnamara, of No. 5, Paper Buildings, Temple, in the city of London, barrister-at-law, was appointed as umpire to decide the said matters in difference between the said parties. That the said arbitrators did not, within thirty days next after the said matters in difference were referred to them, agree on their award thereon; and that the said umpire duly enlarged the said time for making his said award from time to time until January 2, 1868; and that the said umpire, on December 6, 1867, duly made his award, and did thereby adjudge and award that the price to be paid for the purchase of the interest of the plaintiff in the said banking company was 2,100*l.*, at which sum he assessed the said price, and which sum he directed the said defendants to pay to the plaintiff. That the said umpire did further award and direct that the defendants should pay to the plaintiff his costs of and incident to the said reference and the costs of the said award, and should bear and pay their own costs of the said reference. That the plaintiff's costs of and incident to the said reference, and the costs of the said award were duly taxed and allowed to the plaintiff at 70*l.* 18*s.* 6*d.* And that all conditions were performed and fulfilled, and all things happened and were done, and all times elapsed necessary to entitle the plaintiff to be paid the said sums of 2,100*l.* and 70*l.* 18*s.* 6*d.*, yet the defendants have not paid the same, or any part thereof to the plaintiff.

The defendants pleaded, ninthly, on equitable grounds, that before the meeting of the said banking company, at which the said resolution in the said declaration mentioned was passed, to wit, before September 26, 1866, and before the accruing of any of the alleged causes of action in the said declaration mentioned, the plaintiff was the holder of 120 shares in the said banking company, and was, as such shareholder, indebted to the said company in 600*l.*, in respect of a call of 5*l.* upon each of the said shares, whereby an action accrued to the said banking company, and the plaintiff's said shares became and were liable to forfeiture. That the defendants were then proposing to reconstitute the said bank, and to pass the said special resolution in the first count mentioned; and it was then mutually agreed by and between the plaintiff and the defendants, that in consideration that the defendants would forbear from pressing for payment of the said money then due and owing to them by the plaintiff, and would give the plaintiff time for the payment of the same, and would abstain from forfeiting his said shares, the plaintiff promised to consent to the proposal of the directors, if duly authorized by a resolution of a general meeting, or with such modifications as such general meeting should approve of; and that he would assent to and vote in favour of such special resolution, when the same was passed, and would not dissent therefrom; and that he would exchange his said shares which he then held for a proportionate number of shares in the reconstituted bank. And the defendants says that they did forbear from pressing for payment of the said money then due and owing to them by the plaintiff, and did give the plaintiff time for the payment of the same, and did

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abstain from forfeiting his said shares. And that the proposal of the defendants was duly authorized by a resolution of a general meeting of the said banking company, with such modifications as they thought fit, and the said special resolution was passed as aforesaid as in the said first count alleged.

There were demurrers to the declaration and the plea, and joinders therein.

Holl, for the plaintiff.—The important sections of the Companies' Act, 1862, as bearing upon the present question, are the 161st and the 162nd[1]. The former of these sections provides for the proceedings to be taken where a company is to be wound up voluntarily, and its business to be transferred to another company. A shareholder may dissent from the resolution to be passed, and may call upon the liquidators to abstain from carrying the resolution into effect, or to purchase his interest at a price to be determined. Then, section 162. provides that the price may be determined by agreement, but if the parties dispute about the same, such dispute shall be settled by arbitration, and for the purposes of such arbitration the Companies' Clauses Consolidation Act, 1845, with respect to the settlement of disputes by arbitration, shall be incorporated with that Act. The declaration sets out all that has taken place, and the real question to be determined upon the demurrer to the declaration is whether the umpire was properly appointed. It is to be observed that the 162nd section does not provide that the provisions of the Companies' Clauses Act, 1845, must be carried out, but only that they shall be incorporated with the Companies' Act, 1862, which is the special Act, and the general rule applies that when there are provisions in a general Act, and also in a special Act, or in the articles of association of the company, the mode of proceeding in the special Act or in the articles may be adopted, and indeed that it overrides the mode of proceeding in the general Act. Sections 14. and 16. provide for the articles being binding, and the effect is that they are incorporated with the special Act. The declaration sets out the articles which are material, and it is clear that the dispute which

(1) Section 161. "Where any company is proposed to be or is in the course of being wound up altogether voluntarily, and the whole or a portion of its business or property is proposed to be transferred or sold to another company, the liquidators of the first-mentioned company may, with the sanction of a special resolution of the company by whom they were appointed, conferring either a general authority on the liquidators, or an authority in respect of any particular arrangement, receive in compensation or part compensation for such transfer or sale, shares, policies, or other like interests in such other company, for the purpose of distribution amongst the members of the company being wound up, or may enter into any other arrangement whereby the members of the company being wound up may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the purchasing company; and any sale made or arrangement entered into by the liquidators in pursuance of this section shall be binding on the members of the company being wound up; subject to this proviso, that if any member of the company being wound up who has not voted in favour of the special resolution passed by the company of which he is a member at either of the meetings held for passing the same expresses his dissent from any such special resolution in writing addressed to the liquidators or one of them, and left at the registered office of the company not later than seven days after the date of the meeting at which such special resolution was passed, such dissentient member may require the liquidators to do one of the following things as the liquidators may prefer; that is to say, either to abstain from carrying such resolution into effect, or to purchase the interest held by such dissentient member at a price to be determined in manner hereinafter mentioned, such purchase-money to be paid before the company is dissolved, and to be raised by the liquidators in such manner as may be determined by special resolution: No special resolution shall be deemed invalid for the purposes of this section by reason that it is passed antecedently to or concurrently with any resolution for winding up the company, or for appointing liquidators; but if an order be made within a year for winding up the company by or subject to the supervision of the Court, such resolution shall not be of any validity unless it is sanctioned by the Court."

Section 162. "The price to be paid for the purchase of the interest of any dissentient member may be determined by agreement, but if the parties dispute about the same, such dispute shall be settled by arbitration, and for the purposes of such arbitration the provisions of 'The Companies' Clauses Consolidation Act, 1845,' with respect to the settlement of disputes by arbitration, shall be incorporated with this Act; and in the construction of such provisions this Act shall de deemed to be the special Act, and 'the company' shall mean the company that is being wound up, and any appointment by the said incorporated provisions directed to be made under the hand of the secretary, or any two of the directors, may be made under the hand of the liquidator, if only one, or any two or more of the liquidators if more than one."

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has arisen between the plaintiff and the defendants falls within article 196. That being so, the Judge had power to appoint the umpire under the 101st article. Further, the appointment may be supported under section 12. of the Common Law Procedure Act, 1864, as was suggested by Blackburn, J., upon the authority of *In re Lord* (1 Kay & J. 90; 24 L. J. Ch. 145), in this same case when it was before the Court upon a rule to set aside the appointment of the umpire (L. R. 2 Q.B. 452). It is therefore submitted that the declaration is good, and the action is maintainable. Next, the plea is bad. The facts stated in it amount to no more than that the defendants may have a cross action against the plaintiff.—(He was then stopped.)

Matthews (*H. James* with him), for the defendants.—Even if the award is good, no action will lie upon it against the defendants. The proceeding enacted by section 161. was given for the purpose of enabling companies to amalgamate without an Act of Parliament authorizing them to do so. Otherwise, in the absence of a special Act of Parliament, any single dissentient shareholder might prevent such an amalgamation. Under the powers conferred by the 161st section, the liquidators and a dissentient shareholder, if there be one, are to settle the price of the interest of the latter; but there is nothing which can be construed as giving the latter a right of action against the company. The remedy which he has is by stopping the dissolution of the company until the amount be raised in the manner determined on by special resolution, and paid. If the old company remain he is still a shareholder; but until such special resolution is passed, he has no right to the money, nor can he sue the company. This declaration contains no statement of such a special resolution, or of the money having been raised: the company may be insolvent.

[HANNEN, J.—All such matters must be taken into account by the arbitrators.]

No dissolution can take place until the affairs of the company have been completely wound up, and until the Court has made an order that it be dissolved —see section 111. The plaintiff's practical remedy is, that he cannot be deprived of his position of a shareholder until he has been paid off. He will also have a remedy under section 138, as a contributory, by application to the Court of Chancery, but he cannot bring an action against his own company as if he was a creditor. The remedy which a creditor has in the case of a voluntary winding-up is under section 145, by enforcing a winding-up by the Court, if his rights are likely to be prejudiced by the voluntary winding-up provided for by section 133, under which the property of the company shall be applied in satisfaction of its liabilities *pari passu*. But if this action is maintainable, the plaintiff may sweep off everything. It is submitted that he has no common law remedy at all. He is clearly a contributory, and cannot also be a creditor who is to come in *pari passu*. Next, the appointment of the umpire is bad. The 161st section is in terms imperative, and the arbitration ought to have been under the Companies' Clauses Act, 1845.

[LUSH, J.—The machinery provided by the articles of association is ample, and I see no reason why the company should not agree that an umpire should be appointed in any manner they thought proper.]

This Court has already decided, as stated on the other side, that the appointment was under the Common Law Procedure Act, 1854. But the declaration does not shew that the requirements of section 12. have been complied with, and this is more like a valuation than an arbitration under that section—*Collins* v. *Collins* (26 Beav. 306; 28 L. J. Ch. 184), *Bos* v. *Helsham* (36 L. J. Ex. 20; L. R. 2 Ex. 72). Next, the award is bad on the ground of its being *ultra vires*. The umpire had no power to do more than determine the price to be paid; he could not direct it to be paid by the defendants, nor could he direct them to pay the costs.

[LUSH, J.—But if the statute implies an obligation to pay, he might order it to be paid; if it does not, his making the order would not affect the rights of the parties.]

Next, the plea is good. It sets up a contract, made by the plaintiff for a

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good consideration, by which he binds himself to waive and release the right of dissent which the statute gives him. He has sold to the defendants his right of dissent to the winding-up of the old company, and the transfer of the business to the new one. At any rate it is a good equitable plea.—See *Nash* v. *Armstrong* (10 Com. B. Rep. 259; 30 L. J. C.P. 286) and *De Pothonier* v. *De Mattos* E. B. & E. 461; 27 L. J. Q.B. 260).

Holl, in reply, was desired to confine his argument to the declaration.—The question for the umpire to determine was as to the price to be paid to the plaintiff, which, by section 162, might have been determined by agreement; the direction that it should be paid does not carry it any further, and the defendants are in no way damnified by it. It may be rejected as surplusage. So as to the costs.

[LUSH, J.—We need not trouble you upon that point.]

Next, it is immaterial whether the declaration shews that the requirements of the Common Law Procedure Act, 1854, have been complied with, if the appointment of the umpire is good under the articles, as it is submitted it clearly is. The requirements of section 162. have been complied with, and there is nothing to shew that it was intended that all the requirements of section 12. should be followed; but in truth the declaration does state that the appointment was duly made. Further, any objection on that ground ought to have been made at chambers. It may be that all was correctly done, or that the performance of those matters has been waived. Next, the action will lie against the company (sections 161. and 195), and that although no special resolution has been passed, for the defendants cannot take advantage of their own wrong in not raising the money, when they had agreed that the dispute between the plaintiff and themselves should be referred to arbitration; they are represented by the liquidators, and that part of the 161st section simply points out what the liquidators are to do. Section 138. was never intended to take away the right of action, or to compel the dissentient shareholder, who has had the price of his interest determined, to go to the Court of Chancery.

LUSH, J.—I am of opinion that our judgment should be for the plaintiff. The first objection is, that the award was not made by a proper authority; that there is no power under the statute to appoint an umpire in the manner in which the umpire was appointed in this case, and therefore that the award of the umpire is of no binding force against the defendants. That depends on the construction to be put on the Companies' Act, 1862, the Companies' Clauses Consolidation Act, 1845, and perhaps upon the Common Law Procedure Act, 1854. The Companies' Act, by section 162, prescribing the mode for ascertaining the price to be paid under the circumstances detailed in section 161, says, that if the price to be paid for the purchase of the interest of a dissentient member cannot be determined by agreement between the parties, the dispute shall be settled by arbitration, and for the purposes of such arbitration the provision of the Lands Clauses Consolidation Act, 1845, with respect to the settlement of disputes by arbitration. shall be incorporated. Now, there are various sections in the Companies' Clauses Consolidation Act, 1845, referring to arbitrations. There are sections which also contemplate the appointment of an umpire in the event of the arbitrators disagreeing, but there is no section there which gives power to any person to appoint an umpire for the settling of this particular dispute, in cases where the arbitrators differ about it, or neglect to make their appointment. The only clause providing the means of appointing an umpire where the arbitrators disagree is one that confines it to an umpirage between a claimant and a railway company, and in that case the umpire is to be appointed by the Board of Trade; therefore if the case rested on those sections of the Companies' Clauses Consolidation Act, undoubtedly there is nothing that warrants the appointment of the umpire by a Judge; but if it stood there, the case of *In re Lord* (1 Kay & J. 90; 24 L. J. Ch. 145), before the present Lord Chancellor, then Vice-Chancellor Wood, might have been referred to, sanctioned as it is by the decision of this Court in this very case, on motion, as an authority that in that event the Common Law Procedure

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Act would step in, and the 12th section of that Act would enable a Judge to make that appointment. If I had to put a construction, for the first time, on that clause, I should hesitate in coming to the conclusion that the 12th section was meant only to apply to a case of this kind. On the other hand, as the point has been already decided by the Court of Chancery, and by this Court, I should give judgment in conformity with those decisions if the case rested on these sections alone; but it is not necessary to base our judgment on the clauses in the Common Law Procedure Act, because there is here a set of clauses forming part of the code of the company, namely, the articles of association, by which they provide for the event that has happened. It is argued that that set of clauses cannot apply, because the 162nd section of the Companies' Joint-Stock Act says, that the Companies' Clauses Consolidation Act shall apply. I think that cannot mean that whether there is any provision or not, whether there is any necessity for resorting to those sections or not, those sections shall be resorted to, where they are ineffective to carry out the purpose. I think that section only means that where it is needful, and the parties cannot agree, they may resort to those sections, and treat them as incorporated into the particular code; but where the code itself, whether it be a special Act or articles of association under the Companies' Act, 1862, provides for the means of appointing an umpire, then, I think, the parties are not driven to resort to the Companies' Clauses Consolidation Act, 1845, or to that Act as supplemented by the Common Law Procedure Act. I think, therefore, by virtue of the articles of association of this company, the umpirage may well stand, and the appointment of the umpire by the Judge was well made, and that therefore the umpire had authority to make the award between the parties.

Then comes the important question, whether the action may be brought upon the award. Upon this question I have entertained considerable doubt in the course of the argument, and I cannot say that that doubt is entirely removed; but the strong inclination of my opinion is, that the action may be brought on the award. No doubt, the section is worded ambiguously as to this particular matter; but still, I think that there is nothing in the Act suggesting that the ordinary right of the party who has been made to sell an interest which he had at a price fixed, to recover that money by action, is taken away. I must hold, therefore, that the ordinary consequences must follow, and that the company, the purchasers of that right, are liable to an action for the price.—[His Lordship then read the 161st section.]—This section, therefore, in the event which has happened here, namely, that of the plaintiff dissenting from the resolution and requiring the liquidators to elect, gives them power to make a contract to purchase the interest of a dissentient member, and if they and such member cannot agree about the price, to have the price determined by arbitration. The liquidators here did elect to purchase, and not being able to agree with the plaintiff about the price, did appoint an arbitrator, in order to have the price settled by arbitration. That I regard as a contract which they were specially authorized to make. It was a contract by the liquidators on behalf of the company on the one hand, and the shareholders on the other, by which the company purchased the interest of the plaintiff in that company. Then it would follow, unless there are some words restraining the ordinary right, that if the purchase-money is not paid, the seller would have a right to enforce the payment by action. Is there anything in this clause which takes away that *primâ facie* right? I was for a considerable time puzzled by the words which follow, which did appear to me, at one time, to have the effect of making the payment, as it were, optional as far as a Court of law is concerned, on the part of the liquidators or the company, and of driving the party into a Court of equity to have compensation paid through the agency of that Court. After saying that they are to purchase the interest held by the dissentient member at a price to be determined in manner hereinafter mentioned, the words are "such purchase-money to be paid before the company is dissolved, and to be raised by the liquidators in such manner as may be determined by special resolution." On looking at these words again, I do not think that there

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is anything inconsistent with the idea that the plaintiff has a right to sue the company through the liquidators, who are acting on behalf of the company, for the purchase-money unpaid. It is to be paid before the company is dissolved. That is equivalent to saying that the company shall not be dissolved until they have paid, and if they could be so dissolved, there could be no remedy by action against them as a company; therefore, those words may have been put in for the purpose of preserving their liability until the money was paid. Then, again, "The money is to be raised by the liquidators in such a manner as may be determined by special resolution." There is nothing there to indicate that that resolution must be made before the party is entitled to his money. It may be made afterwards. The liquidators may pay it out of the money in their hands, and call on the meeting to say how they are to be reimbursed. At all events, there are no means here by which the plaintiff is enabled to compel them to pass any such resolution for payment. I cannot hold these words to have the effect of postponing his right to the payment of the money awarded to him. And I, therefore, come to the conclusion, inasmuch as there has been a purchase of his interest at a price, and that price is to be paid at some time or other, that the right to bring an action naturally follows from that, and that if the money is not paid there is a right of action against the company for the purchase-money.

The remaining question is, whether the equitable plea that has been set up affords any answer to this action? I am clearly of opinion that it does not. The plea says, in effect, "You ought not to have the money awarded to you as the price of your interest, because at an antecedent period, when you were in arrear for calls, you asked for time to pay them, and we gave you time on your agreement that when the meeting should be held you would vote in favour of it; but when the meeting came you broke that agreement." If he did, how could that disentitle him to the right to the price of his interest in the company? It may subject him, for aught I know, to an action for a breach of contract, but that does not appear to me to create any ground on which a Court of equity could say, "you shall not recover the price of your interest because you broke your contract with the company." Upon all these grounds, I think our judgment should be for the plaintiff.

HANNEN, J.—I am of the same opinion. I do not think it necessary to add anything to what has fallen from my Brother Lush on any other point than that as to the construction to be put on the 161st and 162nd sections of the Companies' Act, 1862. I take the meaning of the 161st section to be that the liquidators, acting for the company, are to have the power of buying off the opposition of a particular dissentient shareholder to a proposed change or dissolution of the company. That is to be effected in this way: that upon his expressing his dissent, it becomes the duty of the liquidators to elect which of two courses they will pursue; they must either elect to abstain from carrying out their resolution, or if they do not elect to abstain, there is but one other thing for them to do, namely, to purchase the interest held by such dissentient member. Now reserving, for the moment, the question of how the price is to be arrived at, if they have in any way, either by absolute agreement or by going to arbitration, manifested their election not to abstain from carrying out the resolution, but to purchase the interest, then, as it appears to me, it is not open to them afterwards to withdraw from it. There must be some time or other at which a valid agreement is entered into, for the purchase and for the sale of the interest of the dissentient shareholder. Then it appears to me to be immaterial whether that be carried out by agreement as to the price, or by that which is substituted for the agreement as to the price, namely, by arbitration. When once they have either entered into the agreement, which would, of course, involve an agreement as to the price to be paid, or when they have proceeded to arbitration, and the arbitration has reached an end, they have then no longer any option whatever, and the thing in concluded. The effect of that is, that there has been a bargain by the shareholder to divest himself altogether of his interest in the company, and that there has arisen a duty

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on the part of the company, to pay him either the agreed or awarded purchase-money. Then, if that be so, I can see nothing here to alter that which is the ordinary and natural result of an agreement of purchase and sale at a price fixed, namely, that the purchaser should pay the price so agreed or fixed. The words there pointed to seem to me to have a better interpretation, or a more reasonable interpretation than that assigned to them by Mr. Matthews by assuming that they mean only this: when the price has been agreed upon or fixed by arbitration, then the company shall not have power to dissolve; and so, as it were, to escape or evade payment in that way, and be no longer capable of being dealt with at all, and that they shall have no power of dissolving until they shall have paid the purchase-money; and, further, that as between the liquidators and the company whom they represent, the company shall pass a special resolution directing in what particular manner the liquidators are to raise the money. But the duty to pay seems to me to remain as it was before, and, unless there be some language in the statute directly depriving a person who has had an award made in his favour, or who has an agreement with the company to pay money,—unless there be something expressly depriving him of the right to sue, which I cannot find in this Act, his remedy by action remains, and if there be, by possibility, any reason why the money so agreed or awarded should not be paid, it will be open to the company to set out those reasons, either by way of answer to the action, or by taking proceedings themselves in equity to shew why they should not do that which, it appears to me, they are *primâ facie* bound to do, namely, to pay the money. I abstain from touching on the other points, which seem to me to have been exhausted by my Brother Lush. I think, for the reasons he has given, that our judgment should be for the plaintiff.

HAYES, J.—I am entirely of the same opinion. It is unnecessary for me to add anything to what has been already said by my Brothers Lush and Hannen. I think the subject is exhausted. I was perplexed at one time about there being a partnership existing and the plaintiff continuing still to be a partner, but the case seems to be that the plaintiff has withdrawn, and there is an enabling power given by the statute, that those who remain in may buy the interest of the others. Now if an ordinary partner had retired, and had entered into an agreement with the continuing partners for purchase of his interest, he would have a right of action, and the ordinary consequences would follow, and, so it seems to me, the liquidators acting for the company are empowered to enter into a contract to purchase these shares. What is the meaning of the word "purchase"? The shareholder is to transfer his shares to them, and they are to pay the purchase-money to him, and unless the ordinary remedy were taken away, which it is not, by the Act of Parliament, he would, as it seems to me, have the ordinary remedy. Therefore, whatever doubts existed in my mind for some time, I now agree with the rest of the Court in thinking that our judgment ought to be for the plaintiff.

Judgment for the plaintiff.

IN THE EXCHEQUER CHAMBER. May 10, 1869.

(Appeal from the Court of Queen's Bench.)

READHEAD *v.* THE MIDLAND RAILWAY COMPANY.

38 L. J. Q.B. 169; 9 B. & S. 519; L. R. 4 Q.B. 379; 20 L. T. 628; 17 W. R. 737; affirming, [1867] E. R. A. 1641; 36 L. J. Q.B. 181; 8 B. & S. 371; L. R. 2 Q.B. 412; 16 L. T. 485; 15 W. R. 831 (Q.B.).

Discussed, *Francis* v. *Cockrell*, [1870] E. R. A.; 39 L. J. Q.B. 291; 10 B. & S. 950; L. R. 5 Q.B. 501; 23 L. T. 466; 18 W. R. 1205 (Ex. Ch.). See, *Johns* v. *Bacon*, [1870] E. R. A.; 39 L. J. C.P. 365; 22 L. T. 477; 18 W. R. 894 (C.P.). Referred to, *Stanton* v. *Richardson*, [1872] E. R. A.; 41 L. J. C.P. 180;

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L. R. 7 C.P. 421; 27 L. T. 573; 21 W. R. 71 (C.P.): affirmed, [1874] E. R. A.; 43 L. J. C.P. 230; L. R. 9 C.P. 390; 30 L T. 643 (Ex. Ch.): latter decision affirmed, [1876] E. R. A.; 45 L. J. C.P. 78; 33 L. T. 193; 24 W. R. 324 (H.L.); *Wright* v. *Midland Railway*, [1873] E. R. A.; 42 L. J. Ex. 89; L. R. 8 Ex. 137; 29 L. T. 436; 21 W. R. 460 (C.P.). Observed upon and followed, *Searle* v. *Laverick*, [1874] E. R. A.; 43 L. J. Q.B. 43; L. R. 9 Q.B. 122; 30 L. T. 89; 22 W. R. 367 (Q.B.). Referred to, *Richardson* v. *Great Eastern Railway*, 1875, L. R. 10 C.P. 486; 33 L. T. 248 (C.P.): reversed, [1876] E. R. A.; 1 C.P. D. 342; 35 L. T. 351; 24 W. R. 907 (C. A.). Observed upon, *Kopitoff* v. *Wilson*, [1876] E. R. A.; 45 L. J. Q.B. 436; 1 Q.B. D. 377; 34 L. T. 677; 24 W. R. 706 (Q.B. D.). See, "*The Virgo*," 1876, 35 L. T. 519 (P.D.). Not followed, *Randall* v. *Newsom*, [1877] E. R. A.; 46 L. J. Q.B. 259; 2 Q.B. D. 102; 36 L. T. 164; 25 W. R. 313 (C. A.). Referred to, *Steel* v. *State Line Steamship Co.*, 1878, 3 App. Cas. 72; 37 L. T. 333 (H.L. Sc.). See, *Hyman* v. *Nye*, 1881, 6 Q.B. D. 685; 44 L. T. 919 (Q.B. D.); *Robertson* v. *Amazon Tug Co.*, [1882] E. R. A.; 51 L. J. Q.B. 68; 7 Q.B. D. 598; 46 L. T. 146 (C. A.). Applied, *Pounder* v. *North Eastern Railway*, [1892] E. R. A.; 61 L. J. Q.B. 136; [1892] 1 Q.B. 385; 65 L. T. 679; 40 W. R. 189 (Q.B.D. Div.). Distinguished, *Burrell* v *Tuohy*, [1898] 2 I. R. 271 (Q.B. D.). Comments referred to, *Powell* v. *M'Glynn*, [1902] 2 I. R. 154 (K.B. D.). Principle referred to, *Wing* v. *London General Omnibus Company*, [1909] E. R. A.; 78 L. J. K.B. 1063; [1909] 2 K.B. 652; 101 L. T. 411 (C. A.). Referred to, *Clarke* v. *West Ham Corporation*, [1910] E. R. A.; 79 L. J. K.B. 56; [1909] 2 K.B. 858; 101 L. T. 481 (C. A.). Referred to, "*The West Cock*," [1911] E. R. A.; 80 L. J. P. 97; [1911] P. 208; 104 L. T. 736 (C. A.). Observed upon, *Bamfield* v. *Goole and Sheffield Transport Co.*, [1910] E. R. A.; 79 L. J. K.B. 1070; [1910] 2 K.B. 94; 103 L. T. 201 (C. A.).

Carriers by Railway—Contract with Passengers—Negligence—Latent Defect in Carriage—Warranty and Insurance—"Due Care."

CARRIERS. B.—*The plaintiff, a passenger for hire on the defendants' railway, suffered an injury in consequence of the carriage in which he was travelling getting off the line and upsetting. The accident was caused by the breaking of the tire of one of the wheels of the carriage, owing to a latent defect in the tire, which was not attributable to any fault on the part of the manufacturer, and could not be detected previously to the breaking*:—Held, *affirming the judgment of the Court of Queen's Bench, that the company were not liable in respect of such injury, there being no contract of warranty and insurance in the case of passengers that the carriage should be in all respects perfect for its purpose, that is to say, free from all defects likely to cause peril.*

Observations on the obligation in such case of common carriers to take due care.

The following case was stated on appeal, the Court of Queen's Bench (Blackburn, J., *dissentiente*) having given judgment in favour of the defendants.

The decision of the Court below is reported in 36 L. J. Q.B. 181.

The action was brought by the plaintiff to recover damages from the defendants for injuries sustained by him whilst travelling as a passenger by railway from Nottingham to South Shields, in consequence of negligence alleged to have been committed by the defendants. The plaintiff took a second-class ticket, and the carriage in which he was travelling got off the line and was upset, and the plaintiff received injuries therefrom. The cause of the carriage getting off the line and upsetting was the breaking of the tire of one of the wheels, and such breaking arose from a latent defect in the tire, which was not attributable to any fault on the part of the manufacturer, and could not be detected previously to the breaking of the tire.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover in the action.

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The case was argued (Nov. 26, 27, 1868) by

Manisty, for the plaintiff, the appellant.—In the course of his argument he referred to the following authorities and cases—*Chitty on Contracts*, 409; *Brown* v. *Edgington* (2 Man. & G. 279; 10 L. J. C.P. 66); *Lyon* v. *Mells* (5 East, 428); *Jones* v. *Bright* (5 Bing. 533; 7 L. J. C.P. 213); *Shepherd* v. *Pybus* (3 Man. & G. 861; 11 L. J. C.P. 101); *Jones* v. *Just* (37 L. J. Q.B. 89; L. R. 3 Q.B. 197); *Lewis* v. *Peak* (7 Taunt. 153); *Bremner* v. *Williams* (1 Car. & P. 416); *Sharp* v. *Grey* (9 Bing. 457; 2 Mo. & S. 620; 2 L. J. C.P. 45); *Benett* v. *the Peninsular and Oriental Steamboat Company* (6 Com. B. Rep. 782; 18 L. J. C.P. 85); *Israel* v. *Clark* (4 Esp. 259); *Burns* v. *the Cork and Bandon Railway Company* (13 Irish Com. L. R. 546); *Alden* v. *the New York Central Railway Company* (12 Smith, 102); *Macadam* v. *the New York Railway Company* (47 Barbour, 247, 252); and *Warner* v. *the Erie Railway Company* (49 Barbour, 558, 568).

Kemplay (*Aspinall* with him), for the defendants, the respondents.—He commented upon the cases which had been already cited, and in addition referred to the following—*Crofts* v. *Waterhouse* (3 Bing. 319; 4 L. J. C.P. 75); *Aston* v. *Heaven* (2 Esp. 533); *Christie* v. *Griggs* (2 Campb. 79); *Grote* v. *the Chester and Holyhead Railway Company* (2 Ex. Rep. 255); *Buxton* v. *the North-Eastern Railway Company* (37 L. J. Q.B. 258; L. R. 3 Q.B. 519); *Hegeman* v. *the Western Railroad Corporation* (3 Kernan, 1); *Ford* v. *the London and South-Western Railway Company* (2 Fost. & F. 730); *Stokes* v. *the Eastern Counties Railway Company* (2 Fost. & F. 691); *Manser* v. *the Eastern Counties Railway Company* (3 L. T. 585); *Birkett* v. *the Whitehaven Railway Company* (4 Hurls. & N. 730; 28 L. J. Ex. 348); *Bluett* v. *Osborne* (1 Stark. N.P. 384); *Falkner* v. *the Erie Canal Company* (49 Barbour, 324); *Burgess* v. *Wickham* (33 L. J. Q.B. 17); and *Bowen* v. *the New York Central Railway* (4 Smith, 400).

Manisty replied.

Cur. adv. vult.

The following judgment of the Court[1] was, on May 10, delivered by—

MONTAGUE SMITH, J.—In this case the plaintiff, a passenger for hire on the defendants' railway, suffered an injury in consequence of the carriage in which he was travelling getting off the line and upsetting; the accident was caused by the breaking of the tire of one of the wheels of the carriage, owing to "a latent defect in the tire, which was not attributable to any fault on the part of the manufacturer, and could not be detected previously to the breaking." Does an action lie against the company under these circumstances? This question involves the consideration of the true nature of the contract made between a passenger and a general carrier of passengers for hire. It is obvious that for the plaintiff, on this state of facts, to succeed in this action, he must establish either that there is a warranty by way of insurance, on the part of the carrier to convey the passenger safely to his journey's end, or, as his learned counsel mainly insisted, a warranty that the carriage in which he travels should be in all respects perfect for its purpose, that is to say, free from all defects likely to cause peril, although those defects were such that no skill, care or foresight could have detected their existence.

We are of opinion, after consideration of the authorities, that there is no such contract either of general or limited warranty and insurance entered into by the carrier of passengers, and that the contract of such a carrier and the obligation undertaken by him are to take due care (including in that term the use of skill and foresight) to carry the passenger safely. It of course follows that the absence of such care, in other words, negligence, would alone be a breach of this contract, and as the facts of this case do not disclose such a breach, and, on the contrary, negative any want of skill, care or foresight, we

(1) Kelly, C.B., Willes, J., Bramwell, B., Byles, J., Keating, J., Channell, B. and Montague Smith, J.

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think the plaintiff has failed to sustain his action, and that the judgment of the Court below in favour of the defendants ought to be affirmed.

The law of England has from the earliest times established a broad distinction between the liabilities of common carriers of goods and of passengers. Indeed, the responsibility of the carrier to re-deliver the goods in a sound state can attach only in the case of goods. This responsibility (like the analogous one of innkeepers) has been so long fixed and is so universally known that carriers of goods undertake to carry on contracts well understood to comprehend this implied liability. If it had not been the custom of the realm, or the common law declared long ago, that carriers of goods should be so liable, it would not have been competent for the Judges in the present day to have imported such a liability into such contracts on reasons of supposed convenience. But this is, as it seems to us, what we are asked by the plaintiff to do in the case of carriers of passengers. The liability of the common carrier of goods attached upon the particular bailment of the goods to him in his capacity of common carrier, and the rules which govern the rights of bailors and bailees of things are, of course, applicable only to things capable of bailment. The law and the reasons for it in the case of bailments to carriers are found in the great judgment of Holt, C.J. in *Coggs* v. *Bernard* (1 Smith's Lead. Cas. 189), and are thus stated: "As to the fifth sort of bailment, viz., a delivery to carry or otherwise manage for a reward to be paid to the bailee, those cases are of two sorts, either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events, and this is the case of the common carrier, common hoyman, master of a ship, &c., which case of a master of a ship was first adjudged 26 Car. 2, in the case of *Mors* v. *Slue* (Raym. 220; 1 Vent. 190, 238). The law charges this person thus intrusted to carry goods against all events but acts of God and of the enemies of the King. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law for the safety of all persons the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing, for else these carriers might have an opportunity of undoing all persons that had any dealings with them by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point." The same law is found in numerous text-books (some of which are referred to in the judgments of my Brothers Mellor and Lush in their judgments below), and has been acted on for centuries in the case of carriers of goods.

The Court is now asked to declare the same law to be applicable to contracts to carry passengers. The learned counsel for the plaintiff felt the difficulty of the attempt to apply the entire liability of the carrier of goods to the carrier of passengers, but he contended for and mainly relied on the proposition that there was at least a warranty that the carriage in which the passenger travelled was roadworthy, and that the liability of the carriers of goods in this respect ought to be imported into the contract with the passenger. But first, it is extremely doubtful whether such warranty can be predicated to exist in the contract of the common carrier of goods. His obligation is to carry and re-deliver the goods in safety, whatever happens; in the words of Lord Holt, "he is bound to answer for the goods, at all events." Again, "The law charges this person thus intrusted to carry goods against all events but acts of God and of the enemies of the King": and this broad obligation renders it unnecessary to import into the contract a special warranty of the roadworthiness of the vehicle, for if the goods are safely carried and re-delivered, it would be immaterial whether the carriage was roadworthy or not, and if the goods are lost or damaged the carrier is liable on his broad obligation to be answerable "at all events"; and it is unnecessary to inquire how that loss or damage arose. But however that may be, it is difficult to see upon what principle the contract of the carrier of goods, which on the hypothesis does not apply in its entirety to carriers of

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passengers, is to be dissected, and a particular part of it severed and attached to what on the hypothesis is another and different contract. It was contended that the reason which made it the policy of the law to impose the wider obligation on the carriers of goods, applied with equal force to impose the limited warranty of the soundness of the carriage in favour of the passenger. The reason suggested was, as we understood it, that a passenger when placed in a carriage was as helpless as a bale of goods, and therefore entitled to have for his personal safety a warranty that the carriage was sound: but this is not the reason, or anything like the reason, given by Lord Holt for the liability of the carrier of goods. The argument founded on this reason however would obviously carry the liability of the carrier far beyond the limited warranty of the roadworthiness of the carriage in which the passenger happened to travel. His safety is, no doubt, dependent on the soundness of the carriage in which he travels, but in the case of a passenger on a railway it is no less dependent on the roadworthiness of the other carriages in the same train and of the engine drawing them, on the soundness of the rails, of the points, of the signals, of the masonry, in fact of all the different parts of the system employed and used in his transport, and he is equally helpless as regards them all. If then there is force in the above reason, why stop short at the carriage in which the passenger happens to travel? It surely has equal force as to all these things, and, if so, it must follow as a consequence of the argument that there is a warranty that all these things shall be and remain absolutely sound and free from defects. This, which appears to be the necessary consequence of the argument, although Mr. Manisty disclaimed the desire to press it so far, tries the value of it. But surely if the law really be as it is now contended to be, it would have been so declared long ago. No actions have been more frequent of late years than those against railway companies in respect of injuries sustained by passengers. Some of these injuries have been caused by accidents arising from defects or unsoundness in the rolling stock, others from defects in the permanent works. Long inquiries have taken place as to the cause of these defects, and whether they were due to want of care and skill, and these inquiries would have been altogether immaterial, if warranties of the kind now contended for formed part of the contract. An obligation to use all due and proper care is founded on reasons obvious to all, but to impose on the carrier the burden of a warranty that everything he necessarily uses is absolutely free from defects likely to cause peril, when, from the nature of things, defects must exist which no skill can detect and the effects of which no care or foresight can avert, would be to compel a man, by implication of law and not by his own will, to promise the performance of an impossible thing, and would be directly opposed to two maxims of law, *Lex non cogit ad impossibilia; Nemo tenetur ad impossibilia.* If the principle of implying a warranty is to prevail in the present case, there seems to be no good reason why it should not be equally applied to a variety of other cases, as for instance to the managers of theatres and other places of public resort who provide seats or other accommodation for the public. Why are they not to be equally held to insure by implied warranty the soundness of the structures to which they invite the public? But we apprehend it to be clear that such persons do no more than undertake to use due care that their buildings shall be in a fit state. Thus a staircase in the Polytechnic Institution fell, and injured several persons attending a public exhibition there. Two actions were brought by separate plaintiffs who had paid money for the use of their staircase. The first was tried before Wightman, J., the second before Erle, C.J. No one seems to have supposed that there was any warranty of the soundness of the staircase: yet the persons using it were as helpless to detect or prevent the accident as the traveller. Both learned Judges put the liability entirely on the question whether there was the want of due care in maintaining the staircase, and Erle, C.J. told the jury that the defendants would not be liable for latent defects—*Brazier* v. *the Polytechnic Institution* (1 Fost. & F. 507), *Pike* v. *Same* (1 Fost. & F. 712). So in stating the liability of a canal company, who made the canal for profit, and allowed the public to use the canal

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on payment of tolls, Tindal, C.J., in delivering the judgment of the Court of Exchequer Chamber, says, "The common law in such a case imposes a duty upon the proprietors not perhaps to repair the canal or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property"—*The Lancaster Canal Company* v. *Parnaby* (11 Ad. & E. 223). The liability in that case was not put in any degree upon a warranty that the canal shall be free from perilous defects, but upon the rational obligation to use due care that it shall be so. The common law with regard to carriers of goods and innkeepers, stands, as we have said, on its own special grounds. But it has been found so stringent, not to say unjust, in the liabilities it imposed on persons carrying on those trades, that the legislature has found it necessary in both cases to modify its stringency. It will now be necessary to examine the leading authorities cited during the argument.

The counsel for the plaintiff in the first place referred to some of the cases in which it has been held that in contracts for the supply of goods for a particular purpose, there is an implied warranty that the goods supplied shall be reasonably fit for that purpose. *Biggs* v. *Parkinson* (7 Hem. & M. 955) is a case of that class. But the agreement to sell and supply goods for a price which may be assumed to represent their value is a contract of a different nature from a contract to carry, and has essentially different incidents attaching to it. Indeed, the learned counsel did not cite these cases as directly governing the present. Even in the cases of contracts to supply goods, it may be a question, on which it is not now necessary to express an opinion, how far and to what extent the vendor would be liable to the vendee, in the case of a latent defect of the kind existing in the present case, which no skill or care could prevent or detect, that is to say, where an article is supplied which has been manufactured and tested in the best and most careful manner, so as to be turned out as perfect as in the nature of things it could be. It is clear that if the manufacturer is liable for such an inevitable and undiscoverable defect, he can never sell what he makes without the risk of an action attaching to every contract he enters into—without in fact becoming an insurer, unless he expressly limits his liability. In cases of express warranties, the compact of the parties is to be gathered from the words they use in making them. When warranties are expressly made, the parties themselves may guard against excessive liability, by any exceptions they please, and in those implied by law the law itself must take care to keep them within the boundaries of reason and justice, so as not to impose impracticable obligations.

It is now proposed to consider the authorities relied upon as having a direct bearing on the question before us. The case which the plaintiff's counsel relied on as the strongest in his favour is *Sharp* v. *Grey* (9 Bing. 457; 2 Mo. & S. 620; 2 L. J. C.P. 45). But that case, when examined, furnishes no sufficient authority for the extensive liability which the plaintiff seeks to impose on the defendants. There the plaintiff was injured by an accident caused by the breaking of the axle-tree of a stage coach. The defect might have been discovered if a certain examination had taken place, and it was made a question of fact at the trial whether it would have been prudent or not to make that examination. Tindal, C.J., who tried the cause, is reported to have directed the jury to consider "whether there had been on the part of the defendant, that degree of vigilance which was required by his engagement to carry the plaintiff safely." Now, if the learned Chief Justice had supposed there was an absolute warranty of roadworthiness, this direction could not have been given, as it would then have been immaterial whether the defendant had used vigilance or not, and the degree of vigilance would have been an utterly immaterial consideration. The jury having found on this direction for the plaintiff, a motion was made in the absence of Tindal, C.J., for a new trial. Two of the learned Judges, in refusing the rule, Gaselee, J., and Bosanquet, J., are certainly reported to have used expressions which seem to indicate that they thought the defendant bound to supply a roadworthy vehicle. Park, J., uses language which, as reported, is ambiguous. But the judgment of Alderson, J., is distinctly opposed to the

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notion of a warranty against latent and undiscoverable defects. He says, "A coach proprietor is liable for all defects in his vehicle which can be seen at the time of construction, as well as for such as may exist afterwards and be discovered by investigation." We have referred somewhat fully to this case, because it was put forward as the strongest authority in support of the plaintiff's claim which can be found in the English Courts, and because it was relied on by the Judges of the Court of Appeal in New York, in a decision which will be afterwards referred to. But the case when examined furnishes no sufficient authority for the unlimited warranty now contended for. The facts do not raise the point for decision, and the authority of Tindal, C.J., and Alderson, J., is against the plaintiff. The dictum of Best, C.J., in *Bremner* v. *Williams* (1 Car. & P. 416) was not necessary to the decision of the cause. The ruling of Lord Ellenborough in *Israel* v. *Clark* (4 Esp. 259) was also relied on. Of these last two authorities Blackburn, J., in his judgment below, said, "These are, it is true, only Nisi Prius decisions, and neither reporter has such a character for intelligence and accuracy as to make it at all certain that the facts are correctly stated, or that the opinion of the Judge was rightly understood." We find also that Best, C.J., makes observations in the opposite sense in the case of *Crofts* v. *Waterhouse* (3 Bing. 319; 4 L. J. C.P. 75). These cases are really the only English authorities which afford any support at all to the plaintiff's view, for the interpretation reported to have been given by Cresswell, J., in *Benett* v. *the Peninsular and Oriental Steamboat Company* (6 Com. B. Rep. 782; 18 L. J. C.P. 85) of the case of *Sharp* v. *Grey* (9 Bing. 457; 2 Mo. & S. 620; 2 L. J. C.P. 45) was only an observation made during an argument, when it was cited as incidentally bearing on the question then before the Court, and cannot be relied on as authority.

On the other hand, there is not only the plain distinction between the liabilities of the carriers of goods, and of passengers, constantly referred to by text-writers and Judges as well-known and settled law, but numerous cases have been decided on grounds entirely at variance with the supposition that there existed contemporaneously with them the liability by way of warranty. In *Aston* v. *Heaven* (2 Esp. 543), which was the case of injury to a passenger, Eyre, C.J., after carefully pointing out the law as to the liability of carriers of goods to make good all losses except those happening from the act of God or the King's enemies, and the reasons for it, says "I am of opinion that the cases of losses of goods by carriers and the present are totally unlike." Again, "There is no such rule in the case of the carriage of persons; this action stands on the ground of negligence alone." In *Christie* v. *Griggs* (2 Campb. 79) Sir James Mansfield says, "There was a difference between a contract to carry goods and a contract to carry passengers. For the goods the carrier was liable at all events, but he did not warrant the safety of the passengers. His undertaking as to them went no further than this, that as far as human care and foresight could go, he would provide for their safe conveyance." In *Crofts* v. *Waterhouse* (3 Bing. 319; 4 L. J. C.P. 75) the observations attributed to Best, C.J., clearly shew that he did not think there was any warranty on the part of carriers of passengers; and Park, J., in the same case, says, "A carrier of goods is liable at all events; a carrier of passengers is only liable for negligence." But, besides the observations of individual Judges to shew what has hitherto been understood to be the law, there is the long series of important cases involving costly and protracted trials, in which, by common consent, the liability of carriers of passengers has been based upon the duty to take due care, and not upon a warranty. In *Grote* v. *the Chester and Holyhead Railway Company* (2 Ex. Rep. 255), where the accident arose from the breaking down of one of the bridges of the railway, the case turned on what would or would not be negligence for which the company were answerable. Parke, B., says, "It seems to me the company would still be liable for the accident unless he (the engineer) also used due and reasonable care and employed proper materials in the work." There is no trace in the report that it ever occurred to the Court to suppose there was any warranty of the safety of the bridge.

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In a case tried before Erle, C.J., *Ford* v. *the London and South-Western Railway Company* (2 Fost. & F. 730), the plaintiff was injured by the tender of the train being thrown off the line, and one of the causes was alleged to be the defective tire of one of the wheels of the tender; Erle, C.J., in his direction told the jury, "The action is grounded on negligence. Negligence is not to be defined, because it involves some inquiry as to the degree of care required, and that is the degree which the jury think is reasonably to be required from the parties, considering all the circumstances. The railway company is bound to take reasonable care to use the best precautions in known practical use, for securing the safety of their passengers." There the defect was in the tire of a wheel of the tender of the train by which the plaintiff travelled. And no suggestion that a warranty of its soundness existed was made throughout the case. But a case still more directly bearing upon the present point was tried before Cockburn, C.J. There the accident happened in consequence of the breaking of the tire of the near wheel of the engine. The tire broke from a latent flaw in the welding. The trial lasted six days, and the questions mainly were, whether the flaw was not visible, and whether by the exercise of care it might not have been detected. The Lord Chief Justice commences a full direction to the jury by saying, "The question is, whether the breaking of the tire resulted from any negligence in the defendants or their servants, for which they are responsible." The latent defect in the tire was admitted to be the cause of the accident; but the jury having found, in answer to specific questions, that there was no evidence that the tire was negligently welded, and that the defect had not become visible, and having in other respects negatived negligence, the verdict was entered for the defendants. The facts of that case appear to be exactly like the present, except that in this case the defective tire was in the wheel of the carriage, and there in the wheel of the engine. But for the reasons already given, it can never be that a warranty can exist as to the carriage but not as to the engine drawing it. Thus, then, it is plain that a trial of six days took place on issues which were utterly immaterial if a warranty ought to have been implied; and there the learned Chief Justice and the parties themselves seem to have been utterly unconscious of the contract which was really existing, if the plaintiff in this case is right, for the warranty, as an obligation implied by law, must have existed at the time of these trials if it exists now; and surely it is strong to shew that no such rule does form part of the common law that it was not then recognized and declared. The learned counsel for the plaintiff insisted that a carrier by sea is bound to have his ship seaworthy. Undoubtedly the carrier of goods by sea, like the carrier of goods by land, is bound to carry safely, and is responsible for all losses, however caused, whether by the unseaworthiness of the ship or otherwise, and it does not appear to be material to inquire, when he is subject to this large obligation, whether he is also subject to a less one. In the case of *Lyon* v. *Mills* (5 East, 428) it was, no doubt, stated by the Court, that the carrier of goods is bound to have a seaworthy ship, but this only as part of his general liability. It is well to observe that Holroyd, who argued for the plaintiff, and Gaselee, for the defendant, both state the liability of the carrier in all its breadth, viz., a liability for all losses however happening, except by the act of God or the King's enemies. This case therefore falls within the class of decisions relating to the liability of the carriers of goods. No case has been found where an absolute warranty of the seaworthiness of the ship in the case of passengers has arisen, and it affords a strong ground for presuming that no such liability exists, that in this maritime nation no passenger has ever founded an action upon it. The case of *Burns* v. *the Cork and Bandon Railway Company* (13 Irish Com. Law. Rep. 546), in the Irish Court of Common Pleas, certainly does not support the plaintiff's view of the law. The Court there says the averments in the defendants' plea are all consistent with gross and culpable negligence, and on that ground gives judgment for the plaintiff. The judgment plainly shews that the Court does not mean to declare that there is an absolute undertaking that the vehicle shall be free from defects. The language is, "free from defects as far as human care

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and foresight can provide, and perfectly roadworthy." The Court refers with approbation to the language of Sir James Mansfield and Alderson, J., which helps to explain that it was disposed to adopt the views of those learned Judges, and to place the liability, not on a warranty, but on the obligation to exercise care and foresight.

It now remains to consider the American decisions on the subject. They have not been uniform. The judgment of Mr. Justice Hubbard in *Ingalls* v. *Bills* (9 Metc. Rep. 15), cited at length by my Brother Mellor in his judgment below, is opposed to the notion of a warranty. Decisions, however, were cited before us by Mr. Manisty from the Courts of the State of New York, having a contrary tendency, to shew us that, in that State, the law had been declared in favour of annexing a warranty to the contract. The most important of these decisions is *Alden* v. *the New York Central Railway Company* (12 Smith, 102) in the Court of Appeals of the State of New York. That was the case of an accident caused by a defect in an axle-tree; the reasons given by Gould, J., for the decision are not satisfactory to our minds. The learned Judge seems to assume that there was no negligence shewn on the part of the company. He cites the case of *Sharp* v. *Grey* (9 Bing. 457; 2 Mo. & S. 620; 2 L. J. C.P. 45) in the Court of Common Pleas here, and he interprets that case to determine that the carrier warrants the roadworthiness of his coach. But if the view of the case of *Sharp* v. *Grey* (9 Bing. 457; 2 Mo. & S. 620; 2 L. J. C.P. 45) taken in the early part of this judgment is correct, the learned Judge gave too great weight to it. He then, after having given the rule as he supposed it to be laid down in *Sharp* v. *Grey* (9 Bing. 457; 2 Mo. & S. 620; 2 L. J. C.P. 45), observes, "And though this may seem a hard rule it is probably the best that can be laid down, since it is plain and easy of application, and, when once established, is distinct notice to all parties of their duties and liabilities." With deference to the learned Judge, these reasons founded on the convenience of the arrangement are scarcely sufficient to warrant the introduction of onerous obligations into the contracts of parties; and the terms in which the judgment is given rather lead to the conclusion that the learned Judge was conscious that he was annexing to the contract of the carrier of passengers what had not hitherto been understood to form part of it. The English Courts are desirous to treat the American decisions with great respect, but as their authority here must mainly depend on the reasons on which they are founded, we have felt bound to examine the reasons on which this decision was based, with the result which has been already stated. Warranties implied by law are for the most part founded on the presumed intention of the parties, and ought certainly to be founded on reason, and with a just regard to the interests of the party who is supposed to give the warranty, as well as of the party to whom it is supposed to be given. We have already gone fully into the reasons for holding that in our opinion the warranty contended for, in this case, is not so founded.

On the other hand, it seems to be perfectly reasonable and just to hold that the obligation well known to the law, and which, because of its reasonableness and accordance with what men perceive to be fair and right, has been found applicable to an infinite variety of cases in the business of life, viz., the obligation to take due care, should be attached to this contract. We do not attempt to define, nor is it necessary to do so, all the liabilities which the obligation to take due care imposes on the carriers of passengers. Nor is it necessary, inasmuch as the case negatives any fault on the part of the manufacturers, to determine to what extent and under what circumstances they may be liable for the want of care on the part of those they employ to construct works, or to make or furnish the carriages and other things they use—see on this point *Grote* v. *the Chester and Holyhead Railway Company* (2 Ex. Rep. 255). "Due care," however, undoubtedly means, having reference to the nature of the contract to carry, a high degree of care, and casts on carriers the duty of exercising all vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order. But the duty to take due care, however widely construed or however rigorously enforced, will not, as the present action

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seeks to do, subject the defendants to the plain injustice of being compelled by the law to make reparation for a disaster arising from a latent defect in the machinery they are obliged to use, which no human skill or care could either have prevented or detected. In the result we come to the conclusion that the case of the plaintiff, so far as it relies on authority, fails in precedent; and, so far as it rests on principle, fails in reason. Consequently, the judgment of the Court of Queen's Bench in favour of the defendants will be affirmed.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER. May 11, 1869.

(Error from the Court of Queen's Bench.)

SHEPHERD v. HARRISON AND ANOTHER.

38 L. J. Q.B. 177; L. R. 4 Q.B. 493: affirming, [1869] E. R. A. 1151; 38 L. J. Q.B. 105; L. R. 4 Q.B. 196 (Q.B.): and affirmed, [1871] E. R. A.; 40 L. J. Q.B. 148; L. R. 5 H.L. 116; 24 L. T. 857; 20 W. R. 1 (H.L.).

Consignor and Consignee—Acceptance of Bill of Exchange sent with Bill of Lading—Condition Precedent—Vesting of Property.

SALE OF GOODS. D.—*The plaintiff, a merchant, at Manchester, sent an order to P, N. & Co., at Pernambuco, to purchase on his account cotton, upon certain terms. P, N. & Co. accordingly purchased and shipped cotton in the defendant's vessel, and wrote to the plaintiff, saying, "Inclosed please find invoice and bill of lading of 200 bales of cotton. We have drawn upon you in favour of our agents, to which we beg your protection." The invoice, which was headed "on account and risk of S. & Co." (the plaintiff), was sent to the plaintiff, as stated in the letter; the bill of lading, however, which made the cotton deliverable to order or assigns, was not inclosed therewith, but was sent to the agents of P, N. & Co., together with a bill of exchange drawn for the price of the cotton. The agents thereupon wrote to the plaintiff inclosing the bill of lading and the bill of exchange, for which they requested protection. The plaintiff retained the bill of lading, but returned the bill of exchange unaccepted, on the grounds of non-compliance with the terms of the order. On presentment of the bill of lading to the defendants they refused to deliver the cotton, having been advised of the circumstances under which the plaintiff became possessed thereof, and the plaintiff thereupon sued them in trover*:—Held *(affirming the judgment of the Court of Queen's Bench upon a case embodying the above particulars and empowering the Court to draw inferences of fact), that the acceptance of the bill of exchange was a condition precedent to the passing of the property, and that this having been refused the defendants were justified in withholding the cotton.*

The SPECIAL CASE is set out in the report of the case in the Court below (38 L. J. Q.B. 105), and the following short statement will be sufficient to make the arguments and judgment intelligible:

Paton, Nash & Co. are merchants, at Pernambuco, and George Paton & Co. are their Liverpool correspondents and agents.

The plaintiff is a cotton and general merchant, at Manchester, and the defendants are the owners of the screw steamer "*Olinda.*"

Before April, 1866, several transactions in cotton had taken place between the plaintiff and Paton, Nash & Co. In all these, except on one occasion, in 1865, when Paton, Nash & Co. purchased cotton for the plaintiff, Paton, Nash & Co. acted as agents for the sale of goods consigned to them by the plaintiff. On that occasion Paton, Nash & Co., by letter of March 31, announced to the plaintiff the purchase, on his account, intimating "by the English steamer of 13th prox. we shall send bill of lading, and value on you for cost." And on

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May 3, 1865, George Paton & Co. wrote to the plaintiff, inclosing the bill of lading, and adding, " We presume our Pernambuco friends have made a mistake in sending it under cover to us. We inclose draft on your good selves for 2,072*l.* 9*s.* 6*d.*, which we will thank you to return with the needful."

On April 23, 1866, the plaintiff ordered of Paton, Nash & Co., by letter, 1,000 bales of cotton, or any less quantity, at a certain price, but this order was not executed. On September 7, 1867, the plaintiff gave another order for the same quantity of cotton, but at a reduced price. In acknowledging this order Paton, Nash & Co., in their letter of September 28, 1867, added, " You do not mention whether part of the order is to go against your funds lying here, but we suppose you intend it as a remittance." In the course of a letter of October 23, 1867, in answer, the plaintiff replied, " Pray don't make the mistake you did about our funds in your hands; they were never intended to be applied to pay for cotton purchases, but to wait instructions."

On October 25, 1867, 747 bales had been purchased by Paton, Nash & Co. on account of the plaintiff, and on that day they wrote to the plaintiff inclosing invoices of 339 bales, and 208 ditto, per " *Capella* " and " *La Plata*," and adding, " We have drawn upon you as per note at foot for the sum to which we beg your protection. We are afraid the " *Capella* " will not be able to take the other 200 bales, therefore it will be well to insure per steamer or sailing vessel. Note of drafts, No. 926, in favour of Messrs. G. Paton & Co., 1,616*l.* 8*s.* 6*d.* No. 927, ditto, 883*l.* 7*s.* 1*d.* The bills of lading will be handed to you by Messrs. G. Paton & Co."

The invoices of both the above quantities of goods described them as shipped " on account and risk " of the plaintiff. The bills of lading together with the bills of exchange were forwarded by G. Paton & Co. to the plaintiff, by whom the bills were accepted, but with a reservation in a letter of November 18, 1867, as to some portion of the cotton which was alleged by the plaintiff to be not according to order, concerning which he wrote, " In case of any loss arising from the sale of these we must claim against you." Thereupon followed a correspondence between the plaintiff and G. Paton & Co. upon the question whether the plaintiff's orders had been duly executed; but the bills were paid by the plaintiff at maturity.

The remaining 200 bales purchased by Paton, Nash & Co. were shipped by them on the defendant's screw steamer " *Olinda*," and on November 12, 1867, Paton, Nash & Co. wrote to the plaintiff, " Inclosed please find invoice and bill of lading of 200 bales of cotton, shipped per " *Olinda*," &c. We have therefore drawn on you for 916*l.* 9*s.* 1*d.*, draft No. 935, in favour of Messrs. G. Paton & Co., to which beg your protection." The invoice was headed, " Invoice of 200 bales of cotton, shipped per " *Olinda*," for Liverpool, on account and risk of Messrs. John Shepherd & Co."

This letter, with the invoice inclosed, were forwarded by Paton, Nash & Co. to the plaintiff direct from Pernambuco; but the bill of lading and the bill of exchange therein mentioned were forwarded, not to the plaintiff, but to G. Paton & Co., who sent them to the plaintiff on December 5 (on which day the " *Olinda* " arrived at Liverpool) in a letter stating, " We beg to inclose bill of lading for 200 bales cotton, shipped by Messrs. Paton, Nash & Co., per " *Olinda*," on your account. We hand also their draft on your good selves for the cost of the cotton, to which we beg your protection (916*l.* 9*s.* 1*d.*)."

The case then set out a copy of the bill of lading which made the cotton deliverable " unto order or to his or their assigns, he paying freight," &c., and was indorsed, " Per pro. Paton, Nash & Co., A. M. C. Soares—Geo. Paton & Co."

The plaintiff replied to the letter of G. Paton & Co. of December 5, 1867, on the next day, as follows: " On reference to invoices and bills of exchange which we have accepted, we find that they have been drawn in excess of price mentioned in order; there is also a quality styled ' mediums,' which we did not order at all. These, with the hostile position you have taken with regard to the 208 bales ex " *La Plata*," stand in the way of our accepting the bill of exchange

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now inclosed. We shall place the 200 bales ex "*Olinda*" in another broker's hands, and as soon as we learn we shall inform you their opinion of them."

The plaintiff accordingly retained the bill of lading and returned the bill of exchange unaccepted to G. Paton & Co., by whom it was protested. The plaintiff also forwarded the bill of lading for the 200 bales to his brokers, at Liverpool, with instructions to pay freight and obtain the cotton. A demand of the cotton having been in the meantime made by G. Paton & Co. upon the defendants, under a duplicate bill of lading, and an explanation given of the circumstances under which the bill of lading had come to the hands of the plaintiff, the defendants upon being indemnified refused, on December 10, to deliver the goods to the plaintiff's brokers.

From the time when the order for the 1,000 bales was given up to the time of the commencement of the action, Paton, Nash & Co. had always in their hands, at Pernambuco, money or goods to the value of 3,000*l.* or thereabouts.

After a formal demand of the cotton, and refusal by the defendants to deliver it, an action of trover was commenced, in which a verdict was entered by consent for the plaintiff, subject to the above CASE for the opinion of the Court of Queen's Bench, who gave judgment for the defendants.

Jordan (*Quain* with him), for the plaintiff.—The acceptance of the bill of exchange by the plaintiff for the price of the cotton was not a condition precedent to the vesting of the property in him. In *Gurney* v. *Behrend* (3 El. & B. 622; 23 L. J. Q.B. 265), the facts of which case were more complicated than those of the present, although in effect similar, Lord Campbell, C.J. said, "It is contended on the part of the defendants that Collman and Stolterfoht had no authority to part with the bill of lading till they had accepted the bill of exchange drawn for the price of the wheat. If this be so, they certainly exceeded their authority; for their promise to accept, which was not treated by the agents of the defendants as an acceptance, would not have been the performance of the condition on which the right to part with the bill of lading depended. The defendants might easily have imposed such a condition had they suspected the solvency of the parties with whom they were dealing. But, looking to the correspondence and the circumstances of the transaction, we are of opinion that no such condition was imposed. There is nothing in the bill of lading itself to indicate that it is not to be transferred till the bill of exchange has been accepted." And Crompton, J. (p. 630), alluding to the course of business usual a few years previously, and particularly between America and Liverpool, says, it was the practice to insist upon retaining the bill of lading until the draft was not only accepted but paid, or security given; but adds, that he always understood this to be an exceptional course, adopted only in times of peril or suspicion. In *Key* v. *Cotesworth* (7 Ex. Rep. 595; 22 L. J. Ex. 4) the facts were nearly on all-fours with the present case. There the bill of lading and invoice were inclosed in a letter to the defendants; in the present case it was the *intention* of Paton, Nash & Co., as appears by their letter of November 12, 1867, to have inclosed the bill of lading together with the invoice to the plaintiff, although, by some mistake or omission, this unquestionably was not done. The observations of Parke, B. in delivering judgment, "If it had been the intent of the vendors to preserve their right in that property until the bill drawn against it was accepted, he ought to have transmitted the bills of lading indorsed in blank to an agent, to be delivered over only in case the acceptance took place," are therefore strongly in favour of the present plaintiff, the question in this case being entirely one of intention. In *Wilmshurst* v. *Bowker* (7 Mac. & G. 882; 12 L. J. Ex. 475), as here, the invoice stated that the goods were shipped "on account and risk of the vendee," to be paid for by a banker's draft, and the Court held, that by the transmission of the bill of lading with the invoice, the consignor parted with the property in the goods, so as not to be entitled to stop them *in transitu*, although the consignee never remitted the draft in payment; Lord Abinger, C.B. saying, that "the default on the part of the plaintiffs amounted to nothing more than this, that they omitted to perform one part of

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the contract." In *Cox* v. *Harden* (4 East, 211) the consignor shipped goods "on account and risk" of the consignee, to whom he transmitted by letter the invoice and an *unindorsed* bill of lading, with an intimation that he had drawn upon the consignee for the value; he also sent an *indorsed* bill of lading to his own agent; and the Court held, that the property passed to the consignee, however wrongfully parted with by the captain of the ship.—He also cited *Walley* v. *Montgomery* (3 East, 585); *Joyce* v. *Swan* (17 Com. B. Rep. N.S. 84); and distinguished *Brandt* v. *Bowlby* (2 B. & Ad. 932; 1 L. J. K.B. 14); *Van Casteel* v. *Booker* (2 Ex. Rep. 691; 18 L. J. Ex. 9); *Turner* v. *the Trustees of the Liverpool Docks* (6 Ex. Rep. 543; 20 L. J. Ex. 393); and *Ellershaw* v. *Magniac* (6 Ex. Rep. 570, n.). Secondly, in the Court below, Cockburn, C.J. partly based his judgment upon the ground that Paton, Nash & Co. had the same lien as unpaid vendors, and had therefore a right to the goods until payment by acceptance of the bill or otherwise, supposing the property in the cotton to have passed to the plaintiff. This position is not tenable; the case being similar to that of the delivery of goods to a common carrier for conveyance to the buyer, and on his account and risk, in which case the vendor must be taken to have parted with his lien—*Benjamin on the Law of Sale of Personal Property*, p. 602, and cases there cited. And, thirdly, the plaintiff was not bound to accept bills drawn in excess of the sum due.

Holker (*Gully* with him), for the defendants, was not heard.

KELLY, C.B.—The case has been very ably argued by Mr. Jordan, who, at one time, succeeded in raising some doubt in my mind in favour of the plaintiff. Upon reference to the authorities which have been cited, it appears to me that the question is one of fact rather than of law; every case of this kind has its own peculiar and distinguishing circumstances, and here the facts are very simple. —[His Lordship stated them.]—The first question, therefore, with which we have to deal is this: was the plaintiff entitled to refuse acceptance of the bill of exchange, and, notwithstanding such refusal, to retain the bill of lading, and by virtue of that document to demand and obtain possession of the goods then in the hands of the shipowner? Now, the letter of the consignor of November 12, 1867, which relates to that portion of the cotton forming the subject of the present litigation, contains an intimation to the plaintiff that the invoice and bill of lading were both inclosed therein; but this was not, in fact, the case. The letter contained the invoice only, which stated that the goods had been shipped "on account and risk" of the plaintiff; but the bill of lading, together with a bill of exchange for the price of the cotton, were forwarded by the consignors to their own agents in Liverpool, with what particular instructions does not appear. We must, therefore, deal with the facts as found by the case, and we are invited, upon the authority of *Cox* v. *Harden* (4 East, 211), to hold that, by the mere fact of shipment of the cotton on account and risk of the plaintiff, the property in it vested in them; and this position might, perhaps, to a certain extent, be borne out by the opening observations of Grose, J. in his judgment. But those observations must be considered with reference to the other facts of that particular case, a material one being that, not only was the statement there on account and risk of the consignee, but a bill of lading, unindorsed it is true, was also transmitted by the consignor to the consignee, by virtue of which the latter obtained possession of the goods; and the Court held that, under the circumstances, the property vested in the consignee, although an indorsed bill of lading in respect of the goods had been forwarded by the consignors to a third person, by whom a counter claim was set up. Now, one of the peculiar circumstances of the case before us is, that a letter was sent by the consignors to the plaintiff, containing, amongst other things, an intimation that the bill of lading was inclosed with the invoice, whereas, in fact, the bill of lading was transmitted to the consignor's own agents in this country, together with a bill of exchange for the price of the goods. And the question is, what inference ought the Court to draw under the circumstances? It is urged upon us that the non-inclosure of the bill of lading with the invoice was the result of a simple act of omission on the part of the consignors; but it appears that the letter was written by their

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clerk, who might very possibly have misunderstood or exceeded his instructions, upon discovery of which the consignors would naturally rectify the mistake by taking out the bill of lading and forwarding it, as they originally proposed, to their agents instead of to the consignee; and the absence of any explanation upon the point may be due to the hurry of business and the consequent want of time and opportunity of making it. We are unable, therefore, to draw any inference in favour of the plaintiff from this circumstance; and still less can we do so when we come to consider the letter of the consignors' agents of December 5, 1867, to the plaintiff, which seems to me conclusive that the intention of the consignors (and the whole question is one of intention) was, that the acceptance of the bill of exchange by the plaintiff, and the delivery of the bill of lading to him were to be concurrent acts, and that his refusal to accept the one disentitled him to the possession of the other. And this view is further supported by the letter of the consignors of October 25, 1867, which, in reference to a former delivery of goods forming part of the same transaction as the 200 bales now in question, after calling attention to drafts to be accepted in payment, expressly notifies to the plaintiff that the bills of lading will be handed over to him by their agents.

It is clear, therefore, that throughout the transactions the course has been for the consignors to ship the goods at the risk and on account of the plaintiff, but to transmit the bills of lading and the bills of exchange to their (the consignors') agents, and that their object and intention in doing so was to prevent the passing of the property until the acceptance of the bills of exchange.

It was also insisted on behalf of the plaintiff that, whatever may have been the course of dealing between the parties, or the intention of the consignors, the plaintiff was entitled, on the delivery of the bill of lading together with a bill of exchange drawn for a larger amount than the just price of the goods, to retain the bill of lading without honouring the draft. But we gather nothing from the correspondence expressly limiting the consignors to the lower price, nor do we find that they have exceeded their authority. We are therefore of opinion, upon both points, that the retaining of the bill of lading by the plaintiff was, under the circumstances, a violation of the contract between the plaintiff and the consignors, and the judgment of the Queen's Bench must be affirmed.

The other learned Judges concurred[1].

Judgment affirmed.

IN THE QUEEN'S BENCH. May 12, 1869.

MIRFIN *v.* ATTWOOD.

38 L. J. Q.B. 181; L. R. 4 Q.B. 330; 9 B. & S. 414; 20 L. T. 778; 17 W. R. 820.

Costs—County Court Act, 1867 (30 *&* 31 *Vict. c.* 142), *s.* 33.—*Action tried in the Superior Court—Statute of Gloucester*, 6 *Edw.* 1. *c.* 1.—*Repeal of Statutes —Lord Brougham's Act* (13 *&* 14 *Vict. c.* 21), *s.* 5.

COSTS. I.—*Before the passing of the County Courts Act*, 1867, *the plaintiff brought an action for goods sold, and upon the trial, which took place after the Act came into operation, he recovered a verdict for* 13*l. It was not a case of exclusive or concurrent jurisdiction, nor was there any certificate or order entitling the plaintiff to his costs. By the* 33*rd section of that Act, sections* 11 *and* 12. *of* 13 *&* 14 *Vict. c.* 61. *and section* 4. *of* 15 *&* 16 *Vict. c.* 54. *are repealed*:— Held, *by* Lush, J. *and* Hayes, J., *that the plaintiff was not entitled to his costs.*

Per Hannen, J.—*That the plaintiff was entitled to his costs under the Statute of Gloucester.*

This was a rule calling upon the defendant to shew cause why the plaintiff's costs should not be taxed by the master.

(1) Keating, J., Channell, B., Montague Smith, J. and Cleasby, B.

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The action, which was for goods sold, was commenced on July 15, 1867, before the passing of the County Court Act, 1867. By order of a Judge, it was tried in the County Court of Marylebone, in April, 1868, after the Act had come into operation, and the plaintiff obtained a verdict for 13*l*. The master declined to tax the costs upon the authority of *Butcher* v. *Henderson* (37 L. J. Q.B. 133; L. R. 3 Q.B. 335); and this rule was then obtained.

Holl, in shewing cause against the rule (on November 16, 1868), referred to *Butcher* v. *Henderson* (37 L. J. Q.B. 133; L. R. 3 Q.B. 335); *Mount* v. *Taylor* (37 L. J. C.P. 325; L. R. 2 C.P. 645); *Morgan* v. *Thorn* (7 Mee. & W. 400; 10 L. J. Ex. 125); *Kay* v. *Goodwin* (6 Bing. 576; 8 L. J. C.P. 212); and *Kimbray* v. *Draper* (37 L. J. Q.B. 80), and contended that the plaintiff was not entitled to his costs. Under the Statute of Gloucester (6 Edw. 1.) he would have been entitled to them; but that right is taken away by the 13 & 14 Vict. c. 61. s. 11. and 15 & 16 Vict. c. 54, and he could not get them at all unless a certificate or order for costs had been granted. Those statutes are repealed by 30 & 31 Vict. c. 142. s. 33, and it will be contended that therefore the Statute of Gloucester is revived as to such actions. But it is submitted that that cannot be so, and that *Butcher* v. *Henderson* (37 L. J. Q.B. 133; L. R. 3 Q.B. 335) and *Mount* v. *Taylor* (37 L. J. C.P. 325; L. R. 2 C.P. 645) are authorities to shew that the rule ought to be discharged. Further, under Lord Brougham's Act, 13 & 14 Vict. c. 21. s. 5, it is clear that the Statute of Gloucester is not revived. It provides "that where any Act repealing in whole or in part any former Act is itself repealed, such last repeal shall not revive the Act or provisions before repealed, unless words be added reviving such Act or provisions." The Statute of Gloucester has certainly been repealed in whole or in part, and there are no words by which it is revived.

Kemplay, in support of the rule, referred to the above cases and statutes, and to *Restall* v. *the South-Western Railway Company* (37 L. J. Ex. 89); *Wright* v. *Hale* (6 Hurls. & N. 227; 30 L. J. Ex. 40); *Charrington* v. *Meatheringham* (2 Mee. & W. 228; 6 L. J. Ex. 86); *The Queen* v. *Mawgan* (8 Ad. & E. 496; 7 L. J. M.C. 98); *Roadknight* v. *Green* (9 Mee. & W. 652; 11 L. J. Ex. 295); and *Oldrieve* v. *Puckeridge* (37 L. J. Ex. 90; L. R. 3 Ex. 143, n.), and contended that the Statute of Gloucester had not been repealed either in whole or in part; there was no more than a modification of it, and it was still in existence. As for Lord Brougham's Act, he contended that it did not apply to such a case as the present, but only to such cases as in words repealed a former statute. The rule ought, therefore, to be made absolute.

Cur. adv. vult.

The learned Judges differing in opinion, the following judgments were delivered (on May 12)—

HAYES, J.[1]—In this case, which was argued in last Michaelmas Term, a rule had been obtained calling on the defendant to shew cause why the plaintiff's costs should not be taxed by the master; and the question related to the operation of the County Courts Act, 1867 (30 & 31 Vict. c. 142), on the costs of actions in the superior Courts. The action, which was for goods sold, had been commenced before the passing of that Act. It was, by order of a Judge, tried before the County Court of Marylebone, and came on for trial after the Act had come into full operation, when the plaintiff obtained a verdict for 13*l*. It was not a case of either exclusive or concurrent jurisdiction in the superior Courts, nor was it suggested that any ground had existed for obtaining the certificate of a Judge, under the repealed County Courts Act, 15 & 16 Vict. c. 54. s. 14, that there was sufficient reason for bringing such action in the superior Court. It was, therefore, a case in which the plaintiff would have been wholly deprived of his costs if the restricted enactments on this subject in the previous County Courts Acts, 9 & 10 Vict. c. 95. s. 129, 13 & 14 Vict. c. 61. ss. 11. and 12,

(1) Cockburn, C.J., was present when this case was argued, but, by an oversight, these judgments were delivered in his absence. The reporter is informed that his Lordship has intimated he should probably have agreed with the judgment delivered by Hannen, J.

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15 & 16 Vict. c. 54. s. 4, had remained in force. But it was contended for the plaintiff, that, as these enactments had all been repealed while the action was still pending, upon the County Courts Act, 1867, coming into operation, and as the new provision contained in section 5. of the last Act did not apply to actions commenced before the passing of that Act, the effect was to revive the Statute of Gloucester (6 Edw. 1. c. 1.) as to actions like the present, and to entitle the plaintiff to his costs under that statute.

This point was raised, but not decided, in the Court of Exchequer, in *Restall* v. *the London and South-Western Railway Company* (37 L. J. Ex. 89; L. R. 3 Ex. 141) and *Oldreive* v. *Puckeridge* (37 L. J. Ex. 90; L. R. 3 Ex. 143, n). The first of these cases was one of concurrent jurisdiction in the superior Court; and the second resembled the present case; but, in both of them, the event on which the costs depended had occurred before the late Act came into operation, and upon this ground the Court held, that the right was concluded by the former Acts, which were then unrepealed, and which entitled the plaintiff to his costs in the first case, and deprived him of them in the second. The point was again raised in *Butcher* v. *Henderson* (37 L. J. Q.B. 133; L. R. 3 Q.B. 335), which was a case of exclusive jurisdiction in the superior Court; but here also the case was determined, on the ground that the transaction having been complete before the new Act came into operation, it was governed by the enactments of the former County Courts Acts. The Court, however, in delivering judgment on the above ground, referred to actions like the present, where the transaction remained incomplete when the repeal came into operation, and expressed an opinion against the right of the plaintiff to costs under a supposed revival of the Statute of Gloucester in trivial cases where no order ever would have been made to give him costs before.

In *Mount* v. *Taylor* (37 L. J. C.P. 325; L. R. 2 C.P. 645) this question was again raised, and very fully discussed in a case where the event determining the costs did not occur until after the late County Courts Act had come into full operation, and therefore the transaction remained incomplete when the repeal of the provisions of the former Acts took effect. That case, therefore, resembled the present, except that there the cause of action involved questions of title which gave the plaintiff a right to costs under the former Acts. And the Court there decided that the Statute of Gloucester had not been repealed as to the classes of cases in which, under the former County Courts Acts, the plaintiff would be entitled to costs on obtaining a Judge's order or certificate, either on the ground of exclusive or concurrent jurisdiction, or where the circumstances of the case shewed a sufficient reason for bringing the action in the superior Court. But with regard to cases like the present, where there was neither exclusive nor concurrent jurisdiction, nor any ground for obtaining a Judge's order or certificate, a clear opinion was expressed by Willes, J., and not dissented from by the rest of the Court, that, as to such cases, the Statute of Gloucester had been repealed by the former County Court Acts, which prevented the plaintiff from obtaining his costs in any way; and that, under the provisions of the Act commonly called Lord Brougham's Act, 13 & 14 Vict. c. 21. s. 5, the Statute of Gloucester was not revived by the Act of 1867, but continued repealed as to such cases.

In this opinion, which is substantially the same as that which was expressed by Blackburn, J., in delivering the judgment of this Court in *Butcher* v. *Henderson* (37 L. J. Q.B. 133; L. R. 3 Q.B. 335), my Brother Lush and I concur, and we think that the present rule should be discharged.

HANNEN, J.—I regret that I cannot concur in the judgment of my learned Brothers. The cases are so few in which the point here to be determined can arise, that I should not have thought it necessary to make any observation, but for the bearing which the decision of my Brothers may have on the question, when a statute can be considered to be repealed by implication, and the effect in such a case of a repeal of the repealing statute. In this case the action was commenced in July, 1867, before the passing of the recent County Courts Act. It was tried in April, 1868, after that Act came into operation. If no change

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had been made in the law relating to costs between the commencement of the action and the trial, the plaintiff would have been entitled to apply to a Judge at chambers, under the 15 & 16 Vict. c. 54. s. 4, to direct that the plaintiff should recover his costs if he could make it appear to such Judge, that there was sufficient reason for bringing the action in the Court in which it was brought. But by the late County Courts Act the section above referred to (15 & 16 Vict. c. 54. s. 4.) was repealed, and it therefore became impossible for the plaintiff to obtain the order of a Judge under it. It was, indeed, decided by the Court of Exchequer, in *Restall* v. *the London and South-Western Railway Company* (37 L. J. Ex. 89; L. R. 3 Ex. 141), where the verdict was obtained before the recent County Courts Act came into operation, that the power of a Judge to make an order under that section still continued, notwithstanding its repeal, but it was held by this Court, in *Butcher* v. *Henderson* (37 L. J. Q.B. 133; L. R. 3 Q.B. 335), that after the repeal of the enactment, the power to make an order under it was absolutely put an end to, even though it would have been made *ex debito justitiæ*, if the law had remained unaltered. But the legislature, at the same time that it repealed the power of a Judge to order that the plaintiff should recover his costs, also repealed the 13 & 14 Vict. c. 61. s. 11, by which the necessity for such an order was created. The language of the 13 & 14 Vict. c. 61. s. 11. is as follows: "If in any action commenced after the passing of this Act in any of Her Majesty's superior Courts of record in covenant, debt, detinue or assumpsit, not being an action for breach of promise of marriage, the plaintiff shall recover a sum not exceeding 20*l*. . . . the plaintiff shall have judgment to recover such sum only, and no costs, except in the cases hereinafter provided" —one of those excepted cases being where, as it happened here, no part of the cause of action arose within the jurisdiction of the Court where the defendant dwelt or carried on his business at the time of the commencement of the action. And in those excepted cases he was, by the 4th section of the 15 & 16 Vict. c. 54, upon obtaining a Judge's order, to have the same judgment to recover his costs that he would have had, if the 13 & 14 Vict. c. 54. had not passed. I think that the effect of this repealing with one breath, the enactment which empowered a Judge or the Court to order that the plaintiff should recover his costs, and that which imposed this as a condition on the obtaining his costs, is to leave the plaintiff in the position in which he would have been before the existence of the repealed statutes, that is, entitled to recover his costs under the Statute of Gloucester.

It was contended for the defendant that the decision in *Butcher* v. *Henderson* (37 L. J. Q.B. 133; L. R. 3 Q.B. 335) was opposed to this view, but I think that it is not so. In that case the plaintiff in an action of trespass recovered a verdict for less than 5*l*., before the late County Courts Act was in force; he was therefore entitled to a judgment for the amount of the verdict and no costs, unless he obtained an order of a Judge under 15 & 16 Vict. c. 54. s. 4, which he had an opportunity of doing, but did not do, before that enactment was repealed. This Court, applying the maxim "Nova constitutio futuris formam imponere debet, non præteritis," held that the transaction was complete when the plaintiff recovered his verdict, and that as at that time he was entitled to recover judgment for less than 5*l*. and no costs, unless he got an order, which he failed to do, the repeal of the statute could not operate to give him a right to a different judgment. This Court expressly rested its judgment on the fact that the event on which the plaintiff's right to costs depended, namely, recovery by verdict, occurred before 30 & 31 Vict. c. 142. came into operation; and this has been pointed out to be the *ratio decidendi* of the case by Montague Smith, J. in *Mount* v. *Taylor* (37 L. J. C.P. 325; L. R. 2 C.P. 645). But in the present case, when the plaintiff recovered his verdict, there was no statute in existence which deprived him of costs, unless he obtained the order of a Judge. He is therefore entitled to have his costs under the general enactment of the Statute of Gloucester, that the plaintiff, in all actions in which he recovers damages, shall also recover against the defendant his costs of suit. It was, however, contended for the defendant that the Statute of Gloucester was repealed by the County

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Courts Acts as to all actions of debt in which the plaintiff recovers less than 20*l*., and that the subsequent repeal of those statutes did not revive the Statute of Gloucester by reason of the 5th section of Lord Brougham's Act, 13 & 14 Vict. c. 21. This point was under the consideration of the Court of Common Pleas in *Mount* v. *Taylor* (37 L. J. C.P. 325; L. R. 2 C.P. 645), and, for the reasons which are so fully given in the judgments in that case, I think that the Statute of Gloucester was not repealed by the County Courts Acts, but that conditions only were imposed on its operation, such as the obtaining the Judge's order, and that when the conditions were fulfilled the right to costs was derived from the Statute of Gloucester. Willes, J., says, "If the records of the Court be searched from the passing of the County Courts Acts to the present day, it will be found that the costs have always been taxed upon the Statute of Gloucester, and not upon the order of the Judge, that order being created only as evidence of the right. The records, therefore, lead to the inevitable conclusion that the Statute of Gloucester was in force as to all cases in which a Judge's order could be obtained under the County Courts Acts, and that it was the Statute of Gloucester in such cases which gave the plaintiff his costs, while the County Courts Acts rendered the obtaining a Judge's order a necessary condition, and it is the statute imposing this condition only which has been repealed by the Act of last year." It is true that in *Mount* v. *Taylor* (37 L. J. C.P. 325; L. R. 2 C.P. 645) the action could not have been brought in the County Court; but the reasoning of the learned Judges is equally applicable to a case like the present, where the County Court had jurisdiction. I would refer particularly to the judgment of Montague Smith, J., which appears to me conclusively to establish that the Statute of Gloucester cannot properly be said to be repealed as to those cases in which a Judge had power to certify that the plaintiff recovered his costs. To impose a condition on a class of plaintiffs before they shall be entitled to the benefit of a statute, is not a repeal of it as to them, and it is only by a figure of speech that it has been so described. It merely intercepts in the specified cases the operation of the statute, which remains in existence and unrepealed notwithstanding. The 5th section of Lord Brougham's Act has for its object to prevent a revival of a statute contrary to the intention of the legislature, but it cannot be supposed that it is contrary to the intention of the legislature to restore to a statute its original force without condition, when all that it has done has been to repeal the condition; and it can make no difference that other qualifications are introduced which are not applicable to all the cases to which the repealed condition attached. It appears to me that the few cases in which the circumstances can be similar to the present were not in the contemplation of the legislature, when it enacted the recent County Courts Act; and I think it better to say so than to put a construction on the statute which may create an embarrassing precedent on other occasions. I think, therefore, that our judgment should be for the plaintiff.

Rule discharged.

IN THE QUEEN'S BENCH. May 13, 1869.

HARROWER AND OTHERS v. HUTCHINSON.

38 L. J. Q.B. 185; L. R. 4 Q.B. 523; 20 L. T. 556; 17 W. R. 731: reversed, [1870] E. R. A.; 39 L. J. Q.B. 229; L. R. 5 Q.B. 584; 22 L. T. 684 (Ex. Ch.).

Marine Insurance—Policy—Concealment—Deviation—"Port of Loading."

MARINE INSURANCE. G.—*The plaintiffs, the owners of the ship M, on January* 11, 1862, *effected an insurance, by which they insured, lost or not lost, the cargo on board the ship "at and from Buenos Ayres, and port or ports of loading in the province of Buenos Ayres, to port or ports of call and/or discharge in the United Kingdom," &c. The policy was underwritten by the defendant. On November* 7, 1861, *the ship was at Buenos Ayres, and the agents of the owners entered into a contract for a cargo of bones and bone-ash to be shipped at*

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L. On November 13, *the captain, who was one of the plaintiffs, wrote to the other plaintiffs at Glasgow giving an account of L. A letter of the same date was also written by the agents to the plaintiffs at Glasgow, containing statements about L. and as to the cargo to be loaded there. L. is a place situate on the coast and in the province of Buenos Ayres. It has no artificial port or mole, but merely a "salader" or slaughter-house and a wooden jetty or pier. Vessels calling there anchor about a quarter of a mile from the shore in the roadstead, which is protected by natural headlands on either side, which form a kind of bay. In* 1861, *L. was a place unknown to underwriters. The plaintiffs in Glasgow endeavoured to effect a policy with E. & Co., from Buenos Ayres to L, but, owing to the high premiums demanded by E. & Co., the negotiation fell through. The premium charged by the underwriters was at the rate usually charged at that time for the same kind of cargo from Buenos Ayres direct to the United Kingdom; and if information had been given that the ship had been going to load at L, underwriters would have required a higher premium than that charged for this insurance. By the local laws, ships loading at L. are obliged to return to Buenos Ayres to clear for the United Kingdom. The underwriters were not aware of this regulation. The ship loaded part of her cargo at Buenos Ayres and then sailed for L, where she remained for twenty-six days, during which time she only loaded sixteen tons of cargo. The contract for the whole cargo was not completed, and she was obliged to start for Buenos Ayres to complete her cargo there for England. On her way to Buenos Ayres she was wrecked:*—Held, *in an action upon the policy, first, that L. was a "port" within the meaning of the policy. Secondly, that the policy was not avoided by reason of the concealment from the underwriters of the facts contained in the letters of November* 13 *as to the ship being to load at L, and as to the nature of the place. Thirdly, that there was no such deviation as would avoid the policy by reason of the ship going from Buenos Ayres to L, staying there and then sailing for Buenos Ayres.*

This was an action to recover the sum of 18*l.*, part of a sum of 40*l.*, on a policy of insurance, subscribed by the defendant, on bones and bone-ash, per "*Matanzas*," lost by perils of the sea.

The declaration stated, amongst other things, that the plaintiffs, by Alexander Kay & Co., their agents, caused to be made a policy of insurance, by which they insured, lost or not lost, at and from Buenos Ayres and port or ports of loading in the province of Buenos Ayres, to port or ports of call and/or of discharge in the United Kingdom, bones and bone-ash, valued at 2,000*l.*, in the ship "*Matanzas*," beginning the adventure on the said goods from the loading thereof on board the said ship as above, including all risks of craft and lighters, and so to continue until arrived as above, and the said goods should be discharged and safely landed; and it was declared to be lawful for the said ship, on the said voyage, to proceed and sail to and touch and stay at any ports or places whatsoever without prejudice to the said insurance; and touching the adventures and perils which the assurers took upon themselves in that voyage, there were, amongst others, barratry by master and mariners, and all other perils, losses and misfortunes which had or should come to the detriment or damage of the said goods; and that the defendant subscribed a policy for the insurance of 40*l.* on the said goods in the said ship on the said voyage. That the goods were shipped and the plaintiffs interested therein, and the ship sailed on the said voyage with the goods on board, and whilst proceeding on the said voyage, and during the continuance of the said risk, the said goods were by the perils insured against wholly lost, and the defendant became liable to pay the 40*l.*, but had not paid it.

The declaration also contained a count for money received by the defendant for use of the plaintiffs, and for money found to be due on accounts stated.

Pleas—First, as to the first count, that the defendant did not subscribe the policy or become insurer; secondly, that the goods were not loaded at Buenos Ayres nor any port of ports of loading in the province of Buenos Ayres; thirdly,

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that the ship did not sail with the goods on board on the insured voyage from Buenos Ayres or any port or ports of loading in the province of Buenos Ayres; fourthly, that after commencement of the risk and before the loss, the ship, without sufficient cause, deviated from the voyage; fifthly, that the goods were not lost by the perils insured against; sixthly, that certain material facts, which the plaintiffs and their agents knew, but of which the defendant was ignorant, were wrongfully concealed; seventhly, to the residue of the declaration, never indebted.

Issues thereon.

Particulars of the fourth and sixth pleas.—The following particulars of the deviation and concealment relied upon by the defendant were delivered pursuant to the order of Lush, J.

The deviation, on which the defendant will rely in support of his plea of deviation herein, is the deviation arising from the vessel insured going from Buenos Ayres to Laguna de los Padres, staying at the latter place, and returning to Buenos Ayres, the original port of departure, and staying there. The concealment on which the defendant will rely in support of the plea of concealment herein is the concealment of the fact of two letters having been received by the plaintiffs, or some of them or their agents, from Captain Harrower, the master of the said vessel, and from Messrs. Barbour, Barclay & Co., the agents of the said ship, which said two letters are dated on or about November 13, 1861, and the concealment of the several facts and statements contained and communicated in the said two letters.

A SPECIAL CASE was stated, which was substantially as follows:

1. The plaintiffs were, in 1861, the owners of the British ship "*Matanzas*," of 325 tons registered measurement; the plaintiff Harrower was the master of the vessel.

2. The plaintiffs, other than Harrower, were in partnership in Glasgow, under the style or firm of Gray & Buchanan.

3. In November, 1861, the "*Matanzas*," under the command of the plaintiff Harrower, was at Buenos Ayres on the look out for a cargo for her homeward journey to England; Messrs. Barbour, Barclay & Co., of Buenos Ayres, were the agents for the ship and for the plaintiffs.

4. The "*Matanzas*" took in at Buenos Ayres 245 tons of bone and bone-ash; and on November 7, 1861, Messrs. Barbour & Co. entered into a contract for the sale to the plaintiffs, of a cargo of bones and bone-ash with Messrs. O'Shea & Co., the agents in Buenos Ayres of the *salader* (or slaughterhouse) of Laguna de los Padres.

5. On November 13, the plaintiff Harrower wrote to the other plaintiffs, Gray & Buchanan, the following letters:—

"Barque '*Matanzas*,'

"Buenos Ayres, November 13, 1861.

"Messrs. Gray & Buchanan, 7 Princes Square, Glasgow.

"Dear Sirs,—Since I last wrote you, we have got clear of all our outward cargo, with the exception of just as much as will stiffen her, of coals and iron, until we receive on board bones enough, as we have now commenced to load on ship's account, and trust it may turn out well. I will receive as much as will ballast me here, and then proceed down to a place called Laguna de los Padres, which lays about latitude 38° south, near Cape Corrientes. It is rather open to the east and north-east; but these winds are not dreaded at this season, and having ground tackle for a ship of 600 tons, I apprehend no danger from all inquiries I have made. I merely mention this in case they should claim a heavy premium for insurance. If they should, I would not hesitate to take a small part of the risk myself; but this I will leave to your judgment. I mean the time we are anchored there, and Messrs. Barbour, Barclay & Co. could keep you informed of our sailing; the passage can be done at a cheap rate. You will please to have orders lodged for me at Cork, or rather Queenstown, and, I think, Scilly and Falmouth, in case the winds might not enable me to reach Cork. I am not aware if there is any telegraph communication between Scilly and the

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mainland or not. I expect our cargo will be about 500 tons or thereabouts, 300 to 350 tons ash, and the rest bones, which will be very suitable for the Clyde, as far as I can learn. I shall write you from that place, I hope, when I complete my loading. We have to give them thirty running days to load, and the bone-ash will cost alongside about 2*l.* 5*s.* per ton. I hope by the next mail to be in a more forward state. I am, dear Sirs, your most obedient servant, David Harrower."

On the same day Messrs. Barbour & Co. wrote to the plaintiffs Gray & Buchanan the following letter:

"Buenos Ayres, November 13, 1861.
"Per '*Diligente*.'

"Messrs. Gray & Buchanan, Glasgow.

"Dear Sirs,—We have this pleasure on 26th ult., since which we are without any of your valued favours. Captain Harrower will advise you by this steamer that he has decided to load bones and bone-ash on owners' account here and at the 'Laguna de los Padres.' Our last would inform you this was one of the courses open to him. He would have preferred to load for Liverpool or London, but the quantity of exportable produce at present on sale is so small, and the season so late, that he was afraid to risk the delay and detention that seemed unavoidable. He was also unwilling to venture on account of his being rather late for the Mantrues. A Liverpool vessel now in port went there last year about this time, losing about half the mules, and getting only about 10*l.* each for the remainder. This inclined him to prefer loading bones and ash here, and the cargo at the 'Laguna de los Padres' being the only one on sale, we secured it for him. The letters limit themselves to ship 350 to 380 tons bones and bone-ash, and we propose ballasting him by putting 200 to 250 tons bones and ash on board here. She has now commenced to load, and we hope to send her off in a few days. If the sellers of the ash can procure salt afloat, they propose giving from 100 to 150 tons to take down, for which they will pay him a small freight. For your guidance in arranging the insurance we may mention that the 'Laguna de los Padres' is in latitude 38 deg. south; the place is open to the north-east, but in summer the winds from that quarter are usually moderate. The anchorage is very good, and there are two vessels, from 250 to 300 tons, trading regularly between it and this place. We are informed that they anchor usually in 3½ fathoms, which seems to indicate that the swell is not so very heavy. The port may be new to your underwriters, and on this account they may be disposed to ask a rather high premium. If it should be so you might find it suitable only to cover part of the vessel and cargo during her stay there, effecting insurance on the remainder as soon as she sailed; it would be fully cheaper than from this. In case you should think of this we will be careful to advise when she sails. You will observe, from the copy of contract we inclose, that the ash is to be delivered alongside, so that the risk between the shore and the vessel belongs properly to the sellers. We will do all we can to ensure proper weight, &c., and if possible the writer will go down to see the loading properly commenced. Without further to add, we are, dear Sirs, yours faithfully,

(Signed) "Barbour, Barclay & Co.

"Incloses—Duplicate of our last. Copy contract."

7. The aforesaid letters respectively arrived in Glasgow, and were received by the plaintiffs Gray & Buchanan on December 21, 1861.

8. The plaintiffs Gray & Buchanan applied to Messrs. North, Ewing & Co., brokers in Liverpool, to effect a policy on the cargo and freight of the "*Matanzas*," but owing to the premium required by them the negotiations fell through. The correspondence between the plaintiffs Gray & Buchanan and North, Ewing & Co. is marked "B. Nos. 1, 2, 3." in the appendix (see page 190).

9. The plaintiffs Gray & Buchanan having been informed by Messrs. James Finlay & Co., of Glasgow and Liverpool, merchants, that they could get the insurance effected, requested them to do so, and Messrs. J. Finlay & Co. placed the matter in the hands of Messrs. Alexander Kay & Co., of Glasgow, their brokers, for that purpose.

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Messrs. Alexander Kay & Co. entered into negotiations with Messrs. Campbell, Cross & Co., of Liverpool, brokers. The correspondence between Alexander Kay & Co. and Campbell & Co., which is contained in the appendix to this case (see page 190), and marked " B. Nos. 4 to 13 inclusive," and which is to form part of this case, shews what passed between the parties.

11. Eventually, Alexander Kay & Co., as agents of the plaintiffs, effected, on January 3, 1862, through Messrs. Campbell, Cross & Co., a policy on the cargo, which was the policy sued on in this action. They also effected a policy on the freight. This policy was subscribed by the defendant on the day of the date thereof, for the sum of 40*l.*, and the interest of the plaintiffs in the cargo shipped is admitted by the defendant.

12. The letters of November 13, 1861, respectively were not, nor was the fact that the vessel was to load at " Laguna de los Padres," or that it was known to the plaintiffs at what port the vessel was going to load, communicated to Messrs. Campbell & Co. nor to the defendant. And the said Messrs. Campbell & Co. and the defendant were, until some time after the effecting of the policy, ignorant of the aforesaid letters having been written and also of the other facts referred to in this paragraph of the case.

13. At the time the policy was effected, the premium charged by the underwriters on the policy in question was at the rate usually charged by them at that time for insurances on bones and bone-ash from Buenos Ayres direct to the United Kingdom.

14. Laguna de los Padres was, in 1861, unknown to underwriters as a place of loading, and if underwriters on a policy like the policy sued on had been informed that the vessel was going to load there, they would have required a higher premium than that charged for the insurance in question.

15. In the beginning of December, 1861, the " *Matanzas* " being ready to sail to Laguna de los Padres, the plaintiff Harrower applied to the Argentine Customs, the proper officials, for permission to clear and pay the dues at Buenos Ayres for his cargo on board and to be shipped at Laguna, that the vessel might sail straight to England from Laguna de los Padres. This was refused as being contrary to the Customs laws of the country, as vessels sailing outwards from Laguna de los Padres are by the local laws compelled to return to Buenos Ayres to clear.

16. Numerous and influential applications were made by Messrs. Barbour & Co., and at their request to the Argentine government officials for this permission, but the only concession that could be obtained was that the vessel might sail to Laguna de los Padres, without clearing, upon sureties giving bond to government for her return from that place to Buenos Ayres to clear and pay dues, and also that no other than the specified cargo should be taken on board. The underwriters were not acquainted with the laws and regulations of the Customs at Buenos Ayres, nor were they aware, when the policy was effected, of the difficulties in which the ship was placed in respect to her clearance.

17. On December 13, 1861, a bond was accordingly given in that behalf by Messrs. Lamez Brothers, on behalf of the said owners and the plaintiffs.

19. These formalities having been duly completed, the " *Matanzas* " sailed from Buenos Ayres to Laguna de los Padres, intending to return from thence to Buenos Ayres and to proceed to England, and she arrived at Laguna de los Padres on or about December 18.

20. Laguna de los Padres is situate on the coast and in the province of Buenos Ayres, in about latitude 38° south, near to Cape Corrientes. There is no artificial port or mole, but merely a " salader " (or slaughter-house) and a wooden jetty or pier. There is a small village occupied by the people at work at the salader " and others. The place is rather open to the east and north-east. The roadstead is protected by natural headlands on either side, which form a kind of bay. Vessels calling there have to anchor about a quarter of a mile from the shore in the roadstead, and load and unload by means of lighters and small craft belonging to the saladers and others in the place, which ply between the vessels and the jetty. There is a resident government magistrate

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at Laguna. The chief exports of the place are hides and bones and bone-ashes. There is a regular trade between Buenos Ayres and Laguna de los Padres, but not between the latter place and Europe.

21. The "*Matanzas*" lay in Laguna de los Padres for twenty-six days, during which time she took in eighty bags or sixteen tons of bone-ash only. A difference having arisen between the proprietors of the salader, and the plaintiff Harrower, as to the cargo and contract, a sum of 160*l.* was paid by the former to the latter in lieu of the contract being completed.

22. On January 15, 1862, the "*Matanzas*" sailed from Laguna de los Padres for Buenos Ayres in pursuance of the aforesaid bond and legal obligation imposed by the Argentine Customs laws, and to complete her cargo for England.

23. On January 16, 1862, the "*Matanzas*" was wrecked off Cape San Antonio in the open seas, on her way to Buenos Ayres as aforesaid, and the cargo on board, viz., 261 tons 15 cwt., was totally lost.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover against the defendant on the policy sued on.

If the Court was of opinion in the affirmative, then judgment was to be entered for the plaintiff for the sum of 18*l.* If the Court should be of the contrary opinion, then judgment was to be entered for the defendant.

The following documents were set out with others in an appendix.

"A. No. 3.

"Buenos Ayres, December 13, 1861.

"To the General Collector.

"Having obtained permission for the English barque '*Matanzas*' to proceed to her voyage to the port of Laguna de los Padres with the object of completing her cargo of ash and bones, and it being necessary to give bond to the Customs House for the return of the said vessel to this port to pay duties and clear, we hereby offer Messrs. Lamez Brothers as sureties, the said parties being agreed.

(Signed) "Barbour, Barclay & Co.
"Lamez Brothers."

"B. No. 1.

"Correspondence.

"Glasgow, December 24, 1861.

"Gray, Buchanan & Co. to North, Ewing & Co.

"At what rates could you insure the hull, cargo and freight of our barque '*Matanzas*,' at and from Buenos Ayres to Laguna de los Padres, near Cape Corrientes, and thence to a port of call, and for discharge in the United Kingdom. Captain Harrower, who is a thoroughly experienced man, has, with our consent, purchased a cargo of bones and bone-ash upon ship's account. She is to load sufficient to ballast at Buenos Ayres, and proceed to Laguna de los Padres to finish her loading. We are informed there are vessels of 250 to 300 tons trading regularly between that port and Buenos Ayres, so that there is little, if any, danger more than the direct passage. The captain, who is part-owner, writes us that having tackling for a ship of 600 tons, he is willing to run the risk of the port as there is no danger."

"B. No. 2.

"Liverpool, December 26, 1861.

"North, Ewing & Co. to Gray & Buchanan.

"The rate by the '*Matanzas*' would be 5 gs. ship freight, and 4 gs. cargo."

"B. No. 3.

"Glasgow, December 27, 1861.

"Gray & Buchanan to North, Ewing & Co.

"We have your letter of yesterday; the premium per '*Matanzas*' we think high, and will do nothing till beginning of next month."

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"B. No. 4.

"Royal Exchange, Glasgow, December 31, 1861.

"Messrs. Campbell, Cross & Co.

"Dear Sirs,—Please open a policy for 3,000*l.* on bone and bone-ash, valued at as invoice or invoices, adding thereto 10*l.* per cent. for charges, &c., warranted free of average, unless general, or the ship be stranded, sunk or burnt, per '*Matanzas*' (No. 672 in Lloyd's Register, and see supplement No. 2), at and from Buenos Ayres, and port or ports of loading in the province of Buenos Ayres, to port and ports of call, and for discharge in the United Kingdom, with risk of boats and craft in loading; premium at or under 40*s.* per cent., free from war risk, but including general average by foreign statement, if so made up. Our friends expect that the '*Matanzas*' will be loading about now, and sail in all January.—We are yours truly,

"ALEX. KAY & Co."

"Liverpool.

"Since wording the foregoing we have learnt from our friends that the '*Matanzas*' commenced loading on November 13, and may be expected to sail in all December. You will observe that D. Harrower is the master, long in the employ of Messrs. Jas. Ewing & Co., and recently in that of Messrs. Sterling, Gordon & Co. The '*Matanzas*' is chiefly owned by Captain Harrower.

"A. KAY & Co."

"If to-morrow is an inconvenient day for the above, Thursday or Friday will do.

"A. K. & Co."

"B. No. 5.

"January 1, 1862.

"Messrs. Kay & Co., Glasgow.

"Dear Sirs,—We are favoured with yours of yesterday, and have covered 2,500*l.*, per '*Matanzas*,' at your limit of 40s. %. The remaining 500*l.* we hope to be able to do to-morrow. We shall feel obliged if you could give us by return the respective proportion of bone and bone-ash, and also if you could give us a warranty in the policy against the west coast.—Yours faithfully,

"CAMPBELL, CROSS & Co.

"Copy, per '*Myrtle*,' inclosed for 17,965*l.*"

"B. No. 6.

"January 2, 1862.

"Messrs. Alex. Kay & Co., Glasgow.

"Dear Sirs,—We have to-day completed your order for *Matanzas*, for 3,000*l.* on bone and bone-ash, at your limit of 40*s.* per cent.—Yours faithfully,

"CAMPBELL, CROSS & Co."

"B. No. 7.

"Royal Exchange, Glasgow, January 2, 1862.

"Dear Sirs,—We are in receipt of your favour of the 1st inst. As the shipping documents, per '*Matanzas*,' are not yet come to hand, the assured is unable to state the respective proportions of bone and bone-ash. But, generally speaking, vessels of similar class are loaded with half bones and the remaining one-half bone-ash. We regret our inability to give warranty or representation in the policy against the west coast. Without representing the probabilities of either east or west coast of United Kingdom we may state that the present impression on the mind of the assured is that either Clyde or Liverpool will be the discharging port. As the '*Matanzas*' belongs to the former every effort will be made by owners to induce the consignees to send the vessel to Clyde. On analyzing the 3,000*l.* we find the assured have valued on wrong principles, having included in the bone and bone-ash the value of freight,

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which, per contract, is payable here on delivery of the cargo. The policy for 3,000*l.*, therefore, divide as follows:

Bone and bone-ash, valued at	£2,000
Freight (including collision clause)	1,000
	£3,000

Valued at and under separate copy of policy for each interest.—We are, yours truly,

"ALEX. KAY & Co."
"Liverpool.

"We do not understand why you ask a warranty against the west coast. We presume you mean against the east coast.

"A. K. & Co."

"B. No. 8.

"January 3, 1862.

"Messrs. Alex. Kay & Co., Glasgow.

"Dear Sirs,—We have yours of yesterday, and beg to hand you inclosed copy policies for '*Matanzas*,' viz., 2,000*l.* on bone and bone-ash, and 1,000*l.* on freight. In asking for warranty in the policy we of course meant east coast.—Yours faithfully,

"CAMPBELL, CROSS & Co."

"B. No. 9.

"January 4, 1862.

"Messrs. Campbell, Cross & Co., Liverpool.

"Dear Sirs,—We are favoured with yours of the 3rd inst., inclosing copies of policies for 2,000*l.* on bone and bone-ash, and 1,000*l.* on freight, per '*Matanzas*,' from Buenos Ayres to United Kingdom; but on looking over them we find you have omitted to insert words 'or port or ports of loading in the province of Buenos Ayres' as ordered in ours of 31st ult. We, therefore, return the copies in order that you may have them duly corrected and sent back to us.—We are, dear Sirs, yours truly,

"ALEX. KAY & Co."

"B. No. 10.

"January 6, 1862.

"Messrs. Alex. Kay & Co., Glasgow.

"Dear Sirs,—We have yours of yesterday. I hope to send you corrected copy policy, per '*Matanzas*,' to-morrow. We have not time to-day to get it passed through all the brokers. We regret that the omission should have been made, and remain, dear Sirs, yours faithfully,

"CAMPBELL, CROSS & Co."

"B. No. 11.

"January 8, 1862.

"Messrs. Kay & Co., Glasgow.

"Dear Sirs,—We have yours of yesterday, and beg to hand you inclosed policy, per '*Dolphin*,' which we trust may be found in order.—We are, dear Sirs, your faithfully,

"CAMPBELL, CROSS & Co."

"Also corrected copies, per '*Matanzas*,' inclosed."

"B. No. 12.

"Royal Exchange, Glasgow, January 10, 1862.

"Messrs. Campbell, Cross & Co., Liverpool.

"Dear Sirs,—We are favoured with yours of the 8th inst. forwarding copies of policies per '*Matanzas*.' We regret again to trouble you with this matter, but the assured have returned the copies to us, in order to have the voyage worded as follows, as was ordered in ours of the 31st ult., say, 'at and from

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Buenos Ayres, and port or ports of loading in the province of Buenos Ayres to port or ports of call and/or discharge in the United Kingdom.' Please get the word *and* substituted for *or*, which latter inadvertently advised in ours of 4th inst and oblige yours truly,

"ALEX. KAY & Co."

"B. No. 13.

"January 11, 1862.

"Messrs. A. Kay & Co., Glasgow.

"Dear Sirs,—We are in receipt of your favour yesterday, and have substituted the word 'and' for 'or' in policies per '*Matanzas*,' agreeably to your wishes.—We are, dear Sirs, yours truly,

"CAMPBELL, CROSS & Co."

On July 16, 1862, Messrs. Kay & Co. wrote to Messrs. Campbell & Co. a letter, which contained the following:

"B. No. 24.

"We have received your favour of yesterday containing three additional queries as to the insurance per '*Matanzas*,' and which we will answer in order. 1st, Mr. Muir, of Messrs. James, Finlay & Co., we are sure did name to us Laguna de los Padres as the probable port of lading, but never having heard of that place before, and being assured by Mr. Muir that it was in the province of Buenos Ayres, we suggested, in case of mistake, to word the policy in as general terms as possible, and hence in giving the order for insurance we said Buenos Ayres and port or ports in the province of Buenos Ayres.

(Signed) "ALEX. KAY & Co."

"C. No. 8.

"Barque '*Matanzas*,'

"Roadstead of Laguna de los Padres.

"January 5, 1862.

"Messrs. Gray & Buchanan, 7, Princes Square, Glasgow.

"Gentlemen,—You will, no doubt, be anxious to hear of our whereabouts, and what we are doing. Messrs. Barbour, Barclay & Co. would inform of our troubles and difficulties with the Custom House before we left Buenos Ayres, and where we were detained a fortnight; everything at first was held out to me in such favourable light that I had no doubt of its being a good thing. I left Buenos Ayres on December 14, and arrived here on the 19th, after a passage of four days, and had some bad weather coming down. We anchored here with about 50 fathoms, and on the third day after our arrival our chain parted and lost the anchor, with 45 fathoms of cable. I very fortunately happened to be on deck at the time, and let go the other anchor just in time to save her, and rode out some very heavy weather in shoal water, and we were about eight days trying and watching any opportunity to get further out, and also to grapple for our lost anchor, in which I am happy to say we at last succeeded, and are now moored in safety. It is a most abominable place, for we carried away the stock of our spare anchor, which we had to use also, after we lost the one upon a foul bottom. And I regret very much to say we have not taken in a pound of cargo since we have been here, yet, in fact, there has only been one working day with the shore since I arrived, and that was fully occupied by the other vessel that was here, and now she is finished loading, and unless the weather gets more favourable, it is hard to say when we will get away from this place. It has been a bad undertaking, to say the least of it, and very ill-advised. I have only been on shore three times since I have been here, for she very often gets swamped in the surf. No doubt Messrs. Barbour, Barclay & Co. would inform you of the quantity of bones and ash we had on board when we left Buenos Ayres, which was 90 tons of ash and 155 tons of bones, making in all 245 tons. I must close in haste, as this goes by the vessel bound to Buenos Ayres.—I am, gentlemen, yours truly,

"DAVID HARROWER."

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"C. No. 14.

"Ingleses, January 19, /62.

"Messrs. Gray & Buchanan.

"Gentlemen,—I am sorry to inform you of the loss of the '*Matanzas*' on the night of the 16th inst., in lat. 36° 36' south; the current had been running at a fearful rate. I fully expected I was twenty miles a-head of where I unfortunately found myself. The lead was kept regularly going, and every attention paid to the course. I tried to get her on the tack, but she refused stays, and the anchor was immediately ordered to be let go, but some precious time was lost by the fore tack getting foul of it, and after it was let go, she drove and struck most fearfully, and would very soon have gone to pieces had she not gone farther on shore. I was on my passage up to Buenos Ayres to fill up, as I had been there for twenty-six days, and had not the smallest chance of getting loaded. I came to an agreement with the gentlemen to pay me 160*l.* and close the bargain. I wrote you from Laguna de los Padres stating the quantity we had on board, and which I trust you had covered, and also the vessel; for in the desert spot, in which the vessel is wrecked, it will be a difficult matter to get anything at all for her; however, we are watching our chance to get everything saved we possibly can. This goes by the same messenger I am despatching to Buenos Ayres to report the loss to Messrs. Barbour, Barclay & Co. I have shelter at present at Mr. Gibson's Estancia los Ingleses, about three or four leagues back from the coast where the wreck is.—I am, gentlemen, your most obedient servant,

"DAVID HARROWER."

In another letter written by the captain to Messrs. Gray & Buchanan, dated February 13, 1862, the following passage occurred:

"I had two charts of the coast on board, one of Capt. FitzRoy's, date 1840, and the other the River Plate Survey by order of the Spanish Government, with additions up to 1852, and found a difference of six miles of longitude. I could not determine which was correct, but adopted the middle, half way between the two, &c.—I am, gentlemen, your most obedient servant,

"DAVID HARROWER."

Milward (*Baylis* with him), for the plaintiffs.—The short point to be determined in this case is, whether Laguna de los Padres is a "port" or not. It is submitted that it is. The 20th paragraph of the special case gives a description of it, and although there is no artificial port, there is a jetty or pier, a roadstead protected by natural headlands, a resident government magistrate, and it is stated that vessels load and unload there. It follows, then, that it is a "port" within the meaning of the policy. The letter of November 13, written by the captain, shews that he apprehended no danger from going there to load a cargo. The letter of the same date, written to the plaintiffs Gray & Buchanan, also gave information as to the whereabouts of Laguna de los Padres. The captain had a right to go there to load, but as it turned out he could only get 16 tons, and he then sailed for Buenos Ayres, and the vessel was wrecked on the passage, the cargo being totally lost. The attention of the underwriters was called to the necessity of wording the policy "at and from Buenos Ayres, and port or ports of loading in the province of Buenos Ayres, to port or ports of call and/or discharge in the United Kingdom." The captain had therefore a right to go from port to port. The place is called a "port" officially—see the document dated December 13, 1861. It is as much a port as Buenos Ayres is—see *Cockey* v. *Atkinson* (2 B. & Ald. 460); *Brown* v. *Tierney* (1 Taunt. 517); *Jarman* v. *Coape* (2 Campb. 615); *The Sea Insurance Company of Scotland* v. *Gavin* (2 Dow. & Cl. 129). Further, it is submitted that as the underwriter has taken the risk, he cannot now say that, although geographically it is a port, it is not so within the meaning of the policy. There was no intentional concealment, nor was there any fraud.

Cohen, for the defendant.—The plaintiffs are not entitled to recover. First, there was a concealment, which invalidates the policy. The assured ought to

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have informed the underwriter of the place to which the ship was bound, and also to have told him what sort of a place it was. The letter of the captain, written on November 13, speaks of it as a "place" called Laguna de los Padres, and the letter of Barbour & Co. of the same date says, that "it may be new to your underwriters." It is clear that, if the information had been given, the insurance could not have been effected at so low a rate. Par. 8. shews that an insurance at such a rate could not be effected with North, Ewing & Co., to whom the information was given. They demanded double the premium which the plaintiffs were to pay to the defendant. The two letters of November 13 ought to have been communicated, as Laguna de los Padres was unknown to underwriters in 1861—see par. 14. How can it be contended that such a concealment is not material? In *Arnould on Marine Insurance* (edit. by Maclachlan), 520, it is said, "Concealment in the law of insurance is the suppression of a material fact within the knowledge of the assured, which the underwriter has not the means of knowing, or is not presumed to know. A material fact in this connection is one which, if communicated to the underwriter, would induce him either to refuse the risk altogether, or not to accept it but at a higher premium"—see also 2 *Duer on Marine Insurance*, 382. It is not necessary that there should have been any fraud—*Proudfoot* v. *Montefiori* (36 L. J. Q.B. 225; L. R. 2 Q.B. 511), in which case the authorities on this subject are referred to.

[LUSH, J.—Suppose the name of the place is communicated, but the assured does not disclose the fact, which he knows, though the underwriter does not, that it was a very dangerous place, would that avoid the policy?]

Perhaps not. The maxim *Caveat emptor* might be held to apply. But if a ship is allowed by the policy to go to a number of ports, and the assured knows that she is intended to go to one particular port, and that that port is particularly dangerous, he ought to communicate it, and, if he does not, the policy will be avoided, for the underwriter, in calculating the premium, which the assured must pay, takes the average risk of all the places mentioned, one safe, another dangerous, and so on, but the premium would be higher if the ship was intended to go to the one particular port which was dangerous. Indeed, all material facts known to the assured ought to be communicated—see *Bates* v. *Hewitt* (36 L. J. Q.B. 282; L. R. 2 Q.B. 595). It is impossible to measure the dangers of an unknown port. This place was new and without means of loading the ship.

[HANNEN, J., referred to *Middlewood* v. *Blakes* (7 Term Rep. 162).]

That case is in favour of the defendants, as shewing that the underwriter has a right to expect that the captain would be allowed to exercise his discretion as to which of the three courses he would pursue. *Lynch* v. *Hamilton* (3 Taunt. 37) shews that the assured is bound to disclose to the underwriter any information which he has, which might affect his choice whether he would insure at all, or as to what premium he would demand, and even if the information was not true. But, further, it may be well contended that the assured is guilty of a gross fraud, if there are a number of places to which the ship may go, and he does not inform the underwriter that the ship is intended to go to one particular place, and which place is a very dangerous one. To the mind of an underwriter any port which is new to him is a dangerous port.

[HANNEN, J.—But ought not the words used in the policy to have brought home to his mind that the ship might go to some port which was unknown to him? LUSH, J.—Do not the words "port or ports of loading in the province of Buenos Ayres" include any port within the province, although it may be unknown to the underwriter?]

No; he could not have intended to insure the ship for a voyage to a port which he did not know. This was a concealment within *Bates* v. *Hewitt* (36 L. J. Q.B. 282; L. R. 2 Q.B. 595).

[LUSH, J.—You must read the judgment in that case as being given under the very peculiar facts proved.]

He also referred on this point to *Furtado* v. *Rogers* (3 Bos. & P. 191) and

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to *Russell* v. *Thornton* (4 Hurls. & N. 788; 29 L. J. Ex. 9: in error, 6 Hurls. & N. 140; 30 L. J. Ex. 69). The letter of January 5, 1862, shews what a dangerous place Laguna de los Padres is. The ship could not load her cargo, and she was lost on her passage to Buenos Ayres to fill up there—see letter of January 19, 1862. The letter of February 13, 1862, shews that the voyage was of a most dangerous character; and it is submitted that the following passage in *Duer on Marine Insurance*, 403, clearly applies: "The information possessed by the assured may not be material in itself, separately considered, yet may be of such a character that it would probably lead to further inquiries on the part of the underwriter, and if the result of the inquiry would shew the information to be material, it must be communicated. Its concealment, whether fraudulent or innocent, will vitiate the insurance. So the communication of a fact, otherwise unimportant, may be rendered material and necessary, by its connexion with other facts or intelligence already known or presumed to be known to the underwriter. See also *Bridges* v. *Hunter* (1 Moore & Sc. 15) and *Arnould on Marine Insurance*, 523.

[HANNEN, J.—Suppose a cargo is intended to be insured, and it is of new character, unknown to underwriters, must the character be communicated?]

Yes, if it was of such a character as to produce greater danger than usual. Two questions arise in all such cases: first, does the policy cover the risk? secondly, has there been the concealment of a fact which is material?

Next, even if this place was geographically a "port" within the province of Buenos Ayres, it is submitted that it was not a port within the meaning of the policy. The ship has deviated from the terms of the policy; she was not entitled to go to Laguna de los Padres, a place from which she was not able to take her departure for home. The port intended was a port from which she could clear. But she could not clear from Laguna de los Padres. Next, the policy does not cover a voyage to an unknown port.

[HANNEN, J.—Surely the underwriter must be supposed to know that there might be some ports there which he did not know of.]

Baylis, in reply, referred to *Foley* v. *Tabor* (2 Fost. & F. 663) and *Ashby* v. *Pratt* (16 Mee. & W. 471; 17 L. J. Ex. 135: in error, 1 Ex. Rep. 257).

LUSH, J.—In this case I am of opinion that our judgment should be for the plaintiffs. The policy is effected on goods at and from Buenos Ayres and port or ports of loading in the province of Buenos Ayres to port or ports of call and/or of discharge in the United Kingdom. The first question is, whether the place, Laguna de los Padres, to which the vessel went for the purpose of taking in her cargo, and where she took in part of her cargo, was a "port of loading" within the meaning of the policy? If it was not, of course the going there was a deviation, and the underwriters are absolved from all liability. Now, on looking at the words, I think "ports" must be read in a liberal sense, not merely as meaning those places which are technically and properly called "ports," but all places to which ships are accustomed to resort for the purpose of taking in cargo. Mr. Cohen's contention is, that inasmuch as the policy contemplates that the vessel would be going direct from the port of loading to a port of discharge, and inasmuch as by the regulations of the province, a vessel taking in a full cargo at this place, would not have been permitted to go direct from there across the ocean, but must have gone to Buenos Ayres in order to get a clearance—that, on that account, this place cannot be a "port of loading" within the meaning of the policy. I do not think that argument is well founded. The question whether it is a port of loading is entirely irrespective of whether by the regulations of the country, a vessel can clear there for this country. That must depend, I think, on other considerations. The definition that has been given of a port is that it is a place at which ships arrive for the purpose of loading their cargoes. Is this a place of that description? It is described in the 20th paragraph as being a place "situate on the coast and in the province of Buenos Ayres, in about 38° south, near to Cape Corrientes. There is no artificial port or mole, but merely a '*salader*' (or slaughter-house) and a wooden jetty or pier. There is a small village occupied

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by the people, at work at the *salader*, and others. The place is rather open to the east and north-east. The roadstead is protected by natural headlands on either side, which form a kind of bay. Vessels calling there have to anchor about a quarter of a mile from the shore, in the roadstead, and load and unload by means of lighters and small craft belonging to the *saladers* and others in the place, which ply between the vessels and the jetty. There is a resident government magistrate. The chief exports of the place are hides and bones and bone-ashes. There is a regular trade between Buenos Ayres and Laguna de los Padres, but not between the latter place and Europe." And, in the letter of November 13, which is set out in the case, we read that "the anchorage is very good, and there are two vessels, from 250 to 300 tons, trading regularly between it and this place." It thus appears to have been a place where merchandise of the description mentioned here was regularly exported, and to which vessels of the tonnage of this ship regularly go for trade; and therefore it must be taken to be a place within the contemplation of the parties—a port of loading to which the vessel was at liberty to go under this policy.

Then, the vessel having at Buenos Ayres taken in a sufficient portion of her cargo to act as ballast, she went to Laguna de los Padres with the intention, on the part of the owners, of there completing the loading of the entire cargo. They had entered into a contract by which the proprietor agreed to load the cargo. However, when they get there, they find they cannot get a complete cargo; they only get a portion of it. Having received compensation for the breach of contract, the vessel proceeds to return to Buenos Ayres for the purpose of completing her loading, and in the course of her return voyage she is lost. It is contended that that is a deviation—that the vessel deviated from her course when going back again to this same place, Buenos Ayres, to complete her loading. I cannot accede to that argument. I think the liberty to go to a port or ports of loading gave the captain permission to go to any port or ports—whether to the same place or not is immaterial—until he had completed his cargo. If he had once started on the homeward voyage, no doubt any returning back would have been a deviation. Not having done so, I think that the vessel was on the insured voyage at the time when the loss happened.

The next material contention is, that the plaintiffs have been guilty of the concealment of a material fact, in not having informed the underwriter that the vessel was destined to go to this place to take in her cargo. It is alleged and found as a fact that this particular place, Laguna de los Padres, was at the time, 1861, unknown to the underwriters as a place of loading; and that if the underwriters had been informed that the vessel was going to load there they would have required a higher premium. It is said that there was a material fact not communicated to the underwriter, and that the policy is void on account of that concealment. I would dismiss the argument as to the materiality of it, by at once saying that any matter is material which would induce the underwriter to charge a higher rate. But, is it a matter which the assured is bound to disclose, or is it one which the underwriter is bound to find out for himself? A concealment is the suppression of a material fact within the knowledge of the assured which the underwriter is not bound to know. Lord Mansfield, in *Carter* v. *Boehm* (3 Burr. 1905), says, that the assured need not mention what the underwriter ought to know,—what he takes upon himself the knowledge of. Now, taking on himself this risk, I think that he is bound to know the nature of the voyage which he has undertaken to insure, the geographical character and formation of the loading-places where he licenses the vessel to go, and all the perils arising from the ordinary state of things which appertain to that navigation. I, therefore, think that the underwriter cannot excuse himself on the ground that he was not aware that this was one of the loading-places within the province, or on the ground that he was not aware of the peculiar perils attending the navigation from Buenos Ayres to this place. That is a matter which the underwriter took on himself to know, and which the assured were not under any obligation to disclose to him. There being no such obligation, and no question asked by the underwriter of the assured, no information desired,

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no false answer given, I think that there was no concealment of any fact which it was the duty of the assured to disclose to the underwriter.

Mr. Cohen, in his very able argument, contended that, supposing the underwriter bound to know that this was one of the loading-places, and to know of its perils, still he was entitled to know that the assured intended, at the time the policy was effected, to go to this particular place. Because believing that the assured would determine, according to the exigencies of the case, whether he would go to this place or that, and thinking the chances would be that he would not go there, he chose to accept the risk at a smaller premium than he would have done if he had known that the assured had made up his mind to go to this particular place. For that the learned counsel cited *Middlewood* v. *Blakes* (7 Term Rep. 162), which, at first sight, appeared to give a sanction to that doctrine. In that case a ship was insured from London to Jamaica, and there were three tracks which a ship bound on such a voyage might take; it depended on the discretion of the master which of those three courses he would take; but in that particular voyage the asured had already given directions to the master to touch at St. Domingo, so that the discretion which the underwriter supposed he would exercise was entirely taken away; he was bound to go to that particular place. He had gone beyond the deviating point at the time the accident happened, and the Court decided, on grounds which are intelligible enough, that that was a deviation; that, whereas the voyage contemplated was a voyage which, after it had reached a given point, should branch off to the right or to the left, according as the exigencies of the navigation required, this was a voyage to St. Domingo, and the master had been deprived of that discretion which the underwriters supposed that he would exercise for their benefit. That case has no application whatever to the present; there is no deviation here.

Assuming that I am right on the first ground, viz., that this was one of the places the underwriter authorized the assured to go to, whether he determined to go there before or after the making of the policy is immaterial. It is not found, as a fact in the case, that if the underwriter had known of this place and that the assured had made up his mind to go there, that would have induced him to charge a higher rate of premium. The case speaks of what he would have done if he had known there was such a place at all; but it is nowhere stated that, supposing he had known there was such a place, he would have charged anything more for the certainty of the assured going, there, instead of for the mere chance of his going there or somewhere else. For these reasons I am of opinion that the defence entirely fails, and that the plaintiffs are entitled to our judgment.

HANNEN, J.—I am of the same opinion. I do not wish to add anything substantial to the reasons given by my Brother Lush, but merely to indicate what I take to be the governing point in the case. I think, in reference to the rule which my Brother Lush has commented upon, that it is not necessary to communicate to the underwriter those things which he must be presumed to know, and which must have reference to the particular insurance. I think that when an underwriter undertakes to insure at and from a port or ports of loading in the province of Buenos Ayres, in words as large as these, he must be presumed to know that along the coast of a whole province there may be ports of which he has no knowledge and as to which there may be particular risks. That being so, if he does not intend to limit the places by the words he uses, it is his duty to make inquiry. Undertaking by such words as these, the person with whom he contracts has a right to presume that he knows the character of the coast, and the possibility of there being some ports on it of which he has no special or even general knowledge. That being so, it follows that it was not necessary that the plaintiffs should communicate to the underwriters anything more than they did. I merely mention that as the governing point in the case. I agree with my Brother Lush, that our judgment should be for the plaintiffs.

HAYES, J.—I have had considerable doubt during the argument as to what the parties really had in their minds, when they made this insurance. At first

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it struck me very much that, when the name of this place was given as a new port, a place not known to underwriters, the omission to communicate that, was a matter of some moment, and not to be altogether lost sight of; but I am not at all prepared to differ from the opinion of my learned Brothers, that our judgment should be for the plaintiffs. The underwriter has taken on himself the risk that the assured should go to this place. I cannot help thinking that gentlemen in the position of underwriters must be taken to know something of the character of the places that are mentioned to them; and I think we should be introducing a new sort of peril into cases of this kind, if we were to sanction the notion that an underwriter is to be called upon by the assured to state what he may or may not know of the places mentioned in the policy. Upon the whole, I am of opinion that the more reasonable conclusion is the one propounded by my Brother Lush, and that our judgment should be for the plaintiffs.

Judgment for the plaintiffs.

IN THE QUEEN'S BENCH. April 21, 1869.

THE QUEEN *v.* THE CAMBRIAN RAILWAY COMPANY.

38 L. J. Q.B. 198; L. R. 4 Q.B. 320; 20 L. T. 437; 17 W. R. 667; see also, s.c. [1871] E. R. A.; 40 L. J. Q.B. 169; L. R. 6 Q.B. 422; 25 L. T. 84; 19 W. R. 1138 (Q.B.).

Lands Clauses Consolidation Act (8 *Vict. c.* 18), *s.* 35.—*Mandamus to take up Award and furnish Copy—Return that Premises "not injuriously affected within the meaning of the Lands Clauses Act."*

COMPULSORY PURCHASE.—*Mandamus, stating that the prosecutor gave notice that a ferry of which he was owner had been injuriously affected by the works of the defendants, a railway company; that both parties appointed arbitrators; that the umpire proceeded to determine the claim according to the Lands Clauses Act, and made his award. The mandamus commanded the defendants at their own expense to take up the award, and furnish a copy to the prosecutor. Return, that the ferry, and the interest of the prosecutor in it, had not been injuriously affected by the company's works, within the meaning of the Lands Clauses Act*:—Held, *on demurrer, that the return was good, as it shewed that the award would be a mere nullity, and that the company were therefore not bound to incur useless expense in taking it up.*

Mandamus, reciting that the defendants, by different Acts of Parliament, were empowered to make a certain railway, and that Griffith Owen, of Barmouth, ferryman, claimed to be the owner of, and entitled to a certain ferry, called Barmouth Ferry, being an exclusive right of ferry over a certain portion of the river or estuary at and near Barmouth, and to land passengers, goods and chattels at Penrhyn on the south side, and at two places on the north side, of the river or estuary, and that the defendants had built and completed a railway bridge, and also a bridge for foot passengers over the river, near and adjacent to the ferry. And that the prosecutor, on May 3, 1867, caused to be sent to the defendants a notice, under the Lands Clauses Consolidation Act, 1845, of his interest in the ferry, and that the same had been injuriously affected by the works, and claiming from the defendants the sum of 1,700*l.* as compensation. And that Griffith Owen, on May 31, 1867, duly appointed his arbitrator in the matter in pursuance of the provisions of the Act. And the defendants, on June 14, 1867, appointed their arbitrator, but without prejudice to their right to dispute the claim; and on July 3, 1867, the arbitrators duly appointed William Fowler, the elder, of Birmingham, their umpire in the matter; and upon the arbitrators failing to agree, it was agreed by and between the defendants and Owen that the umpire should proceed to

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hear and determine the said claim according to the provisions of the Lands Clauses Consolidation Act, 1845; and the umpire took upon himself the umpirage, and the defendants, on October 4, 1867, by attorney in that behalf, attended before the umpire, and Owen also attended by his counsel and attorney, and evidence was given in support of the claim, and it was then mutually agreed between the defendants and Owen that the umpire should make his award touching the premises on or before December 13, 1867; and that the umpire duly made his award ready to be delivered to the defendants as the promoters of the undertaking, according to the provisions of the Lands Clauses Consolidation Act, 1845, and that the defendants had wholly neglected and refused, and still neglected and refused, to take up the award of the umpire, or to deliver a copy thereof to Owen. The mandamus commanded the defendants at their own expense to take up the award or umpirage, and furnish a copy thereof to Owen.

Return, that the exclusive ferry and the interest therein of Owen had not, nor had either of them, been injuriously affected by the works, within the meaning of the Lands Clauses Consolidation Act, 1845, as alleged in the writ, and that Owen was not, and is not, under the provisions of the Act, entitled to claim or recover compensation from the defendants, as in the writ mentioned.

Demurrer, and joinder in demurrer.

Morgan Lloyd, in support of the demurrer.—The return is bad. Ever since the case of *The Queen* v. *the South Devon Railway Company* (15 Q.B. Rep. 1043; 20 L. J. Q.B. 145) it has been held that the only proper way by which a claimant is to obtain access to an award, under section 35.[1] of the Lands Clauses Act, is to apply for a mandamus directing the company to take up the award, and furnish him with a copy. It may be that in an action on the award the company may have a good defence, as the arbitration is only a valuation of the amount of injury sustained, and is not conclusive as to whether the injury affords any title to compensation. But the company are bound in the first instance to take up the award.

[COCKBURN, C.J.—Do you say that where it is conceded that the claimant has no title to compensation, so that any award in his favour would be *coram non judice* and a perfect nullity, that the company are bound to incur a useless expense by taking up the award?]

The company have chosen to go before the umpire, treating the claim of the prosecutor as a substantial one; so that they are bound to finish what they have begun by taking up the award.

LUSH, J.—It cannot be assumed that the company elected to proceed to arbitration; for if they had neglected to appoint an arbitrator, the claimant's arbitrator might have proceeded to dispose of the matter.]

It has always been customary to try the question in an action on the award.

[COCKBURN, C.J.—Your client may, if he pleases, himself take up the award, though if, as it would appear by the demurrer, he is not entitled to compensation, it is not probable that he will care to do so.]

To decide the question in its present stage is unfair to the claimant.

M'Intyre, contra, was not called on.

Per Curiam[2].—We give judgment for the defendants.

Judgment for the defendants.

(1) By the Lands Clauses Act, 8 Vict. c. 18. s. 35, "the arbitrators shall deliver their award in writing to the promoters of the undertaking, and the said promoters shall retain the same, and shall forthwith, on demand, at their own expense, furnish a copy thereof to the other party to the arbitration, and shall at all times, on demand, produce the said award, and allow the same to be inspected or examined by such party, or any person appointed by him for that purpose."

(2) Cockburn, C.J., Lush, J. and Hannen, J.

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IN THE QUEEN'S BENCH. April 24, 1869.

THE QUEEN v. THE METROPOLITAN BOARD OF WORKS.

38 L. J. Q.B. 201; L. R. 4 Q.B. 358; 10 B. & S. 391; 17 W. R. 1094.

Distinguished, *Metropolitan Board of Works* v. *McCarthy*, [1874] E. R. A.; 43 L. J. C.P. 385; L. R. 7 H.L. 243; 31 L. T. 182; 23 W. R. 115 (H.L.).

Lands Clauses Consolidation Act (8 *Vict. c.* 18), *section* 68.—*Compensation—Premises Injuriously Affected—Injury to Free Dock and to Public Right of taking Water.*

COMPULSORY PURCHASE.—*The claimants were lessees of premises about seventy yards from the river Thames. At these premises they carried on the business of potters, and required in the course of their business a regular supply of water and sand. It appeared that the public had enjoyed from time immemorial a right of way to a part of the bank of the river nearly opposite these premises for the purpose of dipping and taking water from the river. It also appeared that lower down the river there was a free public draw-dock, where the public had been in the habit of taking carts for the purpose of loading and unloading barges. This dock had a direct communication with the claimants' premises by streets. The Metropolitan Board of Works, in the exercise of their statutory powers, constructed works in front of the spot where the public had the right of taking water, and thereby temporarily obstructed this right. The Board also interfered with the hard or landing-place at the dock, so that it was not possible to unload so many barges there as before. No part of the claimants' premises was touched or taken by the Board. A jury, summoned under the Lands Clauses Act, having assessed compensation to the claimants for injury to their premises first, for the obstruction to the right of taking water; secondly, for the difficulty in unloading sand at the dock*:—Held, *on the authority of* Rickett *v.* the Metropolitan Railway Company (36 L. J. Q.B. 205), *that neither injury was a subject for compensation, as it was not an injury to land or any interest therein, but a personal injury to the claimants in the way of their trade.*

This was a rule to shew cause why a *certiorari* should not issue to bring up an inquisition, verdict and judgment, which awarded compensation to Messrs. Batstone, of Ferry Street, Lambeth, in respect of two heads of claim, in order that it might be quashed, on the ground that no part of the claimants' premises were taken, and no private right or easement injuriously affected by the defendants' works.

It appeared from the affidavits that the claimants were lessees for a term of years expiring in March, 1871, of certain premises, situate in Ferry Street, St. Mary, Lambeth. These premises, in which the claimants carried on the business of potters and manufactured pottery-ware, were about seventy yards from the river Thames, and on the banks of the river, nearly opposite these premises, at a spot called Ferry Dock, there was a common and public right for all persons to dip and take water from the river without payment of any kind, and there was a right of way to the river for this purpose. It also appeared that lower down the river there was a free public draw-dock, called Broad Street Dock, communicating by streets with the claimants' premises, and that the public had a right to resort to and use this dock, and to take carts there backwards and forwards, and to load and unload barges, and that barges had a right to lie and be there; and it was proved that the defendants, who were embanking the river under 26 & 27 Vict. c. 75, had caused the embankment to be erected in front of the spot where the public had exercised the right of taking water, and that since the works were commenced the access to the river for this purpose had been practically cut off, and it was suggested that this obstruction would continue until the works of the embankment were completed. It was also proved that the hard or landing-place at Broad Street Dock had been so far interfered with by the defendants' works that only one or two barges could now

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be got up to load or unload in lieu of four or five formerly, and that the access to the dock by barges was attended with difficulty and danger. The claimants had been in the habit of fetching water from Ferry Street Dock to be used in the course of their business as potters, and the sand used in their business was brought by barges to the Broad Street Dock. But since the commencement of the embankment they had been prevented by the works from obtaining access to the river at Ferry Street Dock, or from obtaining water there, and they had also been unable to have their sand brought to Broad Street Dock as before.

No part of the claimants' premises had been touched or taken by the Board.

It was objected that the claimants had made out no title to compensation, as the use of rights common to all the public was not a subject for compensation within the statutes.

The assessor, however, allowed the jury to assess the compensation subject to this objection, and they assessed the compensation for cutting off the right to take water in Ferry Street at 50*l.* and for the injury to Broad Street Dock at 40*l.*

A rule having been obtained as above mentioned,

Montagu Chambers and *Bridgman* shewed cause.—The claimants were entitled to compensation for the injury to their manufactory in cutting off the supply of water and in hindering the unloading of barges at the dock. In *Rickett* v. *the Metropolitan Railway Company* (36 L. J. Q.B. 205), which will probably be relied on by the Board, it was held that the occupier of a public-house could not recover compensation for loss to his business caused by a temporary obstruction of the footway in front of the house. But the judgment of the House of Lords proceeded upon the ground that, at common law, no action could have been maintained for the injury. Now, in the first place, the authorities will shew that, but for the statute, an action could have been maintained in the present case; and secondly, it must not be forgotten that so distinguished an authority as Lord Westbury dissented from the decision in the House of Lords.

[MELLOR, J.—As I understand *Rickett* v. *the Metropolitan Railway Company* (36 L. J. Q.B. 205), Lord Chelmsford and Lord Cranworth thought that no compensation could be recovered because the injury was not an actionable one; but Lord Westbury refused to accept this limitation, as being too narrow a one. HANNEN, J.—Does not the decision in the House of Lords compel us to assume that it is a condition precedent to the right to compensation that the damage would originally have been actionable?]

There are several old cases to shew that the injury to the claimants might have been actionable. The first of these is *Chichester* v. *Lethbridge* (Willes, 71), where *Hart* v. *Bassett* (T. Jones, 156) is cited with approbation. In that case it was resolved that the owner of tithes might maintain an action for obstructing the highway so as to prevent him from carrying the tithes to his barn. In *Rose* v. *Miles* (4 M. & S. 101) the Court held that it was an actionable injury to moor barges across a public navigable creek and keep them so moored, so as to prevent the plaintiff from navigating his barges.

[MELLOR, J. referred to *Winterbottom* v. *Lord Derby* (36 L. J. Ex. 194).]

In *The Queen* v. *the Eastern Counties Railway Company* (2 Q.B. Rep. 347; 11 L. J. Q.B. 66) a mandamus was awarded to assess compensation where the injury was by lowering a road on which the land abutted. It must be evident, when the character of the property abutting on the river is considered, that the premises had lost a great part of their commercial value, and the case is therefore very similar to *Chamberlain's case* (2 Best & S. 605; 32 L. J. Q.B. 173). They also referred to *Brand* v. *the Hammersmith and City Railway Company* (36 L. J. Q.B. 139) and *Beckett* v. *the Midland Railway Company* (37 L. J. C.P. 11).

Parry, Serjeant, and *Philbrick*, in support of the rule.—*Rickett's case* (36 L. J. Q.B. 205) is a conclusive authority against the claimants. It is necessary for them to shew that some interest in land, or some right vested in them by reason of the occupation of land, has been injuriously affected; and this they

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have failed to do. It is not enough that the particular mode of occupying the premises should be injured. This distinction was taken in *The King* v. *the Bristol Dock Company* (12 East, 429), where the Court held that compensation could not be obtained for fouling the water of a public river from which a brewery was supplied. That case is stronger than the present one, for there there was a physical connexion between the brewery and the river by means of underground pipes. The proposition that what was once an actionable wrong is after the passing of the Act a subject for compensation, must be adopted, with the limitation that the injury must be to the property in the soil, and not to the occupier. In *Beckett* v. *the Midland Railway Company* (37 L. J. C.P. 11) the general value of the house had been reduced by one-third. The claimants have sustained the same damage as the rest of the public, though perhaps to a larger extent. They cited *Chamberlain's case* (2 Best & S. 605; 32 L. J. Q.B. 173) and *The Caledonian Railway Company* v. *Ogilvy* (2 Macqueen, 229).

MELLOR, J.—I am of opinion that this rule must be made absolute. Mr. Chambers has certainly urged arguments and cited cases which, were we at liberty to open an inquiry, might have induced us to hesitate in our decision. But I think that we are concluded by the case of *Rickett* v. *the Metropolitan Railway Company* (36 L. J. Q.B. 205). No doubt the decision in that case turned upon facts which shewed that the obstruction, although considerable and lasting for some time, was not intended to be permanent, but lasted only so long as seriously to increase or to cause the injury complained of. But although the decision of the House of Lords turned upon a particular state of facts, I think that we must look at what was the substance of the decision, and what was really the result of the reasoning which all the noble and learned Lords applied to that case. And notwithstanding all that Mr. Chambers has urged, I think that their judgment is conclusive as regards the case before us. If it had not been the ultimate Court of appeal, the dissent of Lord Westbury and the reasons stated by him would have diminished the weight of its authority. But the reasoning of Lord Westbury was not adopted by the supreme tribunal of which he was a member, and until that tribunal shall lay down some new rule as applicable to a different state of facts, we must act in conformity with the latest decision. Now, was the decision of this tribunal that, unless there is an injury to land as distinct from a personal injury, the claim for compensation cannot be maintained? The words of the statute are, "land or any interest in land injuriously affected." A man may live, as I have already observed, in a particular house, and he may suffer a considerable injury, but unless the injury is to the house, such as a right of way, or those other rights which are referred to in the judgment of Lord Cranworth, it is clear that, according to the opinion of that noble and learned Lord, there can be no compensation, because there could have been before the statute no action in respect of injury to the land or to the house in question. I believe that many of the cases cited by Mr. Chambers are strong to shew that where a man suffers a personal injury distinct from that which all the subjects of the realm suffer, he may have an action; but this is a personal action. It is not because he happens to live in a particular house that therefore the injury is to the house. The injury is to him personally, as it appears to me, and not to the house; and we should be confounding all the distinctions which have hitherto prevailed with reference to rights in property such as a house, and simple rights which are enjoyed in common with the rest of the public. But undoubtedly Lord Westbury does go as far as Mr. Chambers's argument, for he says, "When, therefore, the general Railway Acts use the term 'injuriously affected,' the word 'injuriously' does not mean 'wrongfully' or 'unlawfully,' nor does it imply that compensation is limited to cases where the act done is such as but for the powers given would be a tort at common law. The words mean 'damnously affected' only, and the consequential right to compensation is the creature of the statutes, to be ascertained and measured by the positive language of the enactments, and not by analogy to actions of tort or trespass. There is nothing in the statutes to warrant the position that there shall be no compen-

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sation where at common law there would have been a right of action." I quote this passage to shew on what Lord Westbury's mind was turning. He did not proceed upon the special circumstances of the case before him, with regard to its being some injury of a temporary nature, but upon the general construction of the statute. The two other noble and learned Lords entirely differed from this opinion. Lord Chelmsford at the beginning of his judgment says, "I think that the criterion of a party's right to damages under the clauses of the Railway and Companies' Acts, upon which this case depends, is correctly stated by Lord Campbell in *In re Penny* and *The South-Eastern Railway Company* (7 E. & B. 660; 26 L. J. Q.B. 225), and that in his words, 'Unless the particular injury would have been actionable before the company had acquired their statutory powers it is not an injury for which compensation can be claimed. At the same time the observation of my noble and learned friend Lord Cranworth, in the case of *The Caledonian Railway Company* v. *Ogilvy* (2 Macqueen, 229) must not be lost sight of,—that it does not follow that a party would have a right to compensation in some cases in which if the Act of Parliament had not passed there might have been not only an indictment, but a right of action." This clearly shews that when we use the words 'actionable right,' it must be an actionable right in respect of some injury to land. And Lord Cranworth says, "Both principle and authority seem to me to shew that no case comes within the purview of the statute, unless where some damage has been occasioned to the land itself in respect of which, but for the statute, the complaining party might have maintained an action. The injury must be actual injury to the land itself, as by loosening the foundations of buildings on it, obstructing its light or its drains, making it inaccessible by lowering the ground immediately in front of it, or by some such physical deterioration. Any other construction of the clause would open the door to claims of so wide and indefinite a character as could not have been in the contemplation of the legislature." Therefore each of these noble and learned Lords bases his judgment not upon the mere question of the distinction between a temporary and a permanent obstruction, but upon the construction of the statute, and it appears to me that this being the substantive ground on which they all proceeded, it is a decision which most thoroughly and conclusively binds any inferior Court which may have matters of this sort brought before it afterwards. This renders it unnecessary for us to go through the arguments, or refer to the cases which have been cited by Mr. Chambers. It appears to me that in this case no interest in the land has been affected. The injury is of a personal nature, and one for which no claim for compensation can be maintained under a clause which gives it only in respect of land, or some interest in land, which may have been injuriously affected.

HANNEN, J.—I am of the same opinion. I think it is our duty to endeavour to extract from the case of *Rickett* v. *the Metropolitan Railway Company* (36 L. J. Q.B. 205) the principle upon which the decision is based. It seems to me that it has laid down the principle that no case comes within the purview of section 68. of the Lands Clauses Act, or section 6. of the Railways Clauses Act, unless in respect of damage to the land itself, which damage would have been the subject of an action at law before those statutes. So that these two things must concur, not only that the injury would have been the subject of an action before the statute, but an action in respect of damage to the land itself, or some interest therein. Now, in this case, it appears to me to be plain that there is no injury to the land or any interest therein, unless we are to adopt the powerful reasoning of Lord Westbury in *Rickett's case* (36 L. J. Q.B. 205). But this reasoning was not adopted by the House of Lords, and must be disregarded. The stronger this reasoning may appear to be the clearer it becomes that the other noble and learned Lords whose judgment has now become the law of the land were opposed to it. They have laid down a principle, and it would be unbecoming in us to express any disapprobation of it, and it appears to me to dispose of the case.

HAYES, J.—I am quite of the same opinion. The case does not seem open

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to argument after the decision in *Rickett* v. *the Metropolitan Railway Company* (36 L. J. Q.B. 205). The case seems also to be governed by two other decisions, which illustrate extremely well the difference between private and public rights. In one of these, *Glover* v. *the North Staffordshire Railway Company* (16 Q.B. Rep. 912; 20 L. J. Q.B. 376), it was held that a level crossing over a private road belonging to the owner of a house was an interruption appurtenant to the interest in the house, and therefore an injury to land within the meaning of section 68. In the other case, *The Caledonian Railway Company* v. *Ogilvy* (2 Macqueen, 229), the injury was as serious, but the nature of the right varied. It was an action for damage by a level crossing close to the lodge of a gentleman's house, and although every time his horses were driven out they were liable to be frightened by passing trains, yet it was held, reversing the decision of the Court of Session, that there was a distinction between the two cases; that in one case the right was a public one, and in the other it was a private one, affecting the property of an individual. In this case both the rights in respect of which compensation is claimed are public rights. All the Queen's subjects have the same right of going and taking water as the claimant, but it so happens that because he lives nearer the river that he exercises this right more frequently than others. And as to the right of using the dock, it is just as in the *Bristol Dock case* (12 East, 429). The dock is like a public highway; everybody has a right to go to it; but the plaintiff, because of his trade, uses it oftener. It is clear therefore that, independently of *Rickett's case* (36 L. J. Q.B. 205), we are concluded by decisions in the superior Courts. If it had been necessary to reconcile the old cases to which Mr. Chambers has referred, and which present a remarkable diversity of opinion, it is not easy to say what our judgment might have been. But this is a matter which we need not consider. The rule will be made absolute that the inquisition be granted.

Rule absolute.

IN THE QUEEN'S BENCH. April 28, May 10, 1869.

THE QUEEN *v.* PLENTY.

38 L. J. Q.B. 205; L. R. 4 Q.B. 346; 20 L. T. 521; 17 W. R. 792; 9 B. & S. 386.

See, *Mather* v. *Brown*, [1876] E. R. A.; 45 L. J. Q.B. 547; 1 C.P. D. 596; 34 L. T. 869; 24 W. R. 736 (C.P. D.); *Henry* v. *Armitage*, [1884] E. R. A.; 53 L. J. Q.B. 111; 12 Q.B. D. 257; 50 L. T. 4; 32 W. R. 192 (C. A.). Followed, *R.* v. *Casey*, [1914] 2 I. R. 243 (K.B. D.).

Municipal Corporation—Quo Warranto—*Voting Paper—Christian Name and Surname of Person Voted for—Designation by Initial of Christian Name.*

ELECTION LAW. B.—*By the Municipal Corporation Act* (5 & 6 *Will.* 4. c. 76), *s.* 32, *every burgess entitled to vote may vote by delivering a voting paper containing the christian name and surnames of the persons for whom he votes, with their respective places of abode and description; and by the interpretation clause, section* 142, *no misnomer or inaccurate description of any person, body corporate or place in any voting paper required by the Act shall hinder the full operation of the Act, provided that the description of such person, body corporate or place be such as to be commonly understood*:—Held, *that voting papers in which the person voted for (though described so as to be understood) was designated by the initial of his christian name, instead of by his christian name in full, ought to be reckoned as valid, as the use of the initial, instead of the name in full, came within the meaning of the term "misnomer" in the interpretation clause.*

Quo warranto to try the validity of the election of Edward Pellew Plenty as councillor of the borough of Newbury.

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Plea—that Edward Pellew Plenty was duly elected a councillor of the borough; and joinder of issue.

By consent of the parties, the following CASE was stated for the opinion of the Court:

The corporation of the borough of Newbury, which is a borough mentioned in the Municipal Corporation Act, 5 & 6 Will. 4. c. 76, Schedule A, consists of a mayor, four aldermen and twelve councillors, to be elected in the manner in that Act specified.

On November 1, 1867, an election of four councillors was duly held before the mayor and assessors, according to the provisions of that Act, and of the Municipal Corporation Act, 1859.

Henry Dolton, Thomas Fidler, Jonathan Burford Pratt, Edward Pellew Plenty and William Penford, being duly qualified, were duly nominated for the office of councillors in the place of the retiring councillors, and their christian names and surnames respectively, with a statement of their respective places of abode and description, and of the parties nominating them, were duly published according to the provisions of the Municipal Corporation Act, 1859.

No person bearing the surname of Plenty or Penford was nominated for the office of councillor at the election other than Edward Pellew Plenty and William Penford, and at the time of the election Edward Pellew Plenty and William Penford were the only persons bearing the surnames of Plenty and Penford respectively who were duly enrolled burgesses of the borough, or qualified under the provisions of the Act 5 & 6 Will. 4. c. 76. to be chosen councillors of the borough at the election. The result of the election was duly declared by the mayor and assessors. It is admitted in this case that Dolton, Fidler and Pratt were duly elected, and that Penford had a majority of one over Plenty, subject to the question as to the form of voting papers, hereinafter mentioned. At this election thirty-five of the burgesses who were entitled to vote and voted delivered to the mayor and assessors voting papers containing the full surname, but only the initial letter of the christian name of William Penford, for whom the thirty-five burgesses voted, and delivered no other voting papers, and at the election eighteen of the burgesses who were entitled to vote and who voted delivered to the mayor and assessors voting papers containing the full surname, but only the initials of the christian name, of Edward Pellew Plenty, for whom the eighteen burgesses voted.

The following is a specimen of such voting paper:

"Municipal Corporations Reform Act.

"Borough of Newbury.

"Voting paper for four councillors of the borough, in the room of the like number of councillors who go out of office on the 1st day of November inst.

"I, the undersigned, being a burgess entitled to vote for the election of councillors for the borough of Newbury, in the county of Berks, do hereby vote for the persons whose names are hereunder written to be councillors of the borough of Newbury, in the room of the like number of councillors who go out of office on the 1st day of November instant. As witness my hand, this 1st day of November, 1867.

"Chas. D. Rogers, Old Rectory House.

(Street, lane or place where the property rated is situated.)

Names of Persons.	Places of Abode.	Description.
E. P. Plenty	Cheap Street	Ironfounder
H. Dolton	The Wharf	Corn-merchant
T. Fidler	Mansion House Street	Grocer, &c.
W. Penford	Northbrook Street	Draper

If the thirty-five and eighteen voting papers are not invalid by reason of

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their being only so initialed, but are to be counted as good votes, William Penford had a majority of votes at the election over Edward Pellew Plenty, and William Penford was entitled to be elected a councillor of the borough instead of Plenty.

If, on the other hand, the voting papers are invalid, and are not to be counted as good votes, then Edward Pellew Plenty had a majority of votes at the election, and was duly elected councillor at the election, and entitled to act as such. The question for the opinion of the Court is, whether the voting papers are or are not invalid by reason of these initials: if not, the judgment of the Court is to be entered for the Crown by confession; but if the Court be of a contrary opinion, then judgment is to be entered for the defendant.

A. Rogers shewed cause.—To write the initials instead of the full christian name of the candidate in voting papers is only an inaccurate description, which is cured by section 142[1]. In *The Queen* v. *the Borough of Hartlepool* (2 L. M. & P. 666; 21 L. J. Q.B. 71) one Anthony Wilson Dobing gave notice, under section 17. of the Municipal Corporation Act, of his claim to be on the burgess roll of the borough. Upon the revision of the lists this claim was objected to, on the ground that the notice was signed "A. W. Dobing," without giving the christian name in full. But it was held by Erle, J., that the intention of the legislature was to provide that a person having a real qualification should be placed on the burgess roll, notwithstanding any defect of form, and that as it appeared that A. W. Dobing was well understood in Hartlepool to mean "Anthony Wilson Dobing," and that he was the only person of that name there, and as there was before the mayor sufficient information to this effect, the name of the applicant might properly be placed on the roll.

[LUSH, J.—There the section only required the notice to be given according to the scheduled form, *or to the like effect.*]

The decision was founded upon the principle that so long as there was no mistake as to the identity of the person described, a mere inaccuracy in this description was immaterial.

Gray, in support of the rule.—Section 142. cannot apply to a case like the present, where the statute has distinctly prescribed the form of notice. In *The Queen* v. *Avery* (18 Q.B. Rep. 576; 21 L. J. Q.B. 428) it was held to be enough if the voting paper was signed with the usual signature of the burgess voting, and that it was no valid objection that the christian name was denoted only by an initial. But the Court distinguishes the case from one where the statute requires that both the christian name and surname should form part of the description, and this distinction is further explained in *The Queen* v. *Bradley* (3 El. & El. 634; 30 L. J. Q.B. 180), where it was decided that the conditions of this statute were satisfied if the voting paper contained a contraction of a christian name which was well known in ordinary use as representing that name, and that "Wm." and "Willm." might be used as equivalent to William; Wightman, J. saying, p. 639, "Now, admitting that a mere initial could not be regarded as a christian name, I think that the contractions of a christian name, which, like those in the present case, are perfectly well known and in ordinary use, are sufficient to satisfy the statute"; and Hill, J., p. 640, "Now, I think that although an initial cannot be regarded as a christian name, a well-known contraction of a name which cannot be misunderstood may be so regarded."

(1) By the Municipal Corporation Act (5 & 6 Will. 4. c. 76), s. 32, it is enacted, "That every burgess entitled to vote in the election of councillors may vote for any number of persons not exceeding the number of councillors then to be chosen, by delivering to the mayor and assessors, or other presiding officer as hereinafter mentioned, a voting paper containing the christian names and surnames of the persons for whom he votes, with their respective places of abode and description, such paper being previously signed with the name of the burgess voting, and with the name of the street, lane, or other place in which the property for which he appears to be rated on the burgess roll is situated."

By the interpretation clause, section 142, "No misnomer or inaccurate description of any person, body corporate, or place named in any schedule to this Act annexed, or in any roll, list, notice, or voting paper required by this Act, shall hinder the full operation of this Act with respect to such person, body corporate or place, provided that the description of such person, body corporate, or place be such as to be commonly understood."

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[LUSH, J.—If the description is correct it cannot matter whether it is such as would be commonly understood or not. The interpretation clause only applies to a case where the description is inaccurate.]

The interpretation clause was never intended to apply to a notice where there is a total want of that which the statute requires. It cannot be said that since the candidate is described in the nomination paper under 22 Vict. c. 35. there is less difficulty as to his identity, for the present Act is not to be construed by reference to a later one. In *The Queen* v. *Coward* (16 Q.B. Rep. 819; 20 L. J. Q.B. 359), where the defendant's place of abode was stated to be G. P. instead of N. R, it was held to be no answer to shew that the description of the defendant in the voting paper was such as would be commonly understood throughout the borough.

[HAYES, J.—Under the old practice the use of the initial only would have been a misnomer, would it not?]

A misnomer properly so called supposes that a person has been misdescribed by some mistake. But here there was no mistake of fact. The voter intentionally wrote the initials only, supposing that they were sufficient. It was a mistake of law, not a mistake of fact.—He cited *Melbourne* v. *Greenfield* (7 Com. B. Rep. 1; 29 L. J. C.P. 81), and *Eidsforth* v. *Farrer* (4 Com. B. Rep. 9; 16 L. J. C.P. 132).

A. Rogers, in reply.—It is said that this is not a case of misnomer. If so, it must be something less inaccurate, and there is therefore more ground for arguing that it is within the statute.

Cur. adv. vult.

On May 10, the judgment of the Court[2] was delivered by

HANNEN, J.—The question in this case is, whether William Penford was, in November, 1867, duly elected a councillor for the borough of Newbury. It appears from the case that he was so elected if he was entitled to count as valid certain voting papers in which he was designated by the initial of his christian name (thus, W. Penford) instead of by his christian name and surname in full. By the 32nd section of the Municipal Corporation Act (5 & 6 Will. 4. c. 76.) it is enacted that, "Every burgess entitled to vote . . . may vote . . . by delivering . . . . a voting paper containing the christian names and surnames of the persons for whom he votes, with their respective places of abode and description." The interpretation clause (section 142.) enacts, that no "misnomer or inaccurate description of any person, body corporate or place . . . . in any voting paper required by this Act shall hinder the full operation of this Act . . . . Provided that the description of such person, body corporate or place be such as to be commonly understood."

We are of opinion that the voting papers in question were valid, on the ground that the designation of the person voted for by the initial of his christian name is "a misnomer," and is, therefore, cured by the interpretation clause. It was contended for the defendant that where the initial only is used, there is a total omission of the name, which is not cured by the interpretation clause; and in support of this contention the case of *The Queen* v. *Bradley* (3 El. & El. 634; 30 L. J. Q.B. 180) was referred to, where Hill, J. says that an initial cannot be regarded as a christian name. The question for consideration there was, whether the abbreviation "Willm." for William, vitiated the vote; and the Court held that it did not. The dictum referred to was, therefore, not necessary for the decision of the case. The initial W. is certainly intended as an abbreviation of some name or other; its defect is that it may be taken to be an abbreviation of any one of the other names beginning with it—such as Walter—instead of the right one, William; but if any one, or even all of the wrong names which it might be mistaken for were written in full, this would certainly be cured. That being so, it is impossible to suppose that the legislature did not intend to include under the term "misnomer" an abbreviation which could be, and in this case undoubtedly was, understood to indicate the correct name. We are

(2) Lush, J., Hannen, J. and Hayes, J.

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of opinion that the word "misnomer," which means a naming amiss, is wide enough to cover the faulty indication of a christian name by means of the initial (see *Bac. Abr.* tit. 'Misnomer'). This construction has already been put upon the word "misnomer" in another statute. By the 3 & 4 Will. 4. c. 42. s. 11. it is enacted that no plea in abatement for a *misnomer* shall be allowed in a personal action, but that in all cases in which a misnomer would but for the Act have been by law pleadable in abatement, the defendant shall be at liberty to cause the declaration to be amended upon summons. In *Rust* v. *Kennedy* (4 Mee. & W. 587; 8 L. J. Ex. 85) it was sought to set aside the writ and declaration for irregularity on the ground that the defendant was described by his initial only, the action not being on a bill of exchange or other written instrument. It was there contended, as here, that it was not a mere case of misnomer, because the initials were no name at all. But Parke, B. pointed out that before the statute of Will. 4. this was an objection that was pleadable in abatement as a misnomer, and that since that Act the only remedy was by summons, and that this case was within the statute. Our judgment will, therefore, be for the relator.

Judgment for the Crown.

IN THE QUEEN'S BENCH. May 22, 1869.

ZUNZ *v.* THE SOUTH-EASTERN RAILWAY COMPANY.

38 L. J. Q.B. 209; L. R. 4 Q.B. 539; 20 L. T. 873; 17 W. R. 1096; 10 B. & S. 594.

Discussed, *Henderson* v. *Stevenson*, 1875, L. R. 2 H.L. Sc. 470; 32 L. T. 709 H.L.). Considered, *Watkins* v. *Rymill*, [1883] E. R. A.; 52 L. J. Q.B. 121; 10 Q.B. D. 178; 48 L. T. 426; 31 W. R. 337 (Q.B. D.). Distinguished, *Mahony* v. *Waterford & Limerick Railway*, [1900] 2 I. R. 273 (Q.B. D.).

Carriers by Railway—Passengers' Luggage—Special Contract—Foreign Line—Through Ticket—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *s.* 7.

CARRIERS. B.—*The plaintiff was booked through from London to Paris by the defendants, who were carriers, by their railway from London to Dover. He travelled on their railway to Dover, from thence to Calais by steamboat, and from Calais to Paris by a French line of railway. He registered his luggage at the London station of the defendants, who thereupon took possession of such luggage. Upon the through ticket, which he received from the defendants, was the following: "The English railway companies are not responsible for loss, or detention of, or injury to luggage of the passenger travelling by this through ticket, except while the passenger is travelling by their trains or boats, and in this latter case only when the passenger complies with the by-laws and regulations of the companies; and in no case for luggage of greater value than 5l. Each company incurs no responsibility of any kind beyond what arises in connexion with its own trains and boats, in consequence of passengers being 'booked' to travel over the railways of other companies, such through booking being only for the convenience of the passengers. Nor will the companies be responsible for the trains or boats being delayed, or not meeting the trains in correspondence, nor for any consequences that may result to a passenger thereby." The ticket was not signed by the plaintiff. The luggage was lost upon the French railway:—Held, in an action brought by the plaintiff to recover damages in respect of such loss, that the defendants were protected from responsibility by this special contract, and that they did not lose such protection by reason of its not being signed by the plaintiff, the provision to that effect in the Railway and Canal Traffic Act, 1854, only applying to the receiving, forwarding or delivering of goods upon the line belonging to, or worked by the company making the special contract.*

The first count of the declaration alleged that in consideration that the

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plaintiff would deliver to the defendants, as and being carriers of goods for hire, certain goods of the plaintiff to be by the defendants safely carried from London to Paris, and there delivered to the plaintiff, for reward to the defendants in that behalf, the defendants promised the plaintiff that they would safely convey the said goods from London to Paris aforesaid, and deliver the same to the plaintiff as aforesaid, and the plaintiff delivered the said goods to the defendants, and the defendants received the same for the purpose and on the terms aforesaid, and all conditions were performed, &c., to entitle the plaintiff to have the said goods safely carried from London to Paris aforesaid, and there delivered to him as aforesaid, yet the defendants did not safely carry the said goods from London to Paris aforesaid, and there deliver the same to the plaintiff as aforesaid, whereby, &c.

The second count was for not delivering the goods to the plaintiff, whereby he was prevented from proceeding to Brussels, and there transacting business from which he would have derived profit, &c.

The defendants pleaded, first, that they did not promise as alleged; secondly, that the plaintiff did not deliver the goods to them, nor did they receive them as alleged; fifthly, that the said promises respectively were made, and the said goods respectively were delivered by the plaintiff to the defendants, and were received by them to be carried as aforesaid, under special contracts between the plaintiff and the defendants, and subject to certain just and reasonable conditions contained in the said contract respectively, and set out in the through tickets respectively taken by the plaintiff from the defendants, one of which conditions in each case was that the defendants would not be responsible for loss or detention of, or injury to the luggage of the plaintiff travelling by the said through tickets, except when the plaintiff should be travelling by the defendants' trains or boats, and in that latter case only when the plaintiff should comply with the by-laws and regulations of the defendants, and in no case for luggage of greater value than 5*l*. And that the losses and breach in the declaration alleged were respectively losses which did not, nor did any of them, occur while the plaintiff was travelling by the defendants' trains or boats within the meaning of the said conditions.

Issues were joined on these pleas.

At the trial, which took place at the sittings in London after Hilary Term, 1868, it appeared that on September 14, 1867, the plaintiff left the Charing Cross Station, by the defendants' line, as a passenger to Paris. He had with him a portmanteau, containing wearing apparel, and a hat-box. He paid for and received a through ticket, and he also registered his luggage, paying 3*s*., which was charged for excess. When the train arrived at Paris, the portmanteau was missing, having been lost in the course of the journey upon the Great Northern Railway of France, between Calais and Paris. Upon the through ticket, which the plaintiff received from the defendants at their Charing Cross Station, was the following:—

"The English railway companies are not responsible for loss or detention of, or injury to luggage of the passenger travelling by this through ticket, except while the passenger is travelling by their trains or boats, and in this latter case only when the passenger complies with the by-laws and regulations of the companies; and in no case for luggage of greater value than 5*l*."

"Each company incurs no responsibility of any kind beyond what arises in connexion with its own trains and boats in consequence of passengers being 'booked' to travel over the railways of other companies, such through booking being only for the convenience of the passenger. Nor will the companies be responsible for the trains or boats being delayed, or not meeting the trains in correspondence, nor for any consequences that may result to a passenger thereby."

The jury returned a verdict for the plaintiff for 93*l*. 14*s*. 6*d*., the value of the portmanteau and its contents, leave being reserved to the defendants to move to enter the verdict for them.

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Subsequently a rule *nisi* was obtained by *Field*, on the ground that the defendants were not responsible for any loss which occurred in France.

H. James, *Baker Greene* and *Macrae Moir* shewed cause against the rule.—It may be taken that the plaintiff was obliged to pay the sum of 3*s*. in respect of the excess fare to be charged upon his luggage. It may also be assumed that the ticket amounts to a special contract by which the defendants seek to limit their liability. But if there is no such special contract of which they can avail themselves, they must be liable in this action; and it is submitted that they cannot get any benefit from this special contract because it is not "signed," as required by the Railway and Canal Traffic Act, 1854, which, by the 4th proviso to section 7, enacts that "No special contract between such company and any other parties respecting the receiving, forwarding or delivering of any animals, articles, goods or things as aforesaid, shall be binding upon or affect any such party unless the same be signed by him or by the person delivering such animals," &c. It may be said that this Act does not apply to passengers' luggage at all, and *Stewart* v. *the London and North-Western Railway Company* (3 Hurls. & C. 135; 33 L. J. Ex. 199) would seem at first sight to support that view, but there Pollock, C.B. said, "If the question was whether this was a matter within the carriers' liability by the common law, I should think it was not. *Richards* v. *the London, Brighton and South Coast Railway Company* (7 Com. B. Rep. 839; 18 L. J. C.P. 251) is certainly an authority (which I was not aware of) that the luggage of a passenger is in the same condition as goods sent by a carrier, but I am not convinced by it, or disposed to defer to it, and notwithstanding the authority of Mr. Justice Story to the same effect, I am still of opinion that a carrier undertakes no responsibility in respect of the goods of a passenger beyond that which he undertakes with respect to the passenger himself." By the interpretation clause, section 2, the word "traffic" includes, not only passengers and their luggage, goods, &c., but also carriages, waggons, &c. There seems no intention that the Act should not extend to passengers' luggage.

[MELLOR, J.—This would seem to have been a "forwarding" of the luggage by the defendants.]

Yes, they contract to deliver it in Paris, and they forward it by the French company.

[COCKBURN, C.J.—But I think that the special contract which, under section 7, must be signed, is one by which the company seeks to limit its liability for losses which occur on its own line. Must not section 7. be read by the light of section 2? If so, it only applies to the railway belonging to or worked by the defendants.]

Such a construction has never yet been suggested; section 2. only applies to giving facilities for traffic, which can only be upon the companies' own lines; section 7. applies rather to carrying goods over the line than to the working of it. The point was not raised in *Aldridge* v. *the Great Western Railway Company* (15 Com. B. Rep. N.S. 582; 33 L. J. C.P. 161), as might have been expected if it was considered to be tenable. It was there held that the defendants were discharged from liability in respect of damage and detention beyond the limits of their own railway, under a condition very similar to the present. The defendants make the contract to carry to Paris, and *Muschamp* v. *the Lancaster and Preston Junction Railway Company* (8 Mee. & W. 421) shews that they may be liable under such a contract, although the luggage is lost upon a line over which they have no control. Their common law liability remains, unless they limit it by a reasonable written contract. If in the performance of their contract to carry the passenger and his luggage, they have to pass over another line, they must give the passenger the same facilities as upon their own line—*The Great Western Railway Company* v. *Blake* (7 Hurls. & N. 987; 31 L. J. Ex. 346). There, Cockburn, C.J. said, "It has been settled that where a railway company enters into a contract for the conveyance of goods to a distance extending not merely over their own line, but over the whole or some portion of any other line of railway with which it is connected, the company so

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contracting is liable, not only for the loss of the goods on their own line, but also in respect of the loss of the goods upon the line not their own. I think that position obtains in the case of passengers. If a railway company chooses to contract to carry passengers, not only over their own line but also over the line of another company, either in whole or in part, the company so contracting incurs all the liability which would attach to them if they had contracted solely to carry over their own line."

[COCKBURN, C.J.—In that case there was no limitation of the liability.]

Field and *F. M. White*, in support of the rule.—It was not necessary that the special contract should be signed by the plaintiff. The contract to carry entered into by the defendants with the plaintiff, was only to carry him and his luggage to Dover, and then the defendants contract further that they have authority to say that the other company will carry them on. When the luggage was off their line, they had no control over it. It was not delivered to the defendants to be carried—see *Van Toll* v. *the South-Eastern Railway Company* (7 Hurls. & N. 75; 31 L. J. C.P. 241). See also *Aldridge* v. *the Great Western Railway Company* (15 Com. B. Rep. N.S. 582; 33 L. J. C.P. 161) and *Branley* v. *the South-Eastern Railway Company* (12 Com. B. Rep. N.S. 63; 31 L. J. C.P. 286).

COCKBURN, C.J.—The real question is, whether the defendants can avail themselves of the condition limiting their liability.]

There is no doubt that they can do so. This is a special contract, to which the Railway and Canal Traffic Act has no application. That Act does not apply to passengers at all, but simply to goods and things. The ticket bears a strong implication upon the face of it that the foreign company will be liable, and they would clearly be so if the defendants make this contract as their agents.—[They also referred to *Baxendale* v. *the Great Eastern Railway Company* (4 Q.B. Rep. 244; 38 L. J. Q.B. 137) and to *The Bristol and Exeter Railway Company* v. *Collins* (7 H.L. C. 194).]

COCKBURN, C.J.—I consider that it is quite unnecessary to decide whether there was a contract binding upon the defendants to carry the plaintiff and his luggage the whole distance from London to Paris, although I am strongly disposed to think that there was such a contract. I think that the defendants contracted that the plaintiff should be conveyed from London to Dover, from Dover to Calais and from Calais to Paris. But the special contract is set out on the face of the ticket; and however hard it may seem to hold that a passenger is bound by words printed upon a ticket in small letters, and which in the hurry of the last moment at a railway station he has no opportunity of making himself acquainted with, there is no doubt that it has been settled by decided authorities that he must be presumed to know the contents of the ticket, and to be bound by such contents. The defendants have placed upon the ticket a clear and distinct restriction, by which they stipulate that they will not be responsible for loss of the passenger's luggage, except while the passenger is travelling by their own train or boat. Now, unless there is something in the law which will operate to prevent them from making such a restriction of their liability, the plaintiff is out of Court, because it is clear that the loss occurred while the luggage was in the possession of the servants of the French company.

The only ground for saying that there is no right in the defendants so to restrain their liability by imposing such a condition is, that, under the Railway and Canal Traffic Act such a special contract must be signed by the passenger, as provided by the fourth proviso in the 7th section, whereas this special contract is not so signed.—[His Lordship read the section.]—The simple question to be determined is, does this enactment apply to the present case? I am clearly of opinion that it does not. The whole scope and intention of this piece of legislation is indicated by the 2nd section.—[His Lordship read from that section.] —In both sections there are the same words, "receiving," "forwarding" and "delivering." By the 2nd section the company is to afford all reasonable facilities upon the line worked by them; and by the 7th section it may make such conditions as shall be adjudged by the Court or a Judge to be just and

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reasonable. The 7th section must be read by the light of the 2nd section, and then I think that there is nothing which prevents the company from making contracts with such conditions. If it is unreasonable that they should have such power, the legislature may interfere and prevent it.

MELLOR, J.—I also think that it is unnecessary to determine whether one contract was entered into by the defendants to carry the luggage the whole way to Paris, for it seems to me to be clear that the Railway and Canal Traffic Act cannot have any effect upon this contract, so as to prevent the defendants from availing themselves of the protection afforded by it as to losses which occur upon the sea or upon the French railway. If they profess to carry from London to Paris they are at liberty to stipulate that they will not be responsible for losses which occur beyond Dover or after the luggage has been landed from their own boats. I think that is reasonable. Then I think that the Railway and Canal Traffic Act means to say this to the company, "You have powers conferred upon you, and care must be taken to insure your making a proper use of those powers and that you afford proper advantages to the public consistently with the performance of your duties." It is fit to enforce such duties upon them as far as the working of their own line is concerned, but not as to other lines. I think that the Act does not apply to this case, and that the defendants are protected by their special contract.

LUSH, J.—I am of the same opinion. Assuming that this is a special contract, it contains a condition that the defendants will not be responsible except when the loss occurs while the passenger is travelling upon their own line of railway. Now, unless there is something which renders such a condition invalid, they are exempt from liability to the plaintiff for the loss of his luggage. It is said that the provision in the Railway and Canal Traffic Act, that the contract must be signed by the party, renders the present contract invalid. But is the contract governed by that Act? I am clearly of opinion that this contract is not governed by that Act at all. The 7th section is supplemental to section 2, and it is clear that the requirement that the contract shall be signed applies to the obligation imposed by section 2. The defendants were at liberty to impose such conditions as they pleased as to the luggage which was being carried off their own line.

Rule absolute.

IN THE QUEEN'S BENCH. May 20, 1869.

HUDSTON *v.* THE MIDLAND RAILWAY COMPANY.

38 L. J. Q.B. 213; L. R. 4 Q.B. 366; 20 L. T. 526; 17 W. R. 705.

See, *Casswell* v. *Cheshire Lines*, [1907] E. R. A.; 76 L. J. K.B. 734; [1907] 2 K.B. 499; 97 L. T. 209 (K.B. D.).

Carriers by Railway—"Personal Luggage"—Child's Rocking-Horse.

CARRIERS. B.—*A child's toy called a spring-horse, standing upon a flat surface, about 44 inches in length, and weighing 78 lb., is not "personal luggage" within the meaning of regulations allowing passengers by railway to carry 112 lb. of personal luggage free of charge, as the words "personal luggage" apply only to such articles as it is customary for a passenger to take with him on a journey.*

This was an appeal from a decision of the Judge of the County Court of Derbyshire, holden at Derby.

The appellant in the case sought to recover 2*s.* 6*d.*, being the amount paid by him to the respondents, under protest, at King's Cross Railway Station, for carriage charged by them from London to Beeston, near Nottingham, of a toy called a "spring-horse," weighing 78 lb., and 2*l.* 2*s.* for damages, for detention

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in London from 3 o'clock to 5.35 p.m., expenses and loss of business in being prevented from attending to letters at Nottingham.

On the hearing of the case on April 13, 1868, at Derby, before George Russell, Esq., the County Court Judge, it was proved that the appellant, on March 10, 1868, took a first-class return ticket from Beeston, near Nottingham, to King's Cross; that he took no luggage with him, but while in London bought a child's toy called a "spring-horse" (an improvement on the old rocking-horse, but standing on a flat surface and about 44 inches in length), which was sent to the King's Cross Station in time for him to take with him on his return to Beeston by the train which left at 3 o'clock in the afternoon; that the toy reached the station in time, but when the appellant arrived there the respondents refused to allow the spring-horse to be taken as luggage, it being an article for the carriage of which they had a regular and fixed charge of 2*s.* 6*d.*; that the appellant objected to the charge, alleging that as a first-class passenger he was entitled by their rules and regulations, after mentioned, to carry 112 lb. weight of personal luggage free; that the toy in question weighed only 78 lb., and that the same was for use in his family, and that it was not merchandise in his hands; that the respondents, notwithstanding, persisted in the charge, which the appellant refusing to pay, the train was despatched without him; that the appellant ultimately paid the 2*s.* 6*d.* under protest, and thereupon both he and the spring-horse were forwarded by the 5.35 train, which was the next train leaving King's Cross for Beeston; that on the railway ticket so issued and delivered to the appellant there was the following printed condition: "This ticket is issued subject to the regulations and conditions stated in the company's time-tables and bills."

The following are the regulations referred to in the foregoing condition, so far as concerns the matter in question: "Luggage. First-class passengers are allowed 112 lb.; second class, 100 lb.; and government passengers, 56 lb. of personal luggage only (not being merchandise or other articles carried for hire or profit), free of charge; all excess of luggage above the weight allowed will be charged for according to distance."

After hearing the appellant and the counsel for the respondents, the case was adjourned to May 11, 1868, when judgment was given for the respondents, but the Judge granted the appellant leave to appeal.

The appellant contends that, according to the terms of the respondents' contract with him as set forth in the railway ticket above referred to, and in the time-tables and bills published by the respondents, he was entitled, as a first-class passenger, to take the spring-horse in question with him, and have the same carried, as his personal luggage, free of charge, it being under the allowed weight, and not within the restriction in the respondents' bills, of "merchandise or other articles carried for hire or profit." The respondents have a fixed tariff for excepted articles, but that tariff does not appear in their Acts or public time-tables.

The respondents contend that the spring-horse did not come within the meaning of the words "personal luggage," inasmuch as it was not for the appellant's personal use and convenience as a traveller, but was an article for the carriage of which they were entitled to charge according to their usual custom and that of other railway companies.

The question for the opinion of the Court is, whether, under the circumstances as above stated, the appellant was entitled to take with him the spring-horse in question free of charge, or whether the respondents were entitled to charge for the carriage of the same.

Macnamara, for the appellant.—The question is, whether this toy, which is a kind of rocking-horse, comes within the meaning of the term "personal luggage." Any ambiguity in a regulation drawn up by the company ought to be construed favourably for the passenger. The company have not used words of exclusion, but have simply adopted the statutory words. Now by the words "personal luggage" are meant such articles as a cricketer's bat, an angler's fishing-tackle, the books of a barrister going circuit. Sailors about to join their

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vessels often carry their bedding with them, and it could not be denied that such a parcel was personal luggage.

[LUSH, J.—In *Johnson's Dictionary*, Bohn's Edit. (1866), luggage is defined as "anything cumbrous and unwieldy that is to be carried away, anything of more weight than value." I think that the railway companies cannot have drawn up their regulations with reference to this definition.]

Cahill v. *the London and North-Western Railway Company* (13 Com. B. Rep. N.S. 818; 31 L. J. C.P. 271) and *Keys* v. *the Belfast and Ballymena Railway Company* (9 H.L. C. 556) only shew that merchandise is not within the meaning of regulations as to personal luggage. In *Phelps* v. *the London and North-Western Railway Company* (19 Com. B. Rep. N.S. 321; 34 L. J. C.P. 261) where it was held, that deeds and documents carried by an attorney did not come within the meaning of the term "ordinary luggage," Erle, C.J., said, "It is impossible to draw a definite line. Luggage which one person might carry for his personal use might be a distress and annoyance to another. But still the habits of mankind must be considered to be within the cognizance of the railway company, so that anything carried according to usage for personal use would be a matter for which the company would be responsible as luggage of a traveller upon a journey." The true definition of the word "luggage" has undergone much discussion in America. In *Angell on Carriers*, section 115, it is said, "The implied undertaking of the proprietors of stage-coaches, railroads, and steamboats, to carry in safety the baggage of passengers is not unlimited, and cannot be extended beyond ordinary baggage, or such baggage as a traveller usually carries with him for his personal convenience. . . . All articles which it is usual for persons travelling to carry with them, whether from necessity or for convenience or amusement (such as a gun or fishing-tackle), fall within the term 'baggage.' So likewise does money not exceeding a reasonable amount; and a watch has been held to be part of a traveller's baggage, and his trunk a proper place to carry it." And in *Story on Bailments*, s. 499, it is said, "By luggage we are to understand such articles of necessity or personal convenience as are usually carried by passengers for their personal use, and not merchandise." This is an article which a man and his family going upon an excursion for a day or two might reasonably take with them.

A. Wills (*Huish* and *J. C. Carter* with him), for the respondents.—The "spring-horse" is substantially an article of furniture, which it could not reasonably be supposed that a passenger would take with him wherever he went.

[LUSH, J.—Could a passenger by the parliamentary train bring with him a child's cradle or a go-cart of any weight under 56 lb.?]

It is not a thing which a passenger generally takes with him backwards and forwards; if such articles were ordinarily carried the company would have to provide special receptacles for them. The reasoning upon which the American Courts have proceeded in these cases is in favour of the respondents, as appears from a number of cases collected in a note to *Story on Bailments*, last edit. s. 449. The liability of the respondents is the same under these regulations, and under their special Act, 7 Vict. c. xviii. s. 204. (passed before the Railways Clauses Act), for this Act allows passengers to carry a certain weight of "ordinary luggage," and this limitation is as strongly against the plaintiff as that created by the words "personal luggage." The fact that the habits of society are changing, and that so many persons are travelling backwards and forwards daily makes it important that a strict rule should be observed. If not, arm-chairs and other such articles will be brought into railway carriages, and country houses will be furnished from London at the expense of the company.

Macnamara, in reply.—The word "personal" means things required by the passenger and his family. The Court will not restrain the meaning of the word to the disadvantage of travellers. The bulk of the article is not a satisfactory test, for if it had been paid for, the company would have been bound to carry it, however difficult it might be to find a receptacle for it; so that in this respect a great part of the respondents' argument falls to the ground. The present ques-

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tion is not whether the company are or are not bound to carry an inconvenient article, but whether they are to receive payment for carrying it.

LUSH, J.—I am of opinion that our judgment must be for the respondents. The company in this regulation intend to express the same thing as is expressed in their special Act, although they make use of a different phraseology. The regulation is as follows: first-class passengers are allowed 112 lb., second-class, 100 lb., and government passengers, 56 lb. of personal luggage only (not being merchandise or other articles carried for hire or profit). Now it is not difficult to define what is excluded by this rule. The privilege does not extend to merchandise, that is, things intended for sale, nor to articles carried for profit, that is, where the person who carries them makes a profit out of them, although the article itself might under other circumstances come under the definition "personal luggage." It is extremely difficult to frame a definition of what is "personal luggage," which embraces everything which can come within the meaning of the words, or which is not excluded by them. I cannot say that I am satisfied with any of the definitions which are given in the books which have been referred to. These definitions were quite good enough for the occasions upon which they were given, but none of them seem to me to be perfect. It would be very difficult, perhaps impossible, to frame a definition which would be suitable in any possible exigency, but I think that the interpretation put upon the rule by the company is not wide enough, for they contend that "personal luggage" applies only to luggage which is carried by the passenger for his own use, and is personal to himself. But I do certainly think that any one using the words "personal luggage" would mean more than is included by this description. It is also to be observed that the statute uses the words "ordinary luggage," meaning a class of articles which are ordinarily carried by passengers as luggage; so that we may construe the rule by the aid of this description, for the company would take it into account when they were considering what was the description of goods for the carriage of which the passenger had paid when he had taken his ticket, and they would have regard to the usual habits of passengers. Now the article in question, although called a child's toy, cannot to my mind come within this description. It cannot be considered as a mere toy, which suggests something which may be carried in the hand, different from a sort of rocking-horse weighing 78lb. and 44 inches in length. We can only say that the article must be one which is ordinarily carried by passengers as luggage, and that this article does not come within this description.

HANNEN, J., concurred.

HAYES, J.—I am of the same opinion, although I agree that nothing can be more difficult than to frame a satisfactory definition of the term "personal luggage." The counsel on both sides have relied on the decisions in the American Courts; but I think that we ought not to attach too much weight to these decisions, because it is very possible that certain districts in America may be thinly populated, and ill supplied with comforts and conveniences for travellers so as to require them to carry an extraordinary number of articles. It would be just as unreasonable to frame a definition at the present day by reference to the customs and habits of Englishmen fifty years ago, when it was often necessary to carry fire-arms for protection against robbers. The leading idea suggested by the words "personal luggage" is something which may be carried in the hand; and anything which is entirely opposed to this idea is probably not included within the meaning of the words.

Judgment for the respondent.

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IN THE QUEEN'S BENCH. April 26, May 11, 1869.

THE QUEEN v. THE WALLASEY LOCAL BOARD OF HEALTH.

38 L. J. Q.B. 217; L. R. 4 Q.B. 351; 21 L. T. 90; 17 W. R. 766; 10 B. & S. 428.

See, *Pearsall* v. *Brierley Hill Local Board*, [1883] E. R. A.; 52 L. J. Q.B. 529; 11 Q.B. D. 735; 49 L. T. 486; 32 W. R. 141 (C. A.): affirmed, [1885] E. R. A.; 54 L. J. Q.B. 25; 9 A.C. 595; 51 L. T. 577; 33 W. R. 56 (H.L.).

Compensation—Public Health Act, 1848—*Damage by Exercise of Powers of the Act.*

LOCAL GOVERNMENT. D. E.—*By the Public Health Act*, 11 & 12 *Vict. c.* 63. *ss.* 69, 144, *compensation is payable for damage caused to the owners or occupiers of premises by works which the local board, upon the default of such owners or occupiers, are empowered to execute.*

This was a rule calling on the Wallasey Local Board of Health to shew cause why a mandamus should not issue, commanding them to make compensation to Evan Thomas out of the general district rates, under the Public Health Act, 11 & 12 Vict. c. 63.[1], for damage sustained by him by the exercise of the powers vested in the board.

It appeared that Thomas was owner of a house abutting upon a road in the district of the local board of health (not being a highway), and that in December, 1865, a notice was served upon him requiring him within a specified time to sewer, level, pave, &c. part of the street. The notice not being complied with, the board proceeded to execute the works themselves, and in so doing raised the level of the road opposite Thomas's house, so as to block up a portion of the doorway and obstruct the access from the street to the house. The rule, as above stated, having been obtained,

Milward and *R. J. Williams* shewed cause.—The local board may by notice (see 24 & 25 Vict. c. 61. s. 17, Schedule) require the owner himself to do the work. If he had done the work he would have had no claim. The additional power does not affect the question of liability. If the board have acted in excess of their powers the compensation clause does not apply, but the claimant has his remedy by action. But if they were justified in what they did, it is very hard if the occupier is to have a claim for making default in fulfilling his duty.

Bruce, in support of the rule.—Local boards are bound to put their compulsory powers into execution in such a manner as not to injure the ratepayers.

[LUSH, J.—Do you say that if the claimant, while doing the work himself, had sustained damage, that he could have recovered compensation?]

If the claimant had done this work under the compulsion of the board, he would have been their agent in doing it; and it could make no difference who was the immediate actor. The question turns entirely on the meaning of the compensation clause, section 144, which is in general terms, and ought to be construed so as to protect the interests of the public.

Both parties having consented to be bound by the decision of the Court without taking further proceedings, the Court took time to consider its judgment.

(1) 11 & 12 Vict. c. 63. s. 69:—"In case any present or future street, or any part thereof (not being a highway), be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the Local Board of Health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, &c., require them to sewer, level, &c., within a time to be specified in such notice; and if such notice be not complied with the said local board may, if they shall think fit, execute the works mentioned or referred to therein; and the expenses incurred by them in so doing shall be paid by the owners in default, ... in proportion to the frontage of their respective premises," &c.

Section 144. "Full compensation shall be made, out of the general or special district rates to be levied under this Act, to all persons sustaining any damage by reason of the exercise of any of the powers of this Act," &c.

By 24 & 25 Vict. c. 61. s. 17, a form of notice may be used for any of the purposes of the 11 & 12 Vict. c. 63. s. 69, which is set out in Schedule A. to the Act.

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The judgment of the Court [2] was delivered (on May 11) by

HANNEN, J.—In this case a rule was obtained for a mandamus to the Wallasey Local Board of Health to cause compensation to be made to Evan Thomas for damage by him sustained, by the exercise by the local board of the powers of the Public Health Acts.

The local board, acting under section 69. of the Public Health Act, 1848 (11 & 12 Vict. c. 63), required Evan Thomas and other owners of premises in a certain street in New Brighton, to sewer, level, pave and channel the same; and the said Evan Thomas having made default in complying with the notice, the board executed the required works, and claims as contribution payable by Evan Thomas in respect of the works the sum of 71*l.* 8*s.*

It is alleged by Evan Thomas that the effect of the works, as executed, is to obstruct the entrance to his house, and to render the access to his doorway dangerous and inconvenient; and, in respect of the injury, he claims compensation under section 144, which enacts that full compensation shall be made to all persons sustaining any damage by reason of the exercise of any of the powers of the Act.

It was contended on behalf of the local board that, inasmuch as the owners of the houses in the street were bound to do the works themselves, or if done by the board to pay for them, they could not be entitled to compensation for injury incurred by the works. We are of opinion, however, that this argument is not well founded. There is no necessary connection between the cost of the works and the damage which they may occasion. The raising of the level of a street may be very advantageous to the majority of the houses in it, but very injurious to one. Although, therefore, the owner of that house may be bound under section 69. to pay his proportion of the cost (having regard to the frontage of the house) of altering the level, he may still be entitled to compensation out of the general district rate for the special damage which he has sustained in order that his neighbours and the district generally should be benefited.

We are therefore of opinion that Evan Thomas is entitled to have it ascertained whether or not he has sustained damage by the execution of the works in question, and to receive compensation for such damage, if any.

The rule will therefore be made absolute for a mandamus, and the parties have agreed to be bound by our decision.

Rule absolute.

IN THE QUEEN'S BENCH. May 7, 1869.

DIGNAM *v.* BAILEY.

38 L. J. Q.B. 218: for other proceedings, see s.c., [1868] E. R. A. 1071; 37 L. J. Q.B. 71; L. R. 3 Q.B. 178 (Q.B.): and, [1871] E. R. A.; 40 L. J. Q.B. 68; L. R. 6 Q.B. 47; 10 B. & S. 891; 23 L. T. 706; 19 W. R. 325 (Ex. Ch.).

Sheriff, Liability of—Escape—Debtor and Creditor—Omission to plead Deed under Bankruptcy Act, 1861*—Protection from Arrest—Pleading.*

PRACTICE. Z.—*Declaration against the defendant as sheriff for an escape. Plea, that the debtor was discharged from custody on the production of a certificate of the registration of a composition-deed under the Bankruptcy Act,* 1861. *Replication, that the plaintiff's cause of action first arose after the registration of the deed, and that he was not amongst the creditors referred to or intended to be bound by the deed. Issue having been joined, it appeared on the trial that the debtor was acceptor of a bill of exchange, which was running at the date of, and indorsed to the defendant after the registration of the deed. The debtor when sued by the plaintiff had neglected to plead the deed:*—Held, *without deciding what would have been the case if the pleadings had raised the question whether the sheriff was justified in discharging a debtor who had*

(2) Lush, J., Hannen, J. and Hayes, J.

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neglected to plead a composition-deed, that upon the pleadings as framed the only question was whether the plaintiff was a creditor bound by the deed, and upon this issue the verdict must be entered for the defendant.

Declaration—That the plaintiff, on December 11, 1866, recovered judgment against Thomas Brassington for 23*l.* 17*s.* 9*d.*, and on December 14, 1866, sued out a writ of *ca. sa.* on the judgment, directed to the defendant as sheriff of Kent, commanding him to take Brassington, to satisfy the plaintiff 23*l.* 17*s.* 9*d.* with interest; that the defendant as sheriff took Brassington under the writ, but without the consent, &c. of the plaintiff suffered him to escape.

Pleas—first, not guilty; secondly, that after the defendant had taken Brassington in execution of the writ, as in the declaration alleged, Brassington produced to the defendant, or his officer, a copy of the certificate under the seal of the Court of Bankruptcy and the hand of the deputy chief registrar of the Court, of the due registration of a deed or instrument made and executed between Brassington and his creditors within the meaning of the 198th section of the Bankruptcy Act, 1861, and the other statutes relating thereto, wherefore the defendant released and discharged Brassington out of his custody, in pursuance of the provisions of the statute in that behalf, which is the alleged grievance.

Replication—first, a joinder of issue; secondly, to the second plea, that the plaintiff's cause of action against Brassington upon and in respect of which the judgment was recovered first arose and accrued to the plaintiff after the making and after the registration of the deed, and the plaintiff was not a creditor of Brassington in respect of the cause of action when the deed was made nor when the same was produced and left for registration, nor until after the certificate was granted, and the plaintiff was not among the creditors referred to or intended to be bound by the deed.

Rejoinder, taking issue on the replication.

The plaintiff also demurred to the second plea, and the defendant to the second replication; but the Court of Queen's Bench, after argument, held that the plea was bad and the replication good—see *Dignam* v. *Bailey* (37 L. J. Q.B. 71).

At the trial, before Mellor, J., at the London Sittings after Easter Term, 1868, it appeared that the bill of exchange upon which the action against Brassington was brought was accepted by him, and became due on July 20, 1866. On June 26 previous Brassington executed a deed of composition and release under the Bankruptcy Act, 1861, and caused it to be registered on the same day. The bill was indorsed to the plaintiff after the registration of the deed. The plaintiff issued his writ on November 27. Brassington did not plead, and on December 11 judgment was obtained against him for 20*l.* 9*s.* 9*d.* debt and interest, and 3*l.* 8*s.* costs. He was arrested by the defendant on December 15, but was discharged upon producing the certificate of registration.

A verdict was directed for the plaintiff for the amount indorsed on the *ca. sa.*, with leave for the defendant to move to enter it in his favour.

A rule having been obtained accordingly,

Digby Seymour shewed cause.—The case of *Dignam* v. *Bailey* (37 L. J. Q.B. 71) having decided that a debtor is not protected by the certificate of the registration of a deed under section 198. of the Bankruptcy Act, 1861, before the debt in respect of which the judgment was obtained and execution issued became due, there is a direct authority in favour of the plaintiff. Moreover, Brassington having neglected to plead the deed, it is now too late to take advantage of it—*Rossi* v. *Bailey* (37 L. J. Q.B. 204).

Raymond, in support of the rule.—If Brassington had applied to a Judge at chambers to be discharged from custody, it is probable that, on the authority of *Rossi* v. *Bailey* (37 L. J. Q.B. 204), the application would have been refused. But the present question is a different one. It will not be disputed, first, that a running bill, although not due, is provable in Bankruptcy (12 & 13 Vict. c. 106. s. 172); secondly, that, being provable, it is included in the order of discharge

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under the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), sections 161, 162; thirdly, that by section 197. of the latter Act, deeds like the present one are subject to the practice in Bankruptcy; fourthly, that by section 198, the certificate is to be available as a protection in bankruptcy; and fifthly, that by section 113. of the former Act, the sheriff is bound to discharge the bankrupt on the production of the certificate of protection. These propositions are confirmed by the cases of *Topping* v. *Keysell* (16 Com. B. Rep. N.S. 258; 33 L. J. C.P. 225), *Wood* v. *De Mattos* (35 L. J. Ex. 64), and *Exley* v. *Inglis* (37 L. J. Ex. 145). Apart, therefore, from the decision in *Rossi* v. *Bailey* (37 L. J. Q.B. 204), the defendant would have been justified in discharging the debtor. But this case only decided that the debtor could not *compel* the creditor to discharge him. It does not shew that the sheriff is liable in this action.

[LUSH, J.—Is not the only question raised by these pleadings whether the plaintiff was a creditor within the meaning of the deed?]

The defendant contends that this is the only point before the Court; and if so there is an end to the case, as it cannot be disputed that the plaintiff was a creditor bound by the deed, so that the replication is not proved.

Seymour asked leave to amend, but

The COURT[1] refused the application, on the ground that the objection to the deed was a technical one, and made the rule absolute.

Rule absolute.

IN THE QUEEN'S BENCH. May 7, 1869.

MARKS *v.* FELDMAN.

38 L. J. Q.B. 220; L. R. 4 Q.B. 481: reversed, [1870] E. R. A.; 39 L. J. Q.B. 101; L. R. 5 Q.B. 275; 10 B. & S. 371 (Ex. Ch.).

Bankruptcy—Rights of Assignees—Bankruptcy on Debtor's own Petition—Trover—Fraudulent Preference.

BANKRUPTCY. B.—*Where an adjudication of bankruptcy is on the debtor's own petition, and goods of the bankrupt have been delivered by him to a creditor by way of fraudulent preference and sold or otherwise disposed of by the creditor before the petition, the assignees cannot recover the value of these goods either in an action of trover or money had and received.*

The first count of the declaration stated that the plaintiff, as creditors' assignee of the estate and effects of R. P. Jackson, a bankrupt, according to the statutes in force concerning bankrupts, sued the defendant for the conversion of goods of R. P. Jackson before he became bankrupt. Second count, that after Jackson became bankrupt the defendant converted to his own use, and wrongfully deprived the plaintiff as assignee as aforesaid of the use and possession of goods of the plaintiff as assignee as aforesaid. Third count, for money had and received by the defendant to the use of the plaintiff as assignee as aforesaid.

Pleas, to the first and second counts, not guilty; secondly, to the first count, that the goods were not the goods of Jackson; thirdly, to the second count, that the goods were not the goods of the plaintiff as assignee; fourthly, to the last count, never indebted.

Joinder in issue.

At the trial, before Hannen, J., at the York Spring Assizes, 1868, it appeared that Jackson, who was a jeweller, at Richmond, in Yorkshire, presented a petition for adjudication of bankruptcy on November 16, 1867, and was adjudicated bankrupt on the same day. The plaintiff was appointed creditors' assignee on December 10, 1867. The goods in respect of which the action was brought were claimed by the defendant under a bill of sale of the bankrupt's

(1) Cockburn, C.J., Mellor, J., Lush, J. and Hannen, J.

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stock-in-trade, executed by him on July 26, 1867. At the time when the bill of sale was executed Jackson was indebted to the defendant and other creditors. The defendant took possession of these goods on October 12 under the power of entry in the bill of sale, and caused them to be sold by auction on the 18th and 19th. The proceeds, deducting expenses, amounting to 145*l.* 10*s.*, were paid to the defendant. After the bankruptcy of Jackson a demand was made on the defendant for the goods in question, and the present action commenced. It was objected by the counsel for the defendant that, even assuming that the bill of sale was a fraudulent preference, the assignee could not recover as his title did not relate back to the date of the bill of sale. The learned Judge reserved the point; and the jury having found that the giving of the bill of sale was a fraudulent preference, a verdict was entered for the plaintiff for the amount of the value of the goods, with leave for the defendant to move.

A rule having been obtained calling on the plaintiff to shew cause why the verdict should not be set aside and entered for the defendant, on the ground that there was no relation back to the date of the bill of sale so as to entitle the plaintiff to recover,—

Overend and *Forbes* shewed cause.—The plaintiff, as creditors' assignee, is entitled to maintain this action. The objection upon which the defendant relies is, that the title of the plaintiff does not relate back to the date of the bill of sale. But, admitting that the plaintiff cannot succeed on the trover counts, he may still rely on the count for money had and received.

[LUSH, J.—Is it not necessary that the plaintiff should have disaffirmed the bill of sale while the goods were still in the possession of the defendant? *Young* v. *Billiter* (8 H.L. C. 682; 30 L. J. Q.B. 153) is surely an authority for this.]

In *Groom* v. *Watts* (4 Ex. Rep. 727; 19 L. J. Ex. 154) the marginal note is as follows: "The defendant's wife, whilst sole, made, as surety with F, a joint and several promissory-note, payable to L. F. having become embarrassed delivered his effects to W. for the benefit of his creditors. The defendant applied to F. for money to take up the note, when F. voluntarily, and in contemplation of bankruptcy, gave him an order upon W. for the amount, which was paid to the defendant. L. in whose hands the note was, refused to receive the amount unless the whole amount of F.'s debt to him was paid, and the defendant retained the amount which he had received as an indemnity. A fiat in bankruptcy having issued against F, held, that his assignees were entitled to recover from the defendant the sum so paid to him as money received for their use." It appears from the report that this fiat was on the bankrupt's own petition. In the course of the argument Alderson, B. says, "This was money had and received by the defendant to the use of the assignees, inasmuch as it was money handed over by the bankrupt under such circumstances that it was against law that he should retain it." *Young* v. *Billiter* (8 H.L. C. 682; 30 L. J. Q.B. 153) was an action of trover by the assignees of an insolvent under 1 & 2 Vict. c. 110. s. 59, to recover the value of goods seized under a warrant of attorney given to the defendant within three months of the debtor's imprisonment. It was held that trover could not be maintained, as the warrant of attorney was upon the same footing as an ordinary fraudulent preference, and was therefore only voidable as regarded the assignees. But Blackburn, J. in delivering his opinion in the House of Lords to the effect that there was no conversion, says (30 L. J. Q.B. 156), "I think it right, however, to guard against its being supposed that, in my opinion, no action at the suit of the assignees would lie against the favoured creditor. On the contrary, I am strongly disposed to think that as soon as the assignees avoid the transaction they may, by an action for money had and received, or, at all events, by a properly shaped action, make the favoured creditor refund any benefit which he has wrongfully received; and probably, if they can aver and prove that the defendant was a party to the fraudulent transaction, knowing it to be such, they may recover the full damage sustained by the estate, though greater than the benefit received by the defendant; but for this purpose the *scienter* is material." In the present case the

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scienter could have been proved without difficulty, as it is quite clear that the defendant was aware of the position in which the bankrupt was placed.

[LUSH, J.—In *Young* v. *Billiter* (8 H.L. C. 682; 30 L. J. Q.B. 153) the difficulty which the plaintiff had to contend with was, when could it be said that the proceeds of the sale became money had and received to his use? Certainly not at the time of the receipt.]

To allow the defendant to retain this money is contrary to the policy of the whole bankrupt law.

[LUSH, J.—In *Stevenson* v. *Newenham* (13 Com. B. Rep. 285; 22 L. J. C.P. 110), the Court in speaking of a preference similar to this, say "Such acts when voluntary and in contemplation of bankruptcy cannot be valid against the assignees if they choose to avoid them, but they are not absolutely "void." Now, if the buyer has parted with the goods the opportunity of disaffirming the contract is gone.]

It must be remembered that this action is against the person who had the goods, and who now has the money. The plaintiff may be too late to dispute the validity of the sale, but not the validity of the appropriation of the proceeds to the defendant's debt. They cited *Nicholson* v. *Gooch* (5 El. & B. 999; 25 L. J. Q.B. 137).

Field, in support of the rule.—*Young* v. *Billiter* (8 H.L. C. 682; 30 L. J. Q.B. 153) is a conclusive authority against this action. In that case the ground of the decision was that there was no relation back beyond the date of the vesting order, and here there is no relation earlier than the bankrupt's petition. The defendant was guilty of no tort in selling the goods and in receiving the proceeds, for at the time of the sale it cannot be questioned that the goods were his own property. Nor has the defendant been guilty of any further wrong since the title of the assignees accrued.

[MELLOR, J.—It seems very strange to me that the fact that a man keeps goods in his possession up to the time of a bankruptcy should make a difference. LUSH, J.—I cannot see how a transaction good at the time when it took place can afterwards be made invalid, except by Act of Parliament.]

When the defendant has once parted with the possession of the goods there is no further remedy.

COCKBURN, C.J.—I think that this rule must be made absolute. It was admitted by the counsel for the plaintiff, and there could be no doubt, that this is not a case in which trover would lie. The plaintiff is therefore obliged to rely on the count for money had and received. But I am at a loss to see how he can succeed under this count if trover cannot be maintained, for the reason why trover will not lie is that the act of selling the goods being one which the bankrupt law does not prohibit, the assignees cannot repossess them or recover them in specie when they have been sold before the act of bankruptcy. Now, if the assignees are unable to recover either the goods or their value, I do not see how they can recover the proceeds of the sale of them from the person selling them before the act of bankruptcy. This is the conclusion to which I am inevitably led in the absence of any authority in favour of the plaintiff, and no such authority has been cited.

MELLOR, J.—I am of the same opinion. I find it extremely difficult to see how one proposition can be affirmed and the other denied. If trover will not lie for the goods in question, it must be on the ground that the goods at the time of the supposed conversion were the property of the person who parted with them, and not of the assignees; and if there was a power to part with them, I do not see how money had and received will lie. I confess that, upon principle, I am not at all satisfied with a law which enables the wrongful act to be disaffirmed so long as the goods remain in the hands of the person to whom they were delivered, and protects him when he has parted with them before the act of bankruptcy, particularly where the bankruptcy does not relate back before the debtor's own petition.

LUSH, J.—I am of the same opinion. The bill of sale was not fraudulent.

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within the statute of Elizabeth, and was therefore perfectly good between the parties. The bankrupt then had a perfect right to make the deed, and the defendant to take possession under it. It is true that, according to section 67[1] of the Bankrupt Law Consolidation Act, 1849, which contains a provision similar to one which is to be found in the earlier statutes, the deed would have been fraudulent if the debtor had become bankrupt on the petition of a creditor; for then the transaction, though valid at the time, would afterwards become invalid as an act of bankruptcy. But the reason of this is, that the statute not only makes the transaction a fraudulent preference, but also an act of bankruptcy, which is altogether void against the assignees. The case of *Stevenson* v. *Newenham* (13 Com. B. Rep. 285; 22 L. J. C.P. 110) and subsequent cases have settled the point that where the bankruptcy is on the bankrupt's own petition, the title of the assignees does not relate back further than the petition, and that section 67. of the Bankrupt Law Consolidation Act, 1849, does not apply, so that the assignees take only what the bankrupt had at the time of the petition. Therefore, the goods which belonged to the bankrupt before his petition were goods which any creditor would have a perfect right to receive, as he would also have a right to receive and keep money derived from the sale of them; so that, as it must be conceded that section 67. does not apply, it only remains to say that, by the common law, a transaction valid at the time cannot be made invalid afterwards.

HANNEN, J.—I am of the same opinion. There can be little doubt but that the law on this point is anomalous, the difficulty arising from the fact that there can be no relation back when the bankruptcy is on the bankrupt's own petition. The decisions which have already been given make it impossible for us to give judgment for the plaintiff, though the doctrine upon which these decisions are founded is technical, and, in my opinion, the case is one for the interference of the legislature.

Rule absolute.

IN THE QUEEN'S BENCH. May 7, 1869.

STOREY *v.* ASHTON.

38 L. J. Q.B. 223; L. R. 4 Q.B. 476; 17 W. R. 727; 10 B. & S. 337.
See, *Wilson* v. *Owens*, 1885, 16 L. R. I. 1 (C.L.) 225 (Ex. D.).

Negligence—Master and Servant—Carman going Journey without Master's Authority.

MASTER AND SERVANT. E.—*The defendant, a wine-merchant, carrying on business in the Minories, sent his clerk in a cart to Blackheath, to deliver wine and bring back empty bottles. The cart had reached King William Street, on its way back, when the clerk persuaded the carman to drive to the clerk's house, near the City Road, upon private business of his own. The cart while in the City Road, and about two miles out of its way, ran against and injured the plaintiff:*—Held, *on the authority of* Mitchell *v.* Crasweller (13 Com. R. Rep. N.S. 237; 22 L. J. C.P. 100), *that, as it appeared that the driver had started upon an independent journey for a purpose unconnected with his master's business, the defendant was not liable for the consequences of the accident.*

Declaration by the plaintiff, suing by next friend, stating that the defendant, by his servant, so negligently managed a horse and cart that they struck against the plaintiff, who was knocked down and seriously bruised, wounded, &c.

(1) By the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106), s. 67, "If any trader liable to become bankrupt shall depart this realm, &c., or make or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods or chattels, or make or cause to be made any fraudulent gift, delivery or transfer of any of his goods or chattels, every such trader doing, suffering, procuring, executing, permitting, making or causing to be made any of the acts, &c., with intent to defeat or delay his creditors, shall be deemed to have thereby committed an act of bankruptcy."

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Pleas—First, not guilty; secondly, that the horse and cart were not under the care and management of the defendant's servant.

Joinder of issue.

At the trial, before Hannen, J., at Westminster, in June, 1868, it appeared that the plaintiff, a boy about six years old, was crossing the City Road when he was knocked down by a cart belonging to the defendant and seriously injured. The defendant was a wine-merchant, carrying on business in Vine Street, Minories. Parfitt, the defendant's clerk, had been sent in the cart to deliver a quantity of wine and ale at Blackheath, and it was the carman's duty to bring back empty bottles to Vine Street, and then to put up the horse and cart. The cart, at three o'clock in the afternoon, had got so far as King William Street, on its way back, when Parfitt asked the carman to drive him to his house, in the City Road, and said that he would give him a cup of tea if he would take the cart to Barnsbury, to pick up an empty cask. They had proceeded about two miles out of the way when the accident happened.

The learned Judge directed a verdict for the defendant, with leave for the plaintiff to move to enter it in his favour for 80*l*., the damages assessed by the jury.

A rule having been obtained accordingly,

Prentice and *A. L. Smith* shewed cause.—The defendant is not responsible for the negligence of his carman, because the carman at the time of the accident was not engaged in his master's business. *Mitchell* v. *Crasweller* (13 Com. B. Rep. 237; 22 L. J. C.P. 100) is in point. There the carman, instead of putting up his master's horse and cart at the stable, was persuaded to drive the foreman part of the way home, and on his return from this journey drove against the plaintiff, and it was held that the master was not liable, on the ground that the driver had started on a new journey wholly unconnected with his employment.—(He was then stopped.)

Digby Seymour and *Finlay*, in support of the rule.—The plaintiff relies on the cases of *Joel* v. *Morrison* (6 Car. & P. 501), where Parke, B. expressed his opinion that, if a driver being on his master's business made a detour to call upon a friend, the master was responsible, and *Sleath* v. *Wilson* (9 Car. & P. 607), where Erskine, J. followed the ruling in the previous case, and held that the master was liable, though the driver, instead of driving to an inn and putting up the horse, was going another way on business of his own, the learned Judge saying that the driver at the time of the accident was acting in the course of his employment.

[LUSH, J.—Suppose the carman in this case had driven the cart to Barnet, and the accident had then happened?]

The driver was only bound to bring back the cart at some time on that day to his master's premises. *Mitchell* v. *Crasweller* (13 Com. B. Rep. 237; 22 L. J. C.P. 100) is, in fact, an authority in favour of the plaintiff. There the servant had returned to his master's place of business, which was not the case here.

[MELLOR, J.—If the man had remained out till eleven o'clock at night he would still have been in his master's employment, but he could not be said to be on his master's business.]

In *Whitman* v. *Pearson* (37 L. J. C.P. 156), where a man who was in charge of a horse and cart drove it to his own house against orders, it was held that there was evidence to warrant a jury in finding that he was acting in his master's employment.

COCKBURN, C.J.—I think this rule must be discharged, and that the law as laid down in *Mitchell* v. *Crasweller* (13 Com. B. Rep. 237; 22 L. J. C.P. 100) presents us with a true view of the case. I cannot adopt the proposition of Erskine, J. in *Sleath* v. *Wilson* (9 Car. & P. 607), that, whenever the master has entrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it. I think that a servant can only be said to be acting in the employment of his master, so long as he is doing some act with his master's assent. I think that if a driver while acting in his

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master's business were to make a slight deviation in order to carry some business of his own into effect, in such a case the master might be liable, and that the question would be one of degree as regards the extent of the deviation. But this is not the present case. Here the man starts upon an entirely independent journey, which has nothing to do with that which he undertook on behalf of his employer. While returning home by way of King William Street he starts on a journey to the City Road, and is two miles out of his way when the accident happens. In *Mitchell* v. *Crasweller* (13 Com. B. Rep. 237; 22 L. J. C.P. 100) the driver, after returning to his master's house, started upon an entirely independent journey. Here the case is not quite so strong, but in deviating as he did, the driver did, in fact, start upon an independent journey. I think that it would be a strange thing to hold that in such a case the master is responsible; and the rule must be discharged.

MELLOR, J.—I am of the same opinion. A master is generally speaking responsible for the acts of his servant while acting in his service, and, as was said by Cresswell, J., in *Mitchell* v. *Crasweller* (13 Com. B. Rep. 237; 22 L. J. C.P. 100), there can be no doubt that if a servant in executing the orders, express or implied, of his master, acts in a negligent, improper and roundabout manner, the master may be liable. But here the servant had collected all the articles which it was his duty to bring back, and all that he had to do was to return home and deliver them. But, instead of doing this, he starts off upon an independent journey, as my Lord has said, to accommodate a fellow-servant. As this journey was entirely for the accommodation of another the master ought not to be responsible for the consequences of it.

LUSH, J.—I am of the same opinion. The question in all these cases is, whether the servant at the time of the accident was doing that which his master employed him to do? If this is proved to have been the case the master is responsible. Now here what the master employed the servant to do was to bring the empty casks and bottles home. If, in the ordinary course of things, the man had gone home in a roundabout way, the master might still have been responsible. But here the driver did not, in the literal sense of the words, go home, but started two miles out of his way home on the business of another person.

Rule discharged.

IN THE QUEEN'S BENCH. Feb. 2, 3, April 20, 1869.

TAYLOR v. CHESTER.

38 L. J. Q.B. 225; L. R. 4 Q.B. 309; 21 L.T. 359; 10 B. & S. 237.

See, *Wilson* v. *Strugnell*, [1881] E. R. A.; 50 L. J. M.C. 145; 7 Q.B. D. 548; 45 L. T. 219 (Q.B. D.). Applied, *Herman* v. *Jeuchner*, [1885] E. R. A.; 54 L. J. Q.B. 340; 15 Q.B. D. 561; 53 L. T. 94; 33 W. R. 606 (C.A.). See, *Scott* v. *Brown & Co.*, [1892] E. R. A.; 61 L. J. Q.B. 738; [1892] 2 Q.B. 724; 67 L. T. 782; 41 W. R. 116 (C. A.); *In re Cronmire*, [1898] E. R. A.; 67 L. J. Q.B. 620; [1898] 2 Q. B. 383; 78 L. T. 483; 46 W. R. 679 (C. A.). Considered, *Gordon* v. *Chief Commissioner of Metropolitan Police*, [1910] E. R. A. 79 L. J. K.B. 957; [1910] 2 K.B. 1080; 103 L. T. 338 (C. A.). See, *In re Robinson's Settlement*, [1912] E. R. A.; 81 L. J. Ch. 393; [1912] 1 Ch. 717; 106 L. T. 443 (C. A.).

Contract — Breach of Illegal Contract — Detinue — Bailor and Bailee — Pleading.

CONTRACT. E.—*To a declaration containing two counts, the first for the breach of a contract to re-deliver a bank note to the plaintiff, the second, detinue for the same note, the defendant pleaded that it was deposited by way of pledge*

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to secure the repayment of money advanced to the plaintiff. Replication, that the money was knowingly advanced for immoral purposes. Upon the trial the facts were proved as stated in the pleadings:—Held, *that upon the whole record the defendant was entitled to judgment, as it was impossible that the plaintiff could recover, except through the medium and by the aid of an immoral transaction to which he was himself a party, so that the maxim* in pari delicto potior est conditio possidentis *was applicable.*

Declaration—That in consideration that the plaintiff, at the request of the defendant, delivered to the defendant the half of a promissory note of certain bankers for the sum of 50*l.*, to be safely kept and taken care of by the defendant, and to be re-delivered by the defendant to the plaintiff on request, the defendant promised the plaintiff to safely keep and take care of the half note and re-deliver the same to the plaintiff on request. Breach, non-delivery of the note to the plaintiff on his request.

Second count—Detinue for a like half note.

Second plea to the first count, that the alleged agreement was subject to the term or condition, that the half note was to be kept by the defendant as a pledge or security for the payment of 20*l.* then due from the plaintiff to the defendant, and that the defendant received the half note for this purpose; and that the plaintiff would not pay the defendant the sum of 20*l.*, and that the defendant was prevented from performing her agreement by the neglect and default of the plaintiff. There was a like plea to the second count.

Replication to both pleas, that the alleged debts, in respect of which the defendant justified the non-delivery and detention of the security claimed by the plaintiff, were due for wine and suppers supplied by the defendant in a brothel and disorderly house kept by the defendant, for the purpose of being consumed there by the plaintiff and divers prostitutes in a debauch to incite them to riotous, disorderly and immoral conduct, and for money knowingly lent for the purpose of being expended in riot and debauchery and immoral conduct in the brothel.

Demurrer and joinder in demurrer.

The cause, as will appear by the judgment, went down to trial, and a question similar to that raised by these pleadings was also raised upon a rule to enter the verdict for the plaintiff.

Hopwood (*Holker* with him), for the defendant.—Where a dispute arises out of an immoral contract the Court will not interfere between the parties. It cannot be said that the plaintiff is not relying upon the immoral transaction, for, if the whole cause of action had been set out in the declaration, the agreement would have been disclosed, and the defendant might have demurred. In *Chitty on Contracts*, 6th edit. 579, the law is thus laid down: "Whenever the contract which a party seeks to enforce, be it express or implied, is expressly or by implication borbidden by the common or statute law, no Court will lend its assistance to give it effect; and the test as to whether a demand connected with an illegal transaction is capable of being enforced at law is, whether the plaintiff requires to rely on such transaction in order to establish his case." In *Holman* v. *Johnson* (Cowp. 341, 343) Lord Mansfield, after stating that the objection that a contract is illegal or immoral is allowed not for the sake of the defendant, but because the Court will not lend their aid to the plaintiff, says, "So if the plaintiff and the defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equally in fault *potior est conditio defendentis.*" In *Biggs* v. *Lawrence* (3 Term Rep. 454), where goods were sold to be delivered in Guernsey in order that they might be smuggled into England, it was held that the vendor could not recover their value; and the same principle was upheld in *Clugas* v. *Penaluna* (4 Term Rep. 466). It is not necessary that the plaintiff should rely on the immoral transaction; it is enough if it be brought to light by the pleadings or the evidence. He also referred to *Story's Equity Jurisprudence*, s. 298.

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Herschell (*Pope* with him), for the plaintiff.—The Court can only allow the defendant to retain this note by giving effect to an immoral agreement. The plea does not set out the real facts of the case, and ought to be considered as if the replication were incorporated with it. The plaintiff does not rely upon the contract of deposit. He knows that this contract can have no effect, and he therefore takes his stand upon his common law right to the note. If the Court decide in favour of the plaintiff, they will prevent the defendant from getting any benefit from the immoral contract. It surely could not be contended that an unlicensed broker could refuse to deliver up shares and other securities belonging to the principal, who had employed him knowing of his disability.

[HANNEN, J.—Ever since *Cannan* v. *Bryce* (3 B. & A. 179) it has been settled that money advanced for an unlawful purpose cannot be recovered back. If goods were lent for the purpose of prostitution could detinue be brought for them?]

Yes. A special property is merely a right given by contract to hold an article for certain purposes. The defendant admits the plaintiff's property in the note, but says that there is a collateral contract which gives him a right to retain it. But the Court will not acknowledge this contract. Suppose, in an action for goods sold and delivered, the defendant were to plead a set-off in respect of some corrupt bargain, could this prevent the plaintiff from recovering his original debt?

[MELLOR, J., referred to *Pearce* v. *Brookes* (35 L. J. Ex. 134; L. R. 1 Ex. 213) and *Bridges* v. *Fisher* (3 El. & B. 642; 23 L. J. Q.B. 276) as to the right to recover the price of goods supplied in pursuance of an immoral contract.]

In *Feret* v. *Hill* (15 Com. B. Rep. 207; 23 L. J. C.P. 185) it was, it is true, held that ejectment could not be brought for a house which had been taken by the defendant for an immoral purpose. But there the letting of the premises was quite regular, and there was no *agreement* that they should be used for an improper object. Here there is nothing to affect the property of the plaintiff, but a contract which cannot be enforced.—He cited *Scarfe* v. *Morgan* (4 Mee. & W. 270, per Parke, B.; 7 L. J. Ex. 324) and *Story on Contracts*, 2nd edit. p. 405, s. 487.

Holker, in reply.—This case cannot be decided upon a mere question of pleading. The defendant merely informs the Court of the immoral transaction to which the plaintiff was a party, in order that the Court may not interfere to enforce or adjust it. When the details of this transaction are known it is clear that a special property in the note passed to the defendant, just as in *Feret* v. *Hill* (15 Com. B. Rep. 207; 23 L. J. C.P. 185) the term and interest in the premises passed to the defendant as soon as he entered into possession of them.

[HANNEN, J.—The consequence of entering into an arrangement like this appears to be that the special property becomes an absolute property.]

Nothing has happened to divest the interest which the defendant had acquired, and this case must be considered without reference to the order of the pleadings.

Cur. adv. vult.

The judgment of the Court (Mellor, J., and Hannen, J.) was delivered on April 20 by—

MELLOR, J.—In this case the plaintiff declared on the bailment of the half of a 50*l.* Bank of England note to the defendant, to be re-delivered on request, alleging a refusal by the defendant to re-deliver such half note. The second count was in detinue for the same half note.

The defendant, after traversing the delivery and detention of the note, and to the second count denying that it was the property of the plaintiff, pleaded separately and specially to both counts, in effect that the half not in question had been deposited by the plaintiff with the defendant by way of pledge, to secure the repayment of money due and money then advanced by the defendant to the plaintiff and then due.

The plaintiff joined issue on the defendant's pleas, and also replied specially that the alleged debt or sum in respect of which the defendant justified the non-

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delivery and detention of the half note, was for wine and suppers supplied by the defendant in a brothel and disorderly house kept by the defendant, for the purpose of being consumed there by the plaintiff and divers prostitutes in a debauch there to incite them to riotious, disorderly and immoral conduct, and for money knowingly lent for the purpose of being expended in riot and debauchery and immoral conduct.

The defendant rejoined, taking issue on the replication, and also demurred to its validity.

On the trial, before me at Manchester, the case of the plaintiff was, that the note had not been deposited at all with the defendant, but had been fraudulently taken and appropriated by her. The jury, however, did not adopt that view of the facts, but found that the note was deposited by way of security as alleged by the defendant, and they further found upon the evidence that the debt was incurred and the money advanced as alleged in the plaintiff's replication to the special pleas. On these findings the verdict was entered for the defendant, with liberty to the plaintiff to move to enter the verdict for him for 50*l.*, to be reduced to nominal damages in case the note should be restored to the plaintiff. A rule was accordingly obtained to enter the verdict for the plaintiff, on the ground that the jury "had found all the issues tendered by the plaintiff in his favour." This rule and the demurrer to the replication came on together for argument, at the Sittings in banco after last Hilary Term, before my Brother Hannen and myself, and at the close of the argument we took time to consider our judgment.

It was argued, on the part of the defendant, in shewing cause against the rule and in support of the demurrer to the special replication of the plaintiff, that, upon the finding of the jury and the facts as admitted by the demurrer, the plaintiff and the defendant were "*in pari delicto*," and that therefore, upon the whole record, judgment must be entered for the defendant. On the part of the plaintiff, it was urged that it was the defendant who was relying on the illegality of the transaction as an answer to a claim of the plaintiff, founded on his ownership of the note and his right to recover back the same, and many startling consequences were pointed out to us as likely to result from a decision that the plaintiff could not recover. We have fully considered the case, and are satisfied that the plaintiff cannot recover under the circumstances found by the jury and admitted on the record. The maxim that "*in pari delicto potior est conditio possidentis*" is as thoroughly settled as any proposition of law can be. It is a maxim of law, established not for the benefit of plaintiffs or defendants, but is founded on the principles of public policy, which will not assist a plaintiff who has paid over money or handed over property in pursuance of an illegal or immoral contract to recover it back, "for the Court will not assist an illegal transaction in any respect,"—per Lord Ellenborough, in *Edgar* v. *Fowler* (3 East, 222); *Collins* v. *Blantern* (2 Wils. 34); per Lord Mansfield, in *Holman* v. *Johnson* (Cowp. 343). The true test for determining whether or not the plaintiff and the defendant were *in pari delicto* is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party—*Simpson* v. *Bloss* (7 Taunt. 246); *Finaz* v. *Nicholls* (2 Com. B. Rep. 501, 512). It is to be observed that in this case the illegality is not in a collateral matter, as in the case of *Feret* v. *Hill* (15 Com. B. Rep. 207; 23 L. J. C.P. 185), which was cited for the plaintiff, but is the direct result of the transaction upon which the deposit of the half note took place. Mr. Herschell's argument was based upon the hypothesis that, in spite of the findings of the jury, the plaintiff was entitled to recover by virtue of his property in the half note, and that it was the defendant alone who set up an immoral transaction as the answers to the plaintiff's claim. This argument appears to us to be founded upon an entirely erroneous view of the facts. The plaintiff, no doubt, was the owner of the note; but he pledged it by way of security for the price of meat and drink provided for and money advanced to him by the defendant. Had the case rested there and no pleading raised the question of illegality, a valid pledge would have been created and a

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special property conferred upon the defendant in the half note; and the plaintiff could only have recovered by shewing payment or a tender of the amount due. In order to get rid of the defence arising from the plea, which set up an existing pledge of the half note, the plaintiff had recourse to the special replication, in which he was obliged to set forth the immoral and illegal character of the contract upon which the half note had been deposited. It was therefore impossible for him to recover, except through the medium and by the aid of an illegal transaction to which he was himself a party. Under such circumstances, the maxim *in pari delicto potior est conditio possidentis* clearly applies, and is decisive of the case. It would also appear from the case of *Scarfe* v. *Morgan* (4 Mee. & W. 281; 7 L. J. Ex. 324)—per Parke, B., in delivering the judgment of the Court—that, notwithstanding the illegality of the transaction itself, out of which the deposit in this case arose, that the lien would exist because the contract was executed and the special property had passed by the delivery of the half note to the defendant, and the maxim would apply "*in pari delicto potior est conditio possidentis.*" It is, however, sufficient in the present case to determine it upon the ground that the plaintiff could not recover without shewing the true character of the deposit; and that being upon an illegal consideration to which he was himself a party, he was precluded from obtaining "the assistance of the law" to recover it back. It is not necessary to consider what might have been the effect of a tender of the amount for which the note was pledged, as there is nothing to raise any such question in this case. The result, therefore, will be that the verdict must stand for the defendant on the issues taken on the special pleas, and for the plaintiff on the issue taken on the replication; but, as upon the whole record it is manifest that the plaintiff cannot recover, judgment will be entered for the defendant.

Judgment for the defendant.

IN THE QUEEN'S BENCH. May 3, 1869.

THE QUEEN, *on the prosecution of* BEDFORD, *v.* SIR TRAVERS TWISS.

38 L. J. Q.B. 228; L. R. 4 Q.B. 407; 20 L. T. 522; 17 W. R. 765; 10 B. & S. 298.

See, *Re St. George-in-the-East*, 1876, 1 P.D. 311 (Cons. Court). Distinguished, *Re St. Nicholas Cole Abbey*, [1893] P. 58 (Cons. Court). See, *In re Plumstead Burial Ground*, [1895] P. 225 (Cons. Court). Discussed, *St. Nicholas, Leicester* v. *Langton*, [1899] P. 19 (Cons. Court); *In re Bideford Parish*, [1900] P. 314 (Arches). See, *Sutton* v. *Bowden*, [1913] E. R. A.; 82 L. J. Ch. 322; [1913] 1 Ch. 518; 108 L. T. 637 (Ch. D.).

Prohibition—Faculty to erect Buildings on Burial-Ground—Proceedings partly within and partly without the Jurisdiction of Ecclesiastical Court—Interest of Party moving for Prohibition.

ECCLESIASTICAL LAW.—*A prohibition will not be granted to restrain a petition in the Ecclesiastical Court where it is within the jurisdiction of such Court to grant some of the privileges prayed for, especially where the applicant has no special interest in the proceedings.*

The guardians of a parish having presented a petition to the Ecclesiastical Court, praying for a faculty to enable them to desecrate ground duly consecrated for the burial of the dead by erecting on part of it the parish workhouse and upon the rest a chapel for the inmates of the workhouse, a person, not being a rate-payer or in any way interested in the burial-ground, applied for a prohibition to restrain the Ecclesiastical Court from proceeding with the petition. It appeared that the burial-ground had been disused for many years, and that the workhouse had recently at a great expense been erected on a part of it where no corpses had been buried:—Held, *that the prohibition must be refused on two grounds: first, that although ground once duly consecrated for the burial of the dead can*

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only be applied to secular purposes by Act of Parliament, yet that so much of the petition as prayed leave to erect the chapel was within the jurisdiction of the Court, and it could not be presumed that the Court would entertain the residue of it; secondly, because the erection of the workhouse appeared to have been bonâ fide, *and the applicant had no interest in the proceedings greater than what was common to the public at large.*

Rule calling on Sir Travers Twiss, Judge of the Consistory Court of London, to shew cause why a writ of prohibition should not issue to prohibit him from further proceeding in a certain suit instituted upon a petition of the board of guardians of the parish of St. Leonard's, Shoreditch, praying for a licence or faculty to desecrate and erect certain buildings, being part of a new workhouse, upon a burial-ground set apart and duly consecrated for the use of the parishioners of the parish.

The material facts as disclosed by the proceedings in the Ecclesiastical Court and the affidavits used upon the argument of the rule were, that by the Act 43 Geo. 3. c. xxix., certain persons and their successors were appointed trustees for providing for the better relief and employment of the poor within the parish of Shoreditch, Middlesex, and were empowered to purchase land within this parish for the purpose of providing proper ground for the burial of the dead within the parish, and also a suitable piece of ground for erecting a workhouse for the poor thereof; and accordingly erected a workhouse on a portion of a plot of ground near Kingsland Road.

By virtue of a sentence duly given by the then Bishop of London, in 1778, a piece of this land adjoining the workhouse was consecrated as a burying-place for the use of the parishioners, and was inclosed accordingly. The powers of these trustees were continued by a later Act, which was itself repealed by 21 & 22 Vict. c. cxxxii., and administration of the poor law in the parish vested in a board of guardians, to whom the powers of the former trustees were transferred.

For some years subsequent to the occupation of the land and the building of the workhouse, a portion of the land was used for the burial of the deceased paupers of the parish, but for the last forty years the burial-ground had been disused, and no interments of any kind had taken place in it. It had also been closed by an Order in Council under the Burial Acts. No tombstones, mounds, &c., or other external marks of burials, were ever erected on the ground, and several buildings, consisting of cottages, outhouses and other premises, had from time to time during the last forty years been inadvertently erected upon it. The workhouse of the parish having fallen into decay, it became desirable to remove it, and to erect a new building under the statutory powers. The guardians accordingly, in March, 1863, entered into a contract with builders for the erection of a new workhouse, in accordance with plans approved of by the Poor Law Board, for the sum of 43,750*l*. The contractors, in the execution of the contract, laid the foundations of a new chapel, workhouse and infirmary upon the site of the old workhouse and the burial-ground. Neither the guardians nor the builders were aware at the time of these proceedings that the burial-ground was consecrated ground, and that it was necessary to obtain a faculty for permission to build upon it. The guardians subsequently presented a petition to the Consistory Court as above stated, praying that a licence or faculty might be granted to them for the erection of certain buildings for parochial purposes on the burial-ground.

An affidavit of the proctor to the guardians gave particulars of seven faculties or licences for the erection of buildings upon disused burial-grounds, which had been discovered upon searching the records in the registry of the Diocesan Court in London.

The rule *nisi* had been obtained at the instance of one Alfred Bedford, who appeared to have no connexion with any public body in the parish, and not even to be a ratepayer.

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The rule was brought before the Court upon several occasions, when questions were discussed which it is unnecessary to notice.

Cause was finally shewn by

Barnard, Tayler and *R. A. Pritchard.*—The rule must be discharged. The question is one peculiarly within the cognizance of the Ecclesiastical Court. Faculties appear to have been frequently granted for the erection of schools and other buildings upon graveyards, and it will be for the tribunal which has been in the habit of granting such faculties to decide whether a proper case has been made out, and to what purposes the consecrated ground should be devoted. The case of *The Rector, &c. of St. George's, Hanover Square* v. *Stewart* (2 Str. 1126) is not in point. There a prohibition was granted to restrain a suit for a licence to build a charity school on part of a churchyard; but the reason of the decision was that the rector and parishioners had been cited *in invitum*, a proceeding which was not within the jurisdiction of the Court. *Walter* v. *Mountague* (1 Curt. 261) shews that in the opinion of Dr. Lushington a question relating to consecrated ground is peculiarly within the cognizance of the Ecclesiastical Court. Two things are asked for in the present faculty, one of which (the permission to erect the chapel) it is not disputed that the Ecclesiastical Court may lawfully grant. The other may be refused, and it will not be presumed that the Ecclesiastical Court will exceed its jurisdiction. This Court has already acted on this principle in *Hallack* v. *the University of Cambridge* (1 Q.B. Rep. 593), where the Court held that, assuming that the faculty prayed for had two objects, one of which could not be entertained, an application for a prohibition before the faculty was granted, was premature, as it could not be presumed that the Ecclesiastical Court would not care to limit the faculty, if any were granted, to those objects which might legally be embraced in it. In *Campbell* v. *the Parishioners, &c. of Paddington* (2 Robert. 558), Dr. Lushington granted a faculty for the erection of a vestry-room on consecrated ground, as the room was to be used for ecclesiastical as well as secular purposes. The Court in considering this application will keep in mind the fact that the applicant is a mere stranger, with no special interest in the affairs of the parish, and that the faculty is asked for by the parish authorities to legalize what has already been done, at a great expense, and with every desire to benefit the parish.

The Solicitor-General (Sir J. Coleridge), in support of the rule.—There is authority both in ancient and modern times to shew that when ground has once been duly consecrated, and set apart for the purposes of burial, the Ecclesiastical Court has no power to interfere and desecrate it by applying it to secular uses. In *The Rector, &c. of St. George's, Hanover Square* v. *Stewart* (2 Str. 1126) a prohibition appears at once to have been granted. In *The Rector and Churchwardens of St. John's, Walbrook* v. *the Parishioners thereof* (Robert. 515), upon application for a faculty to make alterations in a burial-ground which was promoted both by the rector and the vestry. Dr. Lushington denied most distinctly that he had authority by the general law to exercise the power which was invoked, and that he remembered that Sir W. Wynne, when Judge of the Arches Court, had been asked for a faculty to convert part of a churchyard into a public road, and had refused, saying that nothing short of an Act of Parliament would enable him to accede to the prayer. In *Harper* v. *Forbes* (5 Jur. N.S. 275) the same learned Judge laid down the law in similar terms. It is not a question of discretion; the Ecclesiastical Court has no power to entertain the petition. He also referred to the customary form of consecration—*Gibson's Cod. App.*, and (with regard to the jurisdiction of the Ecclesiastical Court) to 2 Co. Inst. 489.

COCKBURN, C.J.—I am of opinion that, under all the circumstances, this rule must be discharged. At the same time I do not hesitate to express a very decided opinion that the doctrine laid down by Dr. Lushington in the case of *The Rector and Churchwardens of the Parish of St. John, Walbrook* v. *the Parishioners thereof* (2 Robert. 550) is a perfectly right one, namely, that ground once consecrated to sacred purposes cannot, by any authority known

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to the law of this country, be divested of its sacred character, so as to become applicable to secular purposes. I think that there is quite authority enough in the case of *St. George's, Hanover Square* v. *Stewart* (2 Str. 1126), and in the two decisions of Dr. Lushington, to affirm this general proposition. But my reason for saying that I think this rule ought to be discharged rests on a much narrower ground. In the first place, our attention has been called to the fact that the faculty is applied for with reference to several purposes to which it is proposed to apply this churchyard, or rather, for this is the effect of it, to give immunity to the churchwardens, who have already converted this ground to such purposes, against the possibility of proceedings against them.

Now the faculty has reference to an application of the churchyard to distinct and separate purposes, and one of these, as we are informed, is that of the erecting a chapel upon part of the burial-ground. I think the distinction taken by Dr. Lushington between purposes purely secular and purposes of an ecclesiastical or sacred character may well be applied to this case, and that here we may consider, that although the faculty as applied for the erection of a school-house or an infirmary would not be such as the Ecclesiastical Court would be in law warranted in granting, yet the faculty as applied for in reference to the building of a chapel for the purposes of divine worship would be a purpose for which the faculty could be granted.

Now, the case of *Hallack* v. *the University of Cambridge* (1 Q.B. Rep. 593; 10 L. J. Q.B. 206) is, I think, an authority for saying that where the proceedings before an inferior Court have reference to purposes, one of which is within the competency of the Court and the other not, this Court ought not, in the first instance, to presume that the Court against which the prohibition is prayed will go beyond its competency and jurisdiction. I do not think the distinction made between that case and the present by the Solicitor-General is a sound one. I think that the principle applies to this case, and that it is good and sound sense, and a true and substantial distinction. If the whole matter pending before the inferior Court, and as to which the prohibition is applied for, be one beyond its competency and jurisdiction the prohibition ought to go. If the proceeding is one as to part of which a prohibition is competent, and part of which it is not, we ought not to presume that the Court below will act in excess of its jurisdiction, more especially as, when the case is well founded, a prohibition may be applied for here as well after sentence as before. In this case if the inferior Court, instead of distinguishing between that which is within its competency and that which is not, should act in excess of its jurisdiction, nothing could prevent the parties coming to this Court after the sentence has been given.

I think, on the authority of that case, this rule ought to be discharged.

Lastly, there is another ground for our decision, and that is the distinction which has frequently been taken in this Court, and which was very much insisted upon by my Brother Blackburn and myself in the case of *In re Forster* (4 Best & S. 198, 203; 32 L. J. Q.B. 314, 316), with regard to cases where the party at whose instance the application is made is an entire stranger. Here the applicant does not appear to be a parishioner, or in any way interested in the matter of this churchyard, and I presume that he has come forward (I do not say this in his disparagement) with a view of trying the abstract question of whether a churchyard once consecrated as such can ever after, except under the authority of an Act of Parliament, be converted to secular purposes.

I am in hopes that that which is now said by the Court in upholding not only decisions as far back as the time of *Strange*, but also the well-considered judgment of one of the first lawyers who ever sat in the Ecclesiastical Court, Dr. Lushington, will be sufficient to satisfy everybody that this is an act which cannot be recklessly and inconsiderately done, and not otherwise than by virtue of an Act of Parliament, that is to say, that the bodies of the dead cannot be removed and the ground in which they have been buried divested of the sacred character attached to it by the act of persons who may happen to

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be the owners of the soil, even though they obtain or purpose to obtain a faculty.

Looking at all the circumstances of the case, and the fact that what has been done was done without an intention to violate the law, or to outrage the proper feelings of those sensitive on such a subject, and that it is desired to obtain immunity from future consequences, I think we may come fairly to the conclusion that it is a case in which we ought to draw the distinction to which I have referred, and discharge the rule on the additional ground that the present applicant is an entire stranger in the matter, and has no interest whatever in this churchyard.

HANNEN, J. and HAYES, J. concurred.

Rule discharged.

IN THE QUEEN'S BENCH. May 11, 1869.

PRIDEAUX *v.* CRIDDLE.

38 L. J. Q.B. 232; L. R. 4 Q.B. 455; 20 L. T. 695; 10 B. & S. 515.

See, *Heywood* v. *Pickering*, [1874] E. R. A.; 43 L. J. Q.B. 145; L. R. 9 Q.B. 428 (Q.B.).

Cheque—Time for Presentment—Notice of Dishonour—Country Banker and Customer.

BILLS OF EXCHANGE. L.—*The payee of a cheque drawn upon a bank at Falmouth paid it on Tuesday to the credit of his account in a bank at Truro, which is about ten miles from Falmouth. The Truro bank having no agent at Falmouth, sent the cheque by the post of the same day to their London agents, who received it on Wednesday morning. On the same day the cheque was handed by the agents through the clearing-house to the London agents of the Falmouth bank, and by the latter forwarded by the post of the same day to the Falmouth bank, who received it on Thursday morning. On the same morning the London agents of the Falmouth bank failed, and the agents of the Truro bank wrote at once to the Falmouth bank requesting them to pay the cheque or return it. The Falmouth bank replied by letter on Friday, refusing to pay the cheque or return it. On Saturday the Falmouth bank stopped payment. On the same day the manager of the Truro bank informed the payee of the non-payment of the cheque, and subsequently informed him that his account had been debited with the amount of it, though it was not so debited till about a fortnight afterwards. It appeared that it was the usage of bankers when a cheque is paid in by a customer to enter the amount to his credit, and if the cheque is not paid, then immediately upon its dishonour to return it to the customer, and upon so doing to debit his account with it. It also appeared that with regard to cheques drawn upon one Cornwall bank and paid into another, there had been during several years an arrangement by which the cheque was sent by post to the bank upon which it was drawn, and the accounts between the two banks adjusted at a weekly settlement. The Truro bank had never been a party to this arrangement, and if they had followed it the cheque in question would have been received by the Falmouth bank on Wednesday, and the payee credited with the amount*:—Held, *following* Hare *v.* Henty (10 Com. B. Rep. N.S. 65; 30 L. J. C.P. 302), *that the Truro bank was entitled to debit the payee with the amount of the cheque, as the cheque had been presented within reasonable time, and the payee had received reasonable notice of its dishonour.*

This was an action brought, by the plaintiff, as public officer of the Devon and Cornwall Banking Company, to recover from the defendant the sum of 106*l.* 4*s.* The declaration contained the ordinary money counts for money lent, money paid, interest, and money due on accounts stated, the defendant pleading

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never indebted, payment and set-off. By consent of the parties the following CASE was stated for the opinion of the Court:

The Devon and Cornwall Banking Company, hereinafter called the plaintiffs, carry on the business of bankers in Cornwall, and have branch establishments at several different places, and amongst others at Truro, in Cornwall.

The defendant, for some time previous to the month of June, 1866, and until the month of August in the same year, was a customer of the plaintiffs, and kept an account at their branch at Truro.

At the time of the commencement of this action there was a balance of 106*l.* 4*s.* due from the defendant to the plaintiffs upon his banking account, unless he is entitled to be credited in such account with the amount of the cheque hereinafter mentioned, in which case nothing was due to them.

On Monday June 4, 1866, a person named Anderton, who kept an account with Hawkey & Co., bankers, carrying on business at Falmouth, in Cornwall, drew a cheque upon them for 106*l.* 4*s.* in favour of the defendant. This cheque was received by the defendant at Truro on the afternoon of the same day, and on the following morning, Tuesday, June 5, was paid by him to the plaintiffs to the credit of his account with them at their Truro branch.

The plaintiffs had not any branch establishment or agent at Falmouth (which is about ten miles from Truro), but there was direct postal communication twice every day between these places. Letters posted in the morning at Truro before half-past seven o'clock were delivered at Falmouth before ten, and those posted in the afternoon before four were delivered before six. The business hours of Hawkey & Co., at Falmouth, were from ten till three, but the clerks remained two or three hours after. Letters received by the afternoon post were not answered until the following morning, unless an answer by return of post was requested by the writer.

The manager of the plaintiffs' Truro branch sent the cheque by the post of Tuesday, June 5 (the same day on which it was paid in), to their London agents, Messrs. Barclay & Co., who received it on the morning of June 6. On the same day (Wednesday, June 6) the cheque was handed by Barclay & Co., through the clearing-house, to the Agra and Masterman's Bank, who then were the London agents of Hawkey & Co., upon whom the cheque was drawn. The Agra and Masterman's Bank, by post of the same day (Wednesday, June 6), forwarded the cheque to Hawkey & Co. at Falmouth. The Agra and Masterman's Bank was open until the close of banking-hours, namely, five o'clock, on the 6th. It subsequently, on the same evening, was known that the bank had suspended payment, and would not re-open on the following day. On the morning of the 7th the doors were closed.

Hawkey & Co. received the cheque in due course of post on the morning of Thursday, the 7th, when they knew of the suspension of the Agra and Masterman's Bank. They then debited Mr. Anderton's, the drawer's, account with the amount, and cancelled the cheque, and by the post of the same day wrote to the Agra and Masterman's Bank requesting them to pay the cheque on their account. They did not remit any funds to the Agra and Masterman's Bank to meet the cheque. The Agra and Masterman's Bank received Hawkey & Co.'s letter on Friday, June 8. The cheque was not paid to Barclay & Co., and still remains unpaid.

Upon the suspension of the Agra and Masterman's Bank, Barclay & Co. wrote on Thursday, the 7th, direct to Hawkey & Co. at Falmouth, directing them either to pay the cheque or return it. On Friday, June 8, 1866, Hawkey & Co replied by letter to Barclay & Co., refusing either to pay the cheque or return it, alleging that they had debited Anderton's account with the amount of the cheque, and directed the Agra and Masterman's Bank to pay it.

On Saturday, June 9, Hawkey & Co. suspended payment, and have never resumed payment. The cheque was retained by Hawkey & Co. and by the trustees appointed for winding up their affairs until October 25, 1866, when acting under legal advice they returned it to the plaintiffs, who offered to

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return it to the defendant's solicitor about a week after it had come to their hands, but he declined to receive it. On Saturday, June 9, the manager of the plaintiffs' Truro branch saw the defendant and informed him of the fact of non-payment of the cheque, stating that he did not know in whose possession it was, but would write and obtain the information. He also subsequently informed the defendant that his account had been debited with the amount of it. The account was not so debited until June 23, 1866.

It is the ordinary usage of bankers when a cheque is paid in by a customer to enter the amount to his credit, and if such cheque is not paid, then immediately upon its dishonour to return it to the customer, and upon so doing to debit his account with it.

The course pursued by the plaintiffs in forwarding the cheque to their London agents to be presented to the London agents of Hawkey & Co. through the clearing-house was in 1866 the usual and ordinary course pursued by country bankers out of Cornwall. It was also the usual and ordinary course pursued by bankers in Cornwall with respect to cheques drawn upon banks out of Cornwall. It was also the usual and ordinary course pursued by the plaintiffs whether the bank upon which the cheque was drawn was in or out of Cornwall. It was also the usual and ordinary course pursued by banks in Cornwall with respect to cheques drawn upon the plaintiffs' Cornwall branches. With respect to cheques drawn upon one Cornwall bank and paid into another, an arrangement or understanding had existed for many years amongst the principal banks in Cornwall as to the presentation of such cheques. The practice pursued under such arrangement or understanding was as follows:

The cheque was sent by post to the bank upon which it was drawn. A settlement took place every Saturday between the bank sending and the bank receiving such cheque with respect to all cheques which, during the preceding week, had been so sent from one to the other, and the balance due from one bank to the other upon such settlement was paid in London on the Tuesday following. The plaintiffs had never been parties to such arrangement, nor had any newly established bank; it was confined to the private banks. If the plaintiffs had followed such practice in the present case, the cheque in question would have been received by Hawkey & Co. on Wednesday, June 6. It would on the same day have been cancelled by them, and charged to the account of Anderton & Co., and the plaintiffs credited with the amount of it. The accounts for the preceding week between the plaintiffs and Hawkey & Co. would, if Hawkey & Co. had not suspended payment, have been balanced in the country on Saturday, June 9, and the balances would have been paid in London on Tuesday, June 12.

The defendant was not aware of the practice followed by the plaintiffs of sending through the clearing-house in London, cheques drawn upon banks in Cornwall, nor was he aware of the practice followed by other Cornwall banks. In the month of May, 1867, a meeting of Cornwall bankers was held. The plaintiffs were not parties to this meeting and were not represented at it. At this meeting resolutions were come to that, for the future, all cheques upon other banks in Cornwall paid in by customers, should be passed through the London clearing-house, and that notice of such resolution should be issued by the bankers, parties to such meeting, to their respective customers. After this meeting such notice was issued accordingly.

After the stoppage of Hawkey & Co., and before the defendant ceased to be a customer of the plaintiffs, they inserted the following notice in the pass-book of the defendant:

"Notice.

"Cheques on Bankers.

"The Devon and Cornwall Banking Company undertakes only, to forward the above by post for collection, to become answerable for the proceeds when they are actually received (nothwithstanding such cheques may have been credited to the accounts of customers for whom they were received), but the company does not undertake to give notice of delay of payment, any loss from

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which, or from theft, fraud, insolvency, or otherwise, is to be at the customer's risk."

The Court was to be at liberty to draw any inference of fact which a jury might draw.

The question for the opinion of the Court was, whether, upon the facts above stated, the plaintiffs, at the time of the commencement of this action, were entitled to debit the defendant with the amount of the cheque. If the Court should be of opinion that they were so entitled, judgment was to be entered for the nominal plaintiff for 106*l.* 4*s.*, with interest from the time of the commencement of the action and costs of suit. If the Court should be of opinion that they were not so entitled, judgment was to be entered for the defendant, with costs of defence.

Coxon (*Field* with him), for the plaintiffs.—The Truro bank in presenting this cheque followed the usage adopted by country bankers generally in presenting their customer's cheques, and there can be no doubt that this usage is a reasonable one. In *Hare* v. *Henty* (10 Com. B. Rep. N.S. 65; 30 L. J. C.P. 302), where a cheque upon a bank at Lewes was paid on Friday into a Worthing bank it was held that a presentment on Monday was in time, as the Worthing bankers were only bound to send it by Saturday's post to their agents at Lewes. This decision is a clear authority in favour of the course adopted by the Truro bank. But even if the practice of the Cornish bankers had been followed, the plaintiffs would not have been bound to forward the cheque till such time on Wednesday as it could not have reached Falmouth till Thursday, so that the result would have been the same.

Sir G. Honyman (*J. C. Mathew* with him), for the defendant.—The cheque was not presented in due time. A banker who receives a cheque from his customer is not justified in parting with it until he has received the amount. *Hare* v. *Henty* (10 Com. B. Rep. N.S. 65; 30 L. J. C.P. 302) only decided that, as the roundabout way of forwarding the cheques through the London clearing-house did not take more time than if it had been sent directly to a country agent, the presentment was in time. In the present case the plaintiffs ought to have acted according to the course of business among Cornish bankers, and then the cheque would have been presented in time.

[LUSH, J.—It has always been held that you cannot throw an additional obligation on the holders of bills, by shewing that there are extraordinary posts to which they might have had recourse.]

Kilsby v. *Williams* (5 B. & A. 815) shews that the plaintiffs were agents to receive the money upon the cheque as soon as possible. The defendant cannot be bound by the usual practice of the plaintiffs, as he was ignorant of it—*Sweeting* v. *Pearce* (9 Com. B. Rep. N.S. 534; 30 L. J. C.P. 109). Secondly, the notice of dishonour was too late. The delay arose from the peculiar mode in which the plaintiffs transacted business. Barclay & Co. when they knew of the failure of the Agra and Masterman's Bank on Thursday, the 7th, ought to have presumed that the cheque was dishonoured, and have sent notice accordingly.

[HANNEN, J.—Supposing they had constructive notice of the dishonour, they would not have been bound to inform the plaintiffs of it till the next day, and then this notice on Saturday would have been in time.]

The rule has always been that the presentment of a cheque or notice of dishonour should be sent as soon as *practicable* the day after it is received or dishonoured.

[HANNEN, J.—In *Williams* v. *Smith* (2 B. & A. 500) Abbott, C.J., says, "If we were to say that the party must give notice by the next practicable post we should raise in many cases difficult questions of fact, and should according to the peculiar local situations of parties give them more or less facility in complying with the rule."]

He also cited *Rickford* v. *Ridge* (2 Campb. 537) and *Bailey* v. *Bodenham* (16 Com. B. Rep. N.S. 288; 33 L. J. C.P. 252).

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LUSH, J.—I think that our judgment should be in favour of the plaintiffs. The first question is, whether the Truro Bank were guilty of any negligence in presenting the cheque. It is contended that they ought not to have forwarded the cheque by post to their London agents, but ought to have sent it directly to Falmouth. But I think that it has been clearly laid down, in *Hare* v. *Henty* (10 Com. B. Rep. N.S. 65; 30 L. J. C.P. 302), that this was not necessary. Erle, C.J., there says, after referring to *Rickford* v. *Ridge* (2 Campb. 537), "That decision has been recognized and acted upon, and establishes the general rule in all cases as between the parties to a cheque. And we think the rule applies not only as between the parties to the cheque, but as between banker and customer, unless circumstances exist from which a contract or duty, on the part of the banker, to present earlier or to defer presentment to a later period may be inferred." Assuming, therefore, that each person to whom the cheque is regularly forwarded has a whole day within which he may present it, it is evident that this cheque was presented within a reasonable time. The Truro bank were not required to have an agent at Falmouth, but if there had been such an agent and the cheque had been forwarded to him the presentment would still have been in time, as he might have received it on Wednesday, and would have the whole of the next day to present it. With regard to the notice of dishonour, I think that there were no laches on the part of the bank. The notice was given as soon as the bank were aware of the dishonour of the cheque, and the liability of the drawer was in no way affected. The defendant has, therefore, failed in proving any default on the part of the plaintiffs.

HANNEN, and HAYES, JJ., concurred.

Judgment for the plaintiffs.

IN THE QUEEN'S BENCH. May 10, 1869.

MOONE *v.* ROSE.

38 L. J. Q.B. 236; L. R. 4 Q.B. 486; 17 W. R. 729.

See, *Ames* v. *Waterlow*, 1870, L. R. 5 C.P. 53 (C.P.). Distinguished, *Greaves* v. *Keene*, [1879] E. R. A.; 4 Ex. D. 73; 40 L. T. 216; 27 W. R. 416 (Ex. D.). See, *Henderson* v. *Preston*, [1888] E. R. A.; 57 L. J. Q.B. 607; 21 Q.B. D. 362; 36 W. R. 834 (C. A.).

Trespass or Case—Undue Detention for Contempt in Chancery—Liability of Gaoler—11 *Geo.* 4. *&* 1 *Will.* 4. *c.* 36, *s.* 15—*Sheriff.*

PRISON. SHERIFF. A.—*By the* 11 *Geo.* 4. *&* 1 *Will.* 4. *c.* 36, *s.* 15, *if the defendant (in Chancery), under process of contempt for not appearing or not answering, be in actual custody, and shall not have been sooner brought to the bar of the Court, under process, to answer his contempt, the plaintiff, if the contempt be not sooner cleared, shall bring the defendant by a* habeas corpus *to the bar of the Court within thirty days from the time of his being in actual custody; and in case any such defendant shall not be brought to the bar of the Court within the respective times aforesaid, the sheriff, gaoler or keeper, serjeant-at-arms, or messenger in whose custody he shall be, shall thereupon discharge him out of custody without payment by him of the costs of contempt, which shall be payable by the party on whose behalf the process issued.*

By 4 *Geo.* 4. *c.* 64, "*An Act for consolidating the laws relating to the building . . . . and regulating of certain gaols and houses of correction in England and Wales,*" *section* 75, *it is enacted,* "*That all actions, suits and prosecutions to be commenced against any person for anything done in pursuance of this Act shall be laid and tried in the county where the facts were committed, and shall be commenced within six calendar months after the fact committed, and not otherwise.*"

The plaintiff having been guilty of a contempt in Chancery was arrested

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by the sheriff under a writ of attachment and delivered into the custody of the defendant, the governor of a county gaol, under a warrant commanding him to keep the plaintiff in custody, so that the sheriff might bring her before the Court of Chancery to answer her contempt. The defendant having detained the plaintiff in custody beyond the prescribed period, although the plaintiff in Chancery had not brought her to the bar according to the statute:—Held, *first, that in proceeding against the defendant for the undue detention, the proper form of action was trespass, and not case; secondly, that such an action was not within the limitation in* 4 *Geo.* 4. *c.* 64, *s.* 75, *which applied only to proceedings for acts done in a supposed exercise of the powers of the statute.*

Declaration (laying the venue in Middlesex) for assaulting the plaintiff and imprisoning and keeping her in prison for six calendar months and three days, from December 4, 1864, to June 7, 1865, whereby the plaintiff suffered great pain of body and mind, &c., and incurred expense in obtaining her liberation from the imprisonment, and a decree in the High Court of Chancery was obtained against her in her absence, and her estate and effects sequestered by order of the Court.

Pleas—First, not guilty by statute (4 Geo. 4. c. 64, ss. 73-75); thirdly, that before and during the time of the committing of the alleged trespasses, the defendant was keeper of the gaol of and for the sheriff of the county of Devon in and for the county; and a suit was then pending in the High Court of Chancery in which Nicholas Moone was complainant and the now plaintiff was defendant, and a writ of attachment had been issued out of the Court of Chancery in the suit directed to the sheriff, commanding him to attach the now plaintiff if she should be found in his bailiwick, and that he should cause her to be brought to his gaol in the county and delivered to the keeper thereof, who was thereby directed to receive and keep her there safely, so that the sheriff might have her body before the Court of Chancery on November 28 then instant, there to answer to the Court touching a contempt which the now plaintiff, as it was alleged, had committed, as also such other matters as should be then and there laid to her charge; and to perform and abide such order as the Court should make in that behalf; and thereupon the writ was duly delivered to be executed to the sheriff, and he, under and by virtue of the writ, took and arrested the plaintiff, and conveyed her to the gaol, the same being the fit and proper place of confinement for her whilst in the custody of the sheriff; and the sheriff then and there delivered the plaintiff into the care and custody of the defendant as and being such keeper of the gaol, together with the warrant of the sheriff directed to the defendant, and whereby by virtue of the writ he commanded the defendant that he should receive and keep the plaintiff in the gaol safely, so that the sheriff might have her body before the Court of Chancery on November 28 then instant to answer the Court touching the contempt, &c. And the defendant, as and being such keeper of the gaol for the sheriff, and by his authority and command, then and there accordingly received and safely kept the plaintiff, and because neither the sheriff nor the defendant received, or had notice or knowledge of, any writ of *habeas corpus* or other writ, rule, or order of the Court of Chancery of other competent authority, requiring the defendant to bring the plaintiff before the Court of Chancery, or to discharge the plaintiff or otherwise to deal with the plaintiff, the defendant as and being such keeper of the gaol for the sheriff, and by his authority and command safely kept and detained the plaintiff in the gaol for a certain space of time, under and by virtue of the writ and warrant, which are the supposed trespasses in the declaration alleged.

Replication, to the first plea a joinder of issue, to the third plet, that the contempt for which the plaintiff was ordered to be attached was for not answering a bill filed in the High Court of Chancery, and that at the time of the arrest and confinement in the plea mentioned, the sheriff and the defendant had notice that the contempt for which the plantiff was ordered to be attached was for not answering; and, having such notice, it became and was the duty

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of the defendant to discharge the plaintiff from custody, if the plaintiff was not brought to the bar of the High Court of Chancery within thirty days from the time of the arrest and confinement of the plaintiff; and the plaintiff was not brought to the bar of the said Court within such thirty days, and the defendant did not discharge the plaintiff from custody though he was requested to do so.

Rejoinder taking issue on the replication.

There was also a new assignment to the third plea, to which the defendant pleaded not guilty, and the plaintiff joined issue.

At the trial, before Hannen, J., at the Middlesex Sittings after Trinity Term, 1868, it appeared that a bill in equity had been filed against the plaintiff to restrain her from committing waste upon land of which she was tenant for life, and that she had filed no answer to the bill, owing, as she alleged, to her poverty. A writ of attachment was accordingly issued against her, and a warrant delivered to the sheriff, as stated in the pleadings. A warrant directed to the defendant as keeper of the gaol was then deliverd to him by the sheriff commanding him to receive and keep the plaintiff in his custody, and in the margin of this warrant it was stated that the plaintiff was committed for not answering in the Chancery suit. The plaintiff was accordingly received into the gaol on November 4, 1864, where it appeared that she was treated with great kindness, but the defendant, being unaware of the practice in Chancery, detained her in custody till the following June.

The jury found a verdict for the plaintiff with 25*l.* damages, leave being reserved for the defendant to move to enter a verdict in his favour.

A rule having been obtained calling on the plaintiff to shew cause why the verdict obtained in the case should not be set aside and a nonsuit or a verdict for the defendant entered instead, on the grounds that trespass would not lie against the defendant, that the action was brought too late, and that it ought to have been brought against the sheriff, or why a new trial should not be had between the parties, on the ground that the damages were excessive.

J. J. Powell and *Anderson* shewed cause.—By 11 Geo. 4. & 1 Will. 4. c. 36, s. 15, rule 5[1], the gaoler in whose custody a defendant is imprisoned under

(1) The Act 11 Geo. 4. & 1 Will. 4. c. 36. s. 15, rule 5, enacts, "That if the defendant, under process of contempt for not appearing or not answering, be in actual custody, and shall not have been sooner brought to the bar of the Court under process to answer his contempt, the plaintiff, if the contempt be not sooner cleared, shall bring the defendant by a *habeas corpus* to the bar of the Court within thirty days from the time of his being actually in custody, or detained (being already in custody) upon process of contempt, and if the last day of such thirty days shall happen out of term, then within the first four days of the ensuing term; and where the defendant is in custody of the serjeant-at-arms, or of the messenger, upon an attachment or other process, the plaintiff shall, within ten days after his being taken into such custody, or if the last of such ten days shall happen out of term then within the first four days of the next ensuing term, cause the defendant to be brought to the bar of the Court; and in case any such defendant shall not be brought to the bar of the Court within the respective times aforesaid, the sheriff, gaoler or keeper, serjeant-at-arms or messenger, in whose custody he shall be, shall thereupon discharge him out of custody without payment by him of the costs of contempt, which shall be payable by the party on whose behalf the process issued."

By the 12th of the Consolidated General Orders of the Court of Chancery, rule 3, it is provided that "Where a defendant is in prison under an attachment for not answering, or, being already in prison, is detained under such an attachment, and is not brought to the bar of the Court within thirty days from the time of his being actually in custody or detained (being already in custody) under such attachment, he shall be discharged from the process for want of answer under which he was arrested or detained by the sheriff, gaoler or keeper of the gaol in whose custody he is, without payment of the costs of his contempt, which in such case shall be paid by the plaintiff. But if such defendant does not put in his answer within eight days after such discharge, the plaintiff may cause a new attachment to be issued against him for want of his answer."

By the 4 Geo. 4. c. 64, "An Act for consolidating and amending the laws relating to the building, repairing and regulating of certain gaols and houses of correction in England and Wales," section 75, "All actions, suits and prosecutions to be commenced against any person for anything done in pursuance of this Act, shall be laid and tried in the county where the facts were committed, and shall be commenced within six calendar months after the fact committed, and not otherwise."

By the 27 & 28 Vict. c. 126. s. 73, the whole Act 4 Geo. 4. c. 64, is (amongst others) repealed, and it is provided that no repeal thereby enacted shall affect, 2. Any right or privilege acquired, any security given, or other liability incurred under any Act thereby repealed.

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process of contempt is bound to discharge him from custody if he is not brought to the bar by the plaintiff within the prescribed period. Independently therefore of the Consolidated Orders in Chancery, the defendant as gaoler was guilty of a trespass in detaining the plaintiff. The warrant to the gaoler gives him notice that the prisoner is in custody for a contempt of the Court of Chancery. The defendant will rely on *Smith* v. *Egginton* (7 Ad. & E. 167; 6 L. J. K.B. 206), where it was held that case and not trespass was the proper form of action against the sheriff for not discharging the defendant from custody under this Act. But this case is distinguishable. There the action was against the sheriff, not the gaoler, and it did not appear that the sheriff had notice of the illegal detention. In *Fortescue* v. *Hallett* (26 L. J. Ch. 711) it was held that that part of the 5th sub-section which allows the plaintiff the first four days of the next term in case the thirty days expire out of term is superseded by the 74th Order of May, 1845, an order which is in similar terms to those of No. 12, of the Consolidated General Orders, rule 3, so that the defendant ought to have discharged the plaintiff from custody directly the thirty days had expired. With regard to the objection raised under the plea of not guilty, that the case is within the limitation in the 4 Geo. 4. c. 64, s. 75, this statute is among those scheduled as repealed in the 28 & 29 Vict. c. 126. But even assuming that this section applied, the act complained of was done without jurisdiction, and not in exercise of the powers of the statute.

Huddleston and *Bullen*, in support of the rule.—In the first place, this action is against the governor of a prison, and is therefore subject to the limitation in the Consolidation Act relating to gaols and houses of correction (4 Geo. 4. c. 64), s. 75, which directs that in actions commenced against any person for anything done in execution of the Act the venue shall be local, and the action commenced within six calendar months after the act committed, and Exeter gaol is among those in the schedule to the Act. This limitation is not affected by the repeal of the Act by the 28 & 29 Vict. c. 126 (passed July 6, 1865), for in the repealing section, 73, it is provided that the repeal shall not affect any right or privilege acquired, any security given, or other liability incurred under any Act thereby repealed. Secondly, the form of the action ought to have been case, not trespass. *Smith* v. *Egginton* (7 Ad. & E. 167; 6 L. J. K.B. 206) is an authority for this proposition, where it is laid down that a subsequent irregularity cannot make a detention like the present one, which was originally lawful, a trespass *ab initio*. In *Salmon* v. *Percivall* (Cro. Car. 196), which is there cited, where in a declaration for false imprisonment the defendant pleaded that he was serjeant of the mace in London and arrested the plaintiff under the custom of London till he should find bail, and the plaintiff replied that he tendered sufficient bail, but the defendant notwithstanding would not discharge him, it was held, on motion in arrest of judgment, that even if the defendant could have accepted bail, his refusal did not make the arrest and imprisonment tortious, so as to have trespass, but he might have an action on the case for detaining the plaintiff after bail tendered. The sheriff is the real person liable. The warrant is directed to him, and the gaoler is just as much his servant as the turnkey of the prison. They also argued that the amount of the damages was excessive.

LUSH, J.—I quite agree that this is a very hard action, and I should have been well satisfied if the damages had been nominal only, but the jury thought proper to award a substantial sum, though every point which they ought to have taken into consideration was suggested to them by the learned Judge. We cannot therefore set aside the verdict on the ground that the damages were excessive. We come now to the questions of law. The first objection is, that the action is out of time, and that it is within the limitation in 6 Geo. 4. c. 64, s. 75. By this section, "all actions, suits and prosecutions to be commenced against any person for anything done in pursuance of this Act, shall be laid and tried in the county where the facts were committed, and shall be commenced within six calendar months after the fact committed." Although the whole Act has since been repealed, yet the words in the saving clause of the

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repealing section are such that I should have thought that the defendant would have been protected by it if it had applied to the circumstances of this particular case. But the section was intended to apply to a case where the act complained of purported to have been done in pursuance of the statute, and was meant to protect those who have attempted to carry out the provisions of the Act, such as those relating to the classification of prisoners, and have failed in doing so. If the action had been brought for an improper classification of the plaintiff as a prisoner, or for disregarding any of the prison rules, the defendant would have been entitled to the benefit of section 75. But the action is for wrongfully keeping the plaintiff in prison beyond the prescribed period, and there is no limitation to the bringing of an action for such an offence in this or the other statutes.

Secondly, it is said that the action ought to have been brought against the sheriff, and not against the gaoler. This question turns on the construction of the 5th sub-section of 11 Geo. 4. & 1 Will. 4. c. 36, s. 15, and may be decided together with the objection that the form of action ought to have been case and not trespass. The 5th sub-section directs that if the defendant, under process of contempt for not appearing or not answering, be in actual custody, and shall not have been sooner brought to the bar of the Court, under process, to answer his contempt, the plaintiff, if the contempt be not sooner cleared, shall bring the defendant by a *habeas corpus* to the bar of the Court within thirty days from the time of his being actually in custody or detained (being already in custody) upon process of contempt, and if the last day of such thirty days shall happen out of term, then within the first four days of the ensuing term; and in case any such defendant shall not be brought to the bar of the Court within the respective times aforesaid, the sheriff, gaoler or keeper, serjeant-at-arms or messenger in whose custody he shall be, shall thereupon discharge him out of custody without payment by him of the costs of contempt, which shall be payable by the party on whose behalf the process issued. Now, it is immaterial to consider the subsequent Regula or Order of the Court of Chancery by which the period during which the person in contempt is to be kept in custody after term is shortened, as I understand that the plaintiff was kept in custody beyond the period at the expiration of which the statute makes it the duty of the gaoler to discharge the prisoner. The fact that the prisoner has been kept in custody beyond the prescribed period must be known to the defendant as gaoler, for if a *habeas corpus* had issued it must have been directed to him. The statute mentions the "sheriff, *gaoler* or keeper" in whose custody the prisoner may be, and deals with the gaoler as an independent officer, as in fact he is, with duties of his own. He was the person who had the plaintiff in his actual custody, and it was his duty to discharge her out of his custody at the expiration of the prescribed period. This case is very distinguishable from *Smith* v. *Egginton* (7 Ad. & E. 167; 6 L. J. K.B. 206), and also from the case of *Salmon* v. *Percivall* (Cro. Car. 196). In these cases the plaintiff was only constructively in the custody of the sheriff, or person arresting him, and was really in the custody of the gaoler. This was why the action in *Smith* v. *Egginton* (7 Ad. & E. 167; 6 L. J. K.B. 206) failed. A similar remark applies to *Salmon* v. *Percivall* (Cro. Car. 196). There was there no statute which imposed upon the serjeant-at-arms the duty of discharging the plaintiff; he was simply required to arrest the defendant, and carry him to prison till he found bail.

I think, therefore, that as the statute imposed upon the defendant the duty of discharging the plaintiff from custody within a prescribed period, the breach of this duty is ground for an action of trespass, and that the gaoler is the person against whom this action ought to be brought. The rule must therefore be discharged, and the verdict for the plaintiff will stand.

HANNEN and HAYES, JJ., concurred.

Rule discharged.

NOTE.—See *Magnay* v. *Burt* (5 Q.B. Rep. 395).

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IN THE QUEEN'S BENCH. June 3, 1869.

WELFARE v. THE LONDON AND BRIGHTON RAILWAY COMPANY.

38 L. J. Q.B. 241; L. R. 4 Q.B. 693; 20 L. T. 743; 17 W. R. 1065.

Carriers by Railway—Passenger—Evidence of Negligence.

CARRIERS. B.—*The plaintiff went to the station of the defendants, a railway company, intending to travel by their line to C. A train had started previously, and, upon inquiring of a porter when the next train for C. would start, the plaintiff was directed to go to a time-bill which was hanging outside of the door of the booking-office and under a covering or portico. While standing looking at the time-bill, he received an injury from a plank and a roll of zinc which fell through the covering, and upon looking up he saw the legs of a man protruding through the covering:*—Held, *that, there being nothing to shew that the defendants knew that the covering was insecure, or that the man who was upon it was employed by them, there was no evidence of negligence to go to the jury, and that the plaintiff must be non-suited.*

The declaration alleged that, at the time, &c., the defendants were carriers of passengers for hire from London to Croydon on a railway, and used a certain station at or near London Bridge for the reception and accommodation of their said passengers, and the said station was then in the possession and under the management of the defendants for the purposes aforesaid. That the plaintiff lawfully, in order to become a passenger on the defendants' railway from London to Croydon, by the defendants' permission and invitation, was about to enter the said station by the doorway over which there was a covering and a wood and iron roof, forming part of the said station, and in the possession of and used by the defendants, which it was necessary for the plaintiff, in order to become such passenger, to pass under. Nevertheless, by and through the mere carelessness, negligence and default of the defendants in that behalf, the said covering and wood and iron roof was then in an insecure and dangerous condition, and unfit for persons to pass under; and, by reason of the said covering and wood and iron roof being in such insecure and dangerous condition, and unfit as aforesaid, and of the mere carelessness, negligence, default and improper conduct of the defendants in that behalf, a large piece of wood fell through and out of the said covering and wood and iron roof upon the plaintiff as he was about to enter the said station, and he sustained bodily injuries, and remained ill and unable to attend to his business, &c.

Pleas—First, not guilty; secondly, that the plaintiff was not about to enter into the said station by the permission and invitation of the defendants in order to become a passenger on the defendants' railway in manner and form as in the said declaration in that behalf alleged; thirdly, that, at the time of the committing, &c., the said covering and wood and ironwork roof did not form part of the said station, nor was it then in the possession of, or used by, the defendants in manner and form as in the declaration alleged.

Issues were joined on these pleas.

At the trial, which took place before Blackburn, J., at the sittings in Middlesex, after Trinity Term, 1868, it appeared that the plaintiff went on November 25, 1867, to the London Bridge Station of the defendants, intending to go by their railway to Croydon. He found that the train had started, and therefore made inquiry of a porter when the next train for Croydon would start. The porter directed him to a time-bill which was hanging outside the door of the booking-office and under a portico or covering. The plaintiff went to the spot, and as he stood there, looking at the time-bill, he was struck by something on the back of his neck. He found that a plank and a roll of zinc had fallen through the covering, and that one or other of them had struck him, causing the injury in respect of which the action was brought. Upon looking up, he saw that the legs of a man were protruding through the covering.

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The learned Judge nonsuited the plaintiff on the ground that there was no evidence to prove that there was any negligence on the part of the defendants.

Subsequently, a rule was obtained calling upon the defendants to shew cause why the nonsuit should not be set aside, and why there should not be a new trial, on the ground that there was evidence of negligence to go to the jury.

Huddleston and *Lopes* shewed cause against the rule.—The Judge was warranted in holding that there was nothing to be left to the jury. *Cotton* v. *Wood* (8 Com. B. Rep. N.S. 568; 29 L. J. C.P. 333) shews that a mere scintilla of evidence is not sufficient; there Erle, C.J. said that there ought to be proof of well-defined negligence—see also *Hammack* v. *White* (11 Com. B. Rep. N.S. 588; 31 L. J. C.P. 129). Reliance will be placed by the other side on *Byrne* v. *Boadle* (2 Hurls. & C. 722; 33 L. J. Ex. 13), where it was held that the mere fact of the plaintiff being injured by a barrel of flour falling upon him from an upper window of the house in which the defendant, a flour-dealer, carried on his business, was evidence of negligence to go to the jury; but that case differs from the present in this respect, that there the barrel must have been moved in the course of the trade and business of the defendant, while here the defendants had nothing to do with the man who was said to have walked across the roof. The nature of the accident may decide whether *primâ facie* there was any evidence of negligence. In *Scott* v. *the London Dock Company* (3 Hurls. & C. 596; 34 L. J. Ex. 220), in the Exchequer Chamber, Erle, C.J. said: "The majority of the Court have come to the following conclusion: that there must be reasonable evidence of negligence; that where the thing is solely under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen to those who have the management of machinery and use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." But that case also differs from the present in this respect, that the injury was caused by bags of sugar falling from a crane used by the defendants; but here there was nothing to connect the plank or the roll of zinc with the defendants.

[COCKBURN, C.J.—The roof from which they fell was the property of the defendants. But if the jury might take into account the universal habit of employing a contractor or tradesman to do repairs to the roof of a house or building, it would seem as if there was nothing to go to the jury.]

It is fair to suppose that the defendants employed a contractor who sent his own men to do the work, in which case the defendants would not be liable; but further, there is nothing to shew that the man was carrying the plank or the zinc. In *The Great Western Railway of Canada* v. *Braid* (11 W. R. 444) it was held that the fact of a railway having given way was some evidence of the railway having been insufficiently constructed, and that such evidence, if unrebutted, might become conclusive evidence. But that is very different from the present case.

[BLACKBURN, J.—It may fairly be assumed here that the man was on the roof for the purpose of doing something to it, but it would also be likely that he was employed by an independent tradesman; and if that might be assumed, I thought that there would be no evidence of negligence on the part of the defendants.]

C. Wood, in support of the rule.—It is submitted that the plaintiff made out a case which the defendants were called upon to answer. The plaintiff was directed to go to the place over which the defendants had placed the roof; it was their duty to keep it in such a secure condition as that no injury should happen to him while he was standing there.

[COCKBURN, C.J.—You must not put it on the ground that the defendants warranted that the roof should be absolutely secure; but it is not necessary that you should go so far as that.]

No, it is sufficient to put the plaintiff's case in the way in which it was put in *Byrne* v. *Boadle* (2 Hurls. & C. 722; 33 L. J. Ex. 13). In that case, Bramwell, B. said, in the course of the argument (see the *Law Journal Reports*),

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"Look at this case in a reasonable way. The injury is done to the plaintiff, but he has no means of knowing how; the defendant has all those means, and does not think fit to tell the jury." In the present case, it is certain that there was negligence on the part of some person; how can it be said that the plaintiff could be expected to get upon the roof to ascertain whose negligence it was?

[BLACKBURN, J.—You might have interrogated the defendants.]

It might have been more prudent to have taken that course, but the plaintiff relied upon the decisions, which shew that the case which he was able to prove would entitle him to call upon the defendants for an answer. It may be inferred from the fact that the man was upon the defendants' roof that he was there by their order, and working for them. In *Briggs* v. *Oliver* (35 L. J. Ex. 163) the plaintiff was going to the doorway of a house in which the defendant had offices; a packing-case, which was watched by the defendant's servant, was leaning against the wall of the house; the servant pushed the plaintiff out of the way, and the packing-case fell and injured the foot of the plaintiff. It was held that there was a *primâ facie* case to go to the jury, the fall of the packing-case being some evidence that it had been improperly placed against the wall, Bramwell, B. said, "I quite agree that we should be overruling the cases of *Byrne* v. *Boadle* (2 Hurls. & C. 722; 33 L. J. Ex. 13) and *Scott* v. *the London Dock Company* (3 Hurls. & C. 596; 34 L. J. Ex. 220) if we held that there was no evidence of negligence in this case. Every case must, no doubt, depend upon its own particular circumstances. Now there was abundant evidence that the defendant was responsible for this packing-case. It was close to his premises, belonged to him, and his servant, as was not denied, was watching it; and therefore, if it was in an unsafe position and did anybody damage, he was responsible. Then, was there any evidence that it was in an unsafe position? To my mind there was, and as has been said *res ipsa loquitur*. Packing-cases do not fall naturally and of their own accord, when they are carefully placed in a proper position; and we have no right to assume that something was done to this packing-case by somebody else not the defendant's servant so as to cause its fall. Therefore there was a *primâ facie* case of negligence," &c. It is submitted that that language applies to the present case. Further, a duty was cast upon the defendants to keep the roof in such a state that it would not cause an injury while it was being repaired—see *Pickard* v. *Smith* (10 Com. B. Rep. N.S. 470), where the occupier of a coal-cellar, under the platform of a railway station, was held responsible for an injury suffered by a passenger falling into the cellar-opening, although the opening was left unguarded by the servants of a coal-merchant who were engaged in shooting coals into the cellar.

[BLACKBURN, J.—It cannot be said here that there was anything like a trap, as in *Pickard* v. *Smith* (10 Com. B. Rep. N.S. 470).]

Enough was shewn by the plaintiff to call upon the defendants for an answer. As to the point raised, that the defendants would not be liable if the man was employed by a contractor, the case of *Gray* v. *Pullen* (5 Best & S. 970, 981; 34 L. J. Q.B. 265) shews that when it was the duty of the defendant to make a drain, and to fill up the cutting which was made in the public footway, the fact of his having employed a contractor, who had omitted to fill up the cutting, did not excuse him from liability in respect of an injury received by the plaintiff in consequence of getting into a hole caused by the subsidence of the ground. In truth, the maxim *res ipsa loquitur* applies, and it is submitted that the plaintiff is entitled to have this rule made absolute.

COCKBURN, C.J.—If the question was whether there was any proof of negligence on the part of the man, who may be supposed to have trodden upon a plank lying upon the covering which was over the place where the plaintiff was standing, and if there had been any such proof, it would have been important to have ascertained whether he was a servant of the company, or whether he had been employed by some builder or other tradesman to do work upon the roof, because, if he had been so employed, he would not be the servant of the defendants, and they would not be liable in this action. If it

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had been necessary to determine such a question, it may be that we should have had to consider whether the case was properly withdrawn from the jury on the ground that there was no evidence. I rather go along with the plaintiff's counsel when he says that when you find a thing done upon the premises of a person, you may generally draw the inference that it was done by a person employed by him and by his order, but it seems to me that rule does not apply here, because it is a matter of general knowledge, that people in the metropolis do not employ their own servants to do such work as this, and I think that the Judge and jury would draw the inference that the man was employed by a contractor or tradesman rather than that he was the servant of the owners of the premises. But I do not think that we get as far as that point. The difficulty is, that the only evidence of negligence is that the company allowed some person to go upon the covering when it was not sufficiently strong to support his weight, so that the plank and roll of zinc fell through and caused injury to the plaintiff while he was lawfully by leave of the defendants upon the spot. But in order to make out negligence so as to make the defendants liable in respect of that injury, the plaintiff must shew either that the defendants knew, or had the means of knowing, that the covering was in an insecure state or that the person who was upon it was employed by them. Now, in the great majority of cases, a person who desires that his roof should be repaired employs a competent person first to see what repair is wanted to the roof, and then to execute the necessary repairs. In this case, there is nothing whatever to shew that the defendants knew, or had the means of knowing, that the covering was in an insecure state, and nothing to shew any want of reasonable care on their part to ascertain in what state it was, so as to entitle the plaintiff to recover in this action which is brought against them. The rule must be discharged.

MELLOR, J.—I am of the same opinion. It appears to me that the maxim *respondeat superior* does not apply to this case, because there cannot be said to have been any proof of an act of negligence committed by the man who was upon the covering. The injury to the plaintiff may have happened from a pure accident, and, if so, it is immaterial to consider whether the man was the servant of the defendants or not. There was not sufficient evidence to leave to the jury.

LUSH, J.—I am of the same opinion. Suppose the action had been brought against the man himself, there would have been no evidence to go to the jury to shew that he had been guilty of any negligence. It appears that the plaintiff upon looking up saw the legs of a man through the covering, but it rather seems that that may have been the result of an accident, and I do not see any evidence to go to the jury that the injury was caused by his negligence. The principle of *respondeat superior*, therefore, does not apply. Next, is there any evidence to shew that the defendants were guilty of neglect in allowing him to be there? There is no proof whatever that they knew that the covering was not sufficiently strong to support him, and no evidence to justify the jury in finding that the defendants were guilty of negligence in allowing him to be there.

BLACKBURN, J.—I am of the same opinion. Where a master sends his servant to perform some work, and an injury is caused by the servant while doing such work, the master is responsible: but it is otherwise when the person doing the work is the servant of a contractor. In the present case, if the man who was on the covering was the servant of the company and had been guilty of negligence, there would be evidence to shew that the company was responsible. But I very much doubt whether there is any proof that the man was guilty of any negligence; and even if there was, the company would not be liable unless he was shewn to be their servant. But the plaintiff contends that, whether the man was employed by a contractor or not, the defendants are responsible, because a duty was thrown upon them to take care that the place upon which the plaintiff was standing was a fit place, and that the covering was in such a state that the injury should not happen to him, and he cites

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Pickard v. *Smith* (10 Com. B. Rep. N.S. 470); but I think that there is no duty cast upon the defendants to insure that nothing should fall. They were bound, no doubt, to take reasonable care that the covering was in a fit state, so that those whom they invite to come upon their premises should not suffer injury by reason of its defective state; but here there is nothing to shew that they did not take such reasonable care. Something more than the mere occurrence of the accident is wanted to make them liable in this action. But there is in reality nothing more.

Rule discharged.

IN THE QUEEN'S BENCH. June 12, 1869.

SAMPSON *v.* MACKAY.

38 L. J. Q.B. 245; L. R. 4 Q.B. 643; 20 L. T. 807; 17 W. R. 883; 10 B. & S. 694.

Distinguished, *Saywood* v. *Cross*, [1885] E. R. A.; 54 L. J. Q.B. 17; 14 Q.B. D. 53; 51 L. T. 601; 33 W. R. 135 (Q.B. D.).

Costs—Action for Slander—Recovery of Sum not exceeding 10*l.*—30 *&* 31 *Vict. c.* 142. *s.* 5.

COSTS. I.—*Where, in an action of slander, the plaintiff recovers less than* 10*l., and the Judge declines to certify, under* 30 *&* 31 *Vict. c.* 142. *s.* 5, *that there was sufficient reason for bringing the action in the superior Court, the Court, if called upon to determine whether costs should be allowed or not, will consider all the circumstances under which the action was brought, the amount of damages recovered, the fact of the Judge declining to certify, and the fact that the action could not have been brought in the County Court.*

The 5th section of the above Act is general in its application, and applies to all actions, whether they can be brought in a County Court or not.

The first count of the declaration was for trespass in turning the plaintiff out of his dwelling-house, and the second and third counts were for slander.

Plea—not guilty to the whole declaration. Issue joined.

At the trial, which took place, before Mellor, J., at Westminster, at the Sittings in Easter Term, it appeared that the plaintiff, a lawyer's clerk, was tenant to the defendant of a dwelling-house, and that the trespass complained of was an entry by the defendant into the house, which had been shut up and left by the plaintiff, a quarter's rent being due to the defendant. It was also alleged that the defendant had uttered slanders of the plaintiff, as set out in the second and third counts of the declaration, namely, as alleged in the second count, that he was unable to pay his rent, and, as alleged in the third count, that he had taken the gas-meter away from the house.

The jury found a verdict for the plaintiff on the first count, with ½*d.* damages; on the second with 3*l.* damages; and on the third count they found a verdict for the defendant.

The learned Judge having refused to certify that there was sufficient reason for bringing the action in this Court, a rule *nisi* was afterwards obtained, calling upon the defendant to shew cause why he should not pay to the plaintiff his costs of the action, to be taxed by one of the masters.

Cook shewed cause against the rule.—There is a preliminary objection which arises upon the affidavits. This is an appeal from the decision of a Judge at chambers, and there is no affidavit shewing what facts were brought before the Judge. The rule ought to have been drawn up on reading the affidavits used at chambers—see *Warman* v. *Halahan* (30 L. J. Q.B. 48) and *Day's Common Law Procedure Act*, 3rd edit. 239.

[*Per Curiam.*—There is no such inflexible rule, and probably the affidavits now before the Court disclose all the facts brought before the Judge at chambers.]

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Then it is submitted that the rule ought to be discharged. The plaintiff seeks to get his costs upon the second count, upon which he has got 3*l*. damages. The learned Judge who tried the cause refused to certify, and there is nothing to lead the Court to suppose that the circumstances were such as that the plaintiff ought to be allowed his costs. In *Gray* v. *West* (38 L. J. Q.B. 78; L. R. 4 Q.B. 175), this Court allowed the costs, and the Court of Exchequer Chamber, in *Craven* v. *Smith* (38 L. J. Ex. 90; L. R. 4 Ex. 146), did the same; but it was held in the latter case that the 5th section of the 30 & 31 Vict. c. 142. applies to actions of slander as well as other actions, and deprives the plaintiff of his costs if he recovers a sum not exceeding 10*l*., unless the Judge grants a certificate, or a rule or order for the costs be subsequently made. But the present action was really an action of trespass against the landlord.

[MELLOR, J.—I refused to certify because I thought that the action ought not to have been brought.]

Just so. It is material to observe that under the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 34, there was a security against actions being brought in respect of wrongs which were not substantial, because if the plaintiff recovered less than 5*l*. he could not recover his costs if the Judge certified that the action was not really brought to try a right besides the mere right to recover damages, and that the trespass or grievance in respect of which the action was brought was not wilful and malicious, and that the action was not fit to be brought. But that section is repealed by the 30 & 31 Vict. c. 142. s. 33, which affords a reason for holding that the 5th section applies to all actions for wrongs; and in *Craven* v. *Smith* (38 L. J. Ex. 90; L. R. 4 Ex. 146) Bramwell, B. said that he did not think that in *Gray* v. *West* (38 L. J. Q.B. 78; L. R. 4 Q.B. 175) Hayes, J. meant that in all cases of slander, when more than 40*s*. was recovered, there was reasonable ground for bringing the action. It is submitted that the Court will consider all the circumstances, and will agree with the learned Judge who tried the cause that this was an action which ought not to have been brought.

Finlay, in support of the rule.—The preamble of the Act shews that it was passed for the purpose of amending the Acts relating to the jurisdiction of the County Courts. Substantially this was an action of slander. In *Gray* v. *West* (38 L. J. Q.B. 78; L. R. 4 Q.B. 175) it was thought that section 5. does not apply to an action of slander, which cannot be brought in a County Court; and it is submitted that if the plaintiff in such an action recovers 40*s*. he is entitled to his costs. That is the limit established by the 3 & 4 Vict. c. 24, which Act is still in force. In *Craven* v. *Smith* (38 L. J. Ex. 90; L. R. 4 Ex. 146) Bramwell, B. was of opinion that in an action of slander, which could not be brought in the County Court, if the plaintiff recovered substantial damages (in that case 5*l*.) a *primâ facie* case for costs was made out, which called upon the defendant for an answer. The power given to the Judge who presides at the trial to certify, applies only where the plaintiff has a right to elect whether he will sue in the County Court or not, and it is submitted that the present plaintiff has made out a case which calls upon the defendant for a substantial answer.

COCKBURN, C.J.—I am of opinion that this rule must be discharged. The case divides itself into two questions, which depend on different considerations. It is said, first, that the 5th section does not apply at all to actions like the present; and, secondly, that if it does, this Court, in the exercise of its discretion, will refuse to order that the plaintiff shall recover his costs. But I think that the section does apply to such actions. I think it is of general application, first, because it is general in its terms, which apply to all actions of tort, and to an action of slander amongst them. But then it is argued that inasmuch as the section is found in an Act, which *primâ facie* appears to have been intended to force people to bring their actions in the County Courts, it ought not to be construed to be applicable to actions which cannot be brought in such a Court. At first sight the argument seems to be plausible, and would lead us to agree with the conclusion suggested, but then my Brother Blackburn has called

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attention to the fact that, prior to the passing of this Act there was the 34th section of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), a most salutary provision, which enabled a Judge to deprive a plaintiff of his costs by certifying that the action was not really brought to try a right besides the mere right to recover damages, and that the trespass or grievance was not wilful and malicious, and that the action was not fit to be brought. I entirely coincide with what has fallen from my Brother Mellor, that a vast number of frivolous actions of slander have been brought, and then when we find the 33rd section of this Act repealing the 34th section, to which I have just referred, I think it goes far to shew that the 5th section, which is general in its terms, is general also in its application. That being so, the whole question is, whether in the exercise of the power which is given to us, this is a case in which we ought to allow these costs.—[His Lordship read the section, and then continued]—It appears, therefore, that power is given to the Judge at the trial to certify that there was sufficient reason for bringing the action in the superior Court, and power also is given to the Court or a Judge at chambers to allow the costs. Now, is this a fit case for allowing such costs? That depends much upon the nature of the action and the circumstances under which it was brought. My Brother Mellor thinks that this was an action in which he, as the Judge who presided at the trial, could not certify that there was sufficient cause for bringing the action, and he also thinks that this Court ought not to allow the costs. I concur with him. The slander was of a very doubtful character, and the verdict was for 3*l.* only. I therefore think that this rule should be discharged.

BLACKBURN, J.—I am of the same opinion. I have nothing to add, except that Mr. Cook is entitled to the credit of having pointed out that section 34. of the 23 & 24 Vict. c. 126. is repealed. I give him the credit of the argument which he has used on the appeal of that section. The cases of *Gray* v. *West* (38 L. J. Q.B. 78; L. R. 4 Q.B. 175) and *Craven* v. *Smith* (38 L. J. Ex. 90; L. R. 4 Ex. 146) decide that one of the elements for consideration, in determining the question before us, is that this is a kind of action which cannot be brought in the County Court. There is strong *primâ facie* ground for saying that we must take into account that fact, and also the opinion formed by the Judge and jury who heard the cause. I agree that in this case we ought not to allow the costs.

MELLOR, J.—I am of the same opinion. The evidence satisfied me that the action was brought entirely independently of the slanderous words which were spoken.—[The learned Judge went through the facts.]—There was the strongest presumption that the plaintiff was not tenant from year to year, but was only temporarily in possession. The jury gave a verdict for 1*s.* only on the count in trespass, and if they had thought that the plaintiff was a tenant from year to year they would have given more than that. Mr. Finlay, by great ingenuity, succeeded in inducing them to give a verdict for 3*l.* upon one of the counts in slander. I was a little surprised at their doing so, and was certainly dissatisfied with the verdict. Probably the action would never have been brought at all, if the plaintiff had not been a lawyer's clerk. The Judge, who presides at the trial determines whether or not he will grant a certificate by considering all the matters which occur before him in the course of the trial, and in this case I thought that I ought not to grant one. But facts may subsequently be brought to the knowledge of the Court which will present a ground for giving the plaintiff his costs. Ought we now to exercise our discretion in favour of the plaintiff? I assume that it never could have been intended that encouragement should be given to frivolous actions of slander, which would be the case if we allowed the present plaintiff to get his costs.

HANNEN, J.—I am of the same opinion, and I merely wish to add a few words upon the bearing which *Gray* v. *West* (38 L. J. Q.B. 78; L. R. 4 Q.B. 175) has upon the present case. I think that the 5th section is general in its terms, and extends to actions of slander; the Court or a Judge at chambers has

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by that section larger powers than the Judge who presides at the trial. The latter may not think it right to certify that there was sufficient cause for bringing the action, and yet afterwards facts may be shewn which make it proper that the plaintiff should have his costs. The Court may also be of opinion that the Judge at the trial did not exercise his discretion properly. In *Gray* v. *West* (38 L. J. Q.B. 78; L. R. 4 Q.B. 175) the reasons which influenced the Court to hold that the costs ought to be allowed, are set out at the end of the judgment: "We think, therefore, that, as in the present case the plaintiff has recovered an amount much beyond what would have entitled him to costs under the general law applicable to actions for slander in the superior Court, and as he could not have sued elsewhere, that he ought to be allowed his costs in this action." In that case the Court took into consideration the fact that the jury had given 10*l*., a large amount of damages, and also the fact that the action could not have been brought into the County Court; and I think it was right to hold that the plaintiff was entitled to his costs.

Rule discharged.

IN THE QUEEN'S BENCH. July 3, 1869.

PLAYFORD *v.* THE UNITED KINGDOM TELEGRAPH COMPANY (LIMITED).

38 L. J. Q.B. 249; L. R. 4 Q.B. 706; 21 L. T. 21; 17 W. R. 968; 10 B. & S. 759.

Action, when Maintainable—Telegraphic Message, Property in—Privity of Contract—Mistake in Message.

TELEGRAPH AND TELEPHONE.—*The plaintiff, having a cargo of ice on board a ship at Grimsby, telegraphed to R. & H, at Hull, asking them to make an offer for it, and requesting them to send an answer by telegraph. R. & H. sent to the office of the defendants, a telegraph company, a message for transmission to the plaintiff, by which they offered to take the cargo at 23s. per ton. In the reading off the message at the defendant's office in London, a mistake was made in the figures, and the telegram sent to the plaintiff represented the offer as being 27s. instead of 23s. per ton. The plaintiff thereupon, in acceptance of the supposed offer, ordered the ship to proceed to Hull; she arrived there, but R. & H. refused to receive the cargo, except at 23s. per ton. The plaintiff brought an action against the defendants to recover damages in respect of the injury which he had sustained by reason of the mistake*:—Held, *that the defendants were not liable, the obligation upon them to use due care and skill in the transmission of the message arising out of contract, and there being no contract between them and the plaintiff.*

This was an action brought by the plaintiff against the defendants to recover damages for the misdelivery by them of a certain telegraphic message under the circumstances stated in the following

CASE.

1. The plaintiff is a merchant in London, and deals, amongst other things, in ice. The defendants are an Electric Telegraph Co., Lim., incorporated under the Joint-Stock Companies Acts, 1856 and 1857, and in the year 1862 they obtained for themselves a certain Act of Parliament, namely, 25 & 26 Vict. c. cxxxi. (local and personal), to enable them to carry on the works and business of an electric telegraph company. A copy of this Act accompanies, and is to form part of this case.

2. On May 28, 1866, the plaintiff had a cargo of ice, lying on board the schooner "*Victor*," at Grimsby, and wrote on that day to Messrs. Rice & Hellyer, ice-merchants at Hull, informing them that the "*Victor*" was at

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Grimsby, with about 100 tons of ice, and requesting from them an offer for the same by telegraph.

3. Accordingly Messrs. Rice & Hellyer went on the following morning, at about 11 a.m., to the defendants' office, at the Quay Side Station at Hull, for the purpose of telegraphing to the plaintiff, and having obtained at that office from the defendants one of their ordinary printed forms of telegrams, filled it up, and thereby requested them to send to the plaintiff the message, of which, so far as is material to the present case, the following is a copy:

"We can give you 23*s*. for cargo now at Grimsby, small ice, the same cash, thirty tons day."

4. The printed form was directed to the directors of the defendants' company, and was headed,

"Gentlemen,—I request you to send the following message according to the conditions printed hereon, and I agree to abide by the same."

There was the following memorandum at the foot of the printed form:

"All messages taken by this company are received subject to the following conditions." The conditions were as follows: "In order to provide against mistakes, and more effectually insure delivery, every message of consequence ought to be repeated by being sent back from the station at which it is to be received to the station from which it is originally sent. Half the usual price for transmission will be charged in addition for repeating the message. The company will not be responsible for mistakes or delays in the transmission of, nor for the non-delivery of, unrepeated messages from whatever cause arising, either upon its own lines or those of any other company or government, which may be employed to forward the message to its destination. Nor will the company be responsible for mistakes or delays in the transmission of, nor for the non-delivery of a repeated message to any extent above 5*l*., unless it be insured at the rate of 1*l*. per cent."

5. When Messrs. Rice & Hellyer had filled up the printed form as above mentioned, they handed the same back to the defendants at their office, and paid them the sum of 1*s*. 6*d*. for transmitting to the plaintiff by telegraph the message, which was to be forwarded, and it was forwarded as an uninsured message. No charge was tendered for repeating such message, and it was forwarded as an unrepeated message.

6. As soon as the message was delivered to the defendants as above mentioned, it was despatched by them to their central station at Hull, and was thence forwarded by them to their head office in London, where it was duly received at 11.43 a.m. of the same day, and where the mistake, in respect of which the present action was brought, originated as hereinafter mentioned.

7. The telegraphic apparatus, which was then and is still used by the defendants in their head office in London, was the best telegraphic apparatus then known, and was in perfect condition.

8. There is a long slip of paper attached to the telegraphic apparatus, and on a message being transmitted to the head office, the letters and numbers contained in such message are by means of the apparatus and the telegraphic wires connected therewith, represented on such slip of paper by certain combinations of dots and of strokes of different lengths which respectively denote the various letters and numbers. These are read off by that clerk of the department at the office whose duty it is to receive the message, and who at once writes down the letters and numbers on a certain printed form.

9. When the message so sent by Messrs. Rice & Hellyer was being transmitted to the defendants' head office it was received there by Edith Smeaton, a clerk of the defendants, whose duty it was at the time to receive such message, to read it off and to write it down on the telegram paper in manner above mentioned. In reading off the message from the slip of paper attached to the telegraphic apparatus as above mentioned she mistook the combination "· · · — —" which was on the slip, and which denotes the number 3. for the combination "— — · · ·", which denotes the number 7,

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and she consequently wrote down on such printed form, as aforesaid, instead of the message actually sent by Messrs. Rice & Hellyer the following message:

"We can give you 27 shillings for cargo now at Grimsby, small ice, the same cash, thirty tons day."

10. A telegram paper with the last-mentioned message on it was then forwarded by the defendants to the plaintiff.

11. On receipt of the telegram, the plaintiff ordered the schooner "*Victor*" to proceed to Hull with the cargo of ice for Messrs. Rice & Hellyer, but they refused to accept the same, except at the price of 23*s*. per ton, and it is admitted that by reason of the aforesaid error in the telegram, the plaintiff sustained damages to the amount of 39*l*. 1*s*. 6*d*., and that if entitled to recover at all he is entitled to recover the sum of 39*l*. 1*s*. 6*d*.

12. Edith Smeaton had been at the time when she made the aforesaid mistake, in the service of the defendants for about two years. The defendants had used all due care in testing her competency before engaging her as a clerk, and in fact she was in every respect well qualified for the performance of her duties as such clerk, and had made during the period of two years, a less number of mistakes in reading off messages than the average number of mistakes made during the same period by the numerous clerks who were employed by the defendants in the same department.

13. The extreme charge which the defendants could, under section 75. of the aforesaid statute, 25 & 26 Vict. c. cxxxi, have made for transmitting the aforesaid telegraphic message from Hull to London, was 2*s*.

14. It is the practice amongst ice-merchants, that when a merchant, who desires to sell a cargo of ice, requests from another merchant an offer for such cargo by telegraph, and the latter makes such offer by telegraph, and the offer is accepted, for the merchant accepting such offer to deduct from the price of the cargo sold, the cost of the telegram.

15. The plaintiff has not repaid to Messrs. Rice & Hellyer the sum of 1*s*. 6*d*. so paid by them to the defendants for the telegram, nor have Messrs. Rice & Hellyer claimed the sum from the plaintiff.

16. The Court was to be at liberty to draw such inferences of fact as a jury would be entitled to draw.

The question for the opinion of the Court was whether, under the circumstances as above stated, the defendants were liable to the plaintiff, for or on account of the mistake committed as aforesaid, in the transmission of the said telegraphic message.

If the Court should be of opinion in the affirmative, the judgment was to be entered up for the plaintiff for 39*l*. 1*s*. 6*d*., with costs of suit.

If the Court should be of the contrary opinion, then judgment was to be entered for the defendants, with costs of defence[1].

Littler, for the plaintiff (April 20).—The defendants are liable to the plaintiff for the injury which he has sustained. Their liability may be put in two ways: first, a contract was made by Rice & Hellyer as the agents of the plaintiff with the defendants, and the defendants contracted that they would send the message correctly; and secondly, they are liable, because as soon as the message was delivered to the defendants to be sent to the plaintiff it became his property, and he has a right to sue them for not taking due care of the message. On the first point, it appears that the plaintiff desired Rice & Hellyer to send their answer by telegraph, and he was responsible to them for the price of the message. There are no English authorities upon the question, but it arose in *De Rutte* v. *the New York, Albany and Buffalo Telegraph Company* (1 Daly, 547), cited in *Scott and Jarnagin's Law of Telegraphs*, p. 200, where the Court said, "It does not necessarily follow that the contract is made with the person by whom or in whose name a message is sent. He may have no interest in the subject-matter of the message, but the party to whom it is addressed may be

(1) Several sections of the local Act are referred to in the judgment of the Court, but it is thought that they need not be set out here.

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the only one interested in its correct and diligent transmission; and when this is the case he is the one, in reality, with whom the contract is made. The business of transmitting messages by means of the electric telegraph is like that of common carriers in the nature of a public employment, for those who engage in it do not undertake to transmit messages only for particular persons, but for the public generally. They hold out to the public that they are ready and willing to transmit intelligence for any one upon the payment of their charges, and when paid for sending it it forms no part of their business to inquire who is interested in or who is to be benefited by the intelligence conveyed. That becomes material only when there has been a delay or mistake in the transmission of a message which has been productive of injury or damage to the person by whom or for whom they were employed, and to that person they are responsible, whether he was the one who sent or the one who was to receive the message. It is somewhat analogous to the question which arises, when goods are lost upon their carriage, whether the action against the carrier is to be brought by the consignor or by the consignee; and the general rule upon the subject is that the one in whom the legal right to the property is vested is the one to bring the action; and if that is the consignee, the consignor in making the contract with the carrier is regarded as having acted as the agent of the other." So here, Rice & Hellyer were the agents of the plaintiff to make the contract for him, and he has a right to sue. Upon the second point, it is submitted that the defendants are liable to the plaintiff for not taking due care of the message. What is the duty which they take upon themselves? There is very little authority, if any, to be found in the English law books, but the law is very fully discussed in the treatise by Scott & Jarnagin above referred to. At p. 115 the learned editors write: "They (the telegraph companies) receive written messages at one place, and undertake to deliver the same words or symbols to the party addressed at another place. This is a bailment," &c. They go on to discuss the matter in the pages which follow.

[COCKBURN, C.J.—I am by no means prepared to go along with that reasoning, which is extremely subtle and refined. It can hardly be said to be a bailment. The company do not transmit the thing itself. The message which is sent to them is not the one which they actually transmit. The message is not sent verbally, but by symbols different from those which are used by the sender. Their liability must depend upon the contract, and there is no contract with the plaintiff.]

The New York and Washington Printing Telegraph Company v. *Dryburgh* (35 Pennsylvania Rep. 298) is an authority to shew that if such a company negligently or wilfully violate their duty of sending the very message, they are responsible to the party to whom the erroneous message is sent.

[COCKBURN, C.J.—My mind does not go along with the reasoning of the judgment in that case.]

It is submitted that a public duty is thrown upon the defendants to deliver the message correctly—see *The Western Union Telegraph Company* v. *John H. Carew* (15 Michigan Rep. 525), where Christiancy, J. said, "Impartiality and good faith are the chief, if not the only, obligations required by the statute so far as relates to the question here involved. Beyond these statute requirements, their obligations must be fixed by considerations growing out of the nature of the business in which they are engaged, the character of the particular transactions which may arise in the course of their business, and the application of the principles of justice and public policy recognized alike by common sense and the common law." This passage is cited with approbation in Scott & Jarnagin's treatise, p. 270. Next, the defendants have no right to impose upon the public unreasonable conditions. By their Act they are limited to a charge of 2*s*. for their messages, but they seek to stipulate that they will not be responsible unless the message is repeated and the charge paid for so repeating it. In the present case that charge would be 2*s*. 3*d*.—(The Court gave no judgment upon this point, and it need not be farther referred to.)

C. Pollock (*A. L. Smith* with him), for the defendants.—Unless some

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agency can be established between the sender of the message and the receiver, the plaintiff can have no cause of action against the defendants. It is true that the plaintiff requested Rice & Hellyer to send by telegraph, but he does not designate the defendants' company as the company to be employed, and the message sent by Rice & Hellyer was for their own advantage. It was not at all necessary that they should take notice of the request of the plaintiff. There is nothing even to shew that there had been any previous dealings between them, so as to shew a practice to use the defendants' telegraph.

[COCKBURN, C.J.—All that took place was in the nature of correspondence only.]

Just so; it is said that the price of the message would be deducted, but that is simply the custom of trade. If goods are sent by a carrier and are lost, the consignor is the person to bring the action in respect of the loss, unless the particular carrier to whom they are delivered is named by the consignee, so as that the property in the goods passes—see *Coats* v. *Chaplin* (3 Q.B. Rep. 483; 11 L. J. Q.B. 315); *Swain* v. *Shepherd* (1 Moo. & R. 223). But, in truth, there is no analogy between such a case as the present and the case of a carrier of goods, whose responsibility attaches by the custom of the realm—see *Readhead* v. *the Midland Railway Company* (*ante*, Q.B. 169). How can it be said that a telegraphic message is like goods which are to be delivered in specie? Next, the condition that the defendants would not be responsible unless the message was repeated was reasonable—see *Breese and Mumford* v. *the United States Telegraph Company* (45 Barb. 274) and *M'Andrew* v. *the Electric Telegraph Company* (17 Com. B. Rep. 3; 25 L. J. C.P. 26).—He also referred to the judgment of Bramwell, B. in *M'Cance* v. *the London and North-Western Railway Company* (7 Hurls. & N. 477; 31 L. J. Ex. 65); to *Harrison* v. *the London, Brighton and South Coast Railway Company* (2 Best & S. 122; 31 L J. Q.B. 113); and to *White* v. *the Great Western Railway Company* (2 Com. B. Rep. N.S. 7; 26 L. J. C.P. 158), upon the question of the reasonableness of the condition. Even at common law a carrier was allowed to limit his liability —*Izett* v. *Mountain* (4 East, 371); *Nicholson* v. *Willan* (5 East, 507). But whether the condition be reasonable or not, there is no privity of contract between the defendants and the plaintiff, and the defendants cannot be liable in this action.

Cur. adv. vult.

The judgment of the Court[2] was delivered (on July 3) by

LUSH, J.—The plaintiff having a cargo of ice on board a schooner of his at Grimsby, invited an offer for it from Messrs. Rice & Hellyer, merchants at Hull, and requested them to make such offer by telegraph. Accordingly, Messrs. Rice & Hellyer sent to the office of the defendants' company at Hull a message for transmission to the plaintiff, by which they offered to take the ice at 23*s*. per ton. In the reading off of the message at the defendants' office in London a mistake was made in the figures, and the telegram sent to the plaintiff represented the offer to be 27*s*., instead of 23*s*. per ton. The plaintiff thereupon, in acceptance of the supposed offer, ordered the schooner to proceed to Hull with the ice, and upon her arrival there, the mistake was discovered. Messrs. Rice & Hellyer refused to receive the cargo, except at 23*s*. per ton, and this action was brought by the plaintiff to recover the damage he had sustained by reason of the mistake, and which amounted to 39*l*. 1*s*. 6*d*.

It was stated, as a fact in the case, that when an offer made upon the invitation of the seller by telegraph is accepted, the cost of the telegram is allowed to the buyer in account

On delivery of the message for transmission, Messrs. Rice & Hellyer signed the ordinary printed form, by which the defendants stipulated that " they would not be responsible for mistakes or delays in the transmission of, nor for the non-delivery of unrepeated messages, from whatever cause arising, and that half

(2) Cockburn, C.J., Lush, J., Hannen, J., and Hayes, J.

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the usual price for transmission would be charged in addition for repeating the message."

By stat. 25 & 26 Vict. c. cxxxi. (local and personal) certain powers for laying down the line were conferred on the defendants, and by the 61st section it was enacted, "That the use of any telegraph and apparatus erected and formed under the provisions of the Act for the purpose of receiving and sending messages, should, subject to the prior right of use thereof for the service of Her Majesty, and subject to such charges and reasonable regulations as might from time to time be made and entered into by the company, be open for the sending and receiving of messages by all persons alike, without favour or preference." And the 75th section limited the charges, to be made by the company, to the rates specified in the schedule. It appeared that if the message had been repeated, the charge for such repeated message, according to the company's scale and the price paid by Messrs. Rice & Hellyer, would have exceeded the tariff rate.

It was contended, on behalf of the plaintiff, first, that the defendants were liable either as upon a contract with him made through Messrs. Rice & Hellyer, as his agents, or for the breach of a duty to take due care of a message, which it was argued, became his property as soon as it was delivered to the defendants; and secondly, that the stipulation that they would not be responsible for any mistakes, however caused, unless a charge was paid which exceeded the maximum allowed by the Act, was an unreasonable regulation within the meaning of the 61st section, and therefore void

As we are against the plaintiff on the first point, it is unnecessary to give any opinion upon the second.

The obligation of the company to use due care and skill in the transmission of the message, is one arising entirely out of the contract. There is nothing in their special Act which affects their relation either to the sender or the sendee of a message, or makes it different from what it would have been had no Act of Parliament been passed. We cannot agree with the judgments given in the American Courts, in the cases cited on the argument, that there is any analogy between a consignment of goods through a carrier, and the transmission of a telegram. We cannot see how the person, to whom a telegraphic message is sent, can be said to have a property in the message any more than he could have had, had it been sent orally by the servant of the sender.

The only question therefore is, with whom was the contract made? And to this there can be but one answer. It was made with Messrs. Rice & Hellyer. The offer was sent by them on their own behalf and in their own interest. In so doing they acted, it is true, on the invitation of the plaintiff, but not as his agent or as representing him, and the circumstance that there was an implied understanding between them, that in the event of his accepting their offer, he should reimburse them the expense of making it, in no way alters the relation between the two parties, which was that of seller and buyer, and not that of principal and agent. It follows that the plaintiff, who is a stranger to the contract with the company, cannot maintain an action against them for the breach of it.

Our judgment is, therefore, for the defendants.

Judgment for the defendants.

IN THE QUEEN'S BENCH. July 3, 1869.

DENSTON *v.* ASHTON.

38 L. J. Q.B. 254; L. R. 4 Q.B. 590.

Questioned, *Pooley's Trustee* v. *Whetham*, [1885] E. R. A.; 54 L. J. Ch. 182; 28 Ch. D. 38; 51 L. T. 608; 33 W. R. 423 (C. A.). Approved, *Cowell* v. *Taylor*, [1886] E. R. A.; 55 L. J. Ch. 92; 31 Ch. D. 34; 53 L. T. 483; 34 W. R. 24 (C. A.).

Security for Costs—Action by Assignee of Bankrupt.

PRACTICE. M.—*The assignee of a bankrupt, who is suing as assignee for*

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the benefit of the estate, will not be compelled to give security for costs, although he himself may be poor and unable to pay the defendant's costs in the action.

Rule calling upon the defendant to shew cause why an order of Willes, J., by which the plaintiff was ordered to give security for the defendant's costs in this cause, should not be rescinded.

It appeared that the action was one of ejectment to recover possession of certain premises. The plaintiff was the assignee of one Horwood, a bankrupt, and he claimed the premises for the benefit of the estate. The plaintiff was in poor circumstances, and it was alleged that if he failed in the action he would not be able to pay the defendant his costs. Willes, J., had, under those circumstances, ordered him to give security for the defendant's costs.

Bere shewed cause against the rule (on April 22).—The order of Willes, J., was right. There is no case directly in point; but it is submitted that the defendant has a right to call upon the plaintiff to give security. If the plaintiff is suing as an officer of the Court of Bankruptcy, he will not be personally liable for the costs, but he will be entitled to them out of the estate. Generally, if a plaintiff, who is in insolvent circumstances, assigns the debt for which the action is brought, and is suing for the benefit of the assignee, he may be required to give security for costs—*Perkins* v. *Adcock* (14 Mee. & W. 808; 15 L. J. Ex. 7). That case was followed by *Goatley* v. *Emmott* (15 Com. B. Rep. 291; 24 L. J. C.P. 38)—see also *Elliott* v. *Kendrick* (12 Ad. & E. 597). It is also a general rule that when an insolvent is suing for another person he must give security.

C. F. S. Day, in support of the rule.—The plaintiff is suing in an official capacity, and by order of the Court, and cannot be compelled to give security, simply on the ground that he has been unfortunate in his private circumstances. It is his duty to realize the estate just as if he was an official assignee, in which case he could not be required to give security. The cases cited on the other side are all cases where the plaintiffs were suing in their private capacity. They do not touch the present question. The general rule is laid down in *Gray on Costs*, c. 32. s. 2. It is submitted that the Court will not allow the plaintiff to be impeded in his endeavours to get in the assets for the benefit of the estate.

Cur. adv. vult.

The judgment of the Court (Hannen, J., and Hayes, J.), was delivered (on July 3) by—

Hayes, J.—This was the case of a rule obtained to set aside an order of Willes, J., requiring the plaintiff to give security for costs in the action, which was ejectment by the plaintiff, as assignee of one Horwood, a bankrupt, to recover some premises formerly occupied by the bankrupt, and claimed by the plaintiff for the benefit of the estate. The order had been made on the ground of the plaintiff's poverty and alleged inability to pay costs if he failed, and because he was suing, not for his own benefit, but for that of the creditors.

The case was argued in Easter Term last, when cause was shewn against the rule by Mr. Bere, on the part of the defendant, and the rule was supported by Mr. Day on the part of the plaintiff.

On the part of the defendant, reliance was placed on the general rule for requiring security for costs in the case of an insolvent, who is suing as a mere nominal plaintiff for the benefit of a third person, and the cases of *Perkins* v. *Adcock* (14 Mee. & W. 808; 15 L. J. Ex. 7); *Elliott* v. *Kendrick* (12 Ad. & E. 500); and *Goatley* v. *Emmott* (15 Com. B. Rep. 291; 24 L. J. C.P. 38) were cited.

On the other hand, it was contended by Mr. Day that the case was distinguishable from the cases cited, and withdrawn from the ordinary rule, on the ground that the plaintiff had, as assignee, a duty to collect the assets for the benefit of the estate, and that there was no instance in such a case of requiring security for costs, which might obstruct him in the performance of his duty, and prevent the assets from being collected. We took time to consider the case, and being unable to find any authority in favour of enforcing security for

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costs in such a case, we were disposed against requiring it in the present instance.

Very recently the subject has been before the Court of Common Pleas in the case of *Sykes* v. *Sykes* (*post*, C.P. 281), in which the plaintiffs sued as executors for an injury to the assets of the estate, and on an application by the defendant security for costs had been ordered to be given by Brett, J., on the ground that one of the plaintiffs resided in Scotland, out of the jurisdiction of the Court, and the other had become bankrupt, and was unable to pay costs. The Court, who considered the case of an executor to stand on the same footing as the case of an assignee, in regard to the duty of collecting the assets of the estate, held that the circumstances afforded no ground for requiring security, and rescinded the order. This decision entirely agrees with our opinion, and therefore we think that the rule should be made absolute.

Rule absolute.

IN THE QUEEN'S BENCH. July 3, 1869.

POOLE *v.* WILLATS.

38 L. J. Q.B. 255; L. R. 4 Q.B. 630; 20 L. T. 1006; 17 W. R. 1009; 9 B. & S. 957.

Debtor and Creditor—Composition Deed—The Bankrupt Act, 1861, *s.* 197. *—Sureties—Deed executed by Principal.*

BANKRUPTCY. N.—*A bill of exchange drawn upon the defendant was accepted by him, and was then indorsed to the plaintiff. The defendant afterwards executed a composition deed, which was duly registered. It contained no reservation of rights against sureties, but the drawers of the bill, before and at the time of registration, consented to the plaintiff executing and becoming bound by the deed*:—Held, *in an action against the defendant, that the plaintiff was bound by the deed, he being in the same position as if the right to have recourse to the drawers had been reserved by the deed.*

The declaration was upon a bill of exchange drawn by Sadgrove & Belton upon and accepted by the defendant, and indorsed by Sadgrove & Belton to the plaintiff.

Plea—That after the acceptance of the said bill, and before action, to wit, on &c., the defendant, being indebted to the plaintiff and to divers other persons, made and executed the deed following, to wit.—[The plea then set out a composition deed between the defendant and his creditors within the 192nd section of the Bankrupt Act, 1861, and duly registered, but which did not contain any clause reserving rights of creditors against sureties; the plea concluded with the usual averments.]

Replication—That the said bill of exchange, in the declaration mentioned, was accepted by the defendant for a full and valuable consideration in that behalf; and that the said bill was not accepted for the accommodation of the said Sadgrove & Belton, or of any other person or persons, and that the same was indorsed to the plaintiff *bonâ fide* and for value; and that the defendant, as between himself and the said Sadgrove & Belton, was the principal debtor in respect of the said bill, and that the plaintiff, if he had executed or in writing assented to the said deed, would, by so doing, have discharged the said drawers of the said bill.

Rejoinder—That Sadgrove & Belton, before and at the time of the registration of the said deed, and from thence hitherto, duly consented to the said deed, and to the plaintiff's executing the same and becoming bound thereby and receiving the said composition.

Issue joined.

At the trial, which took place before Cockburn, C.J., at the Sittings in

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London after Trinity Term, 1867, the jury found a verdict for the plaintiff upon the issue joined upon the rejoinder.

The plaintiff then obtained a rule *nisi*, calling upon the defendant to shew cause why the verdict should not be entered for the plaintiff for 50*l*. notwithstanding the verdict found for the defendant, on the ground that a deed, which is otherwise incapable of binding a non-assenting creditor, cannot be made so by circumstances which arose after its execution.

Pearce shewed cause against the rule (Nov. 22), contending that the objection raised by the rule was answered by the evidence and by the finding of the jury.

Murphy, in support of the rule.—The question to be decided does not arise upon the evidence, but is, whether the averments in the rejoinder constitute an answer to the action, as shewing that the plaintiff, a non-assenting creditor, is bound by the deed. It is submitted that he is not so bound. There is no reservation in it of the rights of creditors against sureties, and therefore Sadgrove & Belton would have been discharged if he had assented to the deed. In *Johnson* v. *Barratt* (35 L. J. Ex. 15; L. R. 1 Ex. 65) a deed which did not contain any clause reserving rights against sureties was held valid, but upon the ground that there was not any averment that there were any creditors secured by sureties. The point now made, therefore, scarcely arose in that case. Here the plaintiff, by his replication, shews that he would have discharged his sureties, the drawers, if he had assented to the deed. The deed was, therefore, bad on the ground of inequality. *Oldis* v. *Armston* (36 L. J. Ex. 181; L. R. 2 Ex. 406) shews that a deed which contains an unreasonable clause cannot be made good by an averment of extrinsic circumstances tending to shew that it could not prejudice the plaintiff. The replication is an answer to the plea, and the facts stated in the rejoinder afford no protection to the plaintiff, who, if he is to be considered as being bound by the deed, loses his rights against the drawers as well as against the defendant, except so far as the composition extends.

Cur. adv. vult.

The judgment of the Court [1] was delivered (on July 3) by—

Lush, J.—This is an action by an indorsee against the acceptor of a bill of exchange, to which the defendant pleaded a composition deed registered under the statute. The deed, which was set out in the plea, contained no reservation of rights against sureties. The plaintiff replied that the bill was accepted for value, and indorsed to him for value, and that, if he had assented to the deed, he would have discharged the drawers. To this there was a rejoinder alleging that, before the registration of the deed, the drawers consented to the plaintiff executing and becoming bound by the deed. Issue was joined upon this allegation, and found in favour of the defendant.

The plaintiff then moved for and obtained a rule for judgment *non obstante veredicto*, on the ground that, as the deed did not reserve his right against the drawers, he was not on equal terms with the other creditors, and that the consent of the sureties to the composition did not remove the inequality.

We think this argument cannot prevail. It has been held that a composition deed is not necessarily invalid, for not containing a reservation against sureties, because it cannot be assumed that there are any creditors with sureties —*Johnson* v. *Barratt* (35 L. J. Ex. 15; L. R. 1 Ex. 65); that is a fact which must be shewn by averment. Here the fact that the plaintiff was such a creditor is shewn by the replication; and were it not for the rejoinder, that would vitiate the deed, because, if he had executed it without the consent of the drawers of the bill, he would have discharged them, and would thus have been in a worse position than the other creditors, who must be supposed to have had no remedy over for the balance of their debts. But the rejoinder, we think, removes this objection, and leaves the deed as it would have been if this fact had not appeared.

(1) Cockburn, C.J., Lush, J. and Hannen, J.

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A deed under the statute has no operation against non-assenting creditors until it is registered. If, at that date, the plaintiff would have been unable to come in with the rest of the creditors without forfeiting his security, he would not have been bound by the deed, and no subsequent act or assent would have bound him. But as, at that period, the drawer's consent had been given, and he might have come in for the composition, and have held them liable for the balance, he was in precisely the same position as if the right to have recourse to the drawers had been reserved to him in the deed. The case of *Oldis* v. *Armston* (36 L. J. Ex. 1; L. R. 2 Ex. 406) is the converse of the present case. There the deed, in terms, bound the creditors to indemnify the debtor against any bills or notes he might have given them on account of their debts, and was therefore bad on the face of it; and the Court held that it was not made good by an averment that at the time of registration there were no creditors, to whom any bills or notes had been given, other than those who had assented to the deed, for creditors were not bound to look beyond the deed, and, being bad on the face of it, no averment could make it good. In this case, the deed is good on the face of it. We cannot assume that there were any creditors with sureties other than the plaintiff, and as the intrinsic fact, which would have vitiated the deed, as regarded him, is met by the rejoinder, and the *primâ facie* inequality removed, we think he is bound. We therefore discharge the rule.

Rule discharged.

IN THE EXCHEQUER CHAMBER. May 11, 12, 1869.

(Appeal from the Court of Queen's Bench.)

FLEET, *administratrix of* MARY ANN ROSS *v.* PERRINS.

38 L. J. Q.B. 257; L. R. 4 Q.B. 500; 19 L. T. 147; 9 B. & S. 575: affirming, [1868] E. R. A. 1236; 37 L. J. Q.B. 233; L. R. 3 Q.B. 536 (Q.B.).

See, *Lloyd* v. *Pughe*, [1873] E. R. A.; 42 L. J. Ch. 282; L. R. 8 Ch. 88; 28 L. T. 250; 21 W. R. 346 (L. JJ.). Approved, *Jones* v. *Cuthbertson*, [1873] E. R. A.; 42 L. J. Q.B. 221; L. R. 8 Q.B. 504; 28 L. T. 673; 21 W. R. 919 (Ex. Ch.). See, *British Mutoscope, Ltd.* v. *Homer*, [1901] E. R. A.; 70 L. J. Ch. 279; [1901] 1 Ch. 671; 84 L. T. 26; 49 W. R. 277 (Ch. D.).

Baron and Feme—Chose in Action—Money received for Use of Wife—Declaration not shewing Wife's interest in money claimed.

HUSBAND AND WIFE. J.—*The defendant received money for the use of a married woman, and wrote offering to forward it to her if required. The wife shortly afterwards died, and there was no evidence that her husband, who survived her, had in any way interfered, either to allow his wife to have the control of this money, or to prevent her from dealing with it. The wife's administratrix having brought an action against the defendant for money had and received to the use of the wife*:—Held, *by the majority of the Court* (Channell, B., Keating, J., Montague Smith, J., and Cleasby, B.), *that the plaintiff was entitled to recover, as the right to the money was a chose in action, like a bond or promissory note, and had never been reduced into possession by the husband*:—Held, *by* Kelly, C.B., *dissenting from this decision, that the plaintiff was not entitled to recover, as the husband and wife could not have joined in an action for money had and received against the defendant, and because no action could be maintained by the representative of a married woman in respect of a chose in action where the wife's interest did not appear on the face of the record.*

Appeal from the decision of the Court of Queen's Bench, reported 37 L. J. Q.B. 233, where the facts are fully stated. The declaration was by the plaintiff, as administratrix of the estate and effects of Mary Ann Ross for money

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received by the defendant for the use of Mary Ann Ross, for money due from the defendant to Mary Ann Ross on accounts stated between them, and for money due from the defendant to the plaintiff as administratrix, upon accounts stated between the plaintiff as administratrix and the defendant.

In support of the declaration it was proved that Thomas R. Ross was married to the intestate in February, 1864, and that she shortly afterwards accompanied him to India. She died in December, 1864, and he in 1866. In November, 1864, the defendant, who had received a sum of money to be paid to the wife, the intestate, wrote a letter to her, in which were these words: "I received your letter yesterday, and wrote by return of post, on account of your wishing me to send you the money. You will receive my letter sent by last week's mail, where I state that I have received your money and put it at interest at 7*l.* per cent.; but if you wish me to send it after you know what the banks give here, I will do so." It was objected by the defendant that the action could not be maintained, as the husband's administrator was the only person entitled to sue for the money.

The Court of Queen's Bench was of opinion that a chose in action had been conferred on the wife during coverture with which the husband did not during coverture interfere, and therefore that the action was rightly brought.

The defendant now appealed from this decision.

Prentice (*Gorst* with him), for the appellant.—The appellant does not rely on one of the objections taken in the Court below; but the other objection, that the money in question was received to the use of the husband and to the use of the wife, is fatal to this action. The defendant can only be made liable upon an implied contract to hold the money to the use of another person. In the present case the implied contract was with the husband and not with the wife. Suppose money were paid to a banker for the use of a married woman. The money would immediately become the husband's money, and he only could sue in respect of it. The case is not like one where a bond or promissory note is made to the wife during coverture, for in an action upon these instruments the plaintiff must be the person named in them. This principle is explained in *Chitty on Pleading*, 7th edit., p. 34, where, after stating that as a general rule the wife cannot join in any action upon a contract during the marriage, it is said, "But when the wife can be considered as the meritorious cause of the action, as if a bond or other contract under seal or a promissory note be made to her separately or with her husband, or if she bestow her personal labour and skill in curing a wound, &c., she may join with the husband or he may sue alone."

[KELLY, C.B.—And it is also said that where the wife is joined in the action in these cases, the declaration must distinctly disclose her interest, and shew in what respect she is the meritorious cause of action. Is there any report of a case in which the interest of the wife did not appear on the face of the declaration?]

No such case is to be found. There are a number of authorities to shew that the right to the money was vested in the husband, the most important of which is a decision in the Exchequer Chamber, *Bidgood* v. *Way* (2 W. Black. 1236), where it is laid down in broad terms that husband and wife cannot join in an action for money had and received. In *The King* v. *Basingham* (8 Mod. 199), where husband and wife joined in an action for money lent, the Court expressed their opinion that if the money was lent during coverture the declaration was false, because the wife could have no money. In *Abbot* v. *Blofield* (Cro. Jac. 644), assumpsit by husband and wife for money had and received by the wife, it was held that the declaration could not be supported, and although it was objected that it might be for moneys due to the wife *dum sola fuit*, or for rent during the coverture, it was held that it should not be so intended without it had been shewn. In *Johnson* v. *Lucas* (1 El. & B. 659; 22 L. J. Q.B. 174) it was held that a declaration by husband and wife for money found to be due from the defendant to the wife before her marriage on accounts stated between them, and for money found to be due from the defendant to the plaintiffs since their intermarriage on accounts stated between them since the intermarriage of

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the plaintiffs, was bad on demurrer, for not averring that the account was stated in respect of money due in right of the wife, or otherwise respecting her interest in the money.—He also cited *Carne* v. *Brice* (7 Mee. & W. 183; 10 L. J. Ex. 28); *Tugman* v. *Hopkins* (5 Sc. N.R. 464); *Molony* v. *Kennedy* (10 Sim. 254); *Weller* v. *Baker* (2 Wils. 424); and *Holmes* v. *Wood* (cited 2 Wils. 424).

J. Brown (*C. M. Griffith* with him), for the plaintiff.—The decision of the Court below was right. The law as collected from the decisions is stated in *Williams on Executors*, last edit., p. 792: "Property falling under the description of choses in action of the wife, are debts owing to her on bond or otherwise, arrears of rent, legacies, trust funds, residuary personal estate, money in the funds, and other property recoverable by action or suit. Marriage is only a qualified gift to the husband of the wife's choses in action, viz., upon condition that he reduce them into possession during its continuance; for if he happen to die before his wife without having reduced such property into possession, she, and not his executors or administrators, will be entitled to it. Accordingly, the general rule of law is, that choses in action which are given to the wife, either before or after marriage, survive to her after the death of her husband, provided he has not reduced them into possession; but with this distinction, that as to those which accrue during the coverture, the husband may for them bring an action in his own name, may disagree to the interest of the wife, and that recovering in his own name is equal to reducing them into possession." In the present case the claim to the money was just as much a chose in action as in the passage referred to. In all the cases cited by the defendant as authorities against an action by husband and wife in respect of a similar claim, the money had actually come into the wife's possession.

[The COURT here suggested that the declaration might possibly be amended, but the counsel for the plaintiff did not accept the proposition, on the ground that an amendment would place the defect (if any) upon the record.]

In *Tugman* v. *Hopkins* (5 Sc. N.R. 464) the money was the wife's savings, so that there could be no doubt that it belonged to her husband. *Molony* v. *Kennedy* (10 Sim. 254) was a similar case.

[KELLY, C.B.—Have you any precedent for an action like this, except in the case of a bond or a promissory note?]

Bonds and promissory notes are equally with this claim choses in action, and it would be very inconvenient to suggest differences in the remedies upon these rights. He cited *Vin. Abr.* tit. 'Baron and Feme' (D.), *Co. Lit.* 351, *c*, *Williams* v. *Everett* (14 East, 582); *Gaters* v. *Madeley* (6 Mee. & W. 423; 9 L. J. Ex. 173); *The Attorney-General* v. *Partington* (3 Hurls. & C. 193; 33 L. J. Ex. 231); *Wells* v. *Nurse* (1 Ad. & E. 65); *Ex parte Norton* (25 L. J. Bk. 43); *Bendix* v. *Wakeman* (12 Mee. & W. 97; 13 L. J. Ex. 15); and *Demblyn* v. *Brown* (F. Moore, 887).

Prentice, in reply.

CLEASBY, B.—As there is a difference of opinion among the members of the Court, I have been requested to deliver my opinion first. I think that the judgment of the Court below ought to be affirmed. The real question has been fairly stated by Mr. Prentice to be, whether a chose in action was conferred on the wife, Mary Ann Evans, and was reduced into possession during coverture, or rather during her lifetime? There can be no doubt about the correctness of the formula, that marriage is a gift by the wife to the husband of all her movable personal chattels; but as regards choses in action, it must be qualified by the condition that they are reduced into possession by the husband during coverture. It is hardly necessary to refer to *Comyns's Digest* for an exposition of those rights which do not vest in the husband on marriage. There can be no doubt that marriage is only a qualified gift to the husband of choses in action, and that it is necessary that he should reduce them into possession during the lifetime of his wife. This doctrine applies not only to choses in action existing at the time of the marriage, but to those which come into existence afterwards, such as promissory notes, rent due under leases, and similar cases, where the

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wife is the meritorious cause of action. I may refer to the well-known passage in *Coke upon Littleton*, 351 *b*, "Marriage is an absolute gift of all chattels personal in possession in her own right whether the husband survive the wife or no, but if they be in action, as debts by obligation, contract or otherwise, the husband shall not have them unless he and his wife recover them," making no distinction as far as I can see between choses in action accruing before and after marriage. There is also the case of *Brashford* v. *Buckingham* (Cro. Jac. 77), where it was held that husband and wife might join in an action upon a promise made to the wife after coverture upon consideration that she would cure a wound, though in *Buckley* v. *Collier* (1 Salk. 114) it was held that they could not sue on a *quantum meruit* for work done by the wife, as the husband was entitled to her services. Now Sir Edward Williams, in his work on *Executors*, last edition, p. 792, has defined choses in action to be property recoverable by action or suit, and they are, no doubt, rights which require to be enforced or established by action. How, then, do these rules apply to the present case? I do not think that it can make any difference that the money claimed in this action was not due to the wife by virtue of any instrument. It is quite clear that the property could not be reduced into possession till the time of payment arrived. What appears to have been done was, that a sum of money intended as a gift to the wife was placed in the hands of the defendant. But the defendant did not receive this money as her agent, but with a direction to appropriate part of it for her benefit. This being so, all that the wife had was a right to recover this money from the defendant. If this money had been paid to her, or to her agent, it would have been a reduction into possession of the right to the money. But there was no such reduction into possession. The wife dies before the right is reduced into possession, and it is, according to the authorities a chose in action, which can only be enforced by the person taking out administration to her. I have, therefore, come to the conclusion that this action is maintainable, though I cannot say that I am completely satisfied in my own mind.

I will first refer to one or two of the strongest cases which may appear opposed to this conclusion—*Bird* v. *Pegrum* (13 Com. B. Rep. 639; 22 L. J. C.P. 166), where it was held that a husband after his wife's death might, in his own name, bring an action against a person to whom the wife had handed money saved from her separate estate. But the fact that the wife had actually received this money and so reduced it into possession enables us to dispose of this case. Then there is the case of *Bidgood* v. *Way* (2 W. Black. 1236). But there seems to be some error as to what was decided in this case. It appears to have been an action for money had and received to the use of the husband and wife, not to the use of the wife alone, and a receipt to the use of the husband and wife would be necessarily to the use of the husband. This case, therefore, as an authority falls to the ground, and it is moreover to be observed that there was a count for money had and received to the use of the wife, so that one cannot see how the technical difficulty was not got over. In *Philliskirk* v. *Pluckwell* (2 M. & S. 393), Dampier, J., speaking of this decision, says, "There must be some little inaccuracy in the case, because the Court say that no promise to a married woman, either express or implied, gives any interest, and yet they afterwards admit upon the cases that where a promise is so expressly stated, the husband may assent to give the wife an interest in the contract and join her in the action." I think that the expressions in the report of *Bidgood* v. *Way* (2 W. Black. 1236) are stronger than can be sustained. It is not necessary to consider whether the pleadings are properly framed, as the counsel for the defendant founded his argument upon the proposition that the money claimed was never a chose in action of the wife. We may, therefore, read the declaration as though it contained a statement that money was handed to the wife, that it was not paid over in the wife's lifetime, and that this action is brought by her administrator; and upon these facts I think that the plaintiff is entitled to recover, and that the judgment must be affirmed.

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MONTAGUE SMITH, J.—I am also of opinion that the judgment of the Court below should be affirmed. It appears to me that a chose in action was vested in the wife during coverture, which might have been, but was not, reduced into possession by the husband, so that her representative may maintain this action. There is a broad distinction between this case and that of *Carne* v. *Brice* (7 Mee. & W. 183; 10 L. J. Ex. 28), where the money had been in the hands of the wife and she afterwards invested or lent it. In this case the thing was never in her possession, but was a chose in action only. Where the money comes into the hands of the wife it is reduced into the possession of the husband, but where contracts are made with her before marriage, and benefits accrue to her by contracts made after the marriage, these are choses in action which become hers on the death of her husband, unless he has reduced them into possession. This rule is not confined to bonds or promissory notes, although these securities are more frequently mentioned than any other, probably because it was once thought that they might have passed to the husband as chattels, as the instruments would generally be in the possession of the wife. In *Gaters* v. *Madeley* (6 Mee. & W. 426; 9 L. J. Ex. 173) Baron Parke says, "A promissory note is not a personal chattel in possession, but a chose in action of a peculiar nature, which has indeed been made by statute assignable, and transferable according to the custom of merchants, like a bill of exchange, yet still it is a chose in action, and nothing more." The learned Baron again says (p. 427), "The only doubt in this case arose from the observation of Lord Ellenborough in *M'Neilage* v. *Holloway* (2 B. & Ad. 447), that a promissory note may be treated as a personal chattel in possession. Now in that respect I think there was a mistake, and an incorrect expression used; but it was unnecessary for his Lordship to lay down such a doctrine in order to decide the case then before him. In fact, the decision in the subsequent case of *Richards* v. *Richards* (1 B. & Ald. 221) has qualified that position. In that case the Court of King's Bench said that a promissory note was in the ordinary course of things a chose in action, and that there was nothing to take it out of the common rule that choses in action given to the wife survive to her after the death of her husband, unless he has reduced them into possession." Now, I have listened to everything which has been suggested by Mr. Prentice, and have heard nothing to convince me that this common rule does not apply to the present case. I think, therefore, that we must abide by it, and hold that the wife's representative is entitled to recover this money, which was placed with her aunt for her use. The wife did not select the aunt as her agent, and it does not appear from the facts whether the money was deposited as a gift, a legacy, or in pursuance of some contract, but only that it was for the use of the wife, to be applied as she should direct, and that the defendant, the aunt, wrote letters offering to hold it for the wife. If the defendant resists the payment of this money it is only to be got by action. The claim against the defendant is, therefore, only a chose in action, like money secured by a bond or similar agreement. The form of the contract does not seem to be material. *Bird* v. *Pegrum* (13 Com. B. Rep. 639; 22 L. J. C.P. 166) illustrates the position which I have taken. There, when the money came into the hands of the wife, it was reduced into possession; when she afterwards came to deal with it it was her husband's money. It is not necessary to go into all the cases cited by Mr. Prentice. In each of them the money had been reduced into possession, or goods had been purchased by the wife and the property in them had passed at once to the husband. As to any difficulty in the way of recovering this money by reason of the pleading, I see no objection on the face of the record, and all that can be said is that there might possibly be a variance, and that the pleadings would not be supported by the evidence. But the common counts are a general mode of stating that which is a conclusion from the facts; and as to the case in *Sir W. Blackstone's Reports*, *Bidgood* v. *Way* (2 W. Black. 1236), it arose upon motion in arrest of judgment, and my Brother Cleasby has given an answer to it, namely, that there the money was alleged to be received to the use of the wife, which was the same as money

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received to the use of the husband, and that at all events it does not govern our decision in this instance. It might have been more satisfactory if there had been a special count stating the facts, but this is a matter of secondary importance, as Mr. Prentice has very fairly said that his objection is that the action is wrongly brought by the wife's representative in any form whatever.

KEATING, J.—In this case I have not had an opportunity of hearing the whole of the argument, and I can only say that, so far as I have heard it, I agree with the judgment of my Brothers Montague Smith and Cleasby.

CHANNELL, B.—With regard to this case I am not entirely free from doubt, but on the whole I think the judgment of the Queen's Bench should be affirmed. In the considered judgment prepared by my Brother Blackburn, that learned Judge, after commenting upon the case of *Bird* v. *Pegrum* (13 Com. B. Rep. 639; 22 L. J. C.P. 166), says, "We think, however, that in the present case the facts shew that there was a chose in action conferred on the wife with which the husband did not during coverture interfere." Now this conclusion of fact may be divided into two propositions: first, that the wife's right to the money was a chose in action; secondly, that the husband did not during coverture interfere with it. As to the second of these propositions, it is abundantly clear that the husband did not interfere with the wife's right to the money. As to the first proposition, I do not propose to go through those cases which establish the principle that where it appears on the record that the person joining in the action is a married woman the judgment will be arrested unless her interest is disclosed on the face of the pleadings; and secondly, that where the husband has reduced the chose in action into possession the wife has no further interest in it. Here the wife was donee of a sum of money according to the direction of a third person, and this gift could not be reduced into possession until the defendant had assented to the direction which he received, and until this assent had been given no action could be maintained against her. But she did give this assent in letters written by him; and after these letters had been written the husband might have sued for the amount, or he might perhaps have joined his wife as co-plaintiff. And upon the authority of the passage which has been cited from *Williams on Executors*, I think that the right to the money was a chose in action reducible into possession, though, as I have already observed, it was not reduced into possession. I gather from the observations of my Lord Chief Baron that the principal ground of his objections to this action is, that, although some action might be brought, yet a count for money had and received is not sufficient. But I think that objection may be met in this way. The action for money had and received is an equitable remedy, and cannot be maintained unless the defendant has in some way agreed to hold the money for the plaintiff or to pay it over to her. But the defendant did give such an assent, and at the time when the action was brought it was money had and received to the use of the wife. Now, this is an action for the benefit of the wife's estate, and as the husband never reduced her right into possession during her life I think that the action may be maintained. I am not convinced that both husband and wife might not join in suing for money had and received to their use, but I give my decision on the ground that the case is within the rule that a chose in action not reduced into possession by the husband in the lifetime of the wife survives to her representative.

KELLY, C.B.—I rejoice at the conclusion at which my learned Brothers have arrived, that this action is maintainable, as it enables the decision of the Court to be given according to the merits; but it appears to me to be opposed to the first principles of the law of England. It appears to me to involve the principle that money or other personalty may be the property of the wife during coverture, and that she and her husband may sue jointly in respect of it. But the principle of our law has always been that a *feme covert* cannot be the legal owner of money or personal chattels. This is an action by the administratrix of a *feme covert* whom her husband survived. If this action is maintainable, it is necessary that the wife should have been able to maintain it during her

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coverture, and that when the defendant acknowledged that she held money for the wife, the husband might have joined with his wife in an action for money had and received. But under no circumstances that can exist from any hypothesis, is such an action maintainable by husband and wife. The case of *Bidgood* v. *Way* (2 W. Black. 1236) proceeded upon the ground that an action for money had and received could not be maintained by husband and wife jointly, because no contract could be made with a married woman, and no promise either express or implied gave any interest to her. The mode in which the learned Judges expressed themselves may be open to observation, as was afterwards said by Dampier, J., but the inaccuracy was corrected in the course of the judgment, for they go on to say "The cases cited where the wife is joined do not controvert the doctrine laid down: they are exceptions which prove the rule. They only shew that in such cases so expressly stated, the husband may assent to give the wife an interest in the contract, and may join her in the action. It has been insisted that the Court may intend the estate in question to have been the wife's. But there can be no intendment contrary to the plain meaning of the words. Besides there are general damages, and the count for money had and received cannot be supported by intendment." This proposition has never that I am aware of been questioned, but it has been held in a variety of text-books, such as *Chitty on Pleading*, that an action for money had and received will not lie at the suit of the wife. There must have been thousands of cases similar to the present one, but in none of them has such an action ever been held maintainable. In the same way an action by husband and wife for money lent by the wife has failed. Now, what are the alleged exceptions to this rule? The passages in *Coke upon Littleton* and *Williams on Executors* shew that there are cases of a peculiar and specific nature, such as a bond, shares in a joint-stock company, &c., where the wife is the meritorious cause of action, and the claim can only be enforced by an action on the instrument. Such are the exceptions: special contracts to pay debts which can only be enforced by actions on the particular contract. But this is an action for money had and received to the use of the wife, in which the administratrix represents the wife. If the wife had brought such an action at the time of the acknowledgment, she would have been met by a plea of coverture. If the action had been brought by husband and wife, the case must have been held to be concluded by *Bidgood* v. *Way* (2 W. Black. 1236). Nor is this the only objection, for I am of opinion that no action can be brought by the representative of the wife in which her interest does not specifically appear on the record. But in the present case the plaintiff is bound to contend that an action could have been brought by husband and wife without disclosing the wife's interest on the record. I allow that these objections are of a technical nature, but I do not think that we are at liberty sitting here to set aside the first principles of special pleading. I think that this judgment is entirely without precedent, since it decides for the first time that husband and wife could join in an action for money had and received to the use of the wife, and that they could join in an action without the interest of the wife appearing on the record. I say nothing of what might be the result of an amendment, as the counsel for the plaintiff declined to ask for it, and we ought to give our decision upon the pleadings as they stand.

Judgment affirmed.

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IN THE HOUSE OF LORDS. July 3, 1868; April 22, July 13, 1869.

THE HAMMERSMITH AND CITY RAILWAY COMPANY, *plaintiffs in error, defendants below;* BRAND AND ANOTHER, *defendants in error, plaintiffs below.*

38 L. J. Q.B. 265; 8 B. & S. 318; L. R. 4 H.L. 171; 21 L. T. 238; 18 W. R. 12: reversing, [1867] E. R. A. 1596; 36 L. J. Q.B. 139; 7 B. & S. 22; L. R. 2 Q.B. 223; 16 L. T. 101; 15 W. R. 437 (Ex. Ch.).

Referred to, *Buccleuch* v. *Metropolitan Board of Works*, [1870] E. R. A.; 39 L. J. Ex. 130; L. R. 5 Ex. 221; 18 L. T. 906 (Ex.): reversed, [1872] E. R. A.; 41 L. J. Ex. 137; L. R. 5 H.L. 419; 27 L. T. 1 (H.L.); *City of Glasgow Railway Co.* v. *Hunter*, L. R. 2 Sc. App. 79; *Smith* v. *London and South-Western Railway*, [1871] E. R. A.; 40 L. J. C.P. 21; L. R. 6 C.P. 14; 23 L. T. 678; 19 W. R. 230 (C.P.). Distinguished, *Reg.* v. *Cambrian Railway Co.*, [1871] E. R. A.; 40 L. J. Q.B. 169; L. R. 6 Q.B. 422; 25 L. T. 84; 19 W. R. 1138 (Q.B.). Referred to, *Jones* v. *Stanstead Railway*, [1872] E. R. A.; 41 L. J. P.C. 19; 26 L. T. 456; 20 W. R. 417 (P.C.); *Clowes* v. *Staffordshire Potteries Waterworks Co.*, [1873] E. R. A.; 42 L. J. Ch. 107; L. R. 8 Ch. 125 (n. at p. 133); 27 L. T. 521; 21 W. R. 32 (L. JJ.); *Great Western Railway Co.* v. *Smith*, [1876] E. R. A.; 45 L. J. Ch. 235; 2 Ch. D. 235; 34 L. T. 267; 24 W. R. 443 (C. A.): affirmed, [1878] E. R. A.; 47 L. J. Ch. 97; L. R. 3 A.C. 165; 37 L. T. 645; 26 W. R. 130 (H.L.). Applied, *Hopkins* v. *Great Northern Railway*, [1877] E. R. A.; 46 L. J. Q.B. 265; L. R. 2 Q.B. D. 224; 36 L. T. 898 (C. A.). Referred to, *Smith* v. *Midland Railway*, [1877] E. R. A.; 37 L. T. 224; 25 W. R. 861 (V.C.); *Hill* v. *Metropolitan Asylums District*, [1879] E. R. A.; 48 L. J. Q.B. 562; L. R. 4 Q.B. D. 433; 40 L. T. 491: affirmed, [1880] E. R. A.; 49 L. J. Q.B. 228; 42 L. T. 212 (C. A.): latter decision affirmed, [1881] E. R. A.; 50 L. J. Q.B. 353; L. R. 6 A.C. 193; 44 L. T. 653; 29 W. R. 617 (H.L.); *Reg.* v. *Essex*, [1885] E. R. A.; 54 L. J. Q.B. 459; L. R. 14 Q.B. D. 753; 52 L. T. 926; 33 W. R. 214 (Q.B. Div.): reversed, C. A.; latter decision reversed sub nom. *Cowper-Essex* v. *Acton Local Board*, [1889] E. R. A.; 58 L. J. Q.B. 594; L. R. 14 A.C. 153; 61 L. T. 1; 38 W. R. 209 (H.L.). Applied, *Lea Conservancy* v. *Mayor of Hertford*, (1884) 48 J. P. 628; 1 Cab. & Ell. 299 (Q.B. D.). *Parkdale Corporation* v. *West*, [1887] E. R. A.; 56 L. J. P.C. 66; L. R. 12 A.C. 602; 57 L. T. 602 (P.C.). Referred to, *North Shore Railway* v. *Pion*, [1890] E. R. A.; 59 L. J. P.C. 25; L. R. 14 A.C. 612; 61 L. T. 525 (P.C.). Referred to, *Dixon* v. *Metropolitan Board of Works*, [1881] E. R. A.; 50 L. J. Q.B. 772; L. R. 7 Q.B. D. 418; 45 L. T. 312; 30 W. R. 83 (Q.B. D.). Discussed, *Caledonian Railway* v. *Walker's Trustees*, (1882) L. R. 7 A.C. 259; 46 L. T. 826; 30 W. R. 569; 46 J. P. 676 (H.L. Sc.). Distinguished, *Reg.* v. *Sheward*, [1880] E. R. A.; 49 L. J. Q.B. 716; L. R. 9 Q.B. D. 741 (C. A.); *Truman* v. *London, Brighton and South Coast Railway Co.*, [1884] E. R. A.; 53 L. J. Ch. 209; 25 Ch. D. 423; 50 L. T. 89; 32 W. R. 364; 48 J. P. 260 (Ch. Div.): affirmed, [1885] E. R. A.; 54 L. J. Ch. 849; 29 Ch. D. 89; 52 L. T. 522; 33 W. R. 762 (C. A.): latter decision reversed, [1886] E. R. A.; 55 L. J. Ch. 354; L. R. 11 A.C. 45; 54 L. T. 250; 34 W. R. 657 (H.L.). Applied, *Truman* v. *London, Brighton and South Coast Railway Co.*, [1886] E. R. A.; 55 L. J. Ch. 354; L. R. 11 A.C. 45; 54 L. T. 250; 34 W. R. 657 (H.L.). Followed, *Attorney-General and Hare* v. *Metropolitan Railway Co.*, [1894] 1 Q.B. 384; 69 L. T. 811; 42 W. R. 381 (C. A.). Referred to, *Emsley* v. *North-Eastern Railway Co.*, [1896] E. R. A.; 65 L. J. Ch. 385; [1896] 1 Ch. 418; 74 L. T. 113 (C. A.). Adopted, *Kirby* v. *Harrogate School Board*, [1896] E. R. A.; 65 L. J. Ch. 376; [1896] 1 Ch. 437; 74 L. T. 6 (C. A.). Referred to, *Southwark and Vauxhall Water Co.* v. *Wandsworth District Board*, [1898] E. R. A.; 67 L. J. Ch. 657; [1898] 2 Ch. 603; 79

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L. T. 132; 47 W. R. 177 (C. A.). Referred to, *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.*, [1898] E. R. A.; 67 L. J. Ch. 666; [1898] 2 Ch. 614; 79 L. T. 478; 47 W. R. 222 (Ch. Div.): affirmed, [1899] E. R. A.; 68 L. J. Ch. 459; [1899] 2 Ch. 217; 80 L. T. 815 (C. A.); *Canadian Pacific Railway Co.* v. *Parke*, [1899] E. R. A.; 68 L. J. P.C. 89; [1899] A.C. 535; 81 L. T. 127; 48 W. R. 118 (P.C.); *Canadian Pacific Railway Co.* v. *Roy*, [1902] E. R. A.; 71 L. J. P.C. 51; [1902] A.C. 220; 86 L. T. 127; 50 W. R. 415 (P.C.) Distinguished, *Long Eaton Recreation Grounds* v. *Midland Railway Co.*, [1902] E. R. A.; 71 L. J. K.B. 74; 85 L. T. 278; 50 W. R. 120 (K.B. D.): affirmed, [1902] E. R. A.; 71 L. J. K.B. 837; 86 L. T. 873; 50 W. R. 693 (C. A.). Applied, *Dawson* v. *Great Northern and City Railway Co.*, [1905] E. R. A.; 74 L. J. K.B. 190; [1905] 1 K.B. 260; 92 L. T. 137 (C. A.). Not applied, *Price's Patent Candle Co.* v. *London County Council*, [1909] E. R. A.; 78 L. J. Ch. 1; [1908] 2 Ch. 526; 99 L. T. 571 (C. A.). Referred to, *West* v. *Bristol Tramways Co.*, [1908] E. R. A.; 77 L. J. K.B. 684; 1908 2 K.B. 14; 99 L. T. 264 (C. A.); *Dibden* v. *Skirrow*, [1907] E. R. A.; 76 L. J. Ch. 268; 1907 1 Ch. 437; 96 L. T. 257 (Ch. D.): affirmed, [1908] E. R. A.; 77 L. J. Ch. 107; 97 L. T. 658 (C. A.). Not considered, *Horton* v. *Colwyn Bay and Colwyn Urban Council*, [1908] E. R. A.; 77 L. J. K.B. 215; 98 L. T. 547 (C. A.). Applied, *Toronto Railway Co.* v. *Toronto Corporation*, [1907] E. R. A.; 76 L. J. P.C. 57; [1907] A.C. 355; 96 L. T. 794 (P.C.). Distinguished, *Fletcher* v. *Birkenhead Corporation*, [1907] E. R. A.; 76 L. J. K.B. 218; [1907] 1 K.B. 205 (C. A.). Applied, *Grand Trunk Pacific Railway Co.* v. *Fort William Land Investment Co.*, [1912] E. R. A.; 81 L. J. P.C. 137; [1912] A.C. 224 (P.C.).

Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18, *ss.* 18, 21, 22, 49, 63, 68)—*Railways Clauses Consolidation Act*, 1845 (8 *Vict. c.* 20. *ss.* 6, 16, 86) —*Compensation—Injury to premises adjoining Railway—Noise, Vibration and Smoke.*

Compulsory Purchase. Maxims. Statute. A.—*A house and premises adjoining a railway, but not touched by it, were depreciated in value through vibration, noise and smoke, caused by the running of the trains on the railway after it had been completed. The premises sustained no structural injury*:— Held, *(by* Lord Chelmsford *and* Lord Colonsay, Lord Cairns *dissenting), reversing the decision of the Court of Exchequer Chamber, that the owner was not entitled to compensation from the company by virtue of the provisions of either the Lands Clauses Consolidation Act or of the Railways Clauses Consolidation Act.*

This was a proceeding in error upon a judgment of the Exchequer Chamber, reversing the judgment of the Court of Queen's Bench upon a special case without pleadings.

The case in the Court of Exchequer Chamber is reported in 36 L. J. Q.B. 139.

The material facts stated in the special case are given in the report of the case in the Court below, 35 L. J. Q.B. 53.

It is not necessary to state here more than that the original defendants (now the plaintiffs in error) had constructed a railway according to the powers of their special Act, which incorporated the Railways Clauses Consolidation Act and the Lands Clauses Consolidation Act, which railway was leased to the Great Western Railway Company. The railroad crossed the Uxbridge Road near the house of the defendants in error by a viaduct. At an inquisition before the sheriff, a jury had assessed the amount of compensation due to the defendants in error for damage to their house by the railroad under several heads, viz., for obstruction of light, air and doorway, 836*l.*; for damage to garden by lime-dust and smoke in the course of the construction of the railway, 23*l.* and for

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damage to which the premises would be subjected from the vibration, noise and smoke from passing trains in the user of the railroad after construction, 272*l*.

The question was, whether the defendants in error, the plaintiffs below, were entitled to compensation in respect of the third head of their claim. The Court of Queen's Bench had unanimously decided in favour of the company, the plaintiffs in error. The Court of Exchequer Chamber had reversed that decision, hence this appeal.

The Judges were summoned, and Willes, J., Bramwell, B., Blackburn, J., Keating, J., Pigott, B., and Lush, J., attended.

The Attorney-General (Sir J. Karslake) and *J. A. Russell* (*Digby* with them) appeared for the company, the plaintiffs in error.—The arguments on both sides are sufficiently noticed in the opinions of the Judges and in the judgments of their Lordships, and are given in the reports of this case in the Courts below. In addition to the cases cited as reported in the Courts below, viz., *The Imperial Gas Company* v. *Broadbent* (7 De Gex, M. & G. 436; 26 L. J. Ch. 276: affirmed in the House of Lords, 7 H.L. C. 600; 29 L. J. Ch. 377); *In re the Stockport, Timperley and Altringham Railway Company* (33 L. J. Q.B. 251); *Mumford* v. *the Oxford, Worcester and Wolverhampton Railway Company* (1 Hurls. & N. 34; 25 L. J. Ex. 265); *The Caledonian Railway Company* v. *Ogilvie* (2 Mac. H.L. C. 239), the following cases were cited, *Ricketts* v. *the Metropolitan Railway Company* (36 L. J. Q.B. 205; L. R. 2 H.L. 175); *Elliotson* v. *Feetham* (2 Bing. N.C. 134), and *The Queen* v. *the Eastern Counties Railway Company* (2 Q.B. Rep. 347; 11 L. J. Q.B. 178).

Sir Roundell Palmer and *J. Dixon* (*Mellish* with them), appeared for the defendants in error, and in addition to the cases cited below, viz., *The London and North-Western Railway Company* v. *Bradley* (6 Rail. Cas. 551); *Chamberlain* v. *the Crystal Palace Company* (2 Best. & S. 617; 32 L. J. Q.B. 173); *In re Penny* v. *the South-Eastern Railway Company* (7 E. & B. 660; 26 L. J. Q.B. 225); *Glover* v. *the North Staffordshire Railway Company* (16 Q.B. Rep. 912; 20 L. J. Q.B. 376); *Lee* v. *Milner* (2 Mee. & W. 824; 6 L. J. Ex. 205); *In re the Stockport, Timperley and Altringham Railway Company* (33 L. J. Q.B. 251); *The King* v. *Pease* (4 B. & Ad. 30; 2 L. J. M.C. 26), and *Vaughan* v. *the Taff Vale Railway Company* (5 Hurls. & N. 679; 29 L. J. Ex. 247), the following cases were cited, *Gardner* v. *the London, Chatham and Dover Railway Company* (36 L. J. Ch. 323; L. R. 2 Ch. Ap. 201) and *Bryan* v. *Child* (19 L. J. Ex. 264).

J. A. Russell was heard in reply.

The question proposed by the Lord Chancellor (Lord Cairns) to the Judges was, Were the defendants in error entitled to have compensation made to them by the plaintiffs in error for the vibration in respect of which damages were assessed by the jury, as mentioned in the special case?

The learned Judges answered as follows:

Willes, J.—I am of opinion that the defendants in error were entitled to have compensation made to them by the plaintiffs in error for the vibration in respect of which damages were assessed by the jury, as mentioned in the special case.

The admitted relevant facts are found at page 9 of the printed appendix, and are as follows: The claimant Mary was seised in fee simple in possession of a house called Cumberland House and its outbuildings; the railway was made so near the house that, although no part of the site was taken, and although it did not appear that any structural injury was or would be caused to Cumberland House, or any of its outbuildings, by the construction of the railway, "yet it appeared, and is admitted, for the purposes of this case, that by reason of the working of the railway after it had been opened for traffic, the house and buildings were and would be subjected to vibration, noise and smoke from passing trains, and were and always would be affected and depreciated and lessened in value thereby."

No compensation was assessed in respect of the noise or smoke. Compensation was assessed at 272*l*., "for vibration from the use of the railway

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after construction, as before mentioned," which it must be assumed from the terms of the admission, and in the absence of objection as to the extent of the vibration, would have been actionable but for the statutory powers of the company. The result is that the 272*l.* represents the price estimated by a jury of a perpetual right acquired by the company to shake the house and its outbuildings by traffic upon the railway, or, as it was well put in argument, the depreciation of the value of the property by a servitude of vibration imposed in respect of the railway constructed by the company.

Such a servitude, if granted by an ordinary conveyance without being limited in respect of the use of a specified dominant property, would probably have amounted to a licence only, and not have affected the land in the hands of a purchaser; but as limited to vibration by traffic carried on upon a specified railway, it was properly the subject of grant by way of interest in the servient land—*Rowbotham* v. *Wilson* (8 H.L. C. 348; 30 L. J. Q.B. 49).

Therefore, as soon as the railway was completed and fit for use, there was, by the conjoint operation of the company's Act and the execution of the company's works thereunder, statutorily taken away from whoever had or should in future have Cumberland House, and transferred to the company as appurtenant to their railway, part of the use and value of the house, and the house was therefore injuriously affected by the construction of the railway or execution of the authorized works within the words, as within the substantial intention, of the compensation section, 68.

No analogy to the use of a road dedicated by a private individual can assist. A private individual could dedicate a road to a limited use, but a private individual could not of his own power dedicate a highway with tolls, nor a railway with the statutory restrictions and privileges.

The cases which furnish the test, " No right of action, no compensation," are satisfied, because the right of action which would have existed but for the statute, is taken away by the statute in respect of the works executed and railway constructed, and to which the law annexes the dominion.

As against the company, it must be presumed, and indeed it is involved in the admissions, that the railway when made was sure to be used, and the probable extent of that use must have been a subject of proof and consideration in committee, and could in like manner be proved before and considered by the jury in assessing the amount.

The uncertainty of the amount is what made most difficulty to my mind; but I think it must be taken that the depreciation was capable of being calculated, without mere guessing, near enough for practical purposes, quite as near as surveyors calculate work to be paid for by measure and value, either done or to be done, in fulfilment of a covenant to repair, for instance, upon which there are often wide differences of opinion which a jury must reconcile. The case of *The Imperial Gas Company* v. *Broadbent* (7 H.L. C. 600; 29 L. J. Ch. 377) involved peculiar elements of uncertainty defying calculation.

In the result, I adopt the reasoning of Baron Bramwell (with whom Keating, J., and Montague Smith, J., agreed), in the Exchequer Chamber, being satisfied that there must be either compensation or repeated liability to actions, which latter would defeat the general intention of the legislature as well as contradict a series of authorities too convenient and reasonable to bear overruling.

I therefore answer in the affirmative, and in this opinion my Brothers Keating and Pigott concur.

LUSH, J.—A careful consideration of the judgments of my learned Brethren in the Exchequer Chamber, and of the able arguments addressed to your Lordships on the hearing of this appeal, has induced me to change the opinion which I expressed in the Court of Queen's Bench, and to come to the conclusion that the defendants in error were entitled to have compensation made to them by the plaintiffs in error for the vibration in respect of which damages were assessed by the jury, as mentioned in the special case.

The complaint of the defendants in error was, that " by reason of the

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working of the railway after it had been opened for traffic their house and buildings were and would be subjected to vibration from passing trains, and were and always would be affected and depreciated and lessened in value thereby." And I take the jury to have found by their verdict that the premises had, as a consequence of this working of the railway, become less comfortable for occupation, and their value substantially diminished.

It is clear that if, without the sanction of parliament, a private individual had caused this damage by making the railway upon his own land, and running the trains upon it, he would have been liable to an action from time to time so long as the nuisance continued, at the suit of the party injured. This proposition was not disputed on the argument, but it was contended on behalf of the plaintiffs in error that this being a public highway, the company are in the same position as if they had made the railway on their own land, and dedicated it to the public, and in that case they would not have been liable for the nuisance caused by the public in using it. The answer to this argument is, that this is not a highway by dedication; if it were, it would not be, as it is, the property of the company, nor could they receive tolls or any other profit from the public for the use of it, as they now do.

The case assumes that this damage results not from any improper or extraordinary use that is made of the railway, or any negligence or misconduct in the management of the traffic, but from the ordinary use of the line as a passenger line, that being the purpose for which it was authorized to be made. It is therefore to my mind equally clear that the defendants in error cannot maintain an action for the damage they have sustained, because the plaintiffs in error have only done what their Act of Parliament authorized them to do.

But that authority was given to them subject to certain conditions, and the question is whether it is one of those conditions that they should pay to persons situated like the defendants in error compensation in gross for the damage to their property, which is the direct and necessary consequence of such a use of the railway. This depends upon the construction to be put upon the 18th, 22nd, 49th and 68th sections of the Lands Clauses Act, and of the 6th and 16th sections of the Railways Clauses Act.

These sections were so fully commented on in the course of the argument that I do not think it necessary to recite them. It is in your Lordships' recollection that their phraseology differs. In some of them the damage for which compensation is to be made is spoken of as damage sustained by reason of "the execution of the works"; in another, "by reason of the execution of the undertaking"; in others "by the exercise of the powers of the Act"; and the 6th section of the Railways Clauses Act contains both the latter expression and the phrase "by the construction of the railway."

I cannot assent to the argument that the legislature in adopting in that section of the Railways Clauses Act the expression "by the exercise of the powers of the Act" had any reference to the 86th section, which empowers the company to carry on the business of carriers upon their line, and for that purpose to use locomotives. The same phrase occurs in the 49th section of the Lands Clauses Act, and is there evidently used as synonymous with "the execution of the works" in the 69th and other sections; and I cannot doubt that if a special Act were to incorporate all the provisions of the Railways Clauses Act, except those which enable the company to become carriers, the liability of the company in a case like the present would be the same. I think that the variances were undesigned, and that the same idea is meant to be conveyed by each form of expression.

The question then is narrowed to this: did the legislature intend to compensate for damage occasioned by the "making and using" the railway, or for damage occasioned by the "making" only, apart from its use?

As the intention to give the larger measure cannot be collected from the words themselves, we are in the first place to look to the context, and see if we can collect from the general scope and object of the Act as expressed in its other provisions what the intention of the legislature upon this point was; and

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if we see that it was their intention to give the larger measure then to determine whether the words in question are sufficient to give effect to that intention.

The Lands Clauses Act is designed not for railways only, but for all undertakings for which compulsory powers of taking lands are given. And every special Act which incorporates its provisions designates and fixes the purpose for which the land is to be taken, and the use to which it is to be permanently appropriated; and the company who are empowered to take it are bound to apply it to that purpose, and to that purpose only. So much of the general Act as is incorporated becomes part of the special Act, and its language as part of that Act becomes pointed to the particular work or undertaking specified, whatever it may be, whether a railway, a dock, a canal, or any other undertaking. It there authorizes the taking of the land for the purpose of and its conversion into the particular railway, dock, or canal, in order that it may be used as such. The undertaking is regarded as a working concern, and the idea of its use as a railway, dock or canal is in the mind of the legislature inseparable from that of its construction. In professing to give compensation for all damage sustained by the owners of the adjacent land by the "execution of the works," or "the exercise of the powers of the Act as regards such lands" (section 6. Railways Clauses Act), the legislature must, as it appears to me, have had in view the ultimate object aimed at, the works when complete and in operation, the dock, railway, or canal, not abstractedly as a mere excavation, embankment, or reservoir, but in connexion with its appropriate traffic, and with the ordinary incidents of a business undertaking.

These considerations lead me to the opinion that the view I took of the Act in the Court below is too narrow a view, and that it is apparent from the context that the legislature intended to compensate for the use as well as for the making of the railway, and thus to make the new remedy which it gave co-extensive with that which it took away.

Taking this to have been the intention of the legislature in framing the compensation clauses, we are to see whether the words in question are capable, upon a fair and reasonable interpretation, of giving effect to such intention.

It cannot be said, I think, that they are so clear as to exclude this meaning, but only that they are ambiguous. Taken in their literal and primary sense, they would, no doubt, be read as denoting the mere work of construction; and if they occurred in a contract between the company and a person who thereby undertook to make the line, this would be their undoubted meaning. But as applied to the subject-matter of the special Act, which regards the user of the railway as the end and object of all its provisions, and looks at the adjacent land as it will be affected by that user, I think they may, without undue straining, be read as embracing both the construction and the user, as if the expression had been "injuriously affected by the railway" instead of "by the execution of the works," *i.e.*, the making of the railway. It seems to me that no violence is done to the language, nor any forced or unnatural sense put upon the words, by holding the latter expressions to be equivalent to the former.

For these reasons I answer your Lordships' question in the affirmative.

BRAMWELL, B.—In this case it must be taken that the jury have found that by the ordinary working of a railway line, by the passing of trains, without negligence or design, by what, in short, is practically necessary (as we are told) for the using of the line by the defendants below and those who pay them for its use, a nuisance will be caused to the occupiers of the premises of the plaintiffs below by vibration to such an amount that the occupiers, if without remedy, will pay the plaintiffs below for the occupation from time to time a less sum than they otherwise would, the fee simple or capitalized value of which is 272*l*. For this nuisance the occupiers would from time to time be entitled to maintain actions—*Jones* v. *the Festiniog Railway Company* (L. R. 3 Q.B. 733)—unless some statute has legalized the nuisance with or without compensation, by which I mean the statutory compensation they have claimed. If the nuisance is so legalized, no action is maintainable, whether or not there is a right to such compensation. On the other hand, if it is not legalized an action is maintain-

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able; and it is agreed on all hands, that if an action is maintainable, the defendants in error are not entitled to have compensation made to them by the plaintiffs in error for the vibration in respect of which damages were assessed by the jury, as mentioned in the special case.

But for the cases I shall refer to, I should be of opinion that such nuisance was not legalized, that the occupiers would be entitled from time to time to maintain actions for the nuisance, that consequently the plaintiffs below would not be entitled to compensation, and that your Lordships' question should be answered in the negative.

It is for those who say that this nuisance is legalized and the right of action taken away to shew it. For this purpose reliance is placed on the clauses of the Railways Clauses Act, 8 Vict. c. 20, and especially on section 86, authorizing the use of locomotives and carriages which will cause the vibration in question. It is said that these clauses shew that locomotives and carriages may be used, and consequently that no action nor indictment lies for their use; and no doubt this has been so held in *The King* v. *Pease* (4 B. & Ad. 30; 2 L. J. M.C. 26) and in *Vaughan* v. *the Taff Vale Railway Company* (5 Hurls. & N. 679). With great respect, I think those cases clearly wrong, and that they have proceeded on an inadvertent misapprehension of the object and effect of the clauses in question. What that object and effect are I will proceed to point out.

The private Act of a railway company whereby it is constituted is its deed of settlement declaring what are the purposes and objects of the company. It always begins by erecting a corporation for the purpose of making a certain railway. If it stopped there the company could not act as carriers, nor furnish locomotive power, nor do more than make their railway and receive tolls for its use. Anything else would be *ultra vires*, as would now be their keeping an hotel or having steamboats without special powers for that purpose. Moreover, the Courts of common law have held that the powers of these statutory corporations are limited to the purposes for which they are created, and that an agreement for anything else entered into by them is not merely *ultra vires* and void, but illegal—see *The East Anglian Railway Company* v. *the Eastern Counties Railway Company* (11 Com. B. Rep. 775; 21 L. J. C.P. 23); *Gage* v. *the Newmarket Railway Company* (18 Q.B. Rep. 457; 21 L. J. Q.B. 398); and many other cases. Your Lordships are aware that, for the same reasons, canal companies could not act as carriers on their own canals till an Act of Parliament enabled them to do so. This would have been the situation of the railways but for the clauses in question. Those clauses have no other object or effect, as I submit, than to obviate the objection I have referred to.

Your Lordships will find that they begin with a general heading, "With respect to the carrying of passengers and goods upon the railway, and the tolls to be taken thereon." All that follows this heading is to be construed in reference to it—see *The Eastern Counties Railway Company* v. *Marriage* (9 H.L. C. 32; 31 L. J. Ex. 73). There is not a word in this heading as to the legalizing or allowing of nuisances. The first of the following clauses, section 86, allows the companies to be carriers on their own line, and limits the charges they may make. The "company" wanted no law to enable them to *use* a locomotive, any more than it did to use "other moving power and carriages and waggons," except to avoid the objection of *ultra vires*. A man may use a locomotive on his soil and freehold, and so may a corporation. They do want, that is to say, unless given, they do not possess, the power to use it so as to be a nuisance to their neighbours. But if this were intended to be given, where are the words? The words are sufficient if meant to give *vires ultra* those of of a company to make a railway, but insufficient if meant to authorize the doing of damage. Besides, the use of other moving power and of carriages and waggons is authorized. In what sense? That a nuisance may be committed by their use without remedy? Impossible, for it was never contemplated they would be a nuisance. Section 87. clearly also gives power of contracting with other companies, and has no thought of authorizing nuisances. So sections 88. and 89, 90. and 91. Section 92. gives other companies and persons a right to

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use the railway with engines and carriages "properly constructed as by this and the special Act directed." The object of this was to define the rights of the public over the line as against the company, not to authorize nuisances. All these sections, down to and including section 113, have the same object, namely, regulating the use of the railway by the company and others.

But it is said that section 114. shews that the interests of others were in view of the legislature, and that they made thereby what they thought was sufficient provision for that object. The argument is, with all submission, bad. They provided for this matter certainly. They said, "We will not let it be *discussed* whether this is a nuisance." Did they, therefore, say nothing else shall be, or, if it is, it shall be remediless? Certainly not.

Further, the statutes, the Land and Railways Clauses Acts, themselves recite that such clauses as are contained in them usually appear in Acts of Parliament authorizing the taking of land and the construction of railways, and that it is desirable to avoid the necessity of repeating them. They ought to have, therefore, no greater or other effect in the general and public Acts than they had in the particular and private. Now, it is not supposable that in a private Act for a particular company an anomaly so great was to be introduced as that an actionable nuisance might be committed with no common law remedy, and for the benefit of the company, that their profits might be larger if without compensation. If it is said that compensation is given, then it is most surprising that in such private Act there is no provision for it in express words. And the same remark may be made on these general Acts. Why, if the common law remedy was to be taken away, are there not express words to that effect? Why, if there is to be a remedy by compensation, are there not express words to that effect? Why, if there is to be no action and no compensation, is so gross and anomalous an injustice inflicted when such pains are taken to give compensation for the slightest injury occasioned by the very fabric of the railway? It seems to me impossible that it can have been *intended* that this damage can be done without any compensation.

One reason only for such a state of things is given. It is said that the railway and the working of it are for the public benefit, and therefore the damage must be done, *and be uncompensated*. Admitting that the damage must be done for the public benefit, that is no reason why it should be uncompensated. It is to be remembered that that compensation comes from the public, which gets the benefit. It comes directly from those who do the damage, but ultimately from the public in the fares they pay. If the fares will not pay for this damage and a fair profit on the company's capital, the speculation is a losing one, as all the gain does not pay all the loss and leave a fair profit. Either, therefore, the railway ought not to be made, or the damage may well be paid for. But, further, though if it were the law and practice to do individuals a damage for the benefit of the public without compensation, no one in particular could complain when it happened to him, as every one would know that he held his property subject to being deprived of it or having it injured when it suited the public; still such a law and practice would be highly inconvenient and mischievous. It is, however, idle to discuss such a question, as the legislature has acted under no such considerations. For if the public benefit is a good reason for damaging a man's property without compensation, so would it be for taking it without compensation. The legislature has made the most careful and minute provisions for the payment of compensation for everything taken, and indeed for everything injuriously affected. And it is absurd to suppose that it was *intended* that if a house was damaged to the extent of 1*l.* a year by its light and air being diminished compensation should be given, and that it should not be given where the damage was ten times as great, but was caused by the noise and vibration of the trains. Surely when a reasonable meaning can be given to the clauses relied on, it should be adopted rather than one so unreasonable.

It is said that a man might dedicate land as a highway, and no action would lie for the nuisance occasioned by its user. In addition to the other answers

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given to this, I may add, that the ordinary use of a highway is not a nuisance affecting either the building or its occupants to such an extent and in such a way as to be actionable. But if any one continually used the highway with a very heavy vehicle so as to cause such a vibration as is experienced in this case, I apprehend an action would lie against him.

If there is to be a remedy, and it is to be by compensation and not by action, how is the compensation to be calculated? The line may not be used. Its traffic may double. Branch lines may be made. Further, it is not contended by those who say that the common law remedy is gone that there is an unlimited right to damage, but only a right to do reasonable mischief, or a reasonable right to do mischief. That is to say, if by going a little slower, or being at a little more expense, or some other inconvenience, mischief can be avoided, it must be. But on what principle is this to be settled? Ten trains a day at twenty miles an hour might be no nuisance. This might accommodate the public and pay a dividend. But fifty trains a day at thirty miles an hour might be a grievous nuisance, though much better for the public and the company. Where is the line to be drawn? Take the case of the plaintiff in *Vaughan* v. *the Taff Vale Railway Company* (5 Hurls. & N. 679). There the company declared that they went as slowly as they could, and with every contrivance for safety. But they might have had one servant, or ten, or a thousand at the spot in question to prevent the grass catching fire and burning the plaintiff's wood. This would have cost them money, and it was cheaper to burn the wood, or at all events, on a calculation of chances, better to risk doing so, than to have a sufficient number of servants. But how is compensation to be calculated for such a matter? Moreover, if these plaintiffs are entitled to compensation, so is the owner of every piece of land near the railway. For though there may be no house on it now, it is possible there would have been; but that is now prevented by the railway, at least to the same advantage as before. Therefore such land is injuriously affected, if this is.

In the result, then, the right of action is not taken away in terms; the right to compensation is not given in terms; the principle on which compensation should be given would be most difficult to settle. Though given, the companies would still be liable to actions for excess, which it would be difficult to define, leaving scope for continual litigation. It is impossible that all remedy and redress are taken away; and the only clauses supposed to indicate this are shewn to have another and different object and effect.

For these reasons I think the right of action not taken away, and the remedy by compensation not given, and that the two cases I have referred to were erroneously decided. I may observe, however, as to *The King* v. *Pease* (4 B. & Ad. 30; 2 L. J. M.C. 26), that it was not one of private wrong, but of public nuisance. In the latter case, if what was done was for the public benefit, the public is at once the gainer and loser, and the one may in some sense be set against the other, and so it might have been that without an Act of Parliament, the matter complained of there, would have been no public nuisance. But the present is not the case of a public but of a private nuisance, where the loser and gainer are not the same to the same extent. In that case also the point I present to your Lordships was not mooted. It was not noticed that the clause was necessary to avoid the objection of *ultra vires*. Nor was it used by the counsel for the plaintiffs in error before your Lordships, because though it would relieve them from the present claim, it would do so at the expense of leaving them subject to actions from time to time.

It is said that *The King* v. *Pease* (4 B. & Ad. 30; 2 L. J. M.C. 26) has been so long decided, and so many railways have been made on the supposition that it was law, that it must be set right, if wrong, by legislation only. That it gives rise to great difficulties I think I have shewn. I believe it has not been acted on; compensation under the compensation clauses has not been given as it ought to have been if *The King* v. *Pease* (4 B. & Ad. 30; 2 L. J. M.C. 26) is law. This is the first time the question comes before your Lordships, and it cannot be said that railway companies have allowed such compensation to be awarded

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against them without appeal. So also juries in actions have found negligence in railway companies as they ought not to have done if that case is not law, and compensation ought to have been given. As to railway traffic being stopped by injunction, I apprehend injunctions would not be granted in such cases.

I have deemed it my duty to bring these cases before your Lordships. If your Lordships hold them to have been rightly decided, or think they are so far settled law that they must be acted on, then it seems to me they shew that the judgment below was right, and that your Lordships' question should be answered in the affirmative. Because, for the reason I have given, I am sure the legislature did not *mean* to leave persons whose property will be injured as in this case without remedy by action or claim for compensation; and I think it right to hold any words that are capable of it to mean to give a remedy by implication. Of course we must not put a meaning on words which they cannot bear to remedy an injustice, however gross. But I think the words " injuriously affected by the construction thereof," and " full compensation for all damage sustained by reason of the exercise as regards such land of the powers," &c., may, and where it is established there is no right of action must, have the effect of giving compensation for the damage. For according to the case of *Vaughan* v. *the Taff Vale Railway Company* (5 Hurls. & N. 679) immediately on the construction of the railway, and " by the construction thereof," a right accrued to do this damage. How then can it be said that the lands are not injuriously affected " by the construction thereof " if they thereby became subject to this? They immediately come under a servitude, as Mr. Mellish put it.

Suppose it had been enacted expressly that on the construction of the railway there should be a right to use it so as to create a nuisance actionable at common law, would not that have been matter for compensation as much as if it had been enacted that the owner should make a grant of such a servitude? But it makes no difference whether it is expressly or otherwise enacted, if it is enacted as *Vaughan* v. *the Taff Vale Railway Company* (5 Hurls. & N. 679) shews it is.

As to the argument that the premises are none the worse, but only the occupiers, it is enough to say that the same thing might be said in answer to a claim for compensation for diminished light. It is to be observed that the word is not " in " or " during," but " by " the construction of the railway. Besides, this is a damage sustained by occupiers by an exercise as regards these lands of the powers of the Act.

The opinions I have expressed here I entertained and expressed in the Court below. But feeling there that I was bound by the case of *Vaughan* v. *the Taff Vale Railway Company* (5 Hurls. & N. 679), I thought the then plaintiffs entitled to judgment in their favour. Should your Lordships hold those cases to have been well decided, or too settled to be overruled, then, for the reasons I have given, I think the then plaintiffs entitled to judgment in their favour, otherwise not. I have necessarily repeated what I said there because I am unable to offer anything better to your Lordships, and because I desired to save your Lordships the trouble of referring to what I then said, had your Lordships been minded so far to honour me.

BLACKBURN, J.—I have come to the conclusion that the plaintiffs below have no right to compensation for the vibration mentioned in the special case. I need not say that finding that I stand alone amongst the Judges consulted by your Lordships, I give this opinion with diffidence. My reasons are as follows:

I think it is agreed on all hands that if a person, not authorized by Act of Parliament so to do, erected a railway or any other private road on his own land, and then worked it by running locomotives and trains or any other species of carriages upon it, so that the vibration and noise was to such an extent as really to be annoying to a neighbour, that injury would be a nuisance, and that neighbour would have a fresh cause of action against the maintainer of the way every time the way was so worked as to give rise to the nuisance; and he might, I apprehend, obtain an injunction to prevent the continuance of the nuisance. But if, instead of making and maintaining a private way of his own, the owner

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of the land dedicated it as a *public* highway, and the public brought traffic on it to such an extent that the noise and vibration seriously affected the neighbours, I apprehend they would be without remedy. The common law would leave them suffering a private hardship for the public benefit.

This distinction may have some bearing on the construction of the statutes (8 Vict. c. 18. and 8 Vict. c. 20), on the true meaning of which I think the present case depends.

And I think that it is agreed on all hands that if the legislature authorize the doing of an Act (which, if unauthorized, would be a wrong and a cause of action) no action can be maintained for that Act, on the plain ground that no Court can treat that as a wrong which the legislature has authorized, and consequently the person who has sustained a loss by the doing of that Act is without remedy, unless in so far as the legislature have thought it proper to provide for compensation to him. He is, in fact, in the same position as the person supposed to have suffered from the noisy traffic on a new highway is at common law, and subject to the same hardship. He suffers a private loss for the public benefit.

Now the legislature have thought fit to authorize the defendants to make a railway, and by 8 Vict. c. 20. s. 86. " to use and employ locomotive engines and other moving power, and carriages and waggons to be drawn or propelled thereby." And the first question is, whether this is such a legislative authorization of the use of such power as to render all such consequences as inevitably attend it no longer wrongful.

If this were a new matter I should think there was a great deal in what is thrown out by Baron Bramwell in his judgment in the Exchequer Chamber in this case; but the contrary was held in *The King* v. *Pease* (4 B. & Ad. 30; 2 L. J. M.C. 26) so long ago as 1832, and acted on in *Vaughan* v. *the Taff Vale Railway Company* (5 Hurls. & N. 679). And if your Lordships were to reverse those decisions the consequence would follow that any owner of a house or field so adjacent to a railway that the inevitable disturbance from the working of the line amounted to a nuisance might (at least where the railway has not been opened for twenty years) stop the working of the line. So large an amount has been invested in the belief that the trains might be run, even though some mischief to others was inevitable, that I think your Lordships will hold that, even if the principle of *The King* v. *Pease* (4 B. & Ad. 30; 2 L. J. M.C. 26) was originally an error, it has long become *communis error*, and ought to be held to have made the law.

I come, therefore, to the conclusion that but for the statutes the plaintiffs would have had a right of action for the vibration arising from the working of the defendants' line, and that the statutes have taken away that right of action. The question then arises, whether the legislature have given the plaintiffs any compensation; and that must be a question depending on the construction of the statutes.

It has been argued with great force that it is so unjust to take away private rights without compensation that it should be supposed that the legislature at least wished to give compensation in every case where there was a private injury. But I think it is clear that the legislature have not adopted this principle. In such a case as that of *The London and North-Western Railway Company* v. *Bradley* (3 Mac. & G. 336) where the beer in vaults adjoining to the railway turned sour in consequence of the vibration, the owner of the vaults may or may not have had a right to compensation for the injury to his vaults; but the owner of the beer, if a different person from the occupier of the vaults, could have none, for the right to compensation is strictly confined to interest in lands injuriously affected—see *The Caledonian Railway Company* v. *Ogilvie* (2 Mac. H.L. C. 229) and *Ricketts* v. *the Metropolitan Railway Company* (36 L. J. Q.B. 205; L. R. 2 H.L. 175).

The reason why the legislature so narrowed the claim to compensation is probably that stated by Lord Cranworth, in *Ricketts* v. *the Metropolitan Railway Company* (36 L. J. Q.B. 205; L. R. 2 H.L. 175), " that any other construction

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of the clause would open the door to claims of so wide and indefinite a nature." But whatever be the reason, I think it clear that no compensation is given to those whose interest in goods or whose personal interests are injuriously affected, except where it can in some way be annexed to the compensation for an injury to land.

No doubt it is often very difficult to say whether an interest in land is or is not injuriously affected. In the present case, however, I assent to the argument so neatly expressed in the reasons in the appellants' case, that the plaintiffs' house has "become subject to a perpetual servitude," and so their interest in it is injuriously affected.

In my mind, therefore, the question is narrowed to this: Do the compensation clauses in the statutes extend to the consequences of working the railway, and using the statutable powers for that purpose? Or are they confined to the making and maintaining of the railway and the works, and the using the statutable powers for that purpose?

I can see many plausible reasons why the legislature might think fit to adopt the narrower construction. There is the analogy to the hardship which, for the public good, is imposed by the common law on the owner of a quiet villa if his neighbour dedicates the land close under his windows to the public as a highway, it may be, leading to Smithfield Market. Or they might have thought, as Lord Cranworth expresses it, that claims in respect of such damage would be of "a very wide and indefinite character." But I must own that on reading the statutes I do not think that the legislature deliberately excluded such claims. I think they were not in the contemplation of those who framed the statutes at all; and that if there are words used sufficiently large to embrace such a case it is by an unintended accident. My opinion is based on what may be thought the narrow ground, that no right to compensation exists unless given by the legislature, and that I can find no sufficient expression of an intention on the part of the legislature to give compensation for the consequences of exercising the powers given by the 8 Vict. c. 20. s. 86.

I am relieved from the necessity of going through the different sections of the Acts, because Baron Channell in his judgment in the Court of Exchequer Chamber has said everything I could wish to say on that head. I will only add in reference to the argument used in the Exchequer Chamber by Mr. Justice Montague Smith, derived from the general words "they may do all other Acts necessary for making, maintaining, altering or repairing, and using the railway," which occur in the middle of the 16th section of 8 Vict. c. 20, that in *Jones* v. *the Festiniog Railway Company* (L. R. 3 Q.B. 733) the Court of Queen's Bench (then consisting only of my Brother Lush and myself) thought that similar general words in a Railway Act which did not contain any express authority to use locomotive power left the company at liberty, no doubt, to use locomotives, but on the common law terms that they must keep in the fire at their own peril. So far as it goes, this confirms the reasoning of Baron Channell on this part of the 16th section.

I regret that I am obliged to come to such an unsatisfactory termination; but I think the whole depends on the construction of enactments not sufficiently considered when penned. Opinions will differ on such a point, and it is not capable of much illustration from argument. I can only repeat that in my opinion the onus lies on the plaintiffs below to shew that the legislature have given compensation, and I cannot find in the statutes any language which, in my mind, expresses an intention to give compensation for such an injury.

Lord Chelmsford.—This is a proceeding in error upon a judgment of the Court of Exchequer Chamber reversing a judgment of the Court of Queen's Bench in favour of the plaintiffs in error upon a special case.

The question raised for the opinion of the Court below was, whether the plaintiffs in the action, who are owners of a house adjacent to the Hammersmith and City Railway, were entitled to compensation from the railway company for injury to their house from the vibration caused by the passage of trains over the

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line in the ordinary use of the railway without negligence, whereby the house was depreciated in value to the extent, as found by a jury, of 272*l*.

It is necessary in the outset of the consideration of this case to point out that the question is confined to the injury arising from vibration, because Mr. Justice Lush, in the Court of Queen's Bench, stated that the question was whether the owners of the house were entitled to compensation " for vibration, noise and smoke "; and Sir William Erle, who heard the whole of the argument in the Exchequer Chamber, but retired from the bench before the judgment was delivered in that Court, whose opinion, however, is added to the report of the case (see 36 L. J. Q.B. 150), assumed that the compensation was given for noise and smoke as well as for vibration, and stated that " there was nothing to indicate what was the degree of noise, smoke or vibration, or what was the amount assessed for either of these causes separately, and that there was no evidence of any damage to the realty either in structure or otherwise from these causes, so that the compensation must be taken to have been given for the supposed discomfort of the inmates of the house." The special case, however, expressly states, with reference to this head of claim, that the jury assessed the amount of compensation " for vibration from the use of the railway after construction," at 272*l*.

There has been great difference of opinion amongst the Judges in the Courts below upon this case, and those whose assistance your Lordships had are not unanimous in their answers to the question proposed to them. It must therefore be regarded as one of nicety and difficulty.

It must be borne in mind that this is not a case in which it was possible to claim compensation before the construction of the railway, nor indeed till after its working had commenced, because till then it could not be known whether there would be any vibration injurious to the house occasioned by the passing of the trains. The simple question, therefore, is whether the legislature has provided compensation for any damage to land or houses not arising from negligence, but the inevitable consequence of the proper and ordinary use of the railway.

As an introduction to this question, I must repeat what I said in *Ricketts* v. *the Directors, &c. of the Metropolitan Railway Company* (36 L. J. Q.B. 205; L. R. 2 H.L. 175): " The criterion of a party's right to damages under the clauses of the Railway and Companies Acts is correctly stated by Lord Campbell in *Penny* v. *the South-Eastern Railway Company* (7 El. & B. 660; 26 L. J. Q.B. 25), that unless the particular injury would have been actionable before the company had acquired their statutory powers it is not an injury for which compensation can be claimed." To which I must add, as I added there, the observation of my late noble and learned friend Lord Cranworth, in the case of *The Caledonian Company* v. *Ogilvie* (2 Mac. H.L. C. 229), " That it does not follow that a party would have a right to compensation in some cases in which, if the Act of Parliament had not passed, there might have been, not only an indictment, but a right of action."

Assuming that before the passing of their Act the company would have been liable to an action for the injury caused to the plaintiffs' house, it is necessary for the plaintiffs in the first place to establish that the company's Act has taken away the remedy by action in order to open the way to their claim to compensation.

If the cases of *The King* v. *Pease* (4 B. & Ad. 30; 2 L. J. M.C. 26) and *Vaughan* v. *the Taff Vale Railway Company* (5 Hurls. & N. 679) were rightly decided this question has been determined. It was established by those cases, " that when the legislature has sanctioned the use of a locomotive engine there is no liability for any injury caused by using it so long as every precaution is taken consistent with its use." Mr. Baron Bramwell, in his answer to the question put by your Lordships to the Judges adverting to the above case, said, " With great respect, I think those cases clearly wrong, and that they have proceeded on an inadvertent misapprehension of the object and effect of the clauses in question." And he then reasoned from the Act of the company in

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this manner: "The 86th section, which gives the company the right to be carriers on their own line, is preceded by a heading, 'With respect to the carrying of passengers and goods upon the railway, and the tolls to be taken thereon.' There is not a word (said the learned Baorn) in this heading as to the legalizing or allowing of nuisances. The company wanted no power to enable them to use a locomotive. A man may use a locomotive on his soil and freehold, and so may a corporation. They do not possess the power to use it so as to be a nuisance to their neighbours. If this were intended to be given, where are the words? The words are sufficient if meant to give *vires ultra* those of a company to make a railway, but insufficient if meant to authorize the doing of damage."

With great respect to the learned Baron, we do not expect to find words in an Act of Parliament expressly authorizing an individual or a company to commit a nuisance or to do damage to a neighbour. The 86th section gives power to the company to use and employ locomotive engines, and if such locomotives cannot possibly be used without occasioning vibration and consequent injury to neighbouring houses, upon the principle of law, that *cuicunque aliquis quid concedit concedere videtur et id sine quo res ipsa esse non potuit*, it must be taken that power is given to cause that vibration, without liability to an action. The right given to use the locomotive would otherwise be nugatory, as each time a train passed upon the line and shook the houses in the neighbourhood actions might be brought by their owners, which would soon put a stop to the use of the railway. I therefore think, notwithstanding the respect to which every opinion of Mr. Baron Bramwell is entitled, that the case of *The King* v. *Pease* (4 B. & Ad. 30; 2 L. J. M.C. 26) and *Vaughan* v. *the Taff Vale Railway Company* (5 Hurls. & N. 679) were rightly decided.

The plaintiffs' remedy by action being taken away, the question remains whether they are entitled to receive compensation from the company for the injury done to their house, a question which must be decided entirely by the provisions of the Acts of Parliament relating to the subject. It must be taken as an established fact, that by the use of the railway the plaintiff's house has been depreciated in value to the extent of 272*l.*, and as they cannot recover the damage they have thus sustained by action, one naturally feels a wish to find that the legislature has not left them remediless, but has provided for them the means of redress in the shape of compensation, to be paid by the company as the price of the right given to them to injure the plaintiffs' property. It is with this disposition that I entered upon an examination of the clauses of the Acts to which your Lordships' attention was called in the argument, and I may say that it was with regret I was unable to find anything in them upon which, in my opinion, the claim to the compensation can be established. It is not that the legislature has excluded compensation for injury arising as the necessary consequence of using the railway, but that it has not, as far as I can discover, given any right to claim compensation for this species of injury.

The sections of the Railways Clauses Act which appear to me to be alone necessary to be considered are the 6th and the 16th sections. I do not think that the sections of the Lands Clauses Act which are referred to in the argument are applicable.

The sections of the Railways Clauses Act are, as your Lordships know, arranged in order under different heads, which indicate the general object of the provisions immediately following; and these may be usefully referred to to determine the sense of any doubtful expression in a section ranged under a particular heading.

The heading to the 6th, and all the subsequent sections down to the 30th, and including of course the 16th, is "And with respect to the construction of the railway and the works connected therewith, be it enacted as follows." Therefore all the sections to which the heading applies must be taken to have been intended by the legislature to provide for matters relating to "the construction of the railway and the works connected therewith."

The 6th section seems more closely to confine its provisions to these objects,

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for it begins by enacting that " in exercising the power given to the company to construct the railway, and to take lands for that purpose, the company shall be subject to the provisions and restrictions contained in this Act and in the Lands Clauses Consolidation Act;" and then it goes on, " and the company shall make to the owners and occupiers of and all other persons interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers and other parties, by reason of the exercise, as regards such lands, of the powers by this or the special Act, or any Act incorporated therewith, vested in the company."

It was argued for the plaintiffs that the injury occasioned to the house from the vibration caused by the use of the railway came within the words " injuriously effected by the construction thereof," or, at all events, that it was a " damage sustained by reason of the exercise of the powers vested in the company."

Now, as to the words " by the construction thereof," it seems to me that it would be doing violence to language (even without the limitation which is placed upon these words by the general heading to the 6th and the following sections and the context of the section itself) to extend them to any injury which is not the immediate consequence of the construction of the railway. An instance of damage of this sort occurs in this very case, for the jury gave the plaintiffs compensation to the amount of 836*l.* for obstruction of light, air and doorway.

To argue that, as the injury could not have occurred unless the railway had been previously constructed, therefore it was caused " by the construction thereof," is certainly a strong example of illogical reasoning of *post hoc, ergo propter hoc*, and would extend to every accident or injury occurring upon the railway after its construction, which, of course, could not have happened if it had not been constructed.

With respect to the subsequent words in the 6th section, " damage sustained by reason of the exercise of the powers vested in the company," it was argued that they embrace the claim of the plaintiffs, because the powers vested in the company are not merely for the construction of a railway, but also for the use of it after its construction, being the end and object for which it is made. But again we must refer to the heading of this and the following sections, which limit the provisions they contain " to the construction of the railway and the works connected therewith." And reading the words of the section with reference to these objects, we find that compensation is to be made to the owners, &c. of lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, for damage sustained (not as regards such lands), but " by reason of the exercise as regards such lands of the powers vested in the company." Now the powers vested in the company " as regards such lands " are to take and use the lands for the purposes of the railway; and to say that the use of the railway after its construction is one of the powers vested in the company in regard to the lands, conveys to my mind no intelligible meaning.

The 6th section of the Railways Clauses Act being inapplicable to the plaintiffs' claim, we must turn to the 16th section, to see whether it affords any countenance to it. The 16th section, as already observed, is one of the sections ranged under the heading which immediately precedes the 6th section. As the words " using the railway " are found in it, great stress is laid upon it in favour of the plaintiffs' claim to compensation. Now it must be observed that this section begins with the words " It shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith, hereinafter mentioned, to execute any of the following works;" and then follows a specification of different works in detail empowered to be done for the purposes mentioned, ending with a general power to do " all other acts necessary for making, maintaining, altering or repairing, and using the railway." The section then provides that, in the exercise of the powers by this or the special Act granted, the company shall do as little damage as can be, and shall

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make full satisfaction to all parties interested " for all damage by them sustained by reason of the exercise of such powers."

The counsel for the respondents argued that the proviso comprehended every description of damage sustained by reason of the exercise of the powers vested in the company; that power is given to them by the 86th section of the Act, to use and employ locomotive engines upon the railway; and that injury to the plaintiffs' house arose from the use of such locomotive engines, and therefore was sustained by reason of the exercise of the company's powers. It appears to me that this argument claims for the proviso in the 16th section a wider application than is warranted by the purview of the section. The powers specifically conferred by it are expressly referred and limited to " the purpose of constructing the railway." The general power to do all other acts, &c., must be read with reference to this object. If this mode of construing the section by the context is adopted, there will be no difficulty in understanding the words " all other acts necessary for using the railway " to mean, that, for the purpose of constructing the railway, the company may do all acts necessary to enable them to use the railway. This construction appears to me to be aided by the words which are found in juxtaposition with the word " using," viz., " making, maintaining, altering and repairing "; and it seems to me rather a forced interpretation of language to say that the words " the company may do all acts necessary *for* using the railway " mean they may do all necessary acts *in* using the railway. I think that the proviso must be limited to the powers conferred by the section, and that it is only if, in the exercise of those powers, damage is sustained that satisfaction is to be made. The 86th section itself having empowered the company to perform certain works for the purpose of constructing the railway, the proviso enacts that, " in the exercise of the powers, &c. they shall do as little damage as can be," clearly pointing to the execution of the works to which this section relates, and confining the satisfaction to be made for damage done in exercising those powers. It appears to me that, in the reasonable construction of this section, it is impossible to hold that it gives any remedy to the plaintiffs for damage occasioned to their house in the course of using the railway. And there being no other legislative provisions upon which the plaintiffs' claim to compensation can be founded except the 6th and 16th sections of the Railways Clauses Act, which I have fully considered and shewn not to apply to that species of injury of which they complain, I am compelled very reluctantly, in a case where real damage has been sustained, though not to a very large amount, to come to the conclusion that the legislature has not provided for their case, but has left them without remedy; and that the judgment of the Court of Exchequer Chamber ought therefore to be reversed.

Lord Colonsay.—I have, I confess, found this case to be attended with much difficulty, and I think I need not refrain from stating that, when I find that there has been so much difference of opinion in regard to it among those who have decided it in the other Courts, and that there is even a difference of opinion among your Lordships.

The case arises out of a claim made by a party for injury to her property resulting from vibration caused by the use of the railway belonging to the appellants. The claim is rested on the provisions contained in certain statutes, and depends on the construction to be put on those provisions. Two general Acts have been referred to and the special Railway Act; but I do not understand that under the special Act there is any particular clause that can affect the judgment to be pronounced in this case. The two general Acts that have been referred to are the Lands Clauses Consolidation Act and the Railway Clauses Consolidation Act, both of which are held to be incorporated in the special Railway Act. It is, I think, upon the provisions of the two general Acts that the question depends. One of those general Acts, to wit, the Lands Clauses Act, has, I humbly venture to think, only an indirect bearing on the question. No land belonging to the respondent, or in which she was interested, was taken or touched by the railway. Her case is not directly within the provisions as I read them of that Act. I think it is very clear that unless it is within the

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provisions of the 68th section of that Act it is not within the provisions of that Act at all. Nevertheless, in reading the Railways Clauses Act, on which I think the claim of the respondent must be rested, it is not illegitimate to borrow such light as can be got from the language of the Lands Clauses Act, passed at the same time and intended to be co-operative with the Railways Clauses Act, repeatedly referred to in it and intended to be incorporated in the special Act for making the railway.

Now, when I have said that I do not think the Lands Clauses Act bears on this claim otherwise than indirectly, I may explain that it appears to me that the object of the Lands Clauses Act is to give a power to parties engaged in this species of public undertakings to acquire lands. The preamble of the Act says, "Whereas it is expedient to comprise in one general Act sundry provisions usually introduced into Acts of Parliament relative to the acquisition of lands required for undertakings or works of a public nature and to the compensation to be made for the same, and that as well for the purpose of avoiding the necessity of repeating such provisions in each of the several Acts relating to such undertakings as for insuring greater uniformity in the provisions themselves." Then it goes on to enact with regard to the purchase of lands for such undertakings. The Act is classed under various sub-divisions, the first of which is "With respect to the purchase of lands by agreement." That begins with the 6th section and ends with the 15th section. Then there is another heading, "And with respect to the purchase and taking of lands otherwise than by agreement, be it enacted as follows." Then comes another heading, "With respect to the purchase-money or compensation coming to parties having limited interests or prevented from treating or not making title, be it enacted as follows." Then another heading, "And with respect to the conveyances of lands, be it enacted as follows." Then another heading, "And with respect to the entry upon lands by the promoters of the undertaking, be it enacted as follows." And so on, with regard to various matters as to lands. I am not speaking at present of the 68th section; but all the other clauses are clauses which are applicable to the promoters of the undertaking and to the parties from whom lands are to be taken. There is no other class of persons contemplated in that statute. It is not a statute authorizing the execution of any particular kind of works. It is a statute only as to the taking of land. It is intended to regulate the interests of the parties who take the lands and of the parties to whom the lands belong or who are interested in the lands to be taken. It provides on behalf of the parties whose lands are to be taken not only that they are to receive the value of the lands so taken from them, but it provides also that they are to be compensated for the injury done to any lands held along with such lands, whether by severance or any other injury done to them, but it is all with reference to the parties whose lands are to be taken or who are interested in lands to be taken.

The sections which were specially referred to in the argument were the 18th, 21st, 38th, 49th, 63rd and 68th; and it will be seen that, throughout the whole of them, the matter to be dealt with is, the interests of the parties from whom lands are taken or who are interested in those lands, and the interests of the railway company or of the promoters of the undertaking whatever it may be.

Then I come to the 68th section, which is the only one of wider application. Now that section is one of that class of clauses which are placed under the heading "With respect to the purchase and taking of lands otherwise than by agreement, be it enacted as follows." That heading covers the sections beginning with the 16th section and ending with the 68th, and then follow the sections "With respect to the purchase money or compensation coming to parties having limited interests." Section 68 says that, "If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of 50*l*., such party may have the same settled either by arbitration or by the verdict of

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a jury, as he shall think fit." The words here certainly are, "If any party shall be entitled to compensation in respect of any lands injuriously affected by the execution of the works." But these expressions "injuriously affected by the execution of the works," which occur repeatedly throughout the statute, are limited to the persons who are to get notice and from whom lands are taken, or who have other lands which may be affected by such proceedings. And I think that this section of the statute must be read as a part of that class of sections which have reference to the subject mentioned under the heading prefixed to that class of sections, and must be limited in its operation to the matters with which it is immediately connected. It should be observed that this is not a statute relative to any particular kind of work; it is a statute relative to the taking of lands. Even if it were to be read otherwise, it will be observed that there is a limitation in the expression here used, "affected by the execution of the works," to which I shall afterwards refer. But it appears to me that this section is one of those which have reference to the taking of lands otherwise than by agreement; it has reference to parties who, under the other sections of the statute to which I have referred, would be entitled to compensation, but who have been omitted or overlooked in dealing with the matter. It may be, that parties having certain interests in lands taken, or in lands severed by reason of the taking, may not have been found out at the time, and may have come forward afterwards and made a claim. Notice is required to be given to owners and occupiers, and to all parties known to be interested who have not had notice; and it is right that those parties, if found, should have an opportunity of coming forward forward and making a claim; and it seems clear that this was intended, seeing that it will not apply to claims that do not exceed 50*l*. in value. Why should the claims of smaller amount be excluded? There are modes here given of opening up other claims by arbitration; but where they are above 50*l*., they are to have the choice of arbitration or a jury. That also shews that this is connected with the previous sections under this head.

But it appears to me that the Railways Clauses Act stands upon a different footing. That Act has reference to that particular species of undertaking; and I think that it is in that Act that we may expect to find the materials for dealing with claims in reference to such undertakings as this. It provides for compensation, not referring to the Lands Clauses Act as the rule for compensation, but referring to that Act as the machinery by which compensation is to be adjudged; but not taking the Lands Clauses Act as giving the rule, or as regulating the parties to whom, or the matters for which, compensation is to be given. On the contrary, it contains its own provision with regard to the matter that we are here dealing with. I think the Railways Clauses Act is of wider application than the Lands Clauses Act as regards the parties entitled to compensation, and also as regards the matters for which compensation may be given.

The important sections are the 6th and the 16th. The 6th section appears to me to be on the whole the most important and the most general. It says, that "in exercising the power given to the company by the special Act to construct the railway, and to take lands for that purpose, the company shall be subject to the provisions and restrictions contained in this Act and in the said Lands Clauses Consolidation (Scotland) Act; and the company shall make to the owners and occupiers of and all other parties interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers and other parties, by reason of the exercise, as regards such lands, of the powers by this or the special Act, or any Act incorporated therewith, vested in the company."

Under this clause the company are to make compensation to certain parties for certain things. They are to make compensation to the owners and occupiers, and other parties interested in any lands. What lands? "Lands taken or used for the purposes of the railway." So far it is clear that it does not stop there. They are to make compensation to the owners and occupiers of lands "injuriously affected by the construction thereof." Now, I think, it is very

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clear that the owners and occupiers to whom compensation is to be made are to be the owners and occupiers of lands injuriously affected by the construction of the railway. The female respondent in this case is the owner and occupier of land injuriously affected by the construction of the railway, and therefore she is a party who is comprehended within the class of persons who are entitled to claim compensation. Then, what is the matter for which compensation is to be made? It is to be made for "the value of the lands so taken and used." That does not apply to the respondent's case. But the section goes on, "and for all damage sustained by such owners and occupiers" (of whom the respondent is one) "by reason of the exercise as regards *such* lands" (which includes the lands of the respondent) "of the powers by this or the special Act, or any Act incorporated therewith, vested in the company."

Now, the claimant of compensation here is an owner and occupier of lands injuriously affected by reason of the exercise of the powers vested by the Act in this company. It is very clear that her property has been injuriously affected by the exercise of the powers vested in the company. It has been injuriously affected by the construction of the railway, the very words of the clause being "by the construction thereof." Therefore, she is a person who under this clause is entitled to come forward and make a claim. Her property was in the predicament which this clause contemplates as property "injuriously affected," and therefore she is a person entitled to compensation. Then the question arises, how far that compensation is to go? Is it to go beyond the measure in which she is injuriously affected by the construction of the railway? Is it to be extended to any injury which her property has sustained by the *use* of the railway? Compensation has been awarded to her for the injury done by the construction of the railway as affecting the access to her property, and the lights, and so forth. The sum of 800*l.* and odd has been assessed for that. But the question remains whether the statute by this enactment provides for compensation to be given for damage sustained, not only by reason of the construction of the railway and the works connected therewith, but by reason of the subsequent use of the railway by the running thereon of locomotives causing vibration.

Before expressing any opinion on that question, I should like to refer to the terms of that section of the statute which has been relied upon in support of the claim. It is the 16th section, and it says that, "subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith, hereinafter mentioned, to execute any of the following works." This is under the heading "With respect to the construction of the railway and the works connected therewith."

Now, the things that are allowed to be done are specially enumerated: to construct inclined planes; to alter the course of rivers, &c.; to make drains; to erect warehouses, &c.; and to make alterations and repairs. And then there is this general clause, that "they may do all other acts necessary for making, maintaining, altering or repairing and using the railway." And then there is a clause of compensation, "Provided always, that in the exercise of the powers by this or the special Act granted the company shall do as little damage as can be, and shall make full satisfaction in manner herein and in the special Act, and any Acts incorporated therewith, provided, to all parties interested, for all damage by them sustained by reason of the exercise of such powers."

Now, it appears to me that that clause for compensation has reference to the matters comprehended in this 16th section of the Act. And the question, therefore, comes to be whether the general expression that they may do "all other acts necessary for making, maintaining, altering or repairing, and using the railway," comprehends the claim now made for vibration in respect of the use of the railway. I confess it does not appear to me to comprehend this. I think this section has reference altogether to the construction of the railway, and to certain things being done to enable the railway to be constructed and repaired and made ready for use. I think it has reference to all these acts here men-

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tioned, the making of drains and inclined planes, altering and repairing the works, and all other acts necessary for making or maintaining, altering or repairing, and using the railway: all the acts necessary for placing the railway in a condition to be used. That is the construction I put on these words.

Then, when I go back to the 6th section, I think that section points in the same direction; that is, that the claim to compensation is limited to the injury done by the construction of the railway, and that it contains nothing whatever as to the use to be made of it. If compensation had been intended to be given for the using of the railway by locomotives or otherwise, I should have expected something to be said with reference to it. I should not expect to find in the Lands Clauses Act anything specific with reference to any kind of works, because that Act has nothing to do with any particular uses that may be made of the works that are to be constructed. But in the other Act, in which we have statutory exactments with regard to this particular class of public works, namely, railways, I should have expected to find something with regard to claims for compensation, not merely for injury done in the construction, but also for injury arising from the use of locomotion, if such compensation had been intended to be given. I think there may be reasons why such a wide claim should not be given; but, however that may be, I can look only at the statute itself, and I have only to state the construction which I feel myself constrained to put upon the statute, without going beyond that. There is no connexion between this question and the limits of deviation as regards particular lands under the statute. The claim now made could not have been confined to lands within the limits of deviation under the statute, because injury by vibration, or any other injury, might be done to lands more remote, and the claim would be equally well founded. I think that when the legislature gives special powers under any particular Act, the provisions for compensation would be contained in that Act. The legislature has not made Acts in regard to all kinds of public works. It has made an Act with regard to railways, and I do not find within that Act with regard to railways what I consider as a right to claim compensation for vibration by reason of the subsequent use of the railway when made. I therefore feel myself under the necessity of concurring in the judgment that has been suggested by my noble and learned friend.

Lord Cairns.—In a case which is certainly not without difficulties, and which has caused much difference of opinion in the Courts below and among the learned Judges who have assisted your Lordships, it is not perhaps surprising that the same difference of opinion should reach your Lordships' house; and I regret very much that I am unable to concur in the views of my noble and learned friends who have just spoken.

In one part of their view I do entirely concur. It appears to me that the effect of the legislation on this subject is to take away entirely any right of action on the part of the landowner against the railway company for damage that the landowner has sustained. It must be taken, I think, from the statements in this case, that the railway could not be used for the purpose for which it was intended without the consequences of this vibration. It is clear to demonstration that the intention of parliament was that the railway should be used. If, therefore, it could not be used without vibration, and if vibration necessarily caused damage to the adjacent landowner, and if it was intended to preserve to the adjacent landowner his right of action, the consequence would be that action after action would be maintainable against the railway company for the damage which the landowner sustained, and after some actions had been brought and had succeeded the Court of Chancery would interfere by injunction and would prevent the railway being worked, which of course is a *reductio ad absurdum*, and would defeat the intention of the legislature. I have, therefore, no hesitation in arriving at the conclusion that no action would be maintainable against the railway company.

That alone would certainly predispose the mind to find in the enactments upon the subject compensation in some other form for the loss which, beyond all doubt, the landowner in such a case sustains. I do not mean to say that

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it would be safe to strain the words of an Act of Parliament on account of consideration of that kind, but if there be any doubt or ambiguity in the words the consideration ought not to be overlooked that beyond all doubt the intention of legislation of this kind is that, in some shape or other, compensation should be made to those who sustain loss or harm by the operation of the parliamentary powers.

It appears to me that it is not necessary in any way to strain the words of the Acts of Parliament in this case, but it is necessary in the first place to be perfectly clear as to what Acts of Parliament and what clauses apply. In my opinion there are two Acts of Parliament which must be looked at for this purpose, both the Lands Clauses Consolidation Act and the Railways Clauses Consolidation Act.

With regard to the Lands Clauses Act there is no doubt that it is mainly conversant with regard to the taking and purchase of land, but it would be a great mistake to suppose, and it would be at variance with the well settled practice upon the subject, to hold that the Act is confined to the taking of land from landowners; and in fact the frame of the Lands Clauses Act shews that it is even dangerous to trust to the headings which occur at the commencement of these *fasciculi* of clauses for the purpose of restraining or confining the natural operation of the words which you find in the various clauses under those headings. I will illustrate what I mean by one *fasciculus* of clauses in the Lands Clauses Act. The 16th clause is prefaced by these words, "With respect to the purchase and taking of lands otherwise than by agreement, be it enacted as follows." The bundle of clauses which occur under that heading runs on to the 68th section; and if you were to take the literal meaning of the words of the heading you might expect to find nothing in the clauses that follow except with regard to the purchase and taking of land, and you might perhaps say that you must interpret every clause that follows as relating to the taking of land and not to the affecting in any way of land which is not taken. But when we turn to the 22nd clause we find this enactment: "If no agreement be come to between the promoters of the undertaking and the owners of, or parties by this Act enabled to sell and convey or release, any lands taken or required for or injuriously affected by the execution of the undertaking, or any interest in such lands as to the value of such lands, or of any interest therein, or as to the compensation to be made in respect thereof, and if in any such case the compensation claimed shall not exceed 50*l.* the same shall be settled by two justices.

It is evident that various classes of land are there spoken of; not merely land which is taken or land which is required, but also land which is injuriously affected by the execution of the undertaking. And when we come to the 68th clause the language is still more significant. The enactment is, "If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act or any Act incorporated therewith; and if the compensation claimed in such case shall exceed the sum of 50*l.*" then it is to be settled by arbitration or by a jury in the way pointed out.

I need not remind your Lordships that under this Act of Parliament, passed as it was many years ago, many hundreds of thousands of pounds, I might perhaps say millions of pounds, have been paid to persons not one inch or one yard of whose land has been taken by the railway company, but whose land has been (in the words of the section) injuriously affected by the execution of the works (whatever that may mean is another point), but "injuriously affected" as a matter entirely distinct from the taking of the land. That shews, I think, that the headings of these clauses are not to be relied upon; and many other instances might be given of the same kind inside the clauses themselves, something shewing (in the same way that an Act of Parliament often goes beyond the preamble) and that provisions have been introduced in the

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progress of the clauses going somewhat beyond the short and summary definition in the heading of the clauses. In fact, one of these Acts of Parliament shews that these short headings were introduced merely to ear-mark a set of clauses and to afford a short and summary way by which they might be introduced as enactments into other Acts of Parliament.

I have gone through the sections in the Lands Clauses Act which seem to me to be relevant to this matter, and all that I would say more with regard to them is this: As to the 68th section, to which I have referred, I agree that that section does not define the conditions under which the person whose land has become injuriously affected is to be entitled to compensation. It rather assumes that the right to compensation has been given in some other enactments, and it contents itself with pointing out the manner and *modus* in which that compensation shall be obtained; and I may observe that in the present case the whole of the proceedings have been taken under the Lands Clauses Act, and indeed it is only under the Lands Clauses Act that a jury can be summoned or the aid of arbitration invoked. I therefore commence with the Lands Clauses Act as the mode in which compensation is to be obtained if the landowner is entitled to compensation under any other provision.

I now turn, for the purpose of finding the kind of compensation to be given, to the Railways Clauses Act. I will only ask your Lordships to bear in mind the words, which I mention again, in the 68th section: "If any party shall be entitled to any compensation in respect of any lands which shall have been injuriously affected by the execution of the works." Now, turning to the Railways Clauses Act in the *fasciculus* of clauses, which I agree commences with these words: "And, with respect to the construction of the railway and the works connected therewith, be it enacted as follows." The 6th section is in these words: "In exercising the power given to the company by the special Act to construct the railway, and to take lands for that purpose, the company shall be subject to the provisions and restrictions contained in this Act and in the said Lands Clauses Consolidation Act" (that is, in the 68th section among others); "and the company shall make to the owners and occupiers of, and all other parties interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise, as regards such lands, of the powers by this or the special Act, or any Act incorporated therewith, vested in the company." And then it proceeds to say that the compensation shall be ascertained under the Lands Clauses Act. I desire, in passing, to point out to your Lordships that the words are evidently to be read *reddendo singula singulis*. If the land be taken or used full compensation is to be made for the value of the land. If the land be not taken or used, but be injuriously affected by the construction of the railway, the compensation is to be made for the damage sustained by the owner or occupier or other party interested, by reason of the exercise, as regards such lands, of the powers by this or the special Act vested in the company.

Then the 16th section I may also refer to, and that will complete the enumeration of the enactments with which we have to deal; it is as follows: "Subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith,"—that is to say, subject to the provisions and restrictions in the Lands Clauses Consolidation Act,—"it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith, hereinafter mentioned, to execute any of the following works." Then come a number of what I may call structural works, such as turning the course of rivers, making railways across streets, and so on; and then comes this final power: "They may do all other acts necessary for making, maintaining, altering or repairing, or using the railway." Then comes what appears to me to be of great importance, the term and condition upon which alone they are authorized and empowered to make these structural works; and the condition is, not that, in the exercise of those structural powers, they are to

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make certain compensation, but the condition is, "that in the exercise of the powers" (that is, of all the powers by this or the special Act granted) "the company shall do as little damage as can be, and shall make full satisfaction in manner herein and in the special Act, and any Act incorporated therewith, provided, to all parties interested, for all damage by them sustained by reason of the exercise of such powers,"—that is, of all the powers vested in the company.

I venture to think that it would be too narrow a construction of these words to say that the powers here mentioned are simply those powers which are immediately being enumerated. If that had been the intention of the legislature, nothing could have been easier than to say, and it would have been much shorter to have said, "provided always, that, in the exercise of such powers, they shall make full compensation to the persons interested." Then we should have known exactly that what was intended was, that if, by reason of the exercise of those structural powers, any damage was done, they should make compensation. But, on the contrary, the provision is in substance this: We, the legislature, will authorize you to make these structural works, but the term and condition upon which we authorize you to make them is, that if by reason of the exercise of any of the powers by this or the present Act given to you you do any damage, you shall make compensation for that damage. In other words, we will authorize the railway to be made, with certain powers appendant and annexed to the making of the railway,—one of the main and special ones of which is, that the railway shall be used as a passage for locomotive engines; but if, by reason of the exercise of any of the powers we give you, you do damage, you shall make full compensation for that damage to the persons injured.

Now, having taken the liberty of pointing out to your Lordships the sections with which we have to deal, I shall sum up what appears to me to be the true and proper construction, even if we were dealing with the 6th section alone of the Railways Clauses Act, of those words which have been referred to already, "injuriously affected by the construction of the railway." Even if we were dealing with that section alone, it would appear to me that those words, "by the construction of the railway," are just the same words and intended to denote the same idea as the words in the 68th section of the Lands Clauses Consolidation Act, "injuriously affected by the execution of the works"; and that, even dwelling upon those two sections alone, and not praying in aid at all the 16th section, the position of things would be this:—Parliament authorizes the construction of the railway, but Parliament does not look upon those words, "the construction of the railway" or "the execution of the works authorized," as meaning the digging out so much land, the putting so much brick and mortar together, the making a viaduct or the making an embankment, or the mere structural aspect of the work; it looks upon the railway as an undertaking,—as a going concern, if I may so call it,—as a thing which is to be there for a certain purpose and to fulfil a certain end which the legislature has held in its view; and when it uses the term "the execution of the works" and "the construction of the railway," it appears to me to point to a living and active thing which, placed on the spot where parliament authorizes it, may possibly have an injurious effect on some circumjacent land, and then, pointing to that parliamentary power which is given to construct that railway or to execute that work, parliament says—If by the construction of this railway with these incidents, if by the execution of these works there be a consequence in the shape of damage to those who are in the neighbourhood, that damage must be atoned for by compensation.

This case might be illustrated very easily by putting another case, not the instance of a railway. The Lands Clauses Consolidation Act applies to works of all kinds, not merely to a railway. Suppose that, under a special Act of Parliament, a company were authorized to take lands for the purpose of making in a particular locality a gas-works, or were authorized to make on a particular spot a copper-smelting works, either of which we know, when they came to be worked, would most probably produce injury to the circumjacent land, although

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the land around may not be taken by the company. Supposing parliament authorized the gas-works or the copper-smelting works to be conducted, by words of enactment which would make it impossible for the owner of the adjacent land to maintain an action for the injury sustained, and then parliament said, if by the execution of these works the neighbouring owners sustain any damage you shall pay for such damage, I should understand by an enactment of that kind, not that the neighbouring owner is supposed to be likely to sustain damage by the construction of the building, by putting the bricks and mortar together, but to sustain damage by those works as active, going works, which were there for the purpose of manufacturing gas or smelting copper, as the case may be; and that when parliament said " if by the execution of these works damage is done," parliament meant to say, " If by the execution of these works, *qua* gas-works or *qua* copper-smelting works, continuing to exist and actively proceeding, any damage is done," that damage shall be paid for.

I may remind your Lordships that this question was very near having to be decided once in your Lordships' House, although from circumstances the decision became unnecessary. In the case of *Broadbent* v. *the Imperial Gas Company* (7 H.L. C. 600; 29 L. J. Ch. 377) the case which I have supposed was very near happening. The company was authorized to make a gas-works in a particular place, and the Lands Clauses Act was incorporated to a certain extent in the provisions of the special Act; but there was a clause in the Gas Clauses Act, also incorporated, which provided that in carrying on their works and making gas no nuisance or injury should be occasioned to any of the surrounding land. And it was held by this House, as might be expected, that the consequence of that section being introduced was, that the right of action was not taken away; and therefore it was not necessary to consider the case I have suggested. But if you had a case where the right of action was taken away, and where parliament had provided that compensation should be made for injury done by the execution of the works, then, in my opinion at least, it would mean and imply the execution of the works of the undertaking as an active and going concern. That would be the opinion which I should entertain of the 6th section alone, even without the 16th section.

As it appears to me Mr. Justice Lush has expressed with great felicity the same idea which I have entertained, I cannot do better than remind your Lordships of what Mr. Justice Lush says: " The Lands Clauses Act is designed, not for railways only, but for all undertakings for which compulsory powers of taking lands are given. And every special Act which incorporates its provisions designates and fixes the purpose for which the land is to be taken, and the use to which it is to be permanently appropriated; and the company who are empowered to take it are bound to apply it to that purpose, and to that purpose only. So much of the general Act as is incorporated becomes part of the special Act, and its language, as part of that Act, becomes pointed to the particular work or undertaking specified, whatever it may be, whether a railway, a dock, a canal or any other undertaking. It there authorizes the taking of the land for the purpose of, and its conversion into, the particular railway, dock, or canal, in order that it may be used as such. The undertaking is regarded as a working concern, and the idea of its use as a railway, dock or canal is in the mind of the legislature inseparable from that of its construction. In professing to give compensation for all damage sustained by the owners of the adjacent land by the execution of the works, or the exercise of the powers of the Act as regards such lands, the legislature must, as it appears to me, have had in view the ultimate object aimed at, the works when complete and in operation, the dock, railway or canal, not abstractedly as a mere excavation, embankment or reservoir, but in connexion with its appropriate traffic, and with the ordinary incidents of a business undertaking."

It appears to me that if it is necessary to go beyond that, and to make the case still clearer, the case is made clearer by the 16th section, because, as I interpret that section, it gives a number of structural powers, I agree; but it also seems to me to make it the term and condition of exercising those structural

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powers,—of interfering with rivers and with roads, and exercising those other, which may be termed violent powers, which are given by that Act or by the special Act,—that the company shall make full satisfaction to every person for all damage sustained by reason of the exercise of such powers, that is, of all the powers given by the Act to the company.

Now, that being certainly the view which I should take of the construction of these Acts of Parliament, the only other matter which I have to refer to is what appears to have weighed in the minds of some of the learned Judges who were unable to adopt this view. I observe that some of those learned persons say that there would be very great difficulty in estimating the compensation, because the damage could not be ascertained until the undertaking became what I may call a going concern, and until by experience you had ascertained exactly what the amount of damage or injury actually was. Now I do not think there is any difficulty at all on that head. In the first place, in the present case which we have here before us, no difficulty seems to have occurred. A sum has been found by the jury, not representing merely the past damage, but representing the whole damage which, in the opinion of the jury, both had been sustained and would be sustained by the exercise of the powers given to the company. In addition to that, the problem which has to be solved appears to me not to be at all beyond the powers or the province of a jury. What you have to find is, what is the actual deterioration in value. You have a certain house, and near it what I may call a vibrating railway. I mean a railway in the use of which there cannot fail to be vibration. The house was of a certain value before the railway was put there. If the railway causes vibration, evidence can easily be obtained to prove what the amount of deterioration in value is, and the sum can be awarded accordingly. The subject may be illustrated further by supposing a house used for a particular trade, say that of a watch or clock maker, which requires particular steadiness. Serious injury might be done there, and the house might become useless for the particular purpose for which it was used before.

But in addition to that, it is said that you ought to know how many trains a day there will be running, and the weight of them, and the speed at which they will pass. There is a well-known principle which applies to such cases, which is, that if the company against which the claim is made are not willing to bind themselves as to the maximum number of trains, or the weight, or the speed, then the sum must be taken most strongly against the company, upon the principles enunciated in the well-known old case of *Armorie* v. *Delamirie* (1 Strange, 504) and the largest amount of injury which can be sustained would probably be considered to be the amount to be awarded by the tribunal which has to award compensation.

I might mention another case in which every one would admit that compensation would have to be assessed at the commencement, and where the same difficulty might occur. Your Lordships will recollect cases which have come before this House arising upon questions of which *The Caledonian Railway Company* v. *Sprott* (2 Macq. H.L. C. 449) may be taken as an instance. In those cases it was held that a landowner selling a strip of land to the railway company is bound to give lateral support to resist the pressure which a heavy train passing over the land might occasion. Now in that case there must be compensation assessed and payable for the land taken in the first instance. Yet at the time when that compensation was so assessed it might not be known what the number of trains passing along the railway, or the weight or speed of them would be, and therefore it might not be possible to say with mathematical exactitude what would be the precise amount of support which would have to be given to the land on each side. In such a case the landowner would make his claim; he would shew that the nature of the ground was such that the lateral support would be particularly desirable; he would shew that he might have to support the land against the pressure that would be created by a great number of trains passing every day; and he would claim, and probably would recover, compensation for the maximum amount of support which the land might require.

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I therefore cannot accept the suggested difficulty as to ascertaining the amount of compensation as any reason why the Act of Parliament should be taken as having a meaning other than what appears to me to be the plain meaning of the words.

I regret very much to say that I am afraid that the result will be, that although a clear injury and damage has been sustained, and although a substantial sum has been awarded by a jury to the landowner, that sum will not be recovered. But I have been unable to do otherwise than to express to your Lordships the view which I entertain as to the construction of these statutes in a case which, as it appears to me, may be one of great importance.

Mr. Digby.—I am instructed to ask your Lordships to reverse the judgment with costs in the Court below.

LORD CHELMSFORD.—The costs will follow.

Mr. Digby.—I understand not.

LORD CHELMSFORD.—In the case of a writ of error, surely the reversal carries the costs. There can be no doubt about it.

Mr. Digby.—I understood there was some doubt.

LORD CHELMSFORD.—We shall take care that the costs will follow the ordinary course.

Mr. Digby.—I understand that the costs always follow when the appeal is affirmed. But in this case the judgment of the Exchequer Chamber is reversed, and I understand the rule is somewhat different.

LORD CHELMSFORD.—Whatever the ordinary rule is, this case will follow it.

Judgment of the Exchequer Chamber reversed.

IN THE QUEEN'S BENCH. Jan. 13, May 31, 1869.

WEST *v.* DOBB.

38 L. J. Q.B. 289; L. R. 4 Q.B. 634: affirmed, [1870] E. R. A.; 39 L. J. Q.B. 190; L. R. 5 Q.B. 460; 23 L. T. 76; 18 W. R. 1167; 10 B. & S. 977 (Ex. Ch.).

Landlord and Tenant—Covenant not to Assign—Covenant not expressed to be on behalf of Assigns—Equitable Assignment of Term.

LANDLORD AND TENANT.—*A farm was let for a term of years, the lessees covenanting, for themselves, their executors and administrators, not to "underlet, assign or otherwise part with the possession of the demised premises, or any part thereof, without the written consent of the lessor, his heirs and assigns, being first had and obtained for that purpose," with a power of re-entry in default. The lessees sold their interest in the term to W, the lessor writing a letter in which he consented to W. taking the term of the lessees "on the same conditions and in accordance with their lease." W. entered and took possession of the farm, but no assignment of the term was executed to him. W. afterwards executed a deed assigning his property, including his interest in the farm, to trustees for the benefit of his creditors, the lessor assenting to the assignment to them. The trustees then agreed to sell the premises to the defendant, who entered upon them, whereupon the lessor brought ejectment for breach of the covenant not to assign without his consent*:—Held, *without deciding whether the covenant, not being expressed to be made by the lessees on behalf of their "assigns," did or did not run with the land,—that there had been no forfeiture, as there never was any assignee of the whole term so as to be subject to the covenants in the lease, and the trustees could not be considered as agents of the lessees in parting with possession of the premises, and, secondly, because the consent to the assignment did not prohibit the lessees from parting with possession of the premises till a lease had been executed.*

Williams *v.* Earle, 37 L. J. Q.B. 231, *explained.*

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Ejectment to recover possession of two farms in the parish of Kenwyn.

At the trial, before Blackburn, J., at the Cornwall Spring Assizes, 1868, it appeared that on September 29, 1860, the plaintiff being then the owner in fee of the two farms, granted a lease of them to Messrs. Tedder and Pridham, their executors and administrators, from June 24, 1860, for a term of fourteen years, the lessees covenanting, for themselves, their heirs, executors and administrators, "that they, their executors or administrators, should not nor would underlet, assign, or otherwise part with the possession of the said demised premises, or any part thereof, without the written consent of the said lessor, his heirs or assigns, being first had and obtained for that purpose;" and the lease contained a power of re-entry in case the lessees, their executors or administrators, should fail in the observance or performance of any or either of the covenants on their part contained in the lease. It was for breach of this covenant that the ejectment was brought. The lessees occupied the premises until March, 1865, when their interest in them was sold to a Mr. Wade. The plaintiff before this sale wrote to Mr. Wade as follows:

"According to the understanding I had with you and Messrs. Tedder and Pridham on Thursday last, I beg to say that I consent for you to take the two estates that Messrs. Tedder and Pridham have been renting of me on the same conditions, and in accordance with their lease. This will be sufficient authority for Messrs. Tedder and Pridham to transfer the lease to you on their paying 75*l*., being for three quarters year's rent due to this day.

"P.S.—It will be necessary for you to write me accepting these terms."

Mr. Wade wrote in reply:

"Sir,—Your favour to hand, granting permission to hold your farms on the same terms as Messrs. Tedder and Pridham. Mr. Tedder has handed me the lease, and I accept it on same terms as they did."

Wade then took possession of the premises included in the lease, but no assignment of the term was ever executed to him by Tedder and Pridham. He continued in possession until January, 1867, when, becoming embarrassed, it was proposed that his estate and effects should be vested in trustees upon trust, after payment of his debts, for the benefit of himself and family. Before the execution of a deed for this purpose, and on January, 21, 1867, the solicitors acting for Mr. Wade wrote to the plaintiff a letter, in which they said: "By the lease granted by you to Messrs. Tedder and Pridham, the lessees cannot underlet without your written consent, and the object of this communication is to ask you to be kind enough to give your written consent to the lease being vested in Messrs. Chirgwin and Hamilton, as you did when Mr. Wade took possession."

In reply, the plaintiff wrote: "I have no objection to consent to the trustees, Messrs. Chirgwin and Hamilton, acting for Mr. Wade in respect of the two farms, to vest the same in their hands similar to the transfer I allowed Mr. Wade from Messrs. Tedder and Pridham."

In February, 1867, Wade executed an assignment of all his estate and effects, including his interest in the premises, to Chirgwin and Hamilton as trustees, for the benefit of his creditors, and they entered into possession, paying rent, and so remained until November, 1867, when they entered into and signed an agreement with Mrs. Dobb (the defendant) for the sale to her of their interest in the farms. Mrs. Dobb thereupon took possession of the premises, and the plaintiff brought ejectment.

The learned Judge was of opinion that there had been no forfeiture, and nonsuited the plaintiff, with leave to move to enter a verdict in his favour.

A rule having been obtained accordingly,

Pinder shewed cause.—The defendant will contend, first, that the act of the trustees in selling the premises did not work a forfeiture, for the trustees and Wade, under whom they claimed, were only equitable assignees, and nothing done by them ought to affect Tedder and Pridham, who remained legal owners of the term; secondly, even if there had been a legal assignment to the trustees there would not have been a forfeiture, as the covenant was not expressed to be made by the lessees on behalf of their assigns, and therefore only bound the

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original lessees, who have committed no breach. With regard to the first point, the following decisions are material: *Doe* v. *Payne* (1 Stark. 86), where the covenant was " not to assign, set over, or otherwise let the demised premises," and proof was given that the defendant in ejectment was in possession of the premises, carried on business there, had placed his name over the door, and had said that he took the premises from two of the directors of the Commercial Sale Room, Lord Ellenborough said, " this does not prove that Dyer (the lessee) either assigned or let, and it is incumbent on the plaintiff to shew that he did either the one or the other: upon the evidence *non constat* that the defendant was not a tortious intruder. This evidence would not be sufficient even though Dyer had covenanted not to part with the possession." *Seers* v. *Hind* (1 Ves. jun. 295), where the Lord Chancellor said, " If A. lets a farm to B. with covenant not to alien, and B. dies, may not his executors dispose of it? I think it has been determined that they may; and I have always taken it as clear law. It is an alienation by the act of God." *Roe* v. *Harrison* (2 Term Rep. 425), where Ashurst, J., says, speaking of a covenant not to assign, " If indeed the word ' executors ' had not been inserted in the proviso, but it had been confined to an assignment by the lessee himself, it might have been doubted whether the restriction would have extended to the present case." With regard to the second point, that the covenant does not run with the land so as to bind the defendant, *Whitchcot* v. *Fox* (Cro. Jac. 398) seems to shew that the right to enforce the clause of re-entry is founded on contract, and that it does not run with the land so as to bind the assignee. But the more important cases are, *Doe* d. *Cheere* v. *Smith* (5 Taunt. 795) and *Paul* v. *Nurse* (8 B. & C. 486). In the first of these cases the covenant, for breach of which the power of re-entry was given, was that the lessee, his executors, or administrators, should not grant, demise, let, sell, assign, set over or part with the indenture of lease without the consent of the lessor. The lessee became bankrupt, his assignees took to the lease and sold it to a purchaser who underlet to the defendant. It was held that there was no forfeiture, the Court saying, " If he (the lessee) had actually assigned the lease while he remained lessee no doubt it would have been a breach of covenant, but the covenant does not extend to assigns." The act of the lessee is therefore no forfeiture. In *Paul* v. *Nurse* (8 B. & C. 486) Bayley, J., speaking of the liability of the defendant, who was assignee of the lessee, says, " The plaintiff's remedy is by an action on the covenant not to assign. Besides, it may admit of some doubt whether the defendant is within the covenant, for the lessee only covenants that he, his executors or administrators, will not assign." The recent case of *Williams* v. *Earle* (37 L. J. Q.B. 231) is no authority against the defendant, for it merely decided that when in a covenant like this assigns are mentioned, it runs with the land. He also referred to 2 *Platt on Leases*, 272, 273; *Woodfall's Landlord and Tenant*, 9th edit., p. 550; *Davidson's Conveyancing*, vol. 5, 176 n. (c).

Kingdon and *Charles*, in support of the rule.—*Williams* v. *Earle* (37 L. J. Q.B. 231) is identical with the present case.

[BLACKBURN, J.—All I said in my judgment in that case was that the covenant so far touched and concerned the land as to come within the second resolution in *Spencer's case* (Smith's Lead. Cas., 5th. ed., 44) as to covenants where assigns are mentioned.]

In *Tatem* v. *Chaplin* (2 H. Black. 133) a covenant that the lessee, his executors and administrators, should constantly reside upon the demised premises during the demise was held binding on the assignee though not named in the covenant. There can be no distinction in principle between such a covenant and the present one. *Doe* d. *Cheere* v. *Smith* (5 Taunt. 795) was decided upon the construction of the bankruptcy statutes; and it is submitted that this covenant runs with the land equally with those a list of which is given in *Spencer's case* (Smith's Lead. Cas., 5th ed., 44). But, assuming that the covenant does not run with the land, the lessees have been guilty of a breach. Neither of the two succeeding assignees was ever anything at law, but tenant at sufferance.

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[BLACKBURN, J.—The only fact relied on as a forfeiture is that the lessees, with the assent of the lessor, have put themselves in a position in which they cannot prevent a breach of the covenant. A covenant not to part with possession does not amount to a covenant to resume possession when you have lawfully parted with it.]

The moment that the lessor finds any one in possession of the premises without his permission he is entitled to bring ejectment.

[BLACKBURN, J.—As soon as Wade was discovered to be in possession the *primâ facie* inference was that he came in under the lessees, but when the real facts were known the inference was rebutted.]

A tenant at sufferance has nothing to assign. To adopt the defendant's view would enable the premises to be transferred to a number of paupers in succession. Thirdly, the terms of the letter authorizing the first transfer only permitted a proper legal transfer of the lease and have not been pursued. The receipt of rent from Wade did not waive this irregularity, as the plaintiff was not aware of the real state of the case.—They also referred to *Bally* v. *Wells* (3 Wils. 25, 33).

Cur. adv. vult.

The judgment of the Court[1] was (on May 31) delivered by

BLACKBURN, J.—This was an action of ejectment tried, before myself, during the Spring Assizes, 1868, at Bodmin. It appeared on the trial that the plaintiff had, in 1860, demised the premises in question for fourteen years to Tedder and Pridham. This lease contained various covenants made by the lessees not expressed to be on behalf of their assigns; and amongst others, a covenant not to assign or part with the possession of the demised premises without the written assent of the landlord; and there was a clause of re-entry in case of the breach of any of the covenants. As the term had not expired by efflux of time, the question at the trial was whether it had been forfeited or not. The facts were not disputed. The plaintiff, by a letter addressed to Tedder and Pridham, dated March 25, 1865, assented to a transfer of the lease by them to one Wade, on the same terms as those on which they held it. Wade, who had purchased the term from them, entered into possession without having any formal assignment of the term. Wade continued in possession, paying rent, until 1867, when, by the written licence of the plaintiff, he assigned (*inter alia*) all his interest in the lease to Chirgwin and Hamilton as trustees for his creditors. It appeared that the plaintiff had assented to this transfer under the belief that, by an arrangement between the trustees and Wade, the family of Wade were to be allowed to continue in possession; but the trustees, taking a different view of the matter, sold the term to the defendant, and the defendant entered into possession. Two grounds of forfeiture were relied on at the trial: first, the unlicensed parting with the possession by Chirgwin and Hamilton, the trustees, to the defendants; and, secondly, the parting with the possession by the original lessees, Tedder and Pridham, to Wade without executing a transfer of the lease, so as to make him an assignee, and as such bound by all such covenants as ran with the land. A nonsuit was directed, reserving leave to enter a verdict for the plaintiff. Mr. Kingdon obtained a rule *nisi* accordingly, which was argued in the last term.

There was much argument at the bar as to whether, upon the true construction of the covenant, as expressed in the lease, it bound the lessees themselves only not to assign, and was merely a personal restriction not affecting their assigns, or whether it was a covenant running with the land and binding every assign. In the view we take of the matter, it is not necessary to express any opinion on this point, as there never was, in our opinion, any assignee of the whole term, so as to be subject to any of the covenants in the lease; and therefore, if there was any forfeiture of the term, it could only be in consequence of a breach of covenant by the original lessees, Tedder and Pridham. It was also argued that the parting with the possession by Chirgwin and Hamilton, the

(1) Cockburn, C.J., Blackburn, J., and Mellor, J.

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trustees for Wade's creditors, to the defendant, was such a breach of covenant on the part of Tedder and Pridham, the original lessees, because, it was said, the law takes no notice of the relation of trustee and *cestui que trust*, and therefore it was argued that the possession of Chirgwin and Hamilton, the *cestui que trust*, must be considered at law as the possession of Tedder and Pridham, and the change of the *cestuis que trust* from Chirgwin and Hamilton to the defendant must be considered a parting with the possession by the trustees, Tedder and Pridham, and consequently a breach of covenant on their part for which they would be liable in damages, though they neither were parties to the change nor had any power to prevent it. But no authority was cited in support of this very artificial reasoning. And we think it obvious that it involves in itself the fallacy of requiring the Court to hold (contrary to the fact) that Chirgwin and Hamilton (the assigning *cestuis que trust*) were merely servants to Tedder and Pridham, and yet to take notice that the defendant, to whom they transferred their equitable interest, was more than a servant to Tedder and Pridham. The second ground of forfeiture depends upon the effect of the written licence of March 25, 1865. We do not doubt that the plaintiff might have granted a licence to assign the term so expressed as to forbid the lessees parting with the possession until a complete transfer of the legal interest had been executed. But the practice of letting a purchaser into possession before the legal estate is transferred is so common that, if it was intended to forbid such a change of possession, it ought to have been clearly expressed; and in the present case it was not. The utmost effect which can be given to the expressions in the letter is, that the landlord had a right to call upon the parties to complete the transfer of the legal estate; which he never did. The rule, therefore, must be discharged.

Rule discharged.

IN THE QUEEN'S BENCH. June 4, 1869.

EVANS *v.* BIGNOLD.

38 L. J. Q.B. 293; L. R. 4 Q.B. 622; 20 L. T. 659; 17 W. R. 882.

*Insurance on Life—Policy not containing Name of Person Interested—Husband and Wife—*14 *Geo.* 3. *c.* 48. *s.* 2.

INSURANCE. A.—*By the* 14 *Geo.* 3. *c.* 48. *s.* 2, *a life policy in which there is not inserted the name or names of the person or persons interested therein, or for whose use, benefit, or on whose account the policy is made, is unlawful.*

A husband, whose wife was a minor and entitled to a sum of money on attaining the age of twenty-one, applied to her trustees for an advance, which they agreed to make upon having the repayment of it secured by one J. in the event of the wife dying before attaining twenty-one. J. having consented to become security upon condition that an assurance was effected on the life of the wife, a policy was executed by an insurance company which was expressed to be made between them and the wife, who was described as a married woman. Neither the name of the husband nor that of any other person besides the wife was inserted in the policy as being interested in it:—Held, *that the policy was void, as not containing the name of the husband or other person interested in it.*

Declaration by the plaintiff, William Evans, administrator of the personal estate and effects which were of Mary Ann Evans, deceased, who died intestate, against the defendant, as secretary of the Norwich Life Insurance Society, and duly appointed and liable by virtue of a statute passed in the fifty-third year of the reign of his late Majesty King George the Third to be sued as nominal defendant for the society, upon a policy of assurance bearing date November 2, 1863, made by the society in the lifetime of Mary Ann Evans, in which—after reciting that Mary Ann Evans had agreed to effect an insurance on her own life with the society in the sum of 200*l.*, according to the rules, regulations and

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conditions prescribed by the constitution thereof, and had, by herself or by her agent, made and signed a declaration in writing setting forth her age and certain particulars relative to her health, and had agreed to pay to the society the sum of 3*l*. 19*s*. as a premium for the first year of such insurance, and to continue such payment yearly during the term of her life,—it was declared that if Mary Ann Evans should die between the day of the date of the policy and November 1, A.D. 1864, inclusive, or in the event of her living beyond the last-mentioned day, if she or her assigns should pay unto the society the sum of 3*l*. 19*s*. on or before November 2 in every subsequent year of the term, the funds and property of the society should, pursuant to the regulations, be subject and liable to the payment unto the executors, administrators and assigns of the assured, within three calendar months after satisfactory proof of her death should have been received by the directors of the society, of the sum of 200*l*., and such further sum or sums as should, at any time or times thereafter, be appropriated under the regulations of the society, as a bonus upon the insurance; provided always, that the policy should be void in any or either of the cases mentioned on the back of the policy, and the money paid on account of the insurance should be forfeited to the society. Averment, that afterwards, and whilst the policy remained in force, Mary Ann Evans died, and satisfactory proof of her death was, more than three months before this suit, given by the plaintiff to the directors of the society, and all premiums were paid and all conditions were observed and performed (except so far as the society waived and dispensed with the same), yet the plaintiff, as such administrator, has not been paid the sum of 200*l*. out of the funds and property of the society.

Plea—That the policy was, in truth and in fact, made by the plaintiff in the name and on the pretended behalf of Mary Ann Evans, but for the use and benefit and on the account and behalf of the plaintiff, and not for the use, benefit or on account of Mary Ann Evans, and that the name of the plaintiff was not inserted in the policy as the name of the person interested therein, or for whose use, benefit, or on whose account such policy was made; and the policy was and is an unlawful policy under and pursuant to the provisions of the statute in such case made and provided[1].

Replication, joining issue upon the plea.

The following CASE was, by the consent of the parties, stated for the opinion of the Court, a copy of the pleadings to be annexed and to form part of the case, but the Court to have the power of amending the pleadings in accordance with the facts as found, should any amendment be necessary.

The late Mrs. Mary Ann Evans, the wife of the plaintiff, to whom she was married during her minority, was entitled under the will of her father to a sum of money upon her attaining the age of twenty-one years, viz., 227*l*. and upwards. After her marriage, and during her minority, her husband was in want of a sum of 200*l*., and applied to the trustees of her father's will to advance that sum to him in part payment of his wife's legacy, which the trustees agreed to do upon having the repayment of the money secured by a Mr. Jacobs in the event of Mrs. Evans dying before she attained the age of twenty-one years. Mr. Jacobs having consented to become security for the repayment of the money on condition of an insurance being effected on the life of Mrs. Evans, the 200*l*. was accordingly advanced by the trustees to the plaintiff, and the following policy

(1) By the 14 Geo. 3. c. 48, after reciting that it has been found by experience that the making insurances on lives, or other events wherein the assured shall have no interest, has introduced a mischievous kind of gaming, it is enacted that, from and after the passing of the Act, no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or any other event or events whatsoever wherein the person or persons for whose use, benefit, or on whose account such policies shall be made shall have no interest, or by gaming or wagering; and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever. 2. That it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person or persons, name or names interested therein, or for whose use, benefit, or on whose account such policy is so made or underwrote.

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of insurance was, on November 2, 1863, at the request of Mr. Jacobs, effected by the plaintiff with the Norwich Union Life Insurance Society in the name of his wife. The policy was in the words and figures following:

"No. 34,766. 200*l*. Annual premium, 3*l*. 19*s*.

"Whereas Mary Ann Evans, of No. 44, South William Street, Cardiff, wife of William Evans, hath agreed to effect an insurance upon her own life with the Norwich Union Life Insurance Society, in the sum of two hundred pounds, according to the rules, regulations and conditions prescribed by the constitution thereof, and hath by herself, or by her assent, made and signed a declaration in writing, setting forth her age and certain particulars relative to her health, and hath agreed to pay to the said society the sum of three pounds nineteen shillings and — pence as a premium for the first year of such insurance, and to continue such payment yearly during the term of her life. Now, know all men by these presents, that if the said Mary Ann Evans shall die between the day of the date of this policy and the 1st of November, 1864, inclusive, or in the event of her living beyond the last-mentioned day, if she or her assigns shall pay to the said society the sum of three pounds nineteen shillings and — pence on or before the 2nd day of November in every subsequent year of the said term, the funds and property of the said society shall, pursuant to the said regulations, be subject and liable to the payment unto the executors or assigns of the said assured, within three calendar months after satisfactory proof of her death shall have been received by the directors of the said society, of the sum of two hundred pounds, and such further sum or sums as shall at any time or times hereafter be appropriated under the regulations of the said society as a bonus upon this insurance; provided always, that this policy shall be void in any or either of the cases mentioned on the back hereof, and the money paid on account of the said insurance shall be forfeited to the said society. In witness whereof the undersigned, being three of the directors of the said society, have hereunto set our hands and seals, the 2nd of November, A.D. 1863.

"Thomas Beevor (L.S.)
"W. R. Clarke (L.S.)
"Robert Fitch (L.S.)

The conditions indorsed on the policy and referred to therein are not material to be stated for the purposes of the present case. Mary Ann Evans attained the age of twenty-one years on November 28, 1864. The premium of 3*l*. 19*s*. payable for effecting the insurance on the life of Mary Ann Evans, and the same sum for continuing the same during the year ending on November 2, 1865, were paid by the plaintiff to the society. After the renewal premium had been paid, as in the last paragraph mentioned, namely, on March 15, 1865, Mary Ann Evans died during her confinement. Due proof of the death of Mary Ann Evans was subsequently furnished to the directors of the society pursuant to the provisions of the policy, but the society declined to pay the sum insured, upon the grounds set forth in their pleas to this action. It is agreed that the Court are to have the same power of drawing inferences of fact as a jury might have.

The question for the opinion of the Court is, whether under the circumstances above stated, the plaintiff is entitled to recover in the present action. If the Court shall be of the opinion in the affirmative, then judgment is to be entered for the plaintiff for the sum of 200*l*. and costs. If the Court shall be of opinion in the negative, their judgment is to be entered for the defendant.

Pinder, for the plaintiff.—The policy was a legal one. In the first place, Jacobs had no legal interest in it.

[Lush, J.—If the wife had died under age Jacobs would have had an equitable interest in the money insured.]

The husband is the only person who will be said to have had the legal interest in the insurance. He had an insurable interest in his wife's life, and might have insured her life in his own name, or have allowed her to insure in her own name, in which case it would be unnecessary to state his interest.

[Cockburn, C.J.—How can the wife contract in her own name?]

The husband might confer a chose in action on the wife. In *Dalton* v. *the*

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Midland Counties Railway Company (13 Com. B. Rep. 474; 22 L. J. C.P. 177) it was held that a married woman (subject to a plea of abatement) might sue for the dividends of stock which she had purchased in her own name, and of which she was registered as owner; and the late case of *Fleet* v. *Perrins* (37 L. J. Q.B. 233) is to the same effect. The wife having this chose in action was the person interested in it, as the husband could never reduce it into possession in his lifetime.

[COCKBURN, C.J.—A person may be interested in a policy in two ways: interested in the event, which is one thing, and having the legal interest in the policy, which is another. Can we shut our eyes to the fact that this policy was made for the husband's benefit?]

In *Halford* v. *Kymer* (10 B. & C. 724), a case where a father had effected an insurance on his son's life in which he had no pecuniary interest, Bayley, J., says, p. 729, "If a father, wishing to give his son property to dispose of, makes an insurance on his son's life, in his (the son's) name, not for his (the father's) own benefit, but for the benefit of his son, there is no law to prevent his doing so."

[COCKBURN, C.J.—In *Wainwright* v. *Bland* (1 M. & Rob. 481) it was said that an insurance of her life by a woman in her own name, but for the benefit of another, was prohibited by the statute.]

That was a case of gross fraud and suspected murder. Here the transaction was an honest one, and it is quite consistent with the circumstances that it was intended after the wife had attained twenty-one to keep up the policy for her benefit. In *Shilling* v. *the Accidental Death Insurance Company* (2 Hurls. & N. 42; 26 L. J. Ex. 266), where it was pleaded that the policy was made for the benefit of a person other than the one whose life was insured, both Martin, B., and Bramwell, B:, gave their opinion that if there was an understanding between two persons that one should insure his life, and the other pay the premiums, and that the policy should be bequeathed to the latter, the plea would not be proved. The policy is a chose in action, in which, by the form in which it is prepared, the husband has allowed the wife to take an interest. He has disabled himself from interfering with it during her life, and it is like a bond executed in her favour.

[COCKBURN, C.J.—At any rate the policy is for the joint benefit of husband and wife.]

Both Jacobs and the husband have more or less interest in it, but their interest is too remote to make it necessary to be stated.

H. T. Cole (*Raymond* with him), for the defendants, cited *Hobson* v. *the Observer Life Assurance Society* (8 E. & B. 40; 26 L. J. Q.B. 303).—(He was then stopped.)

COCKBURN, C.J.—I think that this case is too clear to make it necessary to delay our judgment any longer. I will take it in favour of the plaintiff that the policy was intended to operate in the first place for the protection of Jacobs, the surety, and therefore in the language of the statute for his use and benefit, but that after the contingency of the wife dying under twenty-one had been guarded against, it was to enure for the benefit of the wife. But even in this view, it seems to me that when one person has an interest in a policy after its immediate purposes has been satisfied, the terms and spirit of the Act require that the names and interests of the persons first interested in it should be inserted in the policy one after another. Now, this has not been done in the present case, for I think that at any rate the name of the husband ought to have been inserted as a person interested. I was at first strongly impressed with the idea that the defence was a merely technical one; but as an explanation has been offered, I do not wish to make any observations against the company.

MELLOR, J.—I have come, with great reluctance, to the same conclusion. When you come to look at the policy you find that the wife is stated in the recital to be a married woman, therefore, although the husband made the policy and paid the premiums, the company knew that the person insured was

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a married woman, and might, one would think, have presumed that the husband had an interest in the policy. But we must decide the case according to the law; and, looking at the words of section 2, I think that they cannot be got over, as the husband was no doubt a person for whose benefit the policy was made.

LUSH, J.—I am of the same opinion. No doubt the statute may operate hardly in some instances, but it is based on the soundest principles. It was meant that no person should have an interest in destroying the life of another, and in order that it might be known who was the person interested in the death, the statute required that his name should be inserted in the policy. The plea alleges that the policy was made in the name and on the pretended behalf of Mary Ann Evans, but for the use and benefit and on the account of the plaintiff. Do the facts prove this statement? I think that they do most conclusively. It appears that the wife being a minor and entitled to money when she came of age, her husband applied to her trustees for an advance, which they agreed to make if the repayment of the amount was secured by one Jacobs, and that Jacobs agreed to become security upon condition that the insurance was effected for his protection. The policy was accordingly effected by the wife at her husband's request, and the plea is in my judgment proved to the very letter. She made the policy to protect her husband from liability, and it was the same thing in contemplation of law as if she had made it as a surety for him. It may be that as the policy is not limited as to time, it was intended that the husband should continue it for the wife's benefit after she attained twenty-one. But this does not take the case out of the statute; it only made it necessary that the names of both husband and wife should be inserted in the policy.

HAYES, J., concurred.

Judgment for the defendants.

IN THE QUEEN'S BENCH. June 2, 1869.

THE QUEEN *v.* DIPLOCK.

38 L. J. Q.B. 297; L. R. 4 Q.B. 549; 21 L. T. 24; 17 W. R. 823; 10 B. & S. 613.

County Coroner, Election of—Holding of Sheriff's Court—Finality of Proclamation of Person Chosen.

CORONER.—*Where, at a contested election of coroner for any county district, under the 7 & 8 Vict. c. 92, a Court has been duly held and one of the candidates proclaimed by the sheriff as the person chosen, the election cannot be disturbed by quo warranto on the ground that the candidate was not elected by a majority of duly qualified voters, as the sheriff's declaration of the state of the poll and proclamation of the person chosen are judicial acts.*

This was an information, in the nature of a *quo warranto*, calling upon the defendant, Dr. T. B. Diplock, to shew by what right he exercised the office of coroner for the western district of the county of Middlesex.

Plea—That, after the passing of the 7 & 8 Vict. c. 92. and the 23 & 24 Vict. c. 116, the coroner for the district in question having died, a writ was delivered to the sheriff commanding him to cause another coroner to be chosen and certify his name; that a Court was duly held by the sheriff for this purpose, and the defendant and two others offered themselves as candidates; that the defendant was duly qualified; and that a poll was demanded, and the sheriff then adjourned the Court till eight in the forenoon of the next day but one, and duly appointed a number of persons as clerks to take the poll with him. That, before they began to take the poll, every clerk so appointed as aforesaid was duly sworn truly and indifferently to take the same poll, and to set down the

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names of each elector and place of his residence and for whom he should poll, and to poll no elector who was not sworn, if required to be sworn by the candidates or either of them; that the poll was duly taken by the clerks in the presence of the sheriff, and continued for one day only, for eight hours of such day, and was not kept open later than four o'clock in the afternoon of the day; and at the close of the poll the poll clerks inclosed and sealed their several books, and publicly delivered them so inclosed and sealed to the sheriff, who duly received and kept them unopened until the re-assembling of the Court. That the Court re-assembled on the day next but one after the close of the poll, and then and there the sheriff openly broke the seals on the books, and cast up the numbers of votes as they appeared on the several books, and openly declared the state of the poll, and made a proclamation, not later than two o'clock in the afternoon of the day, that the defendant was duly chosen by a majority of such persons residing within the district as were, at the time of the election, duly qualified to vote at the election of a coroner for the division of the county. Averment—That the defendant was duly proclaimed by the sheriff to be the coroner for the division, duly chosen and elected to be such coroner as aforesaid by a majority of such persons residing within the said district as were, at the time of the election, duly qualified to vote, &c.; and that the defendant then and there was duly sworn and took the oaths required by law to be administered to and taken by a person appointed or elected coroner for any county, and accepted and took upon himself the duties of the office.

Demurrer and joinder in demurrer.

Second replication: That the defendant was not elected to the office by a majority of valid voters duly qualified.

Demurrer and joinder in demurrer.

Keane (*Day* with him), for the relator.—It will be said that the question whether the defendant was elected by a majority of voters duly qualified was concluded by the election before the sheriff. But this proposition is wholly untenable; the law relating to the election of county coroners is to be found in the 7 & 8 Vict. c. 92.[1] and 23 & 24 Vict. c. 116. s. 2. These statutes repealed the old Act, 58 Geo. 3. c. 95, and, by reducing the time within which the poll

(1) By 7 & 8 Vict. c. 92. s. 1, after reciting that the regulations for the elections of coroners are insufficient, and that the elections are made with inconvenience, and attended with great and unnecessary expense, the 58 Geo. 3. c. 95. is repealed.

By section 9. every corner is to be chosen by a majority of such persons residing within the district as shall at the time of such election be duly qualified to vote at the elections of coroners for the county.

By section 10, "From and after the division of any county into coroners' districts, upon every election to be made of any coroner or coroners for any county the sheriff of the county where such election shall be made shall hold a Court for the same election at some convenient place within the district for which the election of coroner shall take place, on some day to be by him appointed, which day shall not be less than seven days nor more than fourteen days after the receipt of the writ *de coronatore eligendo;* and in case the election be not then determined upon the view, with the consent of the electors there present, but that a poll shall be demanded for determination thereof, then the sheriff, or in his absence his under-sheriff, shall adjourn the same Court to eight of the clock in the forenoon of the next day but one, unless such next day but one shall be Saturday or Sunday, and then of the Monday following; and the sheriff, or in his absence the under-sheriff, with such others as shall be deputed by him, shall then and there proceed to take the poll in some public place or places by the same sheriff, or his under-sheriff as aforesaid in his absence, or others appointed for the taking thereof as aforesaid; and such polling shall continue for two days only [reduced to one day by 23 & 24 Vict. c. 116. s. 2.], for eight hours in each day; and no poll shall be kept open later than four of the clock in the afternoon of either of the said days."

By section 11. places are to be appointed for taking the poll at elections for coroners.

By section 12. the sheriff is to erect booths for taking the poll at the Court or principal place of election.

By section 13. for the more due and orderly proceeding in the poll the sheriff, or in his absence the under-sheriff, or such as he shall depute, shall appoint such number of clerks as to him shall seem meet and convenient for the taking thereof, which clerks shall take the poll in the presence of the sheriff or his under-sheriff, or such as he shall depute; and before they begin to take the poll every clerk so appointed shall by the sheriff or his under-sheriff, or such as he shall depute as aforesaid, be sworn truly and indifferently to take the same poll, and to set down the names of each elector, and the place of his residence, and for whom he shall poll, and to poll

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is to be taken, have deprived the candidates of the power of obtaining a full and satisfactory scrutiny at the time of the election. In *The Queen* v. *Day* (3 El. & B. 859; 23 L. J. Q.B. 317), the question whether a coroner was elected by voters duly qualified was raised by *quo warranto*.

[LUSH, J.—Yes, but only by the consent of the parties.]

That case is approved of by Lord Cranworth in *In re the Coroner of Hemel Hempstead* (5 De Gex, M. & G. 228). The election before the sheriff is not a judicial act. No judgment is given, and the sheriff is bound to take the votes as they are tendered.

Gray (*H. H. Shepherd* with him), for the defendant.—The question in the present case was finally decided at the election before the sheriff. The election of the coroner at the County Court of the sheriff is a judicial act. The right to the office may be inquired into for some purposes, but this Court is unable to try the question whether the voters were entitled to vote. The sheriff is the Judge of the Court, and his proclamation is final. In *Dyer*, 165 a, resolutions by the Justices, &c. upon the stat. 1 Edw. 6. c. 7, it was resolved, first, the king, who is heir or successor, may proclaim and commence his reign on the same day that his progenitor or predecessor died. Also, all patents of the Judges of the one bench and the other, the Barons of the Exchequer, sheriffs, &c. are determined by the death of the king who made them: otherwise it is of coroners, who are chosen by writ. In *Coke's Inst.*, 2nd part, 175, it is said, "It is holden in our books, that albeit the king dieth, yet the coroner, because he is elected by the freeholders of the county by writ, and returned of record in the Chancery, which is a judicial Act, remained." The mode of electing the candidate is now practically the same as that under the repealed statute, 58 Geo. 3. c. 95; and by 7 & 8 Vict. c. 92. s. 10. the sheriff is directed to hold "a special County Court." The statute also provides that an oath may, if necessary, be administered to the electors, and any one falsely making this oath is liable to the penalties for perjury, so that there can be no difficulty in testing the qualification of the voters.

COCKBURN, C.J.—I think that our judgment must be in favour of the defendant. I entertain no doubt that the sheriff in holding his special County Court for the election of coroner, in taking the poll at such Court, and in making proclamation of the person chosen, was exercising judicial functions. He is Judge of that Court, and there can be no doubt that under the old practice it was his business while holding that Court to take a scrutiny when there was a dispute as to the votes. Many of us are old enough to remember that before the passing of the Reform Act the sheriff or his deputies used to inquire into the validity of votes tendered at a parliamentary election while it was going on, and this inquiry was a judicial proceeding. We have also the high authority of Lord Coke that the sheriff upon this occasion exercises a judicial function. Now, I think that

no elector who is not sworn, if required to be sworn by the candidates or either of them. The oath to be taken is as follows:

"I SWEAR [*or, being one of the people called Quakers, or entitled by Law to make Affirmation*, solemnly affirm], That I am a Freeholder of the County of and have a Freehold Estate, consisting of lying at within the said County; and that such Freehold Estate has not been granted to me fraudulently or colourably on purpose to qualify me to give my Vote at this Election: and that the Place of my Abode is at [*and, if it be a Place consisting of more Streets or Places than One, specifying what Street or Place*]; that I am Twenty-one Years of Age, as I believe; and that I have not been before polled at this Election [*adding, except in Cases of solemn Affirmations*] 'So help me GOD.'"

By section 14. every elector wilfully or falsely taking the oath or affirmation shall incur the penalties by law inflicted on persons guilty of perjury; and any person unlawfully and corruptly procuring or suborning any freeholder, or other person, wilfully and falsely to take the oath or affirmation in order to be polled, shall incur the pains and penalties inflicted on persons guilty of subornation of perjury.

By section 15. the poll-books at the close of the poll are to be transmitted to the sheriff or under-sheriff, who is to receive and keep them until the re-assembling of the Court on the next day but one after the close of the poll, when he is to cast up the votes and "openly declare the state of the poll, and make proclamation of the person chosen, not later than two o'clock in the afternoon of the said day."

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in former times, when there was a scrutiny, it could not have been contended that there was an appeal from the decision of the presiding officer to this Court. Noboby ever came to this Court to ask for a fresh scrutiny, and that the decision of the sheriff might be questioned by the intervention of a jury. It is said that the Act of Parliament has rendered a scrutiny impossible by limiting the duration of the election, so that it is not possible to determine the legality of the votes. This may be so, but it is not because the statute has rendered an inquiry more difficult that therefore the duty of making it is to be transferred to this Court, where no such duty existed before. The time of polling was reduced because it was found that when it lasted for ten days the expense was such as to deter candidates from offering themselves for election. The Act of Parliament has therefore limited the time of polling within narrower limits, and I must confess that I have thought that the time might be still further abridged. The oath that the elector is a freeholder is practically substituted for the scrutiny, and though the change may be open to this inconvenience, that by this means any person by perjuring himself has an opportunity of voting which he did not enjoy before, yet the legislature may have thought that very few persons would take upon themselves the risk of committing this offence. At all events, I think it better that matters should remain as they are instead of having the question decided by a jury, which is not the tribunal best adapted for the purpose. I am very far from saying that there may not be many cases in which a *quo warranto* might lie as regards the office of coroner; for example, where the candidate had not the qualification required by the statute, or where the election had not been properly conducted. But when, as in the present case, no such objection is made, and all that is asked for is a scrutiny into the votes, we must assume that the Court was duly held, that a sufficient number of duly qualified votes was given, and that the proclamation was duly made. Our judgment must therefore be in favour of the defendant.

MELLOR, J.—I am of the same opinion. Is the question whether the candidate was elected by a majority of duly qualified voters to be determined by the County Court or this Court? I think that the allegations which the pleadings contain are sufficient to shew that the proceedings before the sheriff were duly held. The votes must be received and the voter left to the penalties of perjury if he is not duly qualified. This may be an imperfect remedy, but it is the only one which the legislature has provided. I cannot think that the plea is bad for omitting to state that the defendant was elected by a majority of voters duly qualified.

LUSH, J., and HAYES, J., concurred.

Judgment for the defendant.

IN THE QUEEN'S BENCH. May 31, June 8, 1869.

CARY AND ANOTHER *v.* DAWSON.

38 L. J. Q.B. 300; L. R. 4 Q.B. 568; 21 L. T. 23; 17 W. R. 916; 10 B. & S. 663.

See, *Holmes* v. *Symons*, [1872] E. R. A.; 41 L. J. Ch. 59; L. R. 13 Eq. 66; 25 L. T. 628; 20 W. R. 175 (V.C.); *Ex parte Wiseman*, [1872] E. R. A.; L. R. 7 Ch. 35; 25 L. T. 545; 20 W. R. 138 (L. JJ.).

Bankruptcy—Debt or Demand provable—Contingent Liability—Interest.

BANKRUPTCY. H.—*In January*, 1866, *a sum of money in consols was lent to the promoters of a bill before parliament. The plaintiffs, the defendant and others entered into an undertaking with the lenders that if the bill was thrown out the consols should be returned, and that if it passed (which was the event that happened) an equal amount of stock should be transferred to the lenders, and a sum in the nature of interest on the value of the consols at the time they*

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were lent, from the end of six months to the date of the transfer, should be paid to the lenders. In the following April the defendant was adjudged bankrupt. In July he obtained his order of discharge. In August the bill was passed, but the consols were not transferred till the May following, and the plaintiffs were thereupon compelled to pay, under their agreement, a sum of money as the equivalent for interest:—Held, *in an action against the defendant for contribution in respect of the amount so paid, that his bankruptcy afforded no answer to the claim, as his liability could not have been valued at the date of the adjudication so as to be provable either under the* 12 *&* 13 *Vict. c.* 106. *s.* 178, *or* 24 *&* 25 *Vict. c.* 134. *s.* 154.

The declaration contained the common counts for money paid, interest and money due on accounts stated.

Second plea.—The defendant's bankruptcy and order of discharge before action. Joinder of issue.

At the trial, before Blackburn, J., at the Middlesex Sittings after Michaelmas Term, 1867, it appeared that the plaintiffs, the defendant, and three others had promoted a railway bill in parliament, and it became necessary to make the usual deposit required by the Standing Orders. The Marine Insurance Company undertook to make the deposit by transferring to the Accountant-General a sufficient amount of stock, upon condition that interest on the stock for six months, at an agreed scale, should be paid them in advance (over and above the current dividends), and an agreement was accordingly signed in January, 1866. By this agreement the promoters undertook, jointly and severally, that, on the withdrawal or rejection of the bill, the sum of consols so deposited should be forthwith transferred to the company; and that, on the passing of the bill, a sum of consols equal to the sum so deposited should forthwith be purchased in the names of the company or transferred to them, and that they would pay to the company a sum equal to the dividends that might have accrued on the sum of deposited consols at the date at which an equal sum of consols should be so purchased. And they also undertook to pay the company interest, at the rate of 5*l.* per cent. on the value of the deposited consols, at the date of the transfer, for any period which might elapse after the expiration of six months from the date of the agreement until the amount of the deposited consols should be transferred to the company, or that a sum of consols equal thereto should be purchased in their names or transferred to them.

The bill was passed on August 10, 1866, but the stock was not re-transferred to the company until May, 1867. The company accordingly required interest under the latter part of the agreement, which the plaintiffs paid to the amount of 500*l.*, and brought this action against the defendant for contribution. The defendant was adjudicated bankrupt on April 27, 1866, and received his order of discharge on July 12, 1866.

The learned Judge directed a verdict for the defendant, with leave for the plaintiffs to move to enter a verdict in their favour for the amount of the defendant's contribution.

A rule having been obtained to enter the verdict for the plaintiffs, on the ground that the plea of bankruptcy afforded no answer to the plaintiffs' claim, as it was not provable under the bankruptcy.

J. P. Murphy shewed cause.—The plaintiffs' claim might have been valued and proved under the bankruptcy. At the time of the bankruptcy it was certain that the consols must, at some time or other, be returned by the promoters. In *Warburg* v. *Tucker* (El. B. & El. 914; 28 L. J. Q.B. 56), where the bankrupt before his bankruptcy had assigned a life policy as security for the repayment of a loan, and covenanted to keep up the premiums, it was held that the bankruptcy was no answer to an action for a breach of the covenant after the bankruptcy, as the breach was not a liability to *pay money* upon a contingency, but a liability to damages which would be greater or less according to circumstances. But the effect of this decision is altered by the 24 & 25 Vict. c. 134. s. 154, which enables a liability to pay sums of money yearly or otherwise to be proved in bankruptcy.

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He also referred to the 12 & 13 Vict. c. 106. ss. 172, 177, 178, *Saunders* v. *Best* (17 Com. B. Rep. N.S. 731); *Simpson* v. *Maravita* (38 L. J. Q.B. 76).

Henry James, in support of the rule.—At the time of the bankruptcy there was no debt which the plaintiffs could have proved, and they are therefore not barred. The liability of the defendant was not a liability to pay such money as should be found to be due upon the happening of a single contingency. If the bill had been withdrawn, no interest would have been due. If it had been rejected, no interest would have been due. If the consols had been transferred at an earlier date, the amount of the liability would have been smaller. It was also uncertain what amount the lenders would be entitled to receive on account of dividends. The claim was therefore incapable of a certain valuation. He cited *Martin's Patent Anchor Company* v. *Morton* (37 L. J. Q.B. 98); *Ex parte Hastie* (38 L. J. Ch. 233); and *Brett* v. *Jackson* (38 L. J. C.P. 139).

Cur. adv. vult.

The judgment of the Court[1] was now (June 8) delivered by

BLACKBURN, J.—This was an action for money paid. The only material plea was bankruptcy.

On the trial, before me, it appeared that the Marine Insurance Company had, in January, 1866, lent a large sum in consols, to be deposited by the promoters of a bill then before parliament. The plaintiffs, the defendant and others, six in all, entered into an undertaking with the company, that if the bill was thrown out, the consols should be returned, and that if it passed (which was the event that happened), an equal amount of stock should be transferred to the company, and that a sum in the nature of interest on the value of the consols at the time they were lent, from the end of six months to the day of the transfer, should be paid to the company. Interest for the first six months had been paid to the company as the consideration for the loan of the consols. In April, 1866, the defendant was adjudicated bankrupt. In July, 1866, he obtained his order of discharge. In August, 1866, the bill was passed, but the consols were not transferred until May, 1867, and the plaintiffs were compelled to pay, under the undertaking, 500*l.* as the equivalent for interest. The action was brought to recover contribution for one-sixth part of this sum. A verdict was entered for the defendant on the plea of bankruptcy, with leave to move to enter a verdict for the plaintiffs. A rule accordingly was obtained, against which cause was shewn in this term. The only question was, whether the claim against the defendant in respect of his undertaking could in any way have been proved under the bankruptcy, for if so, the defendant was discharged by his order. Had the undertaking been to pay the value of the consols within a reasonable time after the passing of the bill, together with interest from a fixed day up to the actual payment, there seems to be no doubt that the principal debt would have been provable under the 12 & 13 Vict. c. 106. s. 178, as a contingent liability, and the interest would in that case have been so much considered an accessory to the principal that it might have been proved along with it, as in *Ex parte Barwise* (25 L. J. Bk. 10), though in this case at the time of the bankruptcy it was uncertain what sum might be payable as interest along with the principal in the event (which has happened) of the bill not being passed till after the fixed day. But though a promise to replace a particular amount of consols at a future day is not in substance different from a liability to pay a sum of money, and though if the contract be broken before bankruptcy, the amount which is then ascertained may be proved—see *Betteley* v. *Stainsby* (12 Com. B. Rep. N.S. 477; 31 L. J. C.P. 337),—still, whilst the day at which the stock is to be replaced, and consequently the value of what is then to be replaced is at the time of the bankruptcy unascertained, we think it cannot be treated as a liability to pay money within section 178.

The 24 & 25 Vict. c. 134. s. 153. removes the objection that a jury is required to ascertain the amount when the liability to damages is at the time of the

(1) Cockburn, C.J., Blackburn, J., Lush, J., and Hayes, J.

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adjudication already incurred: but there is no provision in the Bankrupt Laws, as yet, under which such a liability not yet incurred at the time of bankruptcy, can be proved. The liability therefore under the promise to pay the interest must, if provable at all, be proved as a separate matter, and we think that the case of *Warburgh* v. *Tucker* (El. B. & El. 914; 28 L. J. Q.B. 56) is a decisive authority that it cannot be proved under the 12 & 13 Vict. c. 106. s. 178. The question then arises whether it can be proved under the 24 & 25 Vict. c. 134. s. 154? We think that though the general words, "any other sums of money, whether yearly or otherwise," taken by themselves, would include every kind of payment, yet they must be restrained by the context to sums of money so far as *ejusdem generis* with premiums of insurance, that the liability may at the time of the adjudication be capable of valuation. This is distinctly laid down by Lord Justice Giffard, in *Ex parte Hastie* (38 L. J. Ch. 233). And we are unable to see how, or on what principle, a value could have been put in April, 1866 (when the adjudication took place) on the liability of the defendant, in case he and his co-contractors failed to transfer the stock in due time according to their undertaking, to pay interest until they did perform it. We think, therefore, that the rule must be made absolute.

Rule absolute.

IN THE QUEEN'S BENCH. June 9, 1869.

Ex parte WASON.

38 L. J. Q.B. 302; L. R. 4 Q.B. 573; 17 W. R. 881.

Considered, *Ex parte Lewis*, [1888] E. R. A.; 57 L. J. M.C. 108; 21 Q.B. D. 191; 59 L. T. 338; 37 W. R. 13 (Q.B. D.). See, *In re Boaler*, [1914] E. R. A.; 83 L. J. K.B. 139; [1914] 1 K.B. 122; 109 L. T. 822 (K.B. D.).

Vexatious Indictments Act (22 & 23 *Vict. c.* 17.)—*Recognizance—Discretion of Magistrate—Charge or Complaint of an Offence not indictable—Privilege of Parliament.*

CRIMINAL LAW. D. MANDAMUS. A. MAGISTERIAL LAW. D.—*A magistrate before whom a charge or complaint is made of an offence which cannot be the subject of an indictment (such as an alleged agreement or conspiracy by Members of either House of Parliament to deceive the House, by denying the truth of charges contained in a petition presented to it, though they knew that these charges were true) is not bound to take the recognizance of the prosecutor according to the* 22 & 23 *Vict. c.* 17. *s.* 2[1]. *Therefore, where complaint was made before a magistrate that certain Members of the House of Lords had conspired to deceive the House by stating that a charge of falsehood contained in a petition presented to the House was false, though they knew it to be true, in order to prevent the prayer of the petition from being granted, to the injury of the petitioner:*—Held, *that the complaint did not charge an indictable offence, as an agreement by members of either House to make defamatory speeches there could not be the subject of an indictment, and that the magistrate was therefore right in refusing to take the recognizance of the prosecutor according to the* 22 & 23 *Vict. c.* 17. *s.* 2.

(1) The 22 & 23 Vict. c. 17, "An Act to prevent vexatious indictments for certain misdemeanours," enacts, in section 2, "Where any charge or complaint shall be made before any one or more of Her Majesty's Justices of the Peace that any person has committed any of the offences aforesaid (among which conspiracy is included) within the jurisdiction of such Justice, and such Justice shall refuse to commit or to bail the person charged with such offence to be tried for the same, then in case the prosecutor shall desire to prefer an indictment respecting the said offence, it shall be lawful for the Justice and he is hereby required to take the recognizance of such prosecutor to prosecute the charge or complaint, and to transmit such recognizance, information, and depositions, if any, to the Court in which such indictment ought to be preferred, in the same manner as such Justice would have done in case he had committed the person charged to be tried for such offence."

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This was a rule calling on Mr. Tyrwhitt, a metropolitan police magistrate, to shew cause why he should not take the recognizance of the prosecutor on a charge of conspiracy against Earl Russell, Lord Chelmsford and the Lord Chief Baron. The rule was moved by the prosecutor, Mr. Rigby Wason, and it appeared from his affidavit that the information alleged that, in 1867, he had entrusted Lord Russell with a petition to the House of Lords, in which he (Mr. Wason) charged the Lord Chief Baron with falsehood in giving evidence before a Committee of the House of Commons. That Earl Russell, Lord Chelmsford and the Lord Chief Baron prevented the course of justice, to the injury of a third person, by making statements which they knew were not true, in order to prevent the prayer of the petition from being granted; and they made these statements after conferring together. That Earl Russell, Lord Chelmsford and the Lord Chief Baron did, between February 5 and 13, 1867, conspire and agree together to prevent the course of justice, to the injury of a third person (the deponent). That the conspiracy consisted in an agreement on the part of Earl Russell, Lord Chelmsford and the Lord Chief Baron, to make statements which they knew were not true, in order to prevent the prayer of the petition from being granted. That the conspiracy consisted in an agreement on the part of Earl Russell, Lord Chelmsford and the Lord Chief Baron to deceive the House of Lords, by stating that the charge of falsehood contained in the petition was false when they knew that the charge was perfectly true.

The magistrate after adjourning the case for the purpose of taking Mr. Wason's recognizance, afterwards refused to take it, on the ground that the information did not charge an indictable offence.

Mr. Rigby Wason, in person, was heard in support of the rule.

COCKBURN, C.J.—I think that this rule must be refused. I entirely agree that if the matter brought by Mr. Wason before the magistrate had been matter cognizable by the criminal law, and for which an indictment would lie, the magistrate would have had no discretion, and could not have refused to take the recognizance in the manner required by the statute, and if he had declined to interfere, it would have been our duty, *ex debito justitiæ*, to grant a rule directing him to take the recognizance. But where the case submitted to the magistrate does not afford ground for an indictment, I think that it is in his discretion whether he shall entertain the application or not, and that this is a discretion which we ought not to review. The question remains, whether the matter brought before the magistrate was such that it could properly form the subject of an indictment. It is necessary to consider Mr. Wason's affidavit, and we find that it states that he gave to Earl Russell a petition to present to the House of Lords containing a charge of falsehood against the Lord Chief Baron, and that Earl Russell, Lord Chelmsford and the Lord Chief Baron conspired to deceive the House of Lords by stating that this charge was unfounded, when they knew it to be true. Now, these statements are stated to have been made with the object of preventing the prayer of the petition from being granted, and as this object could not be attained unless they were made in the House of Lords, we may assume that the alleged conspiracy is a conspiracy to make such statements in that House. I think, then, that the magistrate, looking at the whole of the information, was warranted in coming to the conclusion that the proposed ground of the indictment was an agreement by these three persons to deceive the House of Lords, by statements to be made there, for the purpose of defeating the petition. But I am distinctly of opinion that such an indictment could not be maintained in point of law. I think that a supposed conspiracy to make statements in either House for the purpose of influencing the members must stand on the same footing as statements actually made there, and there can be no doubt that speeches delivered in parliament cannot be made the foundation of legal proceedings. For this reason only, I think that the magistrate was right, and that this Court ought not to interfere.

BLACKBURN, J.—I am entirely of the same opinion. The Act 22 & 23 Vict. c. 17, was passed to prevent an indictment being preferred for certain specified

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offiences without previous authorization, and section 2 is as follows.—[The learned Judge read the section.]—Now, I perfectly agree that where a charge or complaint of any one of these offences is made before a Justice, and he is required after refusing to commit or to bail the person charged with the offence, to take the recognizance for the prosecution of the charge, that he has no discretion, but is bound to take, and that this Court would issue a mandamus to compel him to do so if it thought that the charge was one for which an indictment would lie. Then comes the question whether what was brought before the magistrate did amount to a charge of an offence for which an indictment would lie? I perfectly agree with what my Lord has said, that when either House of Parliament is sitting, it is part of its privilege that each of its members is at liberty to make statements without being liable to criminal proceedings in respect of them. If the privilege did not exist, the example of Hampden and Pym would not be likely to be followed. Therefore, as it is clear that no indictment will lie for statements made in either house, or for agreements among the members themselves that such statements should be made, and as the information only charges an agreement to make false statements in the House of Lords, I think that the magistrate's second thoughts were best, and that the rule must be refused.

LUSH, J.—I am of the same opinion. The whole question is, whether the information charges an indictable offence; if it does not, the magistrate was right in the course which he took. I quite agree with the observations of the Court as to the language of the information. The conspiracy charged is a conspiracy to deceive the House of Lords by certain persons in their capacity of members of the House. Now, I am clearly of opinion, and I do not think that it ought to be a matter of doubt for one moment, that the conduct of members with reference to their deliberations in the House ought not to be inquired into in a criminal Court.

HAYES, J., concurred.

Rule refused.

IN THE EXCHEQUER CHAMBER. June 14, 1869.

(Appeal from the Court of Queen's Bench.)

KELLY, C.B., CHANNELL, B., BYLES, J., MONTAGUE SMITH, J., BRETT, J., and CLEASBY, B.

ENGELL *v.* FITCH AND OTHERS.

38 L. J. Q.B. 304; L. R. 4 Q.B. 659; 17 W. R. 894; 10 B. & S. 738: affirming [1868] E. R. A. 1146; 37 L. J. Q.B. 145; L. R. 3 Q.B. 314; 18 L. T. 318; 16 W. R. 785 (Q.B.).

See, *Godwin* v. *Francis*, [1870] E. R. A.; 39 L. J. C.P. 121; L. R. 5 C.P. 295; 22 L. T. 338 (Ex. Ch.). Discussed, *Bain* v. *Fothergill*, [1874] E. R. A.; 43 L. J. Ex. 243; L. R. 7 H.L. 158; 31 L. T. 387; 23 W. R. 261 (H.L.). Considered, *Day* v. *Singleton*, [1899] E. R. A.; 68 L. J. Ch. 593; [1899] 2 Ch. 320; 81 L. T. 306; 48 W. R. 18 (C. A.); *Jones* v. *Gardiner*, [1902] E. R. A.; 71 L. J. Ch. 93; [1902] 1 Ch. 191; 86 L. T. 74; 50 W. R. 265 (Ch. D.). Applied, *Addis* v. *Gramophone Co.*, [1909] E. R. A.; 78 L. J. K.B. 1122; [1909] A.C. 488; 101 L. T. 466 (H.L.).

Damages, Measure of — Vendor and Purchaser — Default in Delivering Possession of Property—Loss of Profit on Re-sale.

VENDOR AND PURCHASER. B.—*Where the lease of a house was sold by auction the conditions of sale providing that possession should be given on the completion of the purchase, and the vendors, who were mortgagees of the property and entitled to convey it, failed to give possession because of their*

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unwillingness to incur the expense of an ejectment against the mortgagor, who refused to quit the premises:—Held, *that the ordinary rule limiting the damages in sales of real property did not apply, and that the purchaser could recover, not only the amount of the deposit and the expense of examining the title, but the loss of the profit on a re-sale of the premises, and the cost of the conveyance to the sub-vendee.*

This was an appeal from a decision of the Court of Queen's Bench, reported 37 L. J. Q.B. 145.

The following is an outline of the facts, which are fully stated in the judgment of the Court below. The defendants had offered for sale by auction, subject to certain conditions of sale, the lease of two houses mortgaged to them as trustees, with a power of sale, which they had become entitled to exercise. Of one of these houses, lot 48, it was stated in the particulars that "possession would be given on the completion of the purchase." The lease was knocked down to the plaintiff as the highest bidder, and the deposit required by the conditions paid by him. No difficulty arose as to the title of the defendants, but the mortgagor, who was in possession of No. 48, refused to give it up, so that the defendants were unable to give possession at the time appointed. The plaintiff had in the meantime re-sold the house at an advance of 100*l.*, and on applying for possession the vendors, after stating that the mortgagor refused to go out, and it would be necessary to incur considerable expense in order to eject him, claimed the right of rescinding the contract under one of the conditions of sale[1].

The plaintiff then brought an action for breach of agreement to convey the premises. The question in the Court of Queen's Bench was, whether the plaintiff was entitled to recover, as damages, not only his deposit and the expenses of investigating the title (the amount of which was paid into Court), but also the loss of the profit on the re-sale, as well as the expenses which he had incurred in preparing for the sale to his vendee. The Court having decided in favour of the plaintiff, the defendants appealed from that decision.

Manisty (*Beasley* with him), for the defendants.—The judgment of the Court below was wrong. The vendor of real property, whether there is a re-sale of the premises or not, is not liable to make compensation for the loss of the bargain. With the exception of cases where there is a fraudulent misrepresentation, the purchaser is only entitled to recover back his deposit and the expenses of investigating the title. Even the cases where larger damages were awarded on the ground that there was fraud on the part of the vendor, have been over and over again questioned. The mortgagee has a perfect right to suppose that the mortgagor will go out of possession in due time. In this case, as it happened, he remained in possession. But the vendors ought to be in the same position as if they had failed to make out a title. The contract to give possession and the contract to complete are equally absolute.

[MONTAGUE SMITH, J.—Suppose the deeds were in the hands of a wrongdoer, ought you not to have obtained them and handed them over?]

That raises the same question as the present one. Title must be understood to mean title coupled with possession. The purchase of real property for re-sale is treated by the Lord Chief Justice in the Court below, as a matter of everyday occurrance. But it is submitted, that this view cannot be supported; where the vendor as here is willing to put the purchaser *in statu quo*, he ought not to be called upon to pay for the loss of some extraordinary bargain. He cited *Sedgwick on Damages*, 2nd edit. p. 206, *Sugden on Vendors and Purchasers*, 14th edit. p. 360, *Flureau* v. *Thornhill* (2 W. Black. 1078); *Sikes* v. *Wild* (4 Best. & S. 421; 32 L. J. Q.B. 375); *Walker* v. *Moore* (10 B. & C. 416); *Pounsett* v. *Fuller* (17 Com. B. Rep. 660; 25 L. J. C.P. 145); *Lock* v. *Furze* (19 Com. B. Rep. N.S. 96; 34 L. J. C.P. 201); *Hopkins* v. *Grazebrook* (6 B. & C. 31); *Robinson* v. *Harman* (1 Ex. Rep. 850; 18 L. J. Ex. 202); *Jones* v. *Dyke* (Sugd.

(1) One of the questions in the Court below was, whether this condition was applicable, but the point was practically abandoned in the Exchequer Chamber.

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Vend. & Pur. Appendix, No. 6), and *Worthington* v. *Warrington* (8 Com. B. Rep. 134; 18 L. J. C.P. 350).

Field (*Clare* with him), for the plaintiff, was not called upon.

KELLY, C.B.—We are of opinion that the judgment of the Court below should be affirmed. There is no plea which goes to the whole root of this action, but merely a plea of payment into Court. And the question arises whether the plaintiff is entitled to recover the damages following upon a re-sale of the property, for if he is not, it is agreed that the sum paid into Court is sufficient. If we had been called upon to decide the broad question whether, upon every breach of a contract for the purchase of a landed estate the purchaser is entitled to recover the loss on a re-sale, I should have been by no means prepared to decide, as a general proposition of law, that such damages could be recovered in every case. But looking to this particular case, and to the intention and meaning of the parties, it appears to me that as there is evidence of what were the proceeds of a re-sale, and no other evidence of the damage from the breach of contract, that this re-sale must be taken as evidence of the market value of the property, where the breach arises not from some defect in the title, but from the vendor's neglect in delivering possession of the premises, and that the question is whether the purchaser in the case before us, is entitled to recover this difference in the market value? Now, if this be the question which is raised, I will say at once that we are prepared to adopt the rule laid down by Parke, B., in *Robinson* v. *Harman* (1 Ex. Rep. 850; 18 L. J. Ex. 202): "The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed. The case of *Flureau* v. *Thornhill* (2 W. Black. 1078) qualified that rule of the common law. It was there held that contracts for the sale of real estate are merely on condition that the vendor has a good title; so that when a person contracts to sell real property, there is an implied understanding that if he fail to make a good title the only damages recoverable are the expenses which the vendee may be put to in investigating the title."

Now, I am far from wishing to throw any doubt upon the doctrine in *Flureau* v. *Thornhill* (2 W. Black. 1078), but it applies to a case where the vendor is unable by reason of defect in his title to carry out the contract, and the doctrine has been truly called an exception to the general law of the land. It is founded on difficulty in making out a title to real estate and the probable ignorance of law on the part of the vendor. Is this breach of contract within the principle thus entertained?—[His Lordship stated the facts of the case.]—On the face of the case it appears that the defendants had a perfectly good title. But what happens? We find that they refused to complete because of their unwillingness to incur the expense of an ejectment against the mortgagor in possession. But the contract was a contract to sell and deliver possession of the premises. I think, therefore, that this case is not within the exception, and that the contract to re-sell the lease was good evidence of its marketable value, which, under any circumstances, must have been proved by ascertaining what it would probably fetch. No case since *Flureau* v. *Thornhill* (2 W. Black. 1078) has been cited in which it was held that a purchaser was not entitled to recover such damages as those now claimed. I quite agree with the observations of the Chief Justice, as to *Hopkins* v. *Grazebrook* (6 B. & C. 31), that there is an obvious difference between the case of a man who takes upon himself to sell property which is only contracted to be sold to him and the case where he is really in possession as owner. And I also agree with the observations of his Lordship as to the damages upon the re-sale being within the rule in *Hadley* v. *Baxendale* (9 Ex. Rep. 341; 23 L. J. Ex. 179), at any rate in this particular case. The defendants have made default not because of the state of their title, but because of their improvident contract to deliver possession. The damages claimed by the plaintiff are recoverable, and the judgment must be affirmed.

Judgment affirmed.

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IN THE QUEEN'S BENCH. Feb. 13, June 8, 1869.

SMITH *v.* STOCKS.

38 L. J. Q.B. 306; 20 L. T. 740; 17 W. R. 1135; 10 B. & S. 701.

Statute of Limitations (3 & 4 *Will.* 4. *c.* 27), *ss.* 2, 3.—*Right to Dig Gravel —Surveyor of Highways.*

LIMITATIONS (STATUTES OF). B. HIGHWAYS. E.—*A gravel-pit and a road to it were allotted to surveyors of highways under a local Act. The surveyors continued to take gravel from the pit till the year* 1837, *but from that year till the year* 1863 *they took no steps whatever to assert their rights over either the road or the pit. In the year* 1837 *the tenant of the plaintiff's predecessor in title filled up part of the pit with rubbish, and from that year until* 1863 *took the surface of it into regular cultivation. In* 1839 *another such tenant ploughed up the remaining portion of the pit, and from that time till* 1863 *this portion of the pit and the whole of the road were taken into cultivation by the plaintiff's tenants. In* 1844 *one of the plaintiff's tenants, who was in the occupation of the greater portion of the surface of the pit, was elected surveyor of highways, and held the office for one year*:—Held, *the Court having power to draw inferences of fact, first, that the plaintiff had by his tenants been in actual possession of the gravel-pit and road from* 1837 *to* 1863, *so that the title of the surveyors to the soil and their right to dig gravel had become extinguished by twenty years' adverse possession; secondly, that the fact that the tenant occupying a portion of the pit had been elected surveyor after possession had been taken, made no difference, as the character of the previous possession was not altered during the tenant's year of office.*

This was an action for an injury to the plaintiff's reversion in certain land by digging gravel and stones thereon, and trespass for seizing and taking such gravel.

Pleas—First, to the whole declaration, not guilty; secondly, a denial of the land being in the possession of the plaintiff's tenants; thirdly, as to the whole declaration, a justification alleging the land to be the defendant's as surveyor of highways for the parish of Messingham, in the county of Lincoln.

The plaintiff replied to the last plea, relying on a title under the Statute of Limitations, 3 & 4 Will. 4. c. 27[1], to the estate and interest in the land in question before the alleged grievance and trespass.

The case came on for trial at the Lincoln Spring Assizes, 1867, before Montague Smith, J., when a verdict was taken for the plaintiff for 40*s.* damages, subject to the opinion of this Court upon the following

SPECIAL CASE.

1. By an Act of Parliament passed in 1798 for dividing and inclosing and allotting the open and common fields and other uninclosed lands in the township of Messingham, and that part of the hamlet of East Butterwick, in the parish of Messingham, in the county of Lincoln, and which Act is to form part

(1) By 3 & 4 Will. 4. c. 27. s. 2, "No person shall make any entry or distress or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same."

By section 3, "The right to make an entry or distress or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received."

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of this case, certain Commissioners therein named were empowered, before any allotments were made in pursuance of the Act, to appoint and stake out all such public and private roads over the lands to be inclosed as they should think proper.

2. By the same Act the Commissioners were authorized and required, before any other allotments were made in pursuance of the Act, to set out and appoint such one or more piece or parcel, pieces or parcels, of land from and out of the lands and grounds thereby directed to be divided and inclosed in such convenient places within the township of Messingham, and part of the hamlet of East Butterwick respectively, as they should think proper for getting stone, gravel, and other materials for repairing the roads and ways within the township and hamlet; and by the Act it was provided that such parcel of land as should be allotted in the township and hamlet respectfully for such repairs should be vested in the respective surveyor or surveyors of the highways of the township or hamlet in the Act mentioned.

3. The same Act further provided that after the setting out the roads or ways within the same township or hamlet, and making such allotments for land for the repairs thereof as aforesaid, all the grass and herbage growing, arising, and renewing on the roads and ways within the same township and hamlet, as also upon the pieces or parcels of land so to be set out and appointed for getting stone, gravel, sand, or other materials for repairing thereof, should belong to and be the property of such person or persons to whom the Commissioners should allot the same, exclusive of all other persons whomsoever, or should otherwise be applied to and for some general parochial and other use or purpose, and should be occupied and enjoyed in such manner as the Commissioners should in and by their award order, direct or appoint.

4. The Commissioners appointed by the above-mentioned Act duly and in accordance with the statute made their award in the year 1804, part of which award, being so much of it as is material, is annexed to and forms part of this case, and thereby, amongst other things, set out and appointed a piece or parcel of the lands and grounds by the Act directed to be divided and inclosed as one private carriage, bridle and drift road, described in the award of the breadth of 20 feet, and as leading out of the Bottesford Road, at the south-east corner of an old inclosure, No. 114, in a westward and northward direction, through an allotment therein made to Ann Walker, Eleanor Walker, Elizabeth Walker and Mary Walker, No. 107, to an allotment, No. 106, therein made to the surveyors of the highways within the township of Messingham, and that part of East Butterwick lying in the parish of Messingham for the time being, for the use of these surveyors and their and every of their servants, agents and workmen, and all other persons by them authorized to pass or repass to and from the same, and which they directed to be called "The North Gravel Pit Road."

5. By the same award the Commissioners, previously to setting out or making any other allotment, set out, appointed, allotted and awarded unto the surveyors and their successors for ever for getting stone, gravel, sand or other materials for repairing the roads and ways within the township and hamlet respectively (amongst others) a piece or parcel of land, No. 106, lying in the north field (now called Wood Boar Field), containing 1a. 2r., bounded by an allotment to Ann Walker, Eleanor Walker, Elizabeth Walker and Mary Walker, No. 107, on or towards the east, north and south, and by an ancient inclosure on or towards the west.

6. The Commissioners thereby also ordered and directed that all the grass and herbage growing and renewing upon the roads and highways within the township of Messingham, and that part of the hamlet of East Butterwick lying in the parish of Messingham, should belong to and be the property of the surveyor or surveyors for the time being, and their successors for ever, of the township and hamlet respectively, upon trust, for the purposes of keeping the roads and ways in good and complete repair, and all the grass and herbage growing, arising and renewing upon the pieces or parcels of land so set out and

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[illegible] awarded for repairing the roads and ways, should belong to and be [illegible] of the person or persons in whose allotment or allotments the same [illegible] respectively situate, lying and being.

7. At the time when the Commissioners made their award the land allotted as the road and gravel-pit mentioned in the fourth and fifth paragraphs of this case was entirely surrounded by old inclosures belonging, and land allotted to the plaintiff's predecessors in title, and which have continued in their or his possession to the present time.

8. After the Commissioners had made their award the surveyors of the highways within the township and hamlet opened a gravel-pit in the allotment referred to in the fifth paragraph of this case, being the land in the declaration mentioned and therein described as Wood Boar Field, and continued to get gravel from such pit for the repair of the parish highways, using for this purpose the allotted road mentioned in the fourth paragraph up to the year 1837, and subsequently thereto as mentioned in paragraph 16. of this case.

9. Since the year 1837 (until the times hereinafter mentioned) the surveyors have not taken gravel from the allotted pit nor used the allotted road, and from that time until the year 1863 they took no steps whatever to assert their right to the pit or road.

10. In or about the year 1837 the surveyors got gravel for the repair of the parish highways from a pit in a field called the Beggar Hill Field, situate at a distance of two miles from the allotted pit, and this gravel they purchased from time to time from the plaintiff's father and from the plaintiff himself at the price of 60*l.* per acre.

11. In the year 1837 Mr. Sowerby (then tenant to the plaintiff's father), who occupied the greater part of the land in which the allotted pit was situated, commenced filling up part of the allotted pit by carting into it several hundred loads of earth and rubbish, and from the year 1837 until the year 1863 Mr. Sowerby took the surface of that part of the allotted pit into regular cultivation as arable land, together with the adjacent parts of the field in which it was situate.

12. In the year 1839 Mr. Elsome (another tenant of the plaintiff's father) ploughed up the small remaining portion of the allotted pit which abutted upon land in his occupation, and also the allotted road which passed through other land in his occupation, and from that time until 1863 this portion of the allotted pit and the whole of the allotted road were used and cultivated by the plaintiff's tenants as ordinary arable land.

13. Mr. Sowerby, in the year 1844, being then the tenant of the plaintiff, and in the occupation of the Wood Boar Field, and the surface of the greater part of the allotted pit, was elected surveyor of the highways within the township and hamlet, together with Mr. William Stocks, and held that office for one year.

14. After the year 1837 Mr. Sowerby from time to time took small quantities of gravel and other materials from the allotted pit and other parts of the same field, and used them for the repair of a private occupation road leading from the town street to his own house, and to other land of the plaintiff's in his occupation, and over part of which road a Mr. Wakefield also claimed a right of way.

15. From the year 1837 until the happening of the events mentioned in the next paragraph neither the surveyors for the time being of the highways within the township and hamlet, nor any other person, interfered with the quiet enjoyment by the plaintiff's tenants of the surface of the allotted pit and road as such agricultural land as stated in the eleventh and twelfth paragraphs; nor did the plaintiff or his tenants during that time pay any rent or make any acknowledgment to the surveyors or to any other person for such use and enjoyment.

16. In the year 1863 the defendant (who was surveyor of the highways in that year, also for the township and hamlet), accompanied by other persons, entered upon the plaintiff's land and commenced digging upon the site of the

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allotted pit, and took away some small gravel and earth for the purpose of repairing the highways. For this act, which the plaintiff alleged to be a trespass, an action was commenced by him against the defendant and those persons who were assisting him at the time, which action was discontinued on January 28, 1868.

17. On June 7, 1866, the defendant, being one of the surveyors of the highways for the township and hamlet for that year, in order to obtain access to the allotted pit for the purpose of getting stone, gravel and other materials out of the pit for repairing the roads and highways within the township and hamlet, and because he could not otherwise obtain access to the allotted pit, broke the lock of the gate between the Bottesford Road and the allotted road, and then for the purpose aforesaid proceeded along the course of the allotted road to the allotted pit, and there staked out the site of the allotted pit, and in so doing trampled down the growing corn of the plaintiff's tenant. On the two following days the defendant, as such surveyor, requiring materials for the repairs of the roads and highways within the township and part of the hamlet, for the same purpose of getting such materials, accompanied by other persons, again proceeded to the site of the allotted pit and dug into the soil and took away a portion of the gravel, soil and stones from it for the purpose of repairing the highways within the township and part of the hamlet, and there used and applied the same in so repairing the road and highways (the same being materials fit for that purpose), which are the acts complained of in the declaration in this action. It is agreed between the parties that the pleadings in this action on both sides shall form part of this case. Also that the Court shall be at liberty to draw any inferences or find any facts which, in the opinion of the Court, a jury ought to have drawn or found.

18. The question for the opinion of the Court is, whether, upon the facts stated, the defendant was justified in committing the acts complained of, and is entitled to succeed upon any, and if any which, of the issues joined in the action. And if the Court should be of opinion that he is so entitled, then the verdict shall be entered for the defendant upon such issues accordingly; but if the Court shall be of a contrary opinion, then the verdict as entered is to stand.

Barker (*Hannay* with him), for the plaintiff.—The plaintiff is entitled to recover in this action as he has a good title to the land in question under the Statute of Limitations. In *Thew* v. *Wingate*[2], a case decided by the Court of Queen's Bench in June, 1862, but unreported, and where a question very

(2) THEW *v.* WINGATE.—This was a special case, with power for the Court to draw inferences of fact.

In this case it appeared that certain Commissioners, under a local Act, were directed to set out any two or more pieces of land for the purpose of getting stone, gravel and other materials, and it was provided that these pieces of land should be vested in the surveyor or surveyors of the highways in the parish of Ludford Magna and Ludford Parva, upon trust for the purposes of the Act. The Commissioners in the exercise of their powers allotted a tract of land, No. 158 (save and except the herbage thereof), to the surveyors of the highways in the parish, and awarded the grass and herbage of the allotment to John Parkinson (the plaintiff's predecessor in title) and his heirs. Another tract of land adjoining allotment No. 158 was allotted to Parkinson. From the year 1813 to 1858, the time of the trespass complained of, the parish surveyors had ceased to take gravel from allotment No. 158, and it appeared that, in 1813, Parkinson had thrown a portion of it into his own allotment, and had converted another portion into a stack-yard. He had also erected a barn, a cottage and sheds upon a third portion, and had converted a disused gravel-pit into a pond, and surrounded it with a fence, besides making a road through the *locus in quo*.

June 3, 1862.—*Mellish* (*Field* with him), for the plaintiff, and *Lush* (*Beasley* with him), for the defendant.

COCKBURN, C.J.—Our judgment must be for the plaintiff. The effect of the award made by the Commissioners under the Act of Parliament was to vest the soil in the surveyors of the highways for the time being, and their successors, and all that Parkinson, in whose place the plaintiff stands, had granted to him, was the right of taking the grass and herbage on the soil. Mr. Lush contended that the acts of ownership which Parkinson had exercised were referable to the interest in the land which he took under the award. But this argument fails the moment we arrive at the conclusion that Parkinson took nothing in the soil except the right of pasture. The next question is, whether there was sufficient evidence of acts of ownership by Parkinson to lead to the conclusion that the surveyors had discontinued their possession. The authorities which have been cited shew that a mere abandonment on the part of the owner is not sufficient.—

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similar to the present one arose, the Court held that the surveyors had lost their right to dig gravel from the *locus in quo*.—(He was then stopped.)

Quain (*Philbrick* with him), for the defendants.—The plaintiff cannot avail himself of the Statute of Limitations. The surveyors were guilty of no laches, as they were not bound to interfere till their rights as surveyors were interfered with. Their rights could only be barred by an adverse user of the right to dig gravel. A mere trespass upon the pit was no dispossession of the surveyors; it was for the plaintiff to shew that he or his tenant had actually worked it. In *M'Donnell* v. *M'Kinty* (10 Ir. Com. Law Rep. 514) it was held, that where in a grant of the fee, the minerals are excepted to the grantor and his heirs, his right to them is not barred or extinguished if he omit to work them for twenty years, Blackburn, J., saying, p. 526, "The word 'discontinuance' I understand to mean an abandonment of possession by one person followed by the actual possession of another person." *Cruise's Dig.*, tit. 1, s. 29, shews that a mere trespass is not a disseisin, but that a disseisin is when one enters intending to usurp the possession, and to oust another of the freehold. Either the profits must be taken or the inheritance claimed. *Keyse* v. *Powell* (2 E. & B. 133; 22 L. J. Q.B. 305) shews that in order to preserve the right to quarries or mines it is not necessary that they should be actually worked. And *Smith* v. *Lloyd* (9 Ex. Rep. 562; 23 L. J. Ex. 194) confirms this proposition. Secondly, the occupation of Sowerby after his election in 1844 must be considered as an occupation in his character of surveyor. His possession therefore ceased to be adverse in that year, and by the doctrine of remitter his previous possession was placed on the same footing. As surveyor he might have excluded his landlord from the pit. He cited *Sugden's New Laws of Real Property*, 2nd edit. p. 33, and *Andrews* v. *Hailes* (2 E. & B. 349; 22 L. J. Q.B. 409).

Barker, in reply.—In the first place, there can be no doubt that as soon as the pits were filled up or brought under cultivation, the rights of the surveyors were invaded. Supposing that the plaintiff and his predecessors in title were entitled to the herbage this would not justify them in ploughing up the soil. With regard to the argument that Sowerby's election as surveyor operated so as to alter the character of his occupation it can only be said that it has no support in authority. In *Coppin* v. *Coppin* (2 P. Wms. 295), the Lord Chancellor says, "The only matter which made the difficulty in this case was that there happened to be one and the same person both heir and executor of the testator, and likewise vendor of the land, but this must be considered in the same light as if there were several persons, *et cum duo jura in una persona concurrunt, æquum est ac si essent in diversis.*" *Brown* v. *Gordon* (16 Beav. 308; 22 L. J. Ch. 65) also shews that everything depends upon the character in which acts are done. He also cited *Saunders* v. *Lord Annesley* (2 Sch. & Lef. 9) and *Archbold* v. *Scully* (9 H.L. C. 360).

Cur. adv. vult.

The judgment of the Court[3] was (on June 8) delivered as follows, by

MELLOR, J.—We are of opinion that the verdict entered for the plaintiff

[His Lordship then stated the evidence of the discontinuance of the practice of taking gravel by the surveyors, and the acts of ownership by Parkinson.]—Are these not all strong acts to shew that Parkinson had taken possession of the *locus in quo*, making no distinction between it and the land of which he had the fee simple by the allotment of the Commissioners. I think there is quite sufficient to establish a discontinuance of the possession of the surveyors and the existence of a possession adverse to them by Parkinson.

WIGHTMAN, J.—I am of the same opinion. The acts done by Parkinson seem to be wholly inconsistent with the right of the surveyors, and are evidence of a general dispossession of the fee which they had in the *corpus* of the close.

BLACKBURN, J.—I am of the same opinion. Mr. Mellish was quite correct in his argument when he said that the question of fact was, had Parkinson and the plaintiff, who claims under him, twenty years before this action, taken such an actual possession of this ground below the surface that they would have been able to maintain trespass against a stranger who should meddle with the sub-soil?

Judgment for the plaintiff.

(3) Mellor, J., and Hannen, J.

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should stand. The substantial question for our determination was whether the title of the defendant as surveyor of highways to a certain gravel-pit and road to it, had become extinguished by the adverse possession of the plaintiff for more than twenty years. It appears from the case that from the year 1837 down to 1863 the surveyors of highways have ceased to take gravel from the pit or to use the road to it; but it was contended for the defendant that the surveyor for the time being did not by such non-user lose his right to the gravel, inasmuch as the plaintiff had not been in actual possession. And the case was likened to that of an owner in fee of land with minerals under it conveying the surface, reserving the minerals with the right of entry to get them, in which case it has been held that the right of entry to get the minerals is not barred by mere non-user for more than forty years unless some other person has worked or been in possession of them during that time—*Smith* v. *Lloyd* (9 Ex. 562; 23 L. J. Ex. 194). We are, however, of opinion that the plaintiff has, by his tenants, been in actual possession of the gravel-pit and road from 1837 to 1863. This is a question of fact depending on the intention with which certain acts were done, and we come to the conclusion that since 1837 the gravel-pit has been treated as practically exhausted, and that by filling up the greater portion of it with earth and rubbish, and by taking the whole surface into cultivation as well as the road in 1837 and 1839, possession of the gravel-pit and road was actually taken in those years, and consequently the time of limitation began to run from those years respectively. We are further of opinion that the circumstance of the tenant occupying a portion of the gravel-pit being elected surveyor for one year after possession had been taken of it can make no difference. The possession which he previously held was as tenant under the plaintiff, and the character of that possession was not altered during the tenant's year of office. We were referred in the course of the argument to a shorthand writer's note of a case of *Thew* v. *Wingate* (see note (2)), argued in this Court in 1862, before the Lord Chief Justice, Wightman, J., Crompton, J., and Blackburn, J. The facts were not substantially different from those of the present case, and the Court there adopted the same view which we have taken. Our judgment will therefore be for the plaintiff.

Judgment for the plaintiff.

IN THE QUEEN'S BENCH. June 25, 1869.

WRIGHT *v.* PEARSON.

38 L. J. Q.B. 312; L. R. 4 Q.B. 582; 20 L. T. 849; 17 W. R. 1099; 10 B. & S. 723.

Animals—Liability of Owners of Dogs for Injuries to Cattle or Sheep (28 & 29 *Vict. c.* 60.)—*Horses included under Word "Cattle."*

ANIMALS. C.—*By* 28 & 29 *Vict. c.* 60, *s.* 1, *after reciting that it is expedient to amend the law as to the liability of the owners of dogs for injuries done to cattle and sheep by such dogs, it is enacted, that "the owner of every dog shall be liable in damages for injury done to any cattle or sheep by his dog; and it shall not be necessary for the party seeking such damages to shew a previous mischievous propensity in such dog, or the owner's knowledge of such previous propensity, or that the injury was attributable to neglect on the part of such owner:*—Held, *that horses are included under the term "cattle" in this enactment.*

This was an appeal from a decision of the Judge of the County Court of Yorkshire, holden at Thirsk.

A CASE was stated as follows.

This was an action by the plaintiff to recover from the defendant the sum of 41*l.* 8*s.* 2*d.*, for that the defendant knowingly kept a certain ferocious dog, which was accustomed to injure and bite cattle, and which dog, in the month

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of July, 1868, bit and injured the plaintiff's mare, and caused damage to the amount aforesaid. And for a further count, that the defendant's dog, in the month aforesaid, bit and injured the aforesaid mare of the plaintiff, whereby the plaintiff suffered damage to the amount aforesaid.

At the trial, evidence was given on behalf of the plaintiff that in the month of July, 1868, the plaintiff was driving his mare in a gig on the high road from Thirsk to Kilvington, and when about a mile from Thirsk the dog in question flew out and bit the leg of the mare and caused it to kick and be injured, and that the damage was done as alleged. No proof was given by the plaintiff to shew that the defendant knew the dog was accustomed to bite horses or mares, or was of a savage or ferocious character, and the plaintiff contended that such evidence was unnecessary since the 28 & 29 Vict. c. 60.

The Judge considered it necessary for the plaintiff to prove a *scienter* in the defendant, as, in his opinion, the plaintiff's mare did not come within the true intent and meaning of the term " cattle " in the 1st section of the 28 & 29 Vict. c. 60[1], and that the statute did not therefore apply in this action; and he directed a judgment of nonsuit to be entered against the plaintiff, with costs.

The question for the Court of Queen's Bench is, whether the term " cattle " in the above Act includes horses and mares.

Kemplay, for the plaintiff.—The term " cattle " in common parlance applies to horses, and it was the object and intention of the statute to deal with a case like the present one. It was assumed that dogs had a peculiar propensity with regard to quadrupeds. The word " cattle " in *Webtser's Dictionary* is stated to include " camels, horses, asses," &c. In *The King* v. *Paty* (2 W. Black. 721) it was held that a mare and colt were " cattle " within the meaning of the Black Act, 9 Geo. 1. c. 22. Horses grazing in a field are peculiarly liable to the attacks of dogs, and there is no reason why the word " cattle " should have a narrow construction.

A. Wills (*Steele* with him), for the defendant.—It is submitted that the word " cattle " in the statute was not intended to include horses and mares, but only cows and sheep, which would be turned out to graze upon unfrequented places.

[LUSH, J.—Is not this a remedial Act?]

Yes; but as it imposes a fresh liability upon a large class of persons, it ought to be interpreted with all possible strictness. The word " cattle " may properly be confined to horned beasts.

LUSH, J.—Many Acts of Parliament are encumbered with useless definitions; but this is one in which of all others a definition would have been very desirable; none is to be found in it, and it is extremely difficult to say what was in the minds of the framers of the Act. However, the word " cattle " does in its primary sense include horses, and I cannot see that the legislature intended to exclude them, except it be said that the use of the word " sheep " must shew that the framers of the Act did not employ the word " cattle " in its fullest sense; nevertheless, as the Act is a remedial one, and, as far as I know, horses are as liable to be bitten by ferocious dogs as cows are, I do not see why they should be excluded from its operation. I am therefore of opinion, without being at all satisfied that I am doing what the legislature intended, that the County Court Judge was mistaken in his view of the matter, and that our judgment must be in favour of the appellant.

HAYES, J.—I am of the same opinion. No good reason can be assigned for the defendant's construction of the statute. The word " cattle " has a wide

(1) The Act 28 & 29 Vict. c. 60. s. 1, after reciting that it is expedient to amend the law as to the liability of the owners of dogs for injuries done to cattle and sheep by such dogs, enacts that, " The owner of every dog shall be liable in damages for injury done to any cattle or sheep by his dog; and it shall not be necessary for the party seeking such damages to shew a previous mischievous propensity in such dog, or the owner's knowledge of such previous propensity, or that the injury was attributable to neglect on the part of such owner. Such damages shall be recoverable in any Court of competent jurisdiction by the owner of such cattle or sheep killed or injured."

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signification, and we should not narrow it without a satisfactory reason. The word ordinarily applies to the larger animals, and this may be the reason why the word "sheep" is inserted in the section. But I know of no reason why horses should be excepted from its operation.

Judgment for the plaintiff.

IN THE QUEEN'S BENCH. June 4, July 3, 1869.

SIMPSON *v.* YEEND.

38 L. J. Q.B. 313; L. R. 4 Q.B. 626; 21 L. T. 56; 17 W. R. 1100; 10 B. & S. 752.

Bribery— "Offer" or "Promise" to procure Money—Municipal Election —17 & 18 Vict. c. 102. s. 2.—22 Vict. c. 35. ss. 11, 12.

ELECTION LAW. B.—*By the 17 & 18 Vict. c. 102. s. 2, which by the 22 Vict. c. 35. s. 12. applies to municipal as well as parliamentary elections, any one who shall "give, lend, or agree to give or lend, or shall offer, promise, or promise to procure or to endeavour to procure, any money or valuable consideration to or for any voter, or to or for any other person, in order to induce any voter to vote or refrain from voting, is guilty of bribery." The defendant, while soliciting a vote, told the voter that "he would be remunerated for loss of time":*—Held, *that the defendant had been guilty of bribery within the meaning of the section.*

This was an appeal from the County Court of Staffordshire, holden at Lichfield.

The defendant was sued in the County Court for the amount of a penalty[1], to which he was alleged to be liable as having offered a sum of money to a voter at an election of councillors in the city of Lichfield, to induce him to vote at the election. The evidence upon which the claim was supported is stated in the judgment of this Court.

Gray and *R. H. Collins*, for the plaintiff, contended that there was ample evidence of an "offer" within the meaning of 17 & 18 Vict. c. 102. s. 2[2], and cited *Cooper* v. *Slade* (6 H.L. C. 746; 27 L. J. Q.B. 449).

Manisty and *Bosanquet*, for the defendant, insisted that there was no evidence of an offer which, if accepted by the voter, would have constituted a binding contract, but that there was only a representation of a probable consequence of the voter, which did not bring the case within the statutes.

Cur. adv. vult.

COCKBURN, C.J. (on July 3) delivered the judgment of the Court[3].—This was a case stated by the Judge of the County Court of Staffordshire, by way of

(1) By the 22 Vict. c. 35. ("An Act to amend the law relating to municipal elections"), s. 11. "If any person at any election of mayor, councillors, auditors, or assessors for any borough shall be guilty of bribery, he shall for every such offence forfeit the sum of 40*s.* to any person who shall sue for the same in the County Court," &c.

By section 12, "The word 'bribery' shall include anything committed or done before, at, after, or with respect to the election of any mayor, councillors, auditors, or assessors, which, if committed or done before, at, after, or with respect to any election of any member to serve in parliament, would render the person committing or doing the same liable to any pains, penalties, forfeitures, or conviction for bribery, treating, undue influence, corrupt practices, or other offence under any Act or Acts for the time being in force with respect to the election of members to serve in parliament for boroughs in England and Wales."

(2) By the 17 & 18 Vict. c. 102. ("An Act to consolidate and amend the laws relating to bribery, treating, and undue influence at elections of members of parliament"), s. 2, it is enacted that "The following persons shall be deemed guilty of bribery, and shall be punishable accordingly: Every person who shall, directly or indirectly, by himself, or by any other person on his behalf, give, lend, or agree to give or lend, or shall offer, promise, or promise to procure or to endeavour to procure, any money or valuable consideration, to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce any voter to vote, or refrain from voting, or shall corruptly do any act as aforesaid, on account of such voter having voted or refrained from voting at any election," &c.

(3) Cockburn, C.J., Mellor, J., Lush, J., and Hayes, J.

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appeal from his own decision, whereby judgment was given for the defendant. The plaintiff in the County Court, Thomas Simpson, sued the defendant, William Yeend, for 40*s.* forfeited by him by reason of having been guilty of bribery at the election of councillors in the north ward of the city of Lichfield, held on November 1, 1867, " for that he, the defendant, did on that day directly offer a sum of money to one George Marshall, one of the citizens of the said city, to induce him as a voter in the said ward to vote at the said election."

The evidence on which the plaint was tried is set out by the Judge of the County Court, and the question proposed to us is, " whether the transaction as described by the defendant is bribery under the statute 17 & 18 Vict. c. 102." The evidence of the defendant, as stated by the Judge of the County Court, is as follows: " I saw Marshall's wife. I told her I called to solicit a vote. She told me he did not intend to vote; if he did, he should offend Mr. Muckleston and Mr. Playfair. She also said he had been offered something very handsome on the other side, " and I am sure he will not vote." She also said he would lose much time by going to vote; I said he would be remunerated for what loss of time might occur. Never mentioned money—7*s.* 6*d.* I saw Marshall next morning. I again said, ' I solicit your vote.' He told me he did not intend to vote.' I did not offer him money. I said he would be remunerated for loss of time. I did not offer him a sovereign."

The statute referred to by the Judge of the County Court, viz., 17 & 18 Vict. c. 102. s. 2, makes it bribery in " every person who shall, directly or indirectly, by himself, or any other person on his behalf, give, lend, or agree to give or lend, or shall *offer, promise, or promise to procure or to endeavour to procure, any money or valuable consideration, to or for any voter*, or to or for any other person on behalf of any voter, or to or for any other person *in order to induce any voter to vote, or refrain from voting*, or shall corruptly do any such act as aforesaid, on account of such voter having voted or refrained from voting at any election." In answer to the question proposed to us by the Judge of the County Court, we are of opinion that " the transaction as described by the defendant is bribery under the statute." We delayed giving our judgment at the close of the argument, not because of any doubt existing in our minds as to the answer which we ought to return to the question put by the Judge of the County Court, but because we were assured by the counsel for the defendant that the election Judges had in their decisions upon this section taken a view differing from that which we were disposed to take. Had the fact been as suggested we should not have felt ourselves bound by the opinion of the election Judges, unless, upon consideration, we had agreed with it; but we thought it desirable to ascertain what opinion had in fact been expressed by them with reference to a subject with which their duties had necessarily made them familiar. Upon inquiry, we find, as we had anticipated, that those learned Judges had expressed no opinion adverse to the conclusion at which we have arrived. Their observations upon this section, so far as it refers to an " offer " or " promise " *not accepted*, merely expressed a rule of prudence and caution as to the *quantum* and character of the evidence by which such an " offer " or " promise " should be considered as proved. In the present case we are relieved from considering *the truth of the evidence*, as it is the statement of the defendant himself which is submitted to us for consideration. We cannot doubt that the words admitted to have been used by the defendant, viz., " that the voter would be remunerated for what loss of time might occur," did, under the circumstances, amount to an " offer," or " promise " to procure or to endeavour to procure, money or valuable consideration, to a voter, " in order " to induce him to vote at the election in question. The expression, " remuneration for loss of time," would necessarily convey to the apprehension of the voter that if he would vote for a particular candidate, he should receive, either directly from the person offering or by his procurement, money or valuable consideration which he would not otherwise obtain; and any assurance of that kind which can *only* be so understood is calculated to operate upon the mind of the elector as a direct inducement to vote for such candidate. If any authority were required to induce us to adopt

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this view of the transaction in the present case, it is supplied by that of *Cooper* v. *Slade* (6 H.L. C. 746; 27 L. J. Q.B. 449), which upon this point is not distinguishable in principle from the present case. It is so important to the public interest that at elections voters should be left to vote without any disturbing influence of any kind that we feel ourselves bound, in construing the statute in question, to give full effect to the plain meaning of the words used, and to apply them to the substantial parts of the case without raising subtle distinctions or refinements as to the precise words or expressions in which the promise or offer may be conveyed. The case will be remitted to the Judge of the County Court, who will set aside the verdict for the defendant, and enter it for the plaintiff for 40*s*., being the penalty provided by the Municipal Act for the offence in question

Judgment accordingly.

IN THE QUEEN'S BENCH. June 15, 1869.

MYERS *v.* VEITCH.

38 L. J. Q.B. 316; L. R. 4 Q.B. 649; 20 L. T. 847; 17 W. R. 918.

Bankrupt—Detention after Production of Certificate of Protection—Liability of Gaoler—"Officer."

The Bankrupt Law Consolidation Act (12 & 13 *Vict. c.* 106), *s.* 113, *which makes "any officer" who shall detain a bankrupt in custody after he shall have produced his protection liable to penalties, does not apply to the gaoler or governor of a prison to which the bankrupt is taken after his arrest, but only to the officer actually arresting the bankrupt.*

Declaration—That, after the passing of the Bankrupt Law Consolidation Act, 1849, the plaintiff was duly adjudicated a bankrupt under the provisions of this statute and the other statutes in force concerning bankrupts, and had duly surrendered, and at the time of the committing of the grievances hereinafter mentioned was protected and free from arrest and imprisonment by virtue of an order of the Court having jurisdiction in that behalf; and whilst the plaintiff was so protected by the order, he was arrested for debt within the meaning of section 113. of the Bankrupt Law Consolidation Act, 1849[1]; and the defendant, being an officer within the meaning of the section, detained the plaintiff after the plaintiff had shewn to the defendant such protection for a longer time than was necessary for obtaining a copy of it, and, after the plaintiff had given the defendant a copy of the same, that is to say, for six days thereafter, contrary to the statute in that case made and provided; whereby the defendant forfeited and became liable to pay to the plaintiff the sum of 5*l*. for every day the defendant so detained the plaintiff.

Pleas—First, not guilty by statutes 21 Jac. 1. c. 4. s. 4, and 21 Jac. 1. c. 12. s. 5. Secondly, that at the time of committing the alleged grievances the defendant was not an officer within the meaning of section 113. of the Bankrupt Law Consolidation Act, 1849. Thirdly, that the plaintiff did not shew to the defendant the protection as alleged.

Issues thereon.

At the trial, before Lush, J., at the Liverpool Winter Assizes, 1868, it appeared that the plaintiff was adjudicated bankrupt on his own petition on

(1) By the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106), s. 113, "If any bankrupt shall be arrested for debt, or on any escape warrant, on coming to surrender, or shall after his surrender, and while protected by order of the Court, be so arrested, he shall, on producing such protection to the officer who shall arrest him, and giving such officer a copy thereof, be immediately discharged; and if any officer shall detain any such bankrupt after he shall have shewn such protection to him, except for so long as shall be necessary for obtaining a copy of the same, such officer shall forfeit to such bankrupt, for his own use, the sum of 5*l*. for every day he shall detain such bankrupt, to be recovered by action of debt in any Court of record at Westminster, in the name of such bankrupt, with full costs of suit."

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June 16, 1868, and obtained protection until July 23. On July 15 he was arrested on a *ca. sa.* by the assistant of one Ambler, a sheriff's officer. He shewed his original protection to the man arresting him, and to Ambler, to whose office he was taken, but was unable to give them a copy of it, as he had no such copy in his possession. He was on the same day lodged in Walton Gaol, of which the defendant was governor. On July 17 an office copy of the protection was served on the defendant, but the plaintiff was detained in custody till the 23rd, when he was discharged under an Order of the Court of Bankruptcy.

A verdict was directed for the plaintiff, with 30*l.* damages, leave being reserved to the defendant to move to enter a nonsuit, on the ground that he was not an officer within the meaning of the Bankrupt Law Consolidation Act, section 113. A rule having been obtained accordingly.

C. Russell shewed cause.—It is submitted that the gaoler is an officer within the meaning of section 113. The section may be divided into two parts: the object of the first is to procure the release of the bankrupt directly after his arrest, and the words "officer *arresting* the bankrupt" are used. In the latter part it is assumed that this object has failed, and it is intended to secure the bankrupt from a prolonged detention in prison. And the general words "any officer" are substituted for "officer arresting." But if the defendant's construction is adopted and a gaoler is not such an officer, this part of the section can have no operation, for it is the duty of the bailiff arresting the bankrupt to lodge him in prison with as little delay as possible. The omission of the word "such" in the latter part of the section strengthens the defendant's argument.

[BLACKBURN, J.—In the old Act, 5 Geo. 2. c. 30. s. 5, it was provided that in case any bankrupt should be arrested for debt, &c., he should, on producing a summons or notice under the hand of the Commissioners to the officer who should arrest him, and making it appear to such officer that such notice or summons was signed, as aforesaid, be discharged. And the section proceeds, "And in case *any* officer shall detain such bankrupt." There the general word "any" is used, but it is quite plain that what is meant is the officer arresting the bankrupt; and I can find nothing to shew that section 113. was intended to alter the law in this respect.]

Bancroft v. *Mitchell* (36 L. J. Q.B. 257) is an authority that the gaoler is an "officer" within this section.

[BLACKBURN, J.—No such point was raised in the case.]

The Court will consider the hardship of leaving the bankrupt without any remedy for an unjust imprisonment. He also cited *Lees* v. *Newton* (35 L. J. C.P. 285).

C. Crompton, in support of the rule, was not heard.

[BLACKBURN, J.—I am of opinion that this rule should be made absolute to enter a nonsuit. It must be remembered that this section is a penal one, and that we have to find out the person upon whom the penalty is imposed. The section is as follows—[the learned Judge read the section],—and it appears that the plaintiff after he had become bankrupt was arrested by a sheriff's officer. Now, if he had produced his protection to the officer arresting him, and given the officer a copy of it, he would have been entitled to be forthwith discharged, just as under the old Act he would have been protected by a notice or summons signed by the Commissioners. He did not, however, furnish the sheriff's officer with a copy of his protection, and was lodged in gaol. Now, I cannot see that the statute imposes any duty on the gaoler with reference to any bankrupt so arrested, and I think it extremely doubtful whether the gaoler could safely discharge him without the order of a Judge or of some Court of competent jurisdiction. It has been argued, that the meaning of the word "officer in the latter part of this section may be extended beyond the meaning of the words "officer who shall arrest" in the earlier part and the simple word "officer" may include the gaoler who detains the bankrupt in custody after receiving a

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copy of his protection. But this requires us to assume that the gaoler has the power of discharging the bankrupt (which, as I have already said, I think very doubtful), because if he had no such power there would be no reason for imposing the penalty upon him. And I think that such a construction of the section is not the right one. I think that, as in the former Act, 5 Geo. 2. c. 30. s. 5, upon which the section in the later statute was evidently founded, the penalty is confined to the sheriff's officer who actually arrests the bankrupt, and then after receiving a copy of his protection refuses to discharge him. But when once the bankrupt has been lodged in prison, I do not see how the enactment can be made to apply to the gaoler.

LUSH, J.—I am of the same opinion. I cannot think that we are justified in extending by implication a penal section to a class of officers who are not mentioned in the earlier part of it. I agree with my Brother Blackburn that the section was only intended to apply to the officer arresting the bankrupt; and that the word " officer " in the latter part of the section is used in the same sense as the word " officer who may arrest " in the earlier part.

HAYES, J. concurred.

Rule absolute.

IN THE QUEEN'S BENCH. June 24, 1869.

JOHNSON *v.* SHAPTE.

38 L. J. Q.B. 318; L. R. 4 Q.B. 700; 20 L. T. 909; 17 W. R. 1098; 10 B. & S. 727.

Bankrupt Act, 1861, *s.* 153.—" *Contract or Promise* "—" *Demand in the Nature of Damages* "—*Discharge—Bar to Action—Landlord and Tenant—Under-tenant—Distress for Rent—Under-tenant's Goods.*

BANKRUPTCY. G.—*The plaintiff rented a room of the defendant, who was tenant of the whole house under P, the owner. The defendant's rent being in arrear P. put in a distress, and seized the plaintiff's goods. To obtain the release of his goods the plaintiff was obliged to pay* 15*l. to P. The defendant then became bankrupt, and obtained his order of discharge; subsequently to which the plaintiff commenced an action to recover from the defendant compensation for the injury and loss sustained by the plaintiff in consequence of the defendant allowing the rent to be in arrear*:—Held, *that the right of action was not barred by the discharge in bankruptcy, inasmuch as the defendant was not liable, " by reason of any contract or promise, to a demand in the nature of damages," within the meaning of the* 153*rd section of the Bankrupt Act*, 1861, *so as to make the claim of the plaintiff provable under the bankruptcy.*

CASE stated on appeal against a judgment obtained by the plaintiff in the Liverpool County Court.

The action was tried, before the Judge of the Liverpool County Court, with a jury, on November 5, 1868, when a verdict was returned for the plaintiff with 25*l.* damages.

The following are the particulars of demand: " This action is brought to recover compensation for the injury and loss sustained by the plaintiff in consequence of the defendant wrongfully allowing certain rent payable by him, as the tenant of a warehouse, No. 4, Argyle Street, Liverpool, to be in arrear and unpaid, whereby the goods of the plaintiff (who occupied one of the rooms of the warehouse as tenant to the defendant) were lawfully distrained by the defendant's landlord for such arrears of rent, and the plaintiff was compelled to pay to such landlord certain moneys in order to obtain the release of his said goods, and was put to great inconvenience, and was injured in his credit. The plaintiff claims 50*l.*"

The defendant occupied as tenant to one Mr. Pemberton (the owner) a

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warehouse at a certain yearly rent. Whilst the defendant was such tenant, the plaintiff became his sub-tenant of one of the rooms, into the occupation of which room the plaintiff entered, and placed therein cotton, his property, of considerable value.

In the month of February, 1868, whilst the defendant's tenancy and the plaintiff's sub-tenancy continued, the defendant's rent being then in arrear to the amount of 30*l.*, his landlord lawfully distrained the goods in the warehouse, including those of the plaintiff. To obtain the release of his goods the plaintiff was required by the defendant's landlord to pay, and did in fact pay to him the sum of 15*l.*, and upon that payment being made his goods were restored to him. After the distress and payment by the plaintiff of this sum of 15*l.* the defendant became bankrupt on his own petition in the Liverpool Bankruptcy Court, and in due course obtained his order of discharge.

The plaintiff has not proved, or claimed to prove, under the bankruptcy in respect of the subject-matter of this action, nor have any steps been taken under the 153rd section of the Bankruptcy Act, 1861, to obtain an order of the Court of Bankruptcy directing an assessment of the damages which the plaintiff sustained by reason of the entry by bailiffs employed by the defendant's landlord, upon the room in the warehouse occupied by the plaintiff and the seizure of his goods thereon, nor were such damages assessed until the jury assessed them on the trial of this action. After the defendant had obtained his order of discharge in bankruptcy the plaintiff commenced this action, in which he claimed, as part of his special damage, the 15*l.* before referred to.

At the trial, in addition to the defence raised by the defendant on the merits, it was contended on his behalf that the plaintiff's right of action for damages was barred by the order of discharge.

The Judge ruled that it was not.

The question for the opinion of this Court was whether this ruling was correct in point of law.

R. G. Williams, for the defendant[1].—The question turns upon the 153rd section of the Bankrupt Act, 1861, which provides that, "If any bankrupt shall at the time of adjudication be liable, by reason of any contract or promise, to a demand in the nature of damages, which have not been and cannot be otherwise liquidated or ascertained, it shall be lawful for the Court, acting in prosecution of such bankruptcy, to direct such damages to be assessed by a jury, either before itself or in a Court of law, and to give all necessary directions for such purpose; and the amount of damage when assessed shall be provable as if a debt due at the time of the bankruptcy. Provided that, in case all necessary parties agree, the Court shall have power to assess such damages without the intervention of a jury or a reference to a Court of law." It is submitted that the County Court Judge was wrong in deciding that the claim of the plaintiff was not barred. The defendant was liable by reason of the contract made by him to a demand in the nature of damages. The action is not brought against the landlord for seizing the goods, but against the defendant upon the contract for quiet enjoyment of the room which the plaintiff occupied as under-tenant, and for the non-interference with that occupation by the landlord. In the books upon Pleading this action has always been treated as an action upon contract—see *Bullen and Leake upon Pleading*, 3rd ed., 179. Next, the Court of Bankruptcy is empowered, by the section above referred to, to direct that the damages shall be assessed, and therefore the demand would then be provable as a debt under the bankruptcy, the consequence being that the plaintiff's right of action would be barred. Such an interpretation has been put upon the 154th section, the language of which is almost identical—see *Saunders* v. *Best* (17 Com. B. Rep. N.S. 731). Other decisions have been given upon deeds of this kind, such as *Hagaston* v. *Taylor* (36 L. J. Ex. 61); *Sharland* v. *Spence* (36 L. J.C.P. 230); and *Robertson* v. *Goss* (36 L. J. Ex. 251); but

(1) The arguments brought before the Court several important questions, but it is thought better to confine this report to the single point decided by the Court.

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there is no decision to be found which is against the view now submitted on behalf of the appellant. See also *Ex parte Townsend* (35 L. J. Bk. 17); *Woods* v. *De Mattos* (35 L. J. Ex. 64; L. R. 1 Ex. 91); and *Ex parte Willmott* (36 L. J. Bk. 17; L. R. 2 Ch. Ap. 795).

Wheeler, for the plaintiff.—This case does not fall within section 153. at all, and the action was maintainable. The defendant cannot be said to have been liable by reason of any "contract," and the word "promise" does not carry the meaning any further. The action was not brought upon the contract, but for the tort. A construction has been put upon the words "action of contract" in the County Court Act, 19 & 20 Vict. c. 108. s. 30, in *Tattan* v. *the Great Western Railway Company* (29 L. J. Q.B. 184), where it was held that an action against common carriers for the loss of goods delivered to them, as common carriers, to be carried for hire, is founded upon the breach of the common law duty, independently of contract, and therefore is not an action of contract within that section—see also *Griffiths and Holmes's Bankruptcy*, p. 588. Again, *Burnett* v. *Lynch* (5 B. & C. 589) shews that this is not an action on contract. In that case, Littledale, J. says, at page 609, "Assumpsit lies where a party claims damages in consequence of a breach of promise not under seal. That promise may either be express or it may be implied from a legal obligation to do a particular act. Where there is an express promise, and a legal obligation results from it, then the plaintiff's cause of action is most accurately described in assumpsit, in which the promise is stated as the gist of the action. But when, from a given state of facts, the law raises a legal obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, there although assumpsit may be maintainable upon a promise implied by law to do the act, still an action upon the case founded in tort is the more proper form of action, in which the plaintiff, in his declaration, states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and the damage resulting from that breach. For that is the most accurate description of the real cause of action, and that form of action in which the real cause of action is most accurately described is the best adapted to every case." That case is referred to in *Woodfall's Landlord and Tenant*, edited by Cole, p. 670. Next, the 153rd section only applies where there is an admitted breach of contract. The case stated by the County Court Judge shews that the claim was contested upon the merits, and therefore the breach could not have been admitted. It cannot therefore be compulsory upon the creditor to avail himself of the machinery of the Court to be set in motion under a provision which was only meant to apply where the question to be determined was simply the amount of the damages, not the question of liability. If the breach is not admitted the creditor has a right to resort to the ordinary tribunals of the country.

R. G. Williams, in reply.—The words of the section are general, and apply equally where the demand is admitted and where it is disputed.

LUSH, J.—I am of opinion that our judgment must be for the respondent. The case has been extremely well argued, and we are much indebted to the learned counsel on both sides. I should have had considerable difficulty in giving an answer to some of the points raised; but I am of opinion the case may be decided in favour of the plaintiff upon this ground,—that there was no such liability upon the defendant as was contemplated by the legislature in enacting this 153rd section.—(His Lordship read the section.)—Looking at the cases which have been decided previously to the passing of this enactment, I think that it was passed with a view to meet the case of bankrupts who, at the time of adjudication, were liable by reason of some express mercantile contract to a demand in the nature of damages, but which by reason of such damages not being ascertained at the date of the bankruptcy were not provable under it. It applies to contracts popularly so called. Then does this claim arise out of such a contract? I think clearly not. It is a claim by the plaintiff against the defendant to indemnify him against the injury which he has suffered by reason of the seizure of his goods under the distress for rent which the defendant

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owed, and ought to have paid. The action is not founded upon an express contract by the defendant with the plaintiff that he will pay the rent due; but upon a liability out of which the law constructs an implied contract, which may be sued upon either in the shape of an action of assumpsit or of tort, a contract, implied from the breach of duty, arising out of the relation in which the parties stood, and is not a liability of the sort intended by the legislature. I think that, upon that ground, the judgment in the County Court was right.

HAYES, J.—I entirely agree. The 153rd section was chiefly intended to meet the cases of bankrupts liable by reason of mercantile contracts. I may illustrate it by referring to the class of cases of which *Green* v. *Bicknell* (8 Ad. & E. 701; 7 L. J. Q.B. 271) is one, where the measure of damages in an action of contract is the difference between the contract and market prices at the time when the contract should have been fulfilled. Under such circumstances the claim for damages was formerly not provable under the bankruptcy. This was a very great grievance, which has now been remedied. But the contract in the present case is quite different from that which is contemplated by section 153; and I do not think that the appellant can be said to be liable by reason of a contract to a demand in the nature of damages. The cause of action is well described in the particulars as being for wrongfully allowing the goods of the plaintiff to be seized under the distress for rent. I think that this point is very like that which was raised in *Tattan* v. *the Great Western Railway Company* (29 L. J. Q.B. 184), where this Court held that the action against common carriers for the loss of goods is founded upon the breach of duty independently of contract. The claim is founded upon an implied contract, which does not come within section 153.

Judgment for the plaintiff.

IN THE QUEEN'S BENCH. July 3, 1869.

STRINGER AND OTHERS *v.* THE ENGLISH AND SCOTTISH MARINE INSURANCE COMPANY.

38 L. J. Q.B. 321; L. R. 4 Q.B. 676: affirmed, [1870] E. R. A.; 39 L. J. Q.B. 214; L. R. 5 Q.B. 599; 22 L. T. 802; 18 W. R. 1201; 10 B. & S. 770 (Ex. Ch.).

Marine Insurance—Capture—Abandonment—Claim for Partial Loss—Subsequent Claim for Total Loss.

MARINE INSURANCE. D. J.—*The plaintiffs insured with the defendants the cargo on board a ship bound from Liverpool to Matamoras, against the usual perils, including "takings at sea, arrests, restraints and detainments of all kings, princes, and people." The policy also contained a suing and labouring clause, by which, in case of misfortune, it was provided that "it shall be lawful to the insured, their factors, servants and assigns, to sue, labour and travel for, in, and about the defence, safeguard, and recovery of the aforesaid subject-matter of this insurance, or any part thereof, without prejudice to this insurance, the charges whereof the said company (the defendants) will bear in proportion to the same hereby insured." It was also provided that the "acts of the insurer or insured, in recovering, saving, or preserving the property insured, shall not be considered a waiver or acceptance of abandonment." The ship sailed on her voyage, and being captured by a United States cruiser, was taken to New Orleans, where the captors instituted a suit for her condemnation in the Prize Court. The insured contested the suit, electing to treat the seizure as a partial loss. They obtained the judgment of the Court in their favour. Against this judgment the captors, on July* 1, 1864, *appealed, and the judgment was suspended. On September* 12, *the insured gave a formal notice of abandonment, which the insurers refused to accept. Subsequently the insured informed the insurers that endeavours were being made to sell the ship and cargo, and that they were resisting such sale, and they requested them to assist in giving*

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bail to prevent it. The insurers refused to interfere. The sale of the goods could have been prevented by depositing the full value of the goods, or by giving bail for them, and the insurers had opportunity for taking either of such steps, but declined to do so. The ship and cargo were then sold by order of the Prize Court, and the insured gave a fresh notice of abandonment, which was again refused. The insured could not, under the circumstances, by any means which they could reasonably be called upon to adopt, have prevented the sale:—Held, *that although the insured had at first elected to treat the loss as a partial one, and although the fact of the appeal against the judgment would not justify them in changing their election, and claiming for a total loss, yet that the sale of the cargo by order of the Prize Court did amount to such a change of facts as would give them a right, if they chose, to maintain an action upon the policy for a total loss.*

This action was brought upon a policy of insurance for 5,000*l.* effected by the plaintiffs with the defendants on goods, to recover for a total loss.

The defendants paid into Court 1,100*l.*

By consent a SPECIAL CASE was stated, which was substantially as follows:

1. In July, 1863, the goods which formed the subject-matter of insurance were shipped on board the "*Dashing Wave*," a British ship then about to sail from Liverpool to Matamoras in the empire of Mexico.

2. The insurance was effected by the plaintiffs, on behalf of the owner, with the defendants[1].

3. The ship sailed for Matamoras, where the goods were to have been delivered to the consignees thereof. At that time war was being carried on between the United States and the Confederate States of America. Matamoras is near to certain forts which were then blockaded by the United States.

5. On November 2, 1863, the ship anchored about three miles off Matamoras; and on the 5th she was seized by the United States cruisers, and carried into New Orleans.

6. A suit was instituted by the captors in the Prize Court at New Orleans, for the purpose of having the ship and cargo adjudged a lawful prize. The owner of the cargo contested the suit, and wrote to the firms who had shipped the cargo, on his behalf, informing them of the facts.

8. On June 16, 1864, judgment was given against the captors, decreeing restitution of the ship and cargo. On the 22nd judgment was signed, and on July 1 the captors appealed, the ship and cargo being detained, restitution being suspended.

10. On September 12, 1864, the plaintiffs wrote to the defendants informing them of the facts, and giving them notice that they abandoned the cargo, and claiming immediate payment of a total loss.

11. On September 17, 1864, the defendants wrote declining to receive the abandonment.

12. A notice of abandonment had been given previously to the said letter of September 12, and after that time all letters and communications on the subject received by the plaintiff were communicated to the defendants.

13. Application was made by the captors to the Prize Court to order that the cargo should be sold, unless bail were given by the defendants in the prize suit.

14. The following letter was then written to the defendants by the plaintiffs:

"By advices recently received from New Orleans, it appears endeavours

(1) The insurance was against the usual perils, including "takings at sea, arrests, restraints and detainments of all kings, princes, and people." The policy contained a provision that in case of misfortune "it shall be lawful to the insured, their factors, servants and assigns, to sue, labour and travel for, in, and about the defence, safeguard and recovery of the aforesaid subject-matter of the insurance; the charges whereof the said company will bear in proportion to the sum hereby insured." It was also expressly declared and agreed "that the acts of the insurer or insured in recovering, saving or preserving the property insured shall not be considered a waiver or acceptance of abandonment."

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are being made to sell the '*Dashing Wave*' and her cargo, and a meeting of the parties interested has recently been held at Liverpool for the purpose of arranging to give bail and prevent such sale. The result of this meeting was that Mr. Dean (the managing owner) has been authorized to wait upon the Foreign Office, and endeavour to prevail upon the authorities there to give such instructions as shall prevent the sale of the ship and cargo until the appeal be decided. But as it is uncertain whether the interference of the Foreign Office will be successful, we are instructed by our friends, for whom we effected the policy for 5,000*l.* on goods by her, and which was underwritten by you, to inquire whether, in case such interference does fail, you will be willing to join in giving bond to the extent of 5,000*l.*, covered by the above-named policy, in order to prevent such sale."

15. On December 9 the defendants wrote declining to interfere in any way in the matter.

(The case was amended so as to set out the evidence as to the expediency of giving bond or bail in order to prevent the sale of the cargo, and power was given to the Court to draw inferences of fact. It will be seen from the judgment, that the Court did draw such inferences, and it is not necessary to set out the evidence here.)

16. In order to procure bail and prevent the cargo being sold, the plaintiffs again wrote the defendants, who again refused to interfere.

25. On April 26, 1865, no bond or bail having been given by or on behalf of any of the parties interested in the suit, the ship and cargo were sold by order of the Prize Court, and the proceeds paid into Court to be detained pending the appeal; and such proceeds were still in the said Court at the commencement of this action.

27. On receipt of the intelligence of the sale, the plaintiffs gave a fresh notice of abandonment, and claimed for a total loss.

28. The defendants again refused to accept it.

29. This action was commenced, and while pending, the appeal was heard and judgment given affirming the aforesaid judgment of the Prize Court.

The question for the opinion of this Court was, whether, under the above circumstances, the plaintiffs were entitled to recover for a total loss of the goods.

If the Court should be of opinion that the plaintiffs were entitled to recover for a total loss, then judgment was to be entered for them for 5,000*l.*, and such interest thereon as the Court should think fit, in addition to the sum of 1,100*l.* paid into Court, together with all costs of suit.

If the Court should be of opinion that the plaintiffs were not entitled to recover for a total loss, it was to be referred to an average-stater to ascertain whether the money paid into Court was sufficient to cover the average loss and the expenses under the suing and labouring clause: and judgment for costs was to be entered for the plaintiffs, or for the defendants accordingly; provided that the costs of and attending this special case should be the defendants' costs in any event.

The case was argued (on June 8) by

Mellish and *Watkin Williams*, for the plaintiffs, and by

Sir G. Honyman (*Kemplay* and *Cohen* with him), for the defendants.—It is considered unnecessary to report the arguments, as they sufficiently appear from the judgment of the Court.

The following cases were cited, in addition to those which are mentioned in the judgment.—*Farnworth* v. *Hyde* (18 Com. B. Rep. N.S. 835; 34 L. J. C.P. 207); *Palmer* v. *Naylor* (10 Ex. Rep. 382; 23 L. J. Ex. 323); *Rosetto* v. *Gurney* (11 Com. B. Rep. 176; 20 L. J. C.P. 257); *Fleming* v. *Smith* (1 H.L. C. 513); *Benson* v. *Chapman* (2 H.L. C. 696); and *Moss* v. *Smith* (9 Com. B. Rep. 94; 19 L. J. C.P. 225).

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The judgment of the Court [1] was delivered (on July 3) by—

BLACKBURN, J.—By this case it appears that the plaintiffs had, in the year 1863, made insurance with the defendants to the amount of 5,000*l.* on goods valued at 11,500*l.* per the ship "*Dashing Wave*," from Liverpool to Matamoras, against the usual perils, including "takings at sea, arrests, restraints, and detainments of all kings, princes and people," and the policy contained a provision that in case of misfortune "it shall be lawful to the insured, their factors, servants and assigns, to sue, labour and travel for, in and about the defence, safeguard and recovery of the aforesaid subject-matter of this insurance or any part thereof, without prejudice to this insurance; the charges whereof the said company will bear in proportion to the sum hereby insured." And it is expressly declared and agreed "that the acts of the insurer or insured, in recovering, saving and preserving the property insured, shall not be considered a waiver or acceptance of abandonment." We may observe that while, on the one hand, such acts do not, of themselves, produce any such effect as that suggested in this provision—see per Lord Abinger, *Roux* v. *Salvador* (3 Bing. N.C. 287; 7 L. J. Ex. 328), cited *post*,—the provision itself does not, on the other hand, prevent such acts from having their effect properly due to them as evidence that the parties have made their choice. Being so insured the "*Dashing Wave*" sailed with the goods on board, and during the continuance of the risk she was, on November 5, 1863, seized by a cruiser of the United States and carried into New Orleans, where a suit was immediately instituted by the captors in a Prize Court against the ship and cargo, for the purpose of having them adjudged a lawful prize. It is clear at this time the cargo was, by one of the perils insured against, taken entirely out of the control of the assured under circumstances which rendered it doubtful whether it would ever be restored, or if restored, at what period. Under such circumstances the assured has a right to elect whether he will retain the property in himself, and treat the loss as a partial one, or abandon it to the underwriters and claim for a total loss; and he is bound to make that election promptly, and, where it is practicable, to inform the underwriters that he has so made it. This is very clearly explained by Gibbs, C.J., in *Gernon* v. *the Royal Exchange Assurance Company* (6 Taunt. 387). And the regular mode, according to mercantile usage, of notifying such an election is by giving notice of abandonment. We need not inquire, in the present case, whether it is the only mode, or how long the assured might have waited after hearing of the seizure of their goods, before determining whether they would abandon or not, for we think it clear, as a matter of fact, that they did elect to treat the seizure as a partial loss, no doubt under the expectation that their goods would be soon restored to them, and that at Matamoras they would be of such a value as to make it their interest to keep them, coming on the underwriters for compensation for the detention and expense of getting back the goods, instead of coming on them for the whole insured value, giving up the property to the underwriters in proportion to their insurance. They intervened, and conducted the litigation so successfully, that on June 16, 1864, the Prize Court, at New Orleans, gave judgment against the captors, and decreed the restitution of the ship and cargo. On July 1 the captors appealed; and, in consequence, the judgment of restitution was suspended till the decision of the Court of Appeal. It does not appear distinctly when the news of these proceedings arrived in this country; but on September 12, 1864, the assured, who must have then known that there was an appeal, for the first time sent the defendants a formal notice of abandonment, which they, as is the usual course, refused to receive, and declined to interfere. After this time it is stated in the case that all letters and communications on the subject, which were received by the assured, were from time to time communicated by them to the defendants.

On December 7, 1864, and again on February 9, 1865, the assured informed the underwriters, that endeavours were being made in New Orleans to sell the ship and cargo, and that they were endeavouring to prevent the sale of the

(1) Cockburn, C.J., Blackburn, J., Mellor, J., and Lush, J.

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cargo, and requesting them to assist in giving bail to prevent it. The underwriters on each occasion refused to interfere. The case has been amended by stating the evidence as to what occurred, and giving the Court power to draw inferences of fact; and we think that, in fact, the sale of the goods which are the subject of this insurance could have been prevented by depositing the value of these goods, or giving bail for them in the Prize Court, without giving security for the ship and the rest of the cargo, but could not have been prevented in any other way, and that the underwriters had full opportunity to take either of those steps if they pleased, and that they declined to do so. And that the assured also declined to take either of those steps.

On April 24, 1865, the Prize Court made an order that the ship and cargo should be sold, and on May 25, 1865, they were sold, and the proceeds paid into Court. The assured gave a fresh notice of abandonment, which was again formally refused, and this action was commenced; and the question is whether the plaintiffs can recover as for a total loss. We think that this depends upon a question of fact, namely, whether, under the circumstances, the assured ought to have given bail to prevent the sale; but before discussing the evidence set out in the case, it will be more convenient to consider how the point arises.

The assured having elected to treat the seizure and detention as a partial and not a total loss, and proceeded with the suit on their account, were bound by this election, and could not afterwards turn round and treat the same seizure and detention as a total loss. As is well pointed out in 2 *Phillips on Insurance* (sect. 1669, 3rd edit., p. 370), where the cargo still subsists in specie and may be recovered, the question depending on abandonment is, which party should be at the risk of the market and the solvency of agents, neither of which, independently of the direct effect of the perils insured against, concerns the insurers. To allow the assured to change his election whilst the circumstances remain the same, would enable the assured to treat the property as his as long as there was a prospect of profit from the rise in the market, and as the property of the insurers as soon as there was a certainty of loss, which would be inequitable—*Qui commodum sentit sentire debet et onus.* But that election, though binding so long as the circumstances remain the same, does not prevent the assured from claiming for a total loss, if a change of circumstances occurs, which makes the loss actually total. In *Roux* v. *Salvador* (3 Bing. N.C. 287; 7 L. J. Ex. 328), Lord Abinger thus states the law: "If the assured prefers the chance of any advantage that may result to him, beyond the value insured, he is at liberty to do so, but then he must also abide the risk of the arrival of the thing insured in such a state as to entitle him to a partial loss only." Lord Abinger, speaking with reference to the circumstances of the case before him, in which the question was whether the goods could have reached their destination, uses language not generally applicable, though the principle is. He then proceeds, "If, in the event, the loss should become absolute, the underwriter is not the less liable upon his contract because the insured has used his own exertions to preserve the thing insured, or has postponed his claim till that event of a total loss has become certain, which was uncertain before."

In *Phillips on Insurance* (3rd edit.), vol. 2. c. 17. v. 12, the author collects the various authorities, English and American, on this subject with great learning, and also treats the subject with great force of reasoning. He comes to the conclusion, p. 371, s. 1669, we think rightly, that the assured having once by delay shewn that he did not mean to abandon, "loses the right of abandoning on the same state of facts relative to the extent and degree of the operation and effects of the perils insured against." He explains what he means by this in the following sections. He expresses an opinion, that if an embargo or other detention were, in the result, to turn out much longer than was reasonably anticipated, the assured, though he might, in the first instance, have elected to treat the loss as partial, might on discovering this treat it as total, unless something had occurred in the interval in consequence of the delay, although the detention had never changed its nature and by condemnation or sale been turned into a total destruction of the thing. We are unwilling to say

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that this could never be the case; but we think it can only be where it is shewn that the delay occasioned by the detention is much greater than could have reasonably been anticipated at the time of the election made, and we think that, in this case, the prolongation of the litigation by the captors appealing was not more than might have been reasonably anticipated when the ship and cargo were first libelled. We think, therefore, that the appeal on July 1 did not amount to such a change of facts as would justify the assured in changing their election, and consequently that the assured could not, by the notice of abandonment, on September 12, 1864, make the loss by the seizure and detention a total loss, after having elected to treat it as partial only.

But we think the sale by the Prize Court stands on a very different footing. If, notwithstanding the intervention and opposition of the plaintiffs, the Prize Court in America had wrongfully condemned the goods, and they had been under the sentence sold, the case would have been identical with that of *Mullett* v. *Shedden* (13 East, 304), where the very point decided was that by the sale, "the property was totally lost to the owner, and the necessity of any abandonment was altogether done away with"; and the principle is, as stated by Lord Abinger, in the passage already cited, from the judgment of the Exchequer Chamber in *Roux* v. *Salvador* (3 Bing. N.C. 287; 7 L. J. Ex. 328), that inasmuch as in the event the loss had turned out to be absolute, "the underwriter is not the less liable upon his contract because the insured has used his own exertions to preserve the thing assured, or has postponed his claim till that event of a total loss has become certain which was uncertain before."

But, in the present case, the sale occurred not under a condemnation but because the assured did not give security to prevent the sale. The defendants had the fullest notice of what was about to happen, and had ample opportunity to interfere and give security so as to prevent the sale; but still the assured, if by any means such as he could reasonably be expected to use, could have prevented the sale, he was bound to use them; and if the sale was directly occasioned by his default, though remotely, by the seizure, he cannot recover against the underwriters, on account of that sale. But the assured are not bound to use unreasonable exertions in order to preserve the thing insured; and if the giving of bail or deposit of the money would have exposed them to expense or risk of expense beyond the value of the object, or as the same idea is often expressed, if the steps necessary to prevent the sale were such as a prudent uninsured owner would not have adopted, we think they were not in default, and the sale was then a total loss occasioned by the seizure. The question is therefore one of fact. The case has now been amended by setting out the evidence on this question, and giving the Court power to draw inferences of fact.

It appears that the assured might have prevented the sale by depositing the *full value* of the goods; but we think it can seldom be reasonable to require an assured to deposit the full value of the subject-matter in a foreign Court and country, and consequently that, without reference to the peculiarity arising from the state of the American currency, the assured was not bound to adopt that alternative. He might have prevented the sale by giving security; and generally, we think, that it would be a reasonable thing to give security rather than allow the goods to be sold. But in this case, from the peculiarly fluctuating nature of the American currency at the time, those who became sureties must have bound themselves, in the event of condemnation, to pay the value of the goods estimated in paper dollars at a time when gold was at from 150*l*. to 180*l*. premium, and it was not improbable that they might be called upon to pay when gold was at par, thus being liable to pay from 150*l*. to 180*l*. per cent. more than the value of the goods.

No doubt it was also possible that when called upon to pay, gold might have been at a still higher premium, so that they would have been called on to pay less than the value; but we do not think it was reasonable to require the assured to enter into such a very speculative transaction. It is true that in the event which, since the commencement of this action, has happened, of the judgment being affirmed, it would be quite immaterial for how much the

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security was given, but that could not be known at the time when the assured were called upon to determine whether they would give security, and we find that in fact an uninsured owner of part of the cargo, Mr. Simpson, who had nobody's interest to consider but his own, did, after considering the question, decline either to deposit money or to give bail for his goods, and allowed them to be sold, which, though not conclusive, is strong evidence as to what course a prudent man would take.

We come, therefore, to the conclusion of fact, that the assured could not by any means which he could reasonably be called on to adopt, have prevented the sale by the American Prize Court, which at once put an end to all possibility of having the goods restored in specie, and consequently entitled the assured to come upon their insurers for a total loss. Even then the assured was not bound to do so. If he had thought that it was more for his interest still to claim the proceeds of the sale in the hands of the American Court as his money, and come on the underwriters only for the partial loss, he might do so. But it is clear, as a matter of fact, that he elected to come upon the insurers for an indemnity for a total loss, and that by so doing the insurers when they have indemnified him will be entitled to be subrogated for him, and get what they can out of the hands of the Americans for their own benefit—see *Randall* v. *Cochrane* (1 Ves. sen. 98); *Mason* v. *Sainsbury* (3 Dougl. 61); *Yates* v. *Whyte* (4 Bing. N.C. 272); and *Wright* v. *Morley* (11 Ves. 22): see also sta. 20 Vict. c. 97, s. 5. Whether this will ultimately turn out advantageous to the underwriters or not, is a matter which concerns the parties only.

It only remains to add, that the interest should be at the rate of 5*l*. per cent. from May 25, 1863, the date of the sale, to the day on which judgment is given.

Judgment accordingly for the plaintiffs.

IN THE QUEEN'S BENCH. June 15, 16, July 3, 1869.

WREN AND ANOTHER *v.* WEILD.

38 L. J. Q.B. 327; L. R. 4 Q.B. 730; 20 L. T. 1007; 10 B. & S. 51.

Approved, *Steward* v. *Young*, [1870] E. R. A.; 39 L. J. C.P. 85; L. R. 5 C.P. 122; 22 L. T. 168; 18 W. R. 492 (C.P.). Followed, *Halsey* v. *Brotherhood*, [1882] E. R. A.; 51 L. J. Ch. 233; 19 Ch. D. 386; 45 L. T. 640; 30 W. R. 279 C. A.). Approved, *Burnett* v. *Tak*, 1882, 45 L. T. 743 (Ch. D.); *Household* v. *Fairburn*, 1885, 51 L. T. 498 (Ch. D.). See, *Union Electrical Power Company* v. *Electrical Storage Company*, [1888] E. R. A.; 38 Ch. D. 325; 57 L. T. 791; 36 W. R. 263 (C. A.); *Barrett* v. *Day*, [1890] E. R. A.; 59 L. J. Ch. 464; 43 Ch. D. 435; 62 L. T. 597; 38 W. R. 362 (Ch. D.); *Skinner* v. *Shew*, [1893] E. R. A.; 62 L. J. Ch. 196; [1893] 1 Ch. 413; 67 L. T. 696; 41 W. R. 217 (C. A.).

Slander of Title—Liability for threatening to bring Action—Proof of Malice—Patent.

PATENT. E. SLANDER OF TITLE.—*The plaintiff and the defendant were each of them possessed of a separate patent for the construction of spooling-machines. The plaintiff was negotiating for the sale of his machines to different manufacturers, some of whom were already using the defendant's machines under licences from him. The defendant wrote to these manufacturers letters stating that the plaintiff's machines were infringements of a patent of the defendant's, and that if they were used he (the defendant) would claim royalties for their use, and if they were not paid take legal proceedings. In consequence of these threats, the plaintiff lost the sale of his machines. The plaintiff then brought his action, the declaration stating the facts above mentioned, and averring that the letters were falsely and maliciously*

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written; and the defendant pleaded not guilty. At the trial the plaintiff tendered evidence to shew that the defendant's patent (which had not been disputed by scire facias *or otherwise) was void for want of novelty; so that the plaintiff's machines were no infringement of the defendant's patent, and the evidence was rejected and a nonsuit directed*:—Held, *that this evidence was properly rejected, as, if admitted and accepted as true, it could only shew that the patent was void, and not that the plaintiff made the communication to the intended purchasers* mala fide, *and without any intention of instituting proceedings against them*:—Held, *also, that the nonsuit was right, as the plaintiff did not affirmatively prove that the defendant's claim was not* bonâ fide, *but a malicious attempt to injure the plaintiff by asserting a claim which, to his knowledge, was unfounded; and that in the absence of such proof the action would not lie.*

The action for slander of title applies not only to cases where the false and malicious assertion relates to real property, but where it relates to personal chattels; and,

Semble—*That an action will lie against one for taking civil proceedings which, to his own knowledge, are without any foundation.*

Declaration—That before and at the time when, &c., the plaintiffs carried on the trade and business of engineers and machine-makers, under the style or firm of Wren & Hopkinson, and in their trade and business made for sale and sold, and were making for sale and selling from time to time certain machines called spooling-machines, and by the making and selling of such machines were acquiring great gains and profits, and the plaintiffs had sold some of the machines to certain persons, carrying on trade under the style and firm of R. F. & J. Alexander & Co., and thereupon the defendant, in a letter written and sent by the defendant to these persons, falsely and maliciously wrote and published of the plaintiffs in relation to their trade and business, and in relation to these machines being so made and sold by them, and in relation to the machines sold by the plaintiffs to these persons, the words following, that is to say: "It has come to our knowledge that you (meaning the said persons) have on your premises, and are using spooling-machines made by Wren & Hopkinson (meaning the plaintiffs) of this city, (and thereby meaning the said machines sold by the plaintiffs to the said persons) under an alleged patent of Ermen & Smith, which we have been advised is an infringement of our patent spooling-machine. You are, perhaps, not aware that other manufacturers have had similar machines, and when they became aware that they were an infringement of our patent they at once discontinued their use and returned them to the makers. We should regret exceedingly that any misunderstanding between us on this point should arise, but, in justice to ourselves, should you think fit to dispute our claim, which is 25*l.* per spindle, we shall reluctantly be compelled to enforce it, along with damages, as we may be advised. Your reply per return, stating the number of spindles you have, will oblige, yours truly, WILLIAM WEILD & Co." (meaning the defendant).

The declaration contained other counts alleging similar statements by the defendant, and in each count there was an allegation of special damage to the plaintiffs through certain specified persons, who would otherwise have purchased their machines, being prevented from doing so.

Plea, not guilty, and joinder in issue.

At the trial, before Lush, J., at the Manchester Spring Assizes, 1869, a nonsuit was entered and a rule afterwards obtained. The nature of the proceedings at the trial and the arguments upon shewing cause against the rule are described in the judgment of the Court.

Quain and *Aston*, for the defendant, shewed cause, and

Webster and *Baylis*, for the plaintiffs, supported the rule.—For the plaintiffs the following cases were cited: *Green* v. *Button* (2 Cr. M. & R. 707; 5 L. J. Ex. 81); *Evans* v. *Harlow* (5 Q.B. Rep. 624; 13 L. J. Q.B. 120); *Malachy* v. *Soper* (3 Bing. N.C. 371; 6 L. J. C.P. 32); *Young* v. *Macrae* (3 Best

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& S. 264; 32 L. J. Q.B. 6). For the defendant, *Gerard* v. *Dickenson* (4 Coke, 18 (*a*)); *Crossley* v. *Dixon* (10 H.L. C. 293; 32 L. J. Ch. 617); *Smith* v. *Spooner* (3 Taunt. 246); *Pitt* v. *Donovan* (1 M. & S. 639); *Pater* v. *Baker* (3 Com. B. Rep. 831; 16 L. J. C.P. 124).

Cur. adv. vult.

The judgment of the Court[1] was (on July 3) delivered by

BLACKBURN, J.—This was a rule to set aside a nonsuit, against which cause was shewn in these sittings, before my Brothers Lush and Hayes, and myself. The declaration in this case contained eight counts, to the effect that the plaintiffs made and sold spooling-machines, and that the defendant falsely and maliciously wrote to persons in treaty with the plaintiffs for such machines that they were infringements of a patent of the defendant's, and that if they were used, he would claim royalties for their use, and, if not paid, take legal proceedings; in consequence of which the plaintiffs lost the sale of their machines. There was no allegation that the defendant did this without reasonable and probable cause, nor, except in so far as might be implied from the terms of the defendant's letters (which, however, were averred to be false), did it appear on the face of the declaration that the defendant had any patent, or was other than a gratuitous intermeddler. The defendant pleaded not guilty, upon which issue was joined. On the trial, before my Brother Lush, it was proved that the defendant had a subsisting patent. The specification described a very complicated machine, and claimed the whole as a new combination, and also separately claimed many subordinate parts of the machine as new. The plaintiffs' machine did not comprise in it anything precisely identical with any of those subordinate parts, but so closely resembled them as at least to give plausible grounds for contending that they were equivalent to them. The plaintiffs, it appeared, were negotiating for the sale of their machines to different manufacturers, some of whom, if not all, were already using the defendant's machines under licences from him. The defendant wrote to them the letters complained of in the declaration. There were then some abortive attempts at arranging the terms of an indemnity to be given by the plaintiffs to their customers, but, those going off, the customers refused to buy the plaintiffs' machines with the risk of litigation with the defendant. The plaintiffs then brought the present action. At the trial the plaintiffs' counsel offered to prove, in addition to the facts above stated, various specifications and machines existing before the date of the defendant's patent, which according to his contention would shew that the defendant's specification claimed matters that were not new; and also that the defendant had himself used them, and consequently, as it was argued, knew the facts which would render his patent void. My Brother Lush was of opinion that inasmuch as the patent was still subsisting, and not set aside on *scire facias* or otherwise, this evidence was immaterial. Mr. Webster, on the argument before us, contended that this evidence would not only have shewn that the defendant's patent was void, but would also have shewn that the plaintiffs' machines were not an infringement of the patent, inasmuch as, he said, the plaintiffs did not use the whole of anything the defendant claimed, and the evidence would shew that the part they used was not new, and therefore not an infringement upon the rule laid down in *Sellers* v. *Dickinson* (5 Ex. Rep. 312; 20 L. J. Ex. 417). The evidence was rejected, and my Brother Lush directed a nonsuit. The most favourable view for the plaintiffs is to consider whether, if this evidence had been received, and had proved all that it could prove, namely, that the patent of the defendant was void, and that even if it was good, an action brought on it against those who used the plaintiffs' machine must have failed, and that the defendant when he wrote the letters, knew the fact which would have produced this effect, this would leave evidence which the Judge ought to have left to the jury in support of the issue in the present action. And we think that there would not have been such evidence, and consequently that the nonsuit should not be set aside. It becomes

(1) Blackburn, J., Lush, J., and Hayes, J.

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therefore necessary to consider what would support the issue here joined. No action precisely like this has ever been brought, but there is a well-known action for slander of title, where an unfounded assertion that the owner of real property has not title to it, if made under such circumstances that the law would imply malice, or if express malice be proved, and special damage is shewn, such as, for instance, that a bargain to sell the land is lost, is held to give a cause of action. And we see no reason why a similar rule should not apply where the false and malicious assertion relates to goods, and the damage arises from the loss of a bargain to sell them. And accordingly in *Green* v. *Button* (2 Cr. M. & R. 707; 5 L. J. Ex. 81) it was held on demurrer that a declaration which shewed that the defendant knew that he had no claim, and that his assertion of claim of right was made falsely and maliciously without reasonable and probable cause, and that special damage ensued, was good. The case of *Lovett* v. *Weller* (1 Rolle, 409) and the first resolution in *Sir G. Gerard* v. *Dickenson* (4 Coke, 18 (*a*); Cro. Eliz. 196) are authorities that without the allegation of knowledge or at least of want of reasonable and probable cause, the declaration would have been bad. But it is obvious that where a person claims a right in himself which he intends to enforce against a purchaser, he is entitled, and indeed in common fairness bound to give the intended purchaser warning of such his intention—see *Pitt* v. *Donovan* (1 Mau. & S. 639), and consequently we think no action can lie for giving such preliminary warning, unless either it can be shewn that the threat was made *malâ fide*, only with the intent to injure the vendor, and without any purpose to follow it up by an action against the purchaser, or that the circumstances were such as to make the bringing an action altogether wrongful. That an action may be brought under such circumstances as to render it morally wrong and injurious in fact, is certain, though the authorities leave it in doubt whether under any circumstances the person so sued can recover damages for the vexation and annoyance caused to him by the false suit. In *Maynard's Long Quinto* there is a case where (5 Edw. 4. 126) an action was brought alleging that the now defendant forged a bond in the name of the plaintiff, and afterwards sealed it in the name of the plaintiff, and sued on it, and recovered on it. It is now quite settled that the fact that the former suit had terminated against the second plaintiff would be fatal to his right of maintaining the second action, but that does not seem to have been settled law at the time, and though no decision was come to, the inclination of the Court seems to have been that for bringing a suit so manifestly wrongful to the defendant's own knowledge an action might be maintained. In *Sir G. Gerard* v. *Dickenson* (4 Coke, 18 (*a*); Cro. Eliz. 196) the point seems to have been considered, and according to the report by Lord Coke, who was himself counsel in the case, it was resolved, secondly, that inasmuch as the declaration shewed that with knowledge that the plaintiff was bargaining to sell his land, and the defendant alleged against her own knowledge that a lease, which was a forgery, gave her title to the land, and the bargain was thereby lost, the action lay; and Lord Coke cites the opinion in 5 Edw. 4. c. 126. with approbation. The case seems to have been a peculiarly hard one, as the defendant pleaded that she did not know that the deed was a forgery, and judgment was given against her on the assumption that she did know, because of grounds of special demurrer to the plea. In *Waterer* v. *Freeman* (Hob. 267), which was an action for maliciously and vexatiously issuing a second *fi. fa.* whilst the first was unreturned, the Chief Justice says, "If a man sue in a proper Court, yet if his suit be utterly without ground of truth, and that certainly known to himself, I may have an action on the case against him for the undue vexation and damage that he putteth me to by his ill practice." This was not necessary for the decision of the case before the Court, but it was by no means irrelevant, and is therefore an authority entitled to weight. On the other hand, in *Saville* v. *Roberts* (1 Ld. Raym. 374), Lord Holt, in delivering the judgment of the Exchequer Chamber, expresses an opinion that no such action would lie without alleging and proving some collateral wrong, as that he was maliciously held to bail, or the like. For this

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he gives two reasons, first, that a man is entitled to bring an action if he fancies he has a right, which is in accordance with Lord Ellenborough's reasoning in *Pitt* v. *Donovan* (1 Mau. & S. 639). But this reason is quite consistent with Lord Hobart's position, that the action will lie when it was *certainly* known to him that the action was utterly without ground. His second reason is, that the law considers that the party grieved has an adequate remedy in his judgment for costs. And on this the Court of Common Pleas acted in *Purton* v. *Honnor* (1 Bos. & P. 205). But this artificial reason does not apply in the present case; for whether the judgment for costs would or would not have been a recompense to the party sued, it could be none to the plaintiffs for the loss of their bargain if occasioned by a wrongful and malicious threat. If, therefore, the plaintiffs had given evidence on which the jury might properly find that the defendant made the communication to the intended purchasers *malâ fide*, and without any intention to institute legal proceedings at all against the purchasers, so that it was not a step taken in support of his real or fancied right against the purchasers, but entirely out of malice against the plaintiffs, or on which they might properly have found that the defendant did not, to use Lord Holt's phrase, so much as fancy he had a right, but, as Lord Hobart says, knew certainly that his claim was utterly without ground of truth, we are inclined to think that it would have been proper to leave that evidence to the jury in support of the plaintiffs' allegation that the defendant's letter was false and malicious; the question, whether that is enough without an express allegation of knowledge or want of reasonable and probable cause being on the record. But we think that as soon as it was shown in evidence that the defendant really had a patent right of his own, and was asserting it, the occasion privileged the communication, and the plaintiffs were bound to prove such malice as would support the action. As the evidence which they tendered was rejected, they are entitled to a new trial if, supposing it to have been received and to have turned out as favourable as possible to the plaintiffs, it would have made a case proper to have been left to the jury. But we think that, supposing everything had been proved which the evidence, if tendered, could have proved, there would have been no case on which the jury could properly have found for the plaintiffs. The whole reasoning of the Judges in *Pater* v. *Baker* (3 Com. B. Rep. 831; 16 L. J. C.P. 124) seems to us strongly in support of this conclusion. The advisers of the plaintiffs seem to have thought it was enough to maintain this action to shew that the defendant could not really have maintained any action, and that, if well advised, he would have been told so, so as in this action indirectly to try the question whether an action for the infringement of the patent could have been maintained: whilst, as we think, the action could not lie unless the plaintiffs affirmatively proved that the defendant's claim was not *a bonâ fide* claim in support of a right which, with or without cause, he fancied he had, but a *malâ fide* and malicious attempt to injure the plaintiffs by asserting a claim of right against his own knowledge that it was without any foundation. The rule therefore must be discharged.

Rule discharged.

IN THE QUEEN'S BENCH. June 7, 1869.

HARRIS AND ANOTHER *v.* QUINE.

38 L. J. Q.B. 331; L. R. 4 Q.B. 653; 20 L. T. 947; 17 W. R. 967; 10 B. & S. 644.

See, *Baile* v. *Baile*, [1872] E. R. A.; 41 L. J. Ch. 300; L. R. 13 Eq. 497; 26 L. T. 283; 20 W. R. 534 (V.C.); *In re Low*, [1894] E. R. A.; 63 L. J. Ch. 60; [1894] 1 Ch. 147; 70 L. T. 57 (C. A.); *Turner* v. *Midland Railway*, [1911] E. R. A.; 80 L. J. K.B. 516; 104 L. T. 347 (K.B. D.).

Conflict of Laws—Foreign Statute of Limitations—Lex Fori—*Attorney and Client—Right to Costs when first accruing.*

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INTERNATIONAL LAW. L.—*Where a foreign Statute of Limitations requires proceedings to be taken within a period shorter than that prescribed by the English statute, but like the English statute, does not affect causes of action, but only the remedy in respect of them; a foreign judgment declaring that a claim is barred by the local Statute of Limitations is no bar to an action here for that same claim within the period prescribed by the English law.*

SOLICITOR. K.—*Two attorneys in partnership having been retained to defend an action, it was decided in favour of the defendant upon which the plaintiffs appealed. While the appeal was pending, the partnership was dissolved, and the proceedings were continued by one of the partners separately:*—Held, *that the partners were not entitled to sue for their costs till the appeal was decided, so that the Statute of Limitations did not until then begin to run as against their claim.*

Declaration (the writ having been issued January, 1868) for money payable by the defendant to the plaintiffs for the work, &c., of the plaintiffs done as the attorneys and advocates of and for the defendant, at his request, and for fees payable by the defendant to the plaintiffs in respect thereof, and for materials and necessary things by the plaintiffs provided in and about the work for the defendant at his request; for money paid; and for money due from the defendant to the plaintiffs on accounts stated.

Second plea—The Statute of Limitations. Third plea—That the plaintiffs ought not to be admitted to say that the money is payable by the defendant to the plaintiffs as in the declaration mentioned, because before this suit the plaintiffs brought an action against the defendant in the Deemsters Court, Douglas, Isle of Man, for the same debt and cause of action as in the declaration mentioned, and such proceedings were thereupon had in that action that afterwards and before this suit it was considered by the judgment of the Court in the action that the defendant did not owe the debt or any part thereof, and that the plaintiffs should take nothing by their writ or in respect of the debt and cause of action; and the judgment still remains in force, &c.

Demurrer to the third plea and joinder in demurrer. The plaintiffs also joined issue on the pleas.

At the trial, before Blackburn, J., at the Middlesex Sittings, in Trinity Term, 1868, it appeared that the plaintiffs, Messrs. Harris and Adams, carried on business in the Isle of Man as attorneys, solicitors and advocates, in co-partnership, until October 1, 1862, when the co-partnership was dissolved.

In March, 1858, the defendant retained the plaintiffs as his advocates to defend a petition presented against him in the Ecclesiastical Court of the Isle of Man, to compel him to amend his return of the estate of Jane Quine, deceased, of which he had been appointed administrator. The case was finally heard in the Ecclesiastical Court on April 25, 1861, and decided in favour of the defendant. On September 2, 1861, the petitioners appealed from this decision to the Staff of Government, the Manx Court of Appeal, and (after a reference for the purpose of taxing the accounts and reporting to the Court) the appeal was heard on April 7, 1865, when the appellate Court varied the judgment of the Ecclesiastical Court.

The costs of the proceedings from the inception of the cause in the Ecclesiastical Court to its final termination by the judgment of the Court of Appeal on April 7, 1865, amounted up to the day of dissolution of partnership between Messrs. Harris and Adams, to the sum of 46*l.* 13*s.* 3*d.*, and from that period to the end of the suit to 18*l.* 1*s.* 4*d.* After the dissolution of the partnership the legal proceedings were conducted by Mr. Adams alone, with the sanction of the defendant.

The defendant having refused to pay the amount of the costs, two actions were brought against him in the Deemsters Court, Douglas, Isle of Man, one in the name of Harris and Adams for the sum of 46*l.* 13*s.* 3*d.*, and the other in the name of Adams alone for 18*l.* 1*s.* 1*d.* In the action by Adams alone the

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defendant paid the amount, subject to taxation. In the action by Harris and Adams he pleaded the Manx Statute of Limitations (three years).

He also contended that although where a single advocate brought an action for costs the action would not begin to run till the termination of the suit in respect of which these costs were incurred, yet that on the dissolution of the partnership of Harris and Adams, on October 1, 1862, there was a debt due to them, and that the statute ran from that date. The Court gave judgment for the defendant, the judgment stating that the defendant had pleaded the Statute of Limitations in bar of the suit, and that the plea was a good bar to it.

By the Manx Statute of Limitations it is provided that "actions of debt grounded upon any lending contract or demand, without specialty, which shall be sued or brought in any of the temporal Courts of the Isle shall be commenced and effectually prosecuted within three years next after the cause of such action, plaint or suit, and at no time afterwards."

The verdict was for the plaintiff for 45*l.* 10*s.* 3*d.*, with leave for the defendant to move to set it aside and enter a non-suit or a verdict for the defendant.

A rule having been obtained for the plaintiffs to shew cause why the verdict should not be set aside and entered for the defendant, or why the damages should not be reduced to 7*l.* 18*s.* (the costs of the appeal), or such sum as the Court might think fit, on the ground that the judgment for the defendant in the Isle of Man Court is, that the plea of the English Statute of Limitations was a bar to the plaintiff's claim, or some part of it; or why the Court should not amend the third plea; and ordering that the rule should come on for argument with the demurrer,—

R. G. Williams shewed cause, and argued the demurrer to the third plea.—The plaintiffs are entitled to judgment. The judgment in the Isle of Man merely decides that a term of three years has elapsed since the cause of action accrued, and not that the action cannot be maintained here. A foreign judgment for the defendant in a former suit, is no answer to an action in this country, unless there has been a decision on the merits. Whether or not a claim has been barred by a foreign Statute of Limitations is a question affecting the remedy, and not a question upon the merits—*Story's Conflict of Laws*, s. 576. The leading case upon which this passage is founded is *Huber* v. *Steiner* (2 Bing. N.C. 202; 4 L. J. C.P. 233). There an action was brought in England on a French promissory note, and it was proved that according to the law of limitations in the *Code Civil* no action could have been brought on the note. The Court in giving judgment, p. 210, assumed that if the prescription of the French law was only a limitation of the time within which an action could be brought in the French Courts, it would be no bar to the right of action in England. *Ruckmaboye* v. *Mottichund* (8 Moore P.C. 4) is an authority to the same effect. Jervis, C.J., saying, p. 35, "In truth it has become almost an axiom in jurisprudence that a law of prescription or law of limitation, which is meant by that denomination, is a law relating to procedure having reference only to the *lex fori*." In *Don* v. *Lippmann* (5 Cl. & F. 1; Tudor's Lead. Cas. 213), it was held by the House of Lords that where a bill was accepted in France and a judgment obtained there against the acceptor that he might still be sued in Scotland, and that the Scotch law of prescription would apply to the suit.

[COCKBURN, C.J.—That case appears to have been the converse of the present one. But is it not another thing to say that where the cause of action is a foreign one, and the plaintiff has resorted to the foreign Courts, that he may still maintain his action here?]

Where the decision of the foreign Court is not upon the merits, there can be no bar here.

[HAYES, J., referred to *The British Linen Company* v. *Drummond* (10 B. & C. 903), where in an action in this country on a Scotch bond an opinion seems to have been expressed that the English law of limitation would apply.]

In the case alluded to it could not have been said that an action in Scotland would be barred by the proceedings in England.

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[BLACKBURN, J.—No; it would have been said, "You are setting up the law of England against that of Scotland."]

In *The Bank of the United States* v. *Donnally* (8 Peters (American Rep.), 361), where an action was brought in Virginia on a promissory note made in Kentucky, it was held that the Statute of Limitations in Virginia must govern the case, Story, J., saying, page 371, "As the contract upon which the original suit was brought was made in Kentucky, and is sought to be enforced in the state of Virginia, the decision of the case in favour of the defendant, upon the plea of the Statute of Limitations, will operate as a bar to a subsequent suit in the same state, but not necessarily as an extinguishment of the contract elsewhere, and especially in Kentucky." In *Westlake on Private International Law*, p. 376, par. 393, it is laid down that in order that a plea of a foreign judgment should be a conclusive bar here, it must have been given on the merits, referring as an authority to *Garcias* v. *Ricardo* (14 Sim. 265; 14 L. J. Ch. 339); and this view is further illustrated by *Story's Conflict of Laws*, s. 577. With regard to the second point, it is quite clear that the Statute of Limitations did not begin to run till the termination of the whole suit, including the appeal. *Wadsworth* v. *Marshall* (2 Cr. & J. 665; 1 L. J. Ex. 250) shews that an attorney cannot insist on payment of his bill at any stage of an action at law; and in *Whitehead* v. *Lord* (7 Ex. Rep. 691; 21 L. J. Ex. 239) this doctrine was confirmed in the case of a Chancery suit in which no step had been taken for many years. All that is required is, that the attorney should elect to consider the appeal as a continuation of the suit.

Baylis, in support of the rule.—The third plea is a good one. It is admitted that questions upon Statutes of Limitation are part of the *lex fori*, but this rule is subject to another, *Nemo debet bis vexari pro eadem causa*. The plea shews that a foreign Court has pronounced judgment against the defendant, and this judgment must be considered as a judgment on the merits. A plea of a foreign judgment is an issuable plea, and an issuable plea is defined as a plea going to the merits—*Mackay* v. *Wood* (7 Mee. & W. 420; 10 L. J. Ex. 176).

[COCKBURN, C.J.—But only a plea to the merits as distinguished from a dilatory plea.]

The Court in holding the judgment conclusive would be paying regard to the comity of nations.

[BLACKBURN, J.—This judgment cannot estop the plaintiff from denying that the suit is more than six years old.]

The American authorities all shew that where the debt is extinguished the foreign law must prevail. The late case of *Phillips* v. *Eyre* (38 L. J. Q.B. 113) is an example of this rule.

[COCKBURN, C.J.—In *Phillips* v. *Eyre* (38 L. J. Q.B. 113) the right of action was taken away on the merits.]

With regard to the second point, the attorney's right to costs accrues directly a final judgment is given. In *Rothery* v. *Munnings* (1 B. & Ad. 15) it was held that the right accrued when judgment was given on an appeal, and Lord Tenterden said (page 17), "When the suit was terminated by a sentence, there is no doubt that the proctor had a right to call for the amount of his bill."

[BLACKBURN, J.—In the present case, though judgment had been given, there was an instant appeal.]

The suit in the common acceptation of the term had come to an end.—He cited *Harris* v. *Osbourn* (2 Cr. & M. 629; 3 L. J. Ex. 182) and *Phillips* v. *Broadley* (9 Q.B. Rep. 744 16 L. J. Q.B. 72).

COCKBURN, C.J.—I think that the rule must be discharged. As regards the question of whether a judgment recovered on a plea of the Statute of Limitations in the Manx Court is a bar to the bringing of an action here, I think we are bound by authority, and that the case of *Huber* v. *Steiner* (2 Bing. N.C. 202; 4 L. J. C.P. 233) is binding and conclusive upon us. If the matter were *res integra*, I should have required further time to consider whether a regulation as to the time within which a debt may be sued for is wholly a matter of procedure, and not a matter forming part of the contract. I think it might well be

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argued that where by the law of a country money due from one person to another can only be recovered by suit within a certain time, the contract may be interpreted as binding the debtor only to pay the debt when due, or within the period to which the right of action is limited. But the case is a binding authority, and the judgment in the Manx Court can have no effect in this action. The plea is no plea to the merits, and the question is, whether it comes to more than this, that by the law of the Isle of Man the term of prescription is three years. If this be so, the issue in the Manx Court is not the same which would arise here, viz., whether the cause of action had accrued within six years. Upon the other ground of the argument I have nothing to add to what has been already said. Mr. Baylis's argument might have been a good one if nothing had been done after the first judgment in the administration suit. But, as soon as the defendant instructed his attorney to appeal from the judgment, the whole matter of the appeal was nothing more than a continuation of the original suit, and the attorney was not in a position to bring an action to recover the amount of his bill till the appeal was terminated.

BLACKBURN, J.—I am entirely of the same opinion. I think that it must now be taken to be decided that Statutes of Limitation are matters relating to the conduct of a suit, and part of the *lex fori*. It must follow, therefore, that a plea of the Manx Statute of Limitations cannot be good in the case of a debt contracted in the Isle of Man, and sued for in this country. Mr. Baylis argues that the plea shews that the Manx Court has decided that the claim is barred by the lapse of three years, and that according to the comity of nations we ought to hold that the claim is barred here. But I can see no reason why the comity of nations should produce any such effect. Where it appears that the very point in dispute has been the subject of an express decision in a foreign Court, we are estopped from dealing with it, but it would be very strange if the decision of the Manx Court that three years has elapsed since the cause of action, should be an answer to it in England. Then, as to the other point, the case of *Harris* v. *Osbourn* (2 Cr. & M. 629; 3 L. J. Ex. 182) shews that where an attorney undertakes to carry on a suit the Statute of Limitations runs from the termination of it; but where the client is dissatisfied and gives notice of his intention to carry on the suit to a Court of error, then what was *primâ facie* a termination of the suit is shewn by the conduct of the parties to be no real termination. Applying this rule to the present case, I think that the statute did not run till the decision of the appeal.

LUSH, J.—I am of the same opinion. If the Manx law had been analogous to our law of limitations as regards real property (3 & 4 Will. 4. c. 27), not only barring the remedy but extinguishing the right, the plea might have been good. But the Manx statute merely affects the remedy, and the judgment only decided that the plaintiffs had lost their right to sue in the Courts of the island. With respect to the other point, I agree with my Lord and my Brother Blackburn.

HAYES, J.—I am of the same opinion. The distinction between statutes extinguishing the right and barring the remedy is considered at large in *Story's Conflict of Laws*, s. 582.

Rule discharged.

IN THE QUEEN'S BENCH. June 9, 1869.

BERRIDGE AND ANOTHER *v.* FITZGERALD.

38 L. J. Q.B. 335; L. R. 4 Q.B. 639; 17 W. R. 917.

Bill of Exchange—Notice of Dishonour, where excused—Ostensible Place of Business.

BILLS OF EXCHANGE. G.—*A bill of exchange was accepted by a joint-stock company and indorsed by the defendant, who was a director of the company.*

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The bill was accepted and indorsed in the presence of the plaintiffs at the office of the company, which the defendant was in the habit of attending. A notice of dishonour was sent by the holders to the defendant, addressed to him at this office, but as he had ceased to attend it, the notice did not reach him until some time afterwards. The holders also made inquiries as to the defendant's private residence of other directors of the company, and at an office with which the company had had dealings, but not at the office of the company itself:—Held, *that there had been sufficient notice of dishonour. That if nothing more had appeared in the case than that the holders were ignorant of the indorser's private residence, it might have been doubted whether the holders could be taken to have used due diligence in searching for the address. But looking at the facts, that the bill was indorsed at the company's office, that the holders knew nothing of the defendant's address, and that the defendant was described as director on the bill, they were justified in thinking that as far as the bill was concerned he was, as it were, domiciled at the office, and that he intended that the office should be the place where any notice respecting the bill should be sent to him.*

Declaration against the defendant on a bill of exchange for 72*l.* 10*s.* accepted by the Industrial Loan and Interest Company (Limited), and indorsed by the defendant.

Plea, amongst others, denial of notice of dishonour, and issue thereon.

At the trial, before Blackburn, J., at the Middlesex Sittings after Michaelmas Term, 1868, it appeared that the Industrial Loan and Interest Company (Limited), was indebted to the plaintiffs for goods supplied to the company, and that the plaintiffs had threatened to bring an action to enforce payment, but ultimately agreed to give further time upon receipt of a bill of exchange for 72*l.* 10*s.*, drawn by them upon and accepted by the company, and indorsed by the defendant and a Mr. Johnstone, both of whom were directors of the company and in the habit of attending at its office, 20, Great George Street, Westminster. The bill was taken to the company's office, and there accepted by the manager on behalf of the company, indorsed by the defendant and his co-director, and delivered to the plaintiffs. The company shortly afterwards became insolvent, and the bill, when it became due, was dishonoured. A notice of dishonour was on July 27 sent to the defendant, directed 20, Great George Street, Westminster. It appeared that the plaintiffs were ignorant of the defendant's private residence, although the plaintiff Berridge had made inquiries respecting it from one of the directors and at the office of the Provident Union Company, which had had dealings with the insolvent company. The defendant at the time when the notice was sent to him at the office had ceased to attend there, and did not receive the notice till some time afterwards. A writ was, however, issued against the defendant, and his residence having been discovered to be at Petersham, in Surrey, the writ was served there on August 4. It was objected that there had been no due notice of dishonour. A verdict was directed for the plaintiffs for 74*l.*, with leave for the defendant to move.

A rule having been obtained to set aside the verdict and enter a nonsuit or verdict for the defendant, on the ground that there was no notice of dishonour or circumstances to excuse it,—

Warton shewed cause.—The question is, whether the plaintiffs have used due diligence in finding out the place of residence of the defendant—*Rowe* v. *Tipper* (13 Com. B. Rep. 249; 22 L. J. C.P. 135). Now, it appears that inquiries were made in every quarter where the information was likely to be obtained. The case of *Beveridge* v. *Burgis* (3 Campb. 262), shews that it is not enough to make the inquiries at the place where the bill is payable. And it must not be forgotten that the defendant was a director of the company. So that their office may be said to have been his place of business, or at any rate, supposed to be so.

Hodgson, in support of the rule.—It cannot be said that there was anything like due diligence in searching for the defendant's residence. It may be that an inquiry at the office would not, by itself, have been sufficient, but it was a

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precaution which ought not to have been neglected. The company's office could not have been considered as the defendant's place of business, for he indorsed the bill in his personal capacity, and not on behalf of the company. The case of *In re the Leeds Banking Company; Ex parte Prange* (35 L. J. Ch. 33), shews that without strong and satisfactory evidence that a person to whom notice is sent is the defendant's agent to receive it, the holder is not excused from personally communicating with the defendant.

COCKBURN, C.J.—I think that this rule should be discharged. There can be no doubt that the holder of a bill is bound to give due notice of its dishonour to the drawer or indorser. If the bill is not met when it falls due, the holder must find, or use due diligence to find the indorser against whom he proposes to bring his action, either at his place of business, if he is engaged in business, or, if not, at his place of residence. In the case in hand, the notice was not sent to the defendant's place of residence, but to the office of the company by whom the bill was accepted. Now, we have to consider whether this office was, in any sense, the place of business of the defendant, or whether he authorized the plaintiffs to treat it as his place of business, or the place where he might reasonably be expected to be found. It appears that the bill was indorsed by the defendant, who was a director of the Industrial Loan and Interest Company, and that the bill was handed to the plaintiffs in respect of a claim against the company. The plaintiffs insisted that two additional names should be put upon the bill, and the defendant indorsed it under an erroneous notion that he would not be liable in his private capacity. By indorsing the bill as director he, as it seems to me, authorized and warranted the plaintiffs in treating the indorsement as a transaction on the part of the company, and in thinking that the company's place of business would be the place where the defendant would be likely to be found, and his place of business with reference to this transaction. If it had been necessary to search for the defendant's place of residence, I should certainly have thought that the plaintiffs had not exercised due diligence in inquiring for it. But, under the circumstances, I think that the company's office was a proper place for the notice to be left at.

BLACKBURN, J.—I am of the same opinion. There can be no doubt about the rule of law, that the holder of a dishonoured bill of exchange is under the obligation of giving notice of its dishonour to the indorser, unless something has happened which according to the law excuses him from this liability. Now the holder would be excused if, after searching with due diligence, he was unable to find the indorser, and I agree with the Lord Chief Justice that if the plaintiffs had only relied upon the fact that they did not know the private residence of the defendant, it would be very doubtful whether they could be considered to have exercised due diligence in seeking for it, and I should not like to support the verdict upon the supposition that they had. But then comes the question, whether this is a case where the indorser has held out a place of business as being his own, just as where a person drew a bill dating it generally "London" (*Clarke* v *Sharpe*, 3 Mee. & W. 166), and it was held that proof of a letter containing notice of the dishonour of the bill having been put into the post-office addressed to the drawer generally "London," was evidence of notice, on the ground that he must be taken to have said "London is the place where I shall be found." In the same manner, the usage of trade and course of business have made a man's place of business for this purpose equal to his residence. It appears that the defendant resided at Petersham, in Surrey, where in all probability no one knew much about him. An action against the company was compromised, and the bill received at the company's office. It was there that the defendant put his name on the bill, the plaintiffs being utterly ignorant of anything concerning him, except that he was one of the indorsers. The question is, Have the plaintiffs fulfilled their duty as to sending notice of dishonour? It seems to me that the decision as to the address "London" is an authority for holding that it was enough to send the notice directed "20, Great George Street." I wish to guard myself from saying that such an address would in every case be sufficient. I only wish my observations

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to apply to a case where the defendant as far as the bill was concerned was as it were domiciled at the address, and as it were, said, "You may send a notice to me here." With this limitation, I think that what was done by the plaintiffs was sufficient, and that the rule must be discharged.

LUSH, J.—I am of the same opinion. A man has sometimes different places of business. Now here, having regard to the fact that the defendant had attended at the office, I think that we may consider that he held it out as one of his places of business.

Rule discharged.

IN THE QUEEN'S BENCH. June 11, 1869.

HARDY *v.* FETHERSTONHAUGH.

38 L. J. Q.B. 337; L. R. 4 Q.B. 725; 10 B. & S. 628.

Costs, Taxation of—Feigned Issue under General Inclosure Act (8 & 9 *Vict. c.* 118.)—*Finding of Jury for Defendant in respect of Part of his Claim—"Event of Trial."*

COSTS. F.—*By the General Inclosure Act* (8 & 9 *Vict. c.* 118), *s.* 56, *if any person, claiming to be interested in any land proposed to be inclosed under the Act, shall be dissatisfied with any determination of the Commissioners or Assistant Commissioner concerning any claim or interest in or to the land proposed to be inclosed under the powers thereinbefore contained, and shall cause notice in writing of such dissatisfaction to be delivered to the Commissioners, it shall be lawful for such person so dissatisfied, &c. to bring an action upon a feigned issue against the person in whose favour such determination shall have been made, or against the Commissioners, &c., and the verdict given upon the trial of such action shall be binding and conclusive upon all parties thereto, &c.; and after such verdict shall be given and final judgment obtained thereon, the Commissioners shall act in conformity thereto, and allow or disallow the claim thereby determined, according to the event of such trial; and the costs attending any such action shall abide the event of the trial.*

The valuer appointed under the Act allotted to the defendant rights of common in respect of 198 *acres of land, and this allotment was confirmed by the Assistant Commissioner.*

The plaintiff appealed from the decision and brought an action on a feigned issue, in which the question was, whether the decision of the Commissioner allowing the defendant rights of common in respect of the 198 *acres was erroneous. A verdict was given for the plaintiff as to so much of the* 198 *acres as lay within a certain boundary, and for the defendant for the residue. The defendant's portion was slightly inferior in value to the other.*

The master, on taxation, allowed the plaintiff the general costs of the cause, and only allowed the defendant the costs exclusively relating to the issue on which he succeeded:—Held, *that the taxation must be reviewed; that the fact of the statute requiring the party appealing to be the plaintiff must be put out of the question; and that the Master must treat the costs of both plaintiff and defendant as if there had been two records and two issues, and for this purpose look at the briefs and ascertain how many of the witnesses and how much of the expenses related to the portion of land in respect of which the plaintiff and the defendant had respectively succeeded.*

This was a rule calling on the plaintiff to shew cause why the Master should not review his taxation of the plaintiff's and defendant's costs in this action.

It appeared from the affidavits that the cause was a feigned issue, under

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8 & 9 Vict. c. 118[1], to decide the right of the defendant to an allotment of rights of common on Haresceugh Fell, in the manor of Kirkoswald, Cumberland, in respect of his estate there, containing 198 a. 1 r. 23 p.

The issue stated that C. Webster, the valuer, acting in the matter of the inclosure of Haresceugh Fell, &c., in Cumberland, under the provisions of the Acts for the inclosure, exchange and improvement of land, ordered that the claim of T. Fetherstonhaugh of the rights of common of pasture over Haresceugh Fell and Berry Moor, in respect of a mansion-house, pleasure-grounds and closes in his occupation, containing 198 acres 1 rood 23 perches, should be allowed, and that the assistant commissioner duly appointed under the Acts decided that the claim should be confirmed. That C. Hardy claimed to be interested in Haresceugh Fell and Berry Moor, and was dissatisfied with the decision of the valuer and assistant commissioner allowing the claim of T. Fetherstonhaugh to rights of common of pasture over Haresceugh Fell, &c., in respect of the mansion-house and land containing 198 acres 1 rood 23 perches, and had caused due notice of his dissatisfaction to be delivered according to 8 & 9 Vict. c. 118, and that he affirmed, and T. Fetherstonhaugh denied, that the decision of the assistant commissioner was erroneous in so far as the decision confirmed the allowance of the claim of Fetherstonhaugh to rights of common of pasture over Haresceugh Fell, in respect of the mansion-house and lands containing 198 acres 1 rood 23 perches.

The case came on for trial at Carlisle, at the Summer Assizes, 1866, when a verdict was taken for the plaintiff as to so much of the 198 acres 1 rood 23 perches as was on the south side of the Raven Beck, and in the parish of Kirkoswald, and for the defendant as to the residue of the 198 acres 1 rood 23 perches. The difference between the two portions of land in respect of acreage and value was not great, but rather in favour of the plaintiff. The plaintiff signed judgment, and his bill of costs was afterwards taxed by the Master, who allowed him all the general costs of the cause, although it was objected on behalf of the defendant that there had been no event of the trial within the meaning of the Act, so as to entitle the plaintiff to any costs at all, and that if there had been any such event, the defendant had succeeded as much as the plaintiff, so that neither party could have the general costs. A bill of costs was then prepared by the defendant, but the Master refused to tax any of these costs which did not relate exclusively to that part of the issue on which the plaintiff succeeded. A rule was accordingly obtained, as above mentioned.

Gray now shewed cause.—The plaintiff in the feigned issue was entitled to the general costs of the cause. The plaintiff is bound by the statute to appeal

(1) By 8 & 9 Vict. c. 118. s. 48, claims in the matter of any inclosure under the Act are to be heard and determined by a valuer, subject to an appeal to Commissioners.

By section 56, "If any person claiming to be interested in any land proposed to be inclosed under this Act shall be dissatisfied with any determination of the Commissioners or Assistant Commissioner concerning any claim or interest in or to the land proposed to be inclosed under the powers hereinbefore contained, and shall cause notice in writing of such dissatisfaction to be delivered to the Commissioners within thirty days next after notice of such determination shall have been given to the several parties or persons specially interested, if any such there be, it shall be lawful for such person so dissatisfied, and giving such notice as aforesaid, to bring an action upon a feigned issue against the person in whose favour such determination shall have been made, or against the Commissioners, and to proceed to a trial at law at the then next Assizes, or at the Assizes immediately following such next Assizes, to be holden for the county wherein the land relating to which such dispute shall arise shall be situate; and the defendant in such action shall, upon being served with the usual process therein, appear thereto, and accept one or more issue or issues, whereby such claim, and the right and interest thereby insisted upon, may be tried and determined, such issue to be settled by the proper officer of the Court in which the said action shall be commenced, in case the parties shall differ about the same; and the verdict given upon the trial of such action shall be binding and conclusive upon all parties thereto, unless the Court wherein such action shall be brought shall set aside such verdict, and order a new trial to be had; and after such verdict shall be given, and final judgment obtained thereon, the Commissioners shall act in conformity thereto, and allow or disallow the claim thereby determined according to the event of such trial; and the costs attending any such action shall abide the event of the trial."

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against the decision of the Commissioner in the form of an action, and this action must proceed like an ordinary action at common law.

[BLACKBURN, J.—Why could not the plaintiff say, "I appeal against so much of the decision as allows the defendant rights of common in respect of land within a certain boundary," instead of objecting to the whole allotment?]

The plaintiff would have had great difficulty in restricting his claim. In *Staley* v. *Bedwell* (10 Ad. & E. 145; 8 L. J. Q.B. 233), where an interpleader rule directed the sheriff to sell the goods claimed and pay the proceeds into Court to abide the event of an issue between the claimant and the execution creditor to try the right to them, and the jury found that part of the goods were the sole property of the claimant, and the residue the joint property of the claimant and the party levied upon, it was held that the claimant was entitled to be paid by the execution creditor the general costs of the feigned issue (deducting the issues found for the latter), although in such a case there was no more reason than in the present instance why the claimant should be plaintiff. In the case of an ejectment, the claimant is entitled to the general costs although the jury find that he is only entitled to a portion of the property.

[BLACKBURN, J.—Without saying whether that is a satisfactory rule, it must be remembered that there can always be a defence as to part of the property.]

In the present case, the defendant might have abandoned a portion of his claim. The case of *M'Carthy* v. *Nepean* (6 Q.B. Rep. 252; 13 L. J. Q.B. 358), where the plaintiff in a feigned issue under the 6 & 7 Will. 4. c. 71. s. 46, was not allowed the general costs though he had a finding in his favour upon a distinct issue, may be cited by the other side, but there the Court under the Act had a discretion as to costs. The case of *Lewis* v. *Holding* (2 Man. & G. 875; 10 L. J. C.P. 204), where the plaintiff recovered part of his claim and the costs were apportioned, may also be relied on, but there the Court had a discretion in giving costs under the 1 & 2 Will. 4. c. 58. and the 1 & 2 Vict. c. 45. s. 2.—[He also cited *Fitzwillian* v. *Maxwell* (7 Taunt. 30).]

T. Jones, in support of the rule, was stopped by the Court.

COCKBURN, C.J.—I am of opinion that the rule should be made absolute. There can be no doubt that the section is somewhat inartificially worded, but if we were to adopt Mr. Gray's construction of it, we should establish a state of things so anomalous that it cannot be supposed that the legislature intended it. Where the landowner has made a claim before the valuer to rights of common, and has obtained an allotment of rights of common in respect of so many acres of land, he has upon this hypothesis obtained a decision in his favour. Well, suppose that another person comes forward and requires that the question whether the claimant is really entitled to his allotment shall be decided by a feigned issue. Upon a further investigation it turns out that the claimant is only entitled to an allotment in respect of 95 instead of 100 acres of land. Now, according to Mr. Gray, although the claimant was bound to establish his right to the allotment in respect of the 95 acres in the feigned issue, and has succeeded in doing so, yet he is to have no costs. I turn to the words of the statute to see whether such an anomaly cannot be prevented. After directing a feigned issue the section proceeds, "the verdict given upon the trial of such action shall be binding and conclusive upon all parties thereto, &c., and after such verdict shall be given and final judgment obtained thereon, the commissioners shall act in conformity thereto, and allow or disallow the claim thereby determined according to the event of such trial." What the commissioners here had to do following the event of the trial was to allow part of the claim and disallow the rest. Now the words of the section as to costs are in the same terms as those relating to the allowance of the claim, "the costs attending any such action shall abide in the event of the trial." The costs must, therefore, be allowed according to the success of the claim, and in this way substantial justice will be done.

BLACKBURN, J.—I am of the same opinion. It is quite true that in an action at law, if the plaintiff succeeds upon any one of his claims, he gets the

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general costs of the cause, so that where the plaintiff in an expensive action recovers a small sum only, the defendant may be compelled to pay an excessive amount of costs. This is the rule in an ordinary action, but I do not think that this statute intended to adopt it. Section 56 provides—(the learned Judge read the section). Now we might well suppose that the legislature would give costs to the party succeeding, but what we find enacted is, that the unsuccessful and dissatisfied party is to be the plaintiff in an action against the successful party, and that the verdict upon this issue is to be conclusive. Now in the issue in the present case, the finding of the jury was that as to one close, Blackacre, the plaintiff was entitled to succeed, but as to the other close, Whiteacre, he was not. So that the event of the trial being that the claimant was partly in the right, the costs are to be allowed or disallowed according to this event; and it does not matter who was plaintiff or defendant in the feigned issue; just as in the case of *Fitzwilliam* v. *Maxwell* (7 Taunt. 30), the Court of Common Pleas held that the costs, where the local Act directing a feigned issue said nothing about them, were to abide the event of the verdict. Under the old rule, where the plaintiff recovered anything he got all the costs and the defendant got nothing. According to the modern practice, the plaintiff gets the general costs of the cause. In the present case it would seem just and proper that the defendant should be entitled to these costs, and the legislature might very well say that the costs should abide the event of the verdict as distinct from the event of the action, and that the party who succeeds as to one part of his claim should have the costs in respect of it. If the legislature meant this, and it seems to me that the legislature can have meant nothing else, the Master must look at the briefs as if there had been two records and two actions tried at the same time, in one of which the plaintiff had succeeded, and in another the defendant; and he must ascertain how much of the briefs and witnesses and other expenses relate to the land in respect of which the defendant has succeeded. If the Commissioners had decided against the defendant in the first instance, there can be no doubt that he would now be in the position of a plaintiff who has succeeded as to a great part of his claim, and it seems quite unfair that his right to costs should depend upon a mere accident.

MELLOR, J.—I am of the same opinion. I do not profess to understand the reason for making the person dissatisfied with the decision of the Commissioner, the plaintiff in the feigned issue, but the section directs that the action shall be brought in this form, and that the defendant shall accept the issue, which is to be settled by the proper officer of the Court in which the action is commenced, and that the verdict given in the trial is to be binding and conclusive upon all parties thereto. After this verdict is given the Commissioners are to make a fresh determination, and to allow or disallow the claim, according to the event of the trial. Now, the Commissioners here have to allow part of the right claimed by the defendant and to disallow the rest; and as the costs are also to follow the event of the trial, they must be divided according to the allowance of the claim. I do not think that in a case like the present, where the issue is settled under the authority of the Court, the right to costs should depend upon any technical consideration, and I think the Master will have no difficulty in appropriating the costs to that part of the claim on which each party has succeeded, and in awarding him his proportion accordingly.

HANNEN, J., concurred.

Rule absolute.

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IN THE COMMON PLEAS. Nov. 9, 1868.

BOAST *v.* FIRTH, *administratrix, &c.**

38 L. J. C.P. 1; L. R. 4 C.P. 1; 19 L. T. 264; 17 W. R. 29.

Referred to, *Whincup* v. *Hughes*, [1871] E. R. A.; 40 L. J. C.P. 104; L. R. 6 C.P. 78; 24 L. T. 76; 19 W. R. 439 (Ex. Ch.); *Robinson* v. *Davison*, [1871] E. R. A.; 40 L. J. Ex. 172; L. R. 6 Ex. 269; 24 L. T. 755; 19 W. R. 1036 (Ex. Ch.); *Simeon* v. *Watson*, [1877] E. R. A.; 46 L. J. C.P. 679 (C.P. D.).

Apprentice—Covenant for Personal Service—Performance Impossible—Act of God.

ACT OF GOD. APPRENTICE. A.—*A covenant in an apprenticeship deed that the apprentice will honestly remain with and serve his master for a certain term, is, though in terms absolute, subject to an implied condition that the apprentice shall continue in a state of ability to perform his contract. To an action, therefore, by the master for breach of the covenant, a plea that the apprentice was prevented by the act of God, to wit, permanent illness, which arose after the making of the deed and before breach, is good.*

The declaration alleged, that by an indenture of apprenticeship, under seal, between the intestate, his son, and the plaintiff, the son, with the consent of the intestate, bound himself apprentice to the plaintiff, to be taught in the art and trade of a chemist and druggist, and with the plaintiff, after the manner of an apprentice, to remain and serve from a certain day until the term of five years thence next following should be fully complete and ended. And that the intestate covenanted with the plaintiff that the son should and would honestly remain with and serve the plaintiff as his apprentice during all the term. And that, though after the making of the indenture the plaintiff received the son into his service as such apprentice for the term aforesaid, and though the plaintiff had performed all things, &c., yet the son, after the making of the indenture, and during the term, did not nor would honestly remain with or serve the plaintiff as his apprentice during all the term, whereby the plaintiff lost, &c.

Plea, that the son was and is prevented by the act of God, to wit, by permanent illness, from remaining with or serving the plaintiff during all the term.

Demurrer to the plea, and joinder therein.

Tapping (with him *Waddy*), for the plaintiff.—The plea is bad in substance. Permanent illness is no excuse—*Com. Dig.* tit. 'Justices,' (B. 57), Addenda, says, "Sessions cannot discharge the master from his apprentice for the apprentice's incurable sickness; the master is to provide for him in sickness and in health;" founded on *The King* v. *Hales Owen* (1 Str. 99)—see *Hawksworth's case* (1 Wms. Saund. 313 (2) and 316 (2)) and stat. 5 Eliz. c. 4. There cannot be one law for the master and one for the servant. This is an unconditional covenant to perform service. The law will not imply any exception. *Paradine* v. *Jane* (Aleyn, 26) points out the distinction: "Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him." *Hall* v. *Wright* (27 L. J. Q.B. 345: in error, El. B. & El. 746; 29 L. J. Q.B. 43) is in the plaintiff's favour.

[MONTAGUE SMITH, J.—There it was not impossible to perform the marriage contract. The woman had the option of taking the man in spite of the illness; civil rights might be involved.]

If the apprentice cannot personally serve, he can pay damages. The plea is also bad in form. First, it ought to have averred that the illness arose after the making of the indenture and before breach. As it stands, the illness may have existed when the contract was made. Secondly, notice of the illness ought

* *Coram*, Montague Smith, J., and Brett, J., sitting in a second Court.

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to have been given to the plaintiff, that he might elect to dissolve the contract. The contract has not been rescinded, and the defendant might still treat it as subsisting, and sue upon it—*Cuckson* v. *Stones* (1 El. & El. 248; 28 L. J. Q.B. 25); *Harmer* v. *Cornelius* (5 Com. B. Rep. N.S. 236; 28 L. J. C.P. 85). Thirdly, the plea ought to state what the illness is, that the Court may decide whether it is the act of God. It raises no certain issue for trial by jury. The illness may have been caused by the apprentice's own negligence.—See for instances of the "act of God," *Story on Contracts*, s. 752, *New York Civil Code*, p. 215, s. 727, *Broom's Maxims*, 227, and *Pothier, Traité des Obligations*, s. 142.

Thrupp, for the defendant.—The act of God has always been held an excuse for non-performance of a contract, *e.g.*, where a covenant to leave a wood in the same plight if excused if the wind blows down trees—*Sheppard's Touchstone*, 173; *Williams* v. *Lloyd* (W. Jones, 179). In *Hall* v. *Wright* (27 L. J. Q.B. 345; in error, El. B. & El. 746; 29 L. J. Q.B. 43) impossibility to perform the contract was not alleged. Wightman, J., and Erle, J., in the Court below, and three Judges as against four in error, held the plea good without averring notice. Notice is here immaterial, since there is an implied condition that the apprentice continue capable. In *Taylor* v. *Caldwell* (3 Best & S. 834, 836; 32 L. J. Q.B. 166, 167), recognized in *Appleby* v. *Meyers* (36 L. J. C.P. 331; 2 L. R. C.P. 651), a contract in terms absolute was held subject to an implied condition "that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor"; and Blackburn, J., says, "In the ordinary form of an apprentice deed, the apprentice binds himself in unqualified terms to 'serve until the full end and term of seven years to be fully complete and ended,' during which term it is covenanted that the apprentice his master 'faithfully shall serve'; and the father of the apprentice, in equally unqualified terms, binds himself for the performance, by the apprentice, of all and every covenant on his part. It is undeniable that if the apprentice dies within the seven years, the covenant of the father that he shall perform his covenant to serve for seven years is not fulfilled; yet, surely it cannot be that an action would lie against the father. Yet the only reason why it would not is that he is excused because of the apprentice's death." There is no difference in principle between illness and death. The form of the plea is good, for it is pleaded to the whole of the breach, which it traverses in terms.

Tapping replied.

MONTAGUE SMITH, J.—I think the defendant is entitled to judgment. This is an action on a covenant in an indenture of apprenticeship, by which the apprentice's father, since dead intestate, covenanted that the apprentice would honestly remain with the plaintiff, and serve him in the apprenticeship, during all the term for which he was bound. The breach alleges that the apprentice, after the making of the indenture, did not and would not honestly remain and serve during all the term. The plea, pleaded to the whole of the breach, avers that the apprentice was prevented by the act of God, namely, permanent illness, from remaining and serving all the term. Several objections were taken to the form of the plea, but I think they ought not to prevail. The substance of the plea is, that the apprentice was prevented from serving his time by permanent illness, which was occasioned by the act of God. The main question is, whether such an illness, so caused, is an answer to the plaintiff's claim for loss of the personal service of the apprentice. I think it is. The contract is for personal service, depending on the personal capacity of the apprentice, and obviously that may be prevented by his illness caused by the act of God, or by his death, also the act of God. It seems to me that it must be taken to have been in the contemplation of the parties that a prevention by the act of God should be an excuse for non-performance of the personal service of the apprentice. If there had been no authority on the subject, I should have thought that the parties intended it to be an *obligatio certi corporis*, that the contract was to be performed only if health and life continued to enable it to be performed. In such a contract it is implied that ability on the part of the apprentice to perform the contract is to continue. If the apprentice is placed by the act of God in such a state that

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he cannot perform the contract, the parties must be taken to have contemplated that, and no right to compensation should arise.

Taylor v. *Caldwell* (3 Best & S. 834, 836; 32 L. J. Q.B. 166, 167) seems to have been decided on the principle that where parties are contracting about a certain thing or person, there is an implied condition that the thing or person shall continue to exist in a state fit for the performance of the contract, and that if that state ceases to exist then the obligation ceases. Mr. Tapping relies on *Hall* v. *Wright* (27 L. J. Q.B. 345: in error, El. B. & El. 746; 29 L. J. Q.B. 43), but that case is distinguishable. It was a contract for marriage, and the defendant, though in a state of illness, might still have fulfilled his contract, and so have given the woman, so far as he could, the benefit of that contract. It rested with her to say whether she would take him as he was, or renounce the contract. The present case is different. I construe the plea to mean that the apprentice was unable to perform his service, and could not in any way fulfil his contract; whereas the man who contracted to marry could have performed that contract. This view renders it unnecessary to amend the plea by an averment that the plaintiff had notice of the apprentice's illness. The defence is good without that averment. If, however, Mr. Thrupp wishes to insert an averment of notice he can do so on payment of costs. The averment that the illness arose after the making of the indenture and before breach may be added to the plea at once without costs[1].

BRETT, J.—It was argued that this covenant was unconditional, and that though the apprentice was, by the act of God, prevented from fulfilling it, still the defendant must pay damages. If the first proposition, that the covenant was unconditional, could be maintained, then I think the second must follow. But the first is denied, on the principle that where from the nature of the contract the parties must have known that if certain circumstances arose it would be impossible to perform the contract, there, when those circumstances do arise, there is an excuse for non-performance. In such contracts an exception is implied, and I think this was such a contract. When, therefore, the impossibility is caused by the act of God, the exception applies and performance is excused. I further agree that this being the construction of the contract, notice to the plaintiff was unnecessary, and that an amendment as to notice should be made only on the payment of costs; but that the other amendment is necessary and should be made without costs. I also agree that *Taylor* v. *Caldwell* (3 Best & S. 834, 836; 32 L. J. Q.B. 166, 167) is an authority for the principle of this case.

Judgment for the defendant.

IN THE COMMON PLEAS. Nov. 14, 1868.

THE CONSERVATORS OF THE RIVER THAMES *v.* THE VICTORIA STATION AND PIMLICO RAILWAY COMPANY.

38 L. J. C.P. 4; L. R. 4 C.P. 59; 19 L. T. 734.

Referred to, *Conservators of River Thames* v. *The Port Sanitary Authority of the Port of London*, [1894] E. R. A.; 63 L. J. M.C. 121; [1894] 1 Q.B. 647; 69 L. T. 803 (C. A.).

Lands Clauses Consolidation Act—Compensation—Thames Conservancy Act, 1857—*Railway Bridge.*

COMPULSORY PURCHASE.—*By the* 20 *&* 21 *Vict. c.* cxlvii. *the bed of the river Thames was vested in conservators, with power to them to grant licences for embanking, making docks and building jetties, on payment of consideration,*

(1) *Thrupp* elected not to amend the plea as to notice, and to adopt the amendment as to the time when the illness arose.

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to be assessed in a particular way, and be partly paid over to the Crown; by the 21 & 22 *Vict. c.* cxviii. *a railway company was empowered to make a railway bridge over the Thames, but the works were not to be commenced without the consent of the conservators and their approval of the plans; the railway company obtained approval of the construction of the bridge as proposed, and thereupon erected the piers of their bridge in the bed of the river*:—Held, *that the conservators were entitled to have compensation assessed under the Lands Clauses Consolidation Act, which was incorporated as usual in the said Railway Act.*

This was an action by the conservators of the river Thames against the Victoria Station and Pimlico Railway Company, on an award, under the Lands Clauses Consolidation Act, of compensation for taking and injuriously affecting a portion of the bed and shore of the river Thames in constructing the bridge.

The first count of the declaration alleged the taking and injuriously affecting of the plaintiffs' land by the defendants for the purposes of their railway, the plaintiffs' right to compensation, and the occurrence of the various steps necessary to the assessment thereof by certain arbitrators under the Lands Clauses Consolidation Act; set forth an award by such arbitrators of 80*l.* as compensation for the defendants "having entered upon and taken, damaged and injuriously affected the said land and hereditaments, being portions of the bed, shore and soil of the river Thames"; and averred non-payment. The second count was based on the first, and claimed the costs of the arbitration and award.

The defendants pleaded, first, that the said portions of the said bed, shore and soil of the river Thames in the notice of the said conservators in the declaration mentioned were not entered upon, or taken, or damaged, or injuriously affected, nor were nor are the plaintiffs entitled to compensation in respect thereof within the meaning of the said Acts, in manner and form as in those behalfs in the declaration are alleged. Secondly, that the alleged taking and injuriously affecting the lands and hereditaments of the plaintiffs in the declaration mentioned consisted in the making by the defendants of a railway crossing the said river Thames by means of a bridge which the defendants were authorized to make and erect by the said Railway Act in the declaration mentioned, and in placing and making in certain parts of the bed and shore of the said river certain works and supports which were necessary for the construction and support of the said bridge and authorized by the said Railway Act. And the defendants say that before executing or commencing the said works, or any of them, in or upon any part of the bed or shore of the said river, they duly obtained the consent and permission in writing of the plaintiffs, signed by the secretary, pursuant to the provisions of the defendants' Railway Act and of the Thames Conservancy Act, 1857, in that behalf, for the performance by the defendants of the said works in the bed and shore of the said river, and the defendants in all respects performed the said works according to the said consent and permission, and not otherwise.

The plaintiffs took issue on these pleas, and demurred to the second.

At the trial, the following facts appeared. The statute 20 & 21 Vict. c. cxlvii., by section 50, vested the bed, soil and shores of the river Thames, within the flux and reflux of the tides, in the plaintiffs; by section 52, vested the conservancy of the said river in them; by sections 53, 56, 57, gave them power to license people to make embankments, docks and jetties, on payment of a fair and reasonable compensation; by section 54. prohibited the erection, &c. of any erection, building or works in or upon the bed or shore of the river Thames, or the driving of any piles therein without the conservators' permission; by section 58. provided that the consideration for the licences should be such as in the judgment of a person appointed in a specified way should be deemed the true and fair worth or value thereof to the person obtaining such licence, and that no such licence should be granted by the conservators without such previous valuation; and by sections 103. and 104. provided that the

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conservators should render an account to the Crown, and pay over one-third of the money received for such licences.

The statute 21 & 22 Vict. c. cxviii. (which enabled the defendants, amongst other things, to make the bridge) provided, by section 31, that the defendants should not execute or commence the execution of any work whatsoever upon the shore of the river Thames without the consent in writing of the conservators of the river Thames, signed by the secretary of the said conservators; by section 32, that the bridge to be erected for the purpose of carrying the railway across the river Thames should be executed according to a plan and elevation and upon a site to be approved by the conservators of the Thames, and deposited in their office; by section 34, that nothing in the Act should authorize the defendants to embark, encroach upon, or interfere with any part of the soil or bed of the river Thames, or the shore thereof, except according to such plan; and by section 35, that nothing in the Act should extend to prejudice or derogate from the estates, rights, interests, liberties, privileges or franchises of the conservators of the Thames, or to prohibit, defeat, alter or diminish any power, authority or jurisdiction which at the passing of the Act the conservators did or might lawfully claim, use and exercise.

The site of the bridge was included in the deposited plans and schedule. The piers of the bridge were erected on the bed of the river, and were erected without payment of and before claim for any compensation; but before the commencement of the works the defendants received the following letter from the plaintiffs' secretary:

"Thames Conservancy Offices,
"41, Trinity Square, Tower Hill, E.C.,
"August 10, 1858.

"Sir,—Having laid your letter of July 29 last before the conservators of the river Thames, together with a plan of the proposed railway bridge over the Thames for the Victoria Station and Pimlico Railway Company, I am directed to inform you the conservators have given their approval for the construction of the bridge as proposed. I am, Sir, &c.,

"E. BURSTAL.

"John Fowler, Esq., Victoria Station
and Pimlico Railway Company."

A verdict was found for the plaintiffs for the amount claimed, with leave to the defendants to move generally to enter a nonsuit or verdict for themselves, and a rule *nisi* having been obtained, it was arranged that the arguments of the rule and the demurrer should be taken together.

Prentice (*Raymond* with him) shewed cause and supported the demurrer.—The other side say that they can take the land without compensation, and that, at all events, the wrong mode of recovering it has been adopted. By 20 & 21 Vict. c. cxlvii. ss. 50, 52, 56, 58. the soil of the bed, foreshore and bank of the river is vested in the plaintiffs, and certain powers are given to them to consent to the erection of piers, &c., and the user of the banks, such consent, however, only to be granted on payment of compensation, which is to be assessed by a certain officer and to be accounted for, as the Crown has an interest therein. Then, by 21 & 22 Vict. c. cxviii. ss. 31, 32, 35, power is given to the defendants to make a bridge across the river on obtaining the consent of the plaintiffs to the works. This consent is merely with respect to the nature of the works, but as respects the taking of the land the plaintiffs are in the same position as other landowners, and, under the Lands Clauses Consolidation Act, are entitled to compensation. It is said that the plaintiffs may give a licence for nothing, and have done so; and that even if the licence be not for nothing, yet an action on the licence is the proper remedy. Even if this were a licence under the Conservancy Act, it could not be granted for nothing, but, in truth, it has been only obtained under section 31 of the Railway Act, and is an approval merely of the works. By that Act the defendants cannot make the bridge without the plaintiffs' approval; but the plaintiffs' rights are not abridged, and they are

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entitled to compensation. This being so, the rule should be discharged, and the plaintiffs have judgment on the demurrer to the plea of consent under section 31.

J. Brown and *J. O. Griffits*, in support of the rule and demurrer.—Under the Conservancy Act there was no power to make a bridge, and it does not apply; the power to make a bridge is under the Railway Act, which allows it to be made on the plaintiffs' approval, and, as it would be a public benefit, it might well be intended that the plaintiffs might grant their consent for nothing, and, notwithstanding the various provisions in sections 21, 31, 32, 34. and 35. of this Act, there is not one word about compensation. It may be that the conservators might have asked for money for their consent, though obliged to give consent to proper works; but the defendants have got it without, and cannot now be asked to pay. Again, the Lands Clauses Consolidation Act, under which the plaintiffs acted, applies where land is not taken by agreement, but here it was; consent was given, and the land not taken adversely. Further, the plaintiffs must rely on the land being taken as well as injuriously affected within the Lands Clauses Consolidation Act; for if only one be the case, compensation has been awarded as to a matter for which no compensation was due. Now, under the Conservancy Act, the plaintiffs are not ordinary landowners; the conservators are statutory owners only; and it is submitted that, looking to the various provisions of their Act, that they granted, and the defendants obtained, not the land, but only a statutory easement or right to put up the bridge, and if so, the award is bad.

KEATING, J.—I am of opinion that this rule should be discharged. The plaintiffs bring their action to recover the amount of compensation awarded them, by an award made under the Lands Clauses Consolidation Act in respect of the defendants "having entered upon and taken, damaged and injuriously affected portions of the bed, shore and soil of the river Thames." It appears that the plaintiffs are the conservators of the river Thames, and that by statute 20 & 21 Vict. c. cxlvii. the bed, soil and shore of the Thames were vested in them, and it is beyond dispute that the soil on which the piers of the bridge stand was theirs. Certain powers are given also to them for the protection of the nevigation and banks of the river, and authority under certain circumstances to grant persons licences to erect jetties, and take the banks on receiving compensation, and the proceeds are to be accounted for. This was so when the defendants obtained the Act of Parliament, which authorized them to make their railway and do that which the plaintiffs could not have done, viz., to build a bridge across the Thames. The bridge was not built by the licence of the plaintiffs, but by authority of the defendants' Railway Act, and that Act contains a clause similar to clauses generally inserted in other Acts, where there exists a public body to protect the navigation of any river which will be affected by the authorized works,—a clause which says that "the company shall not execute or commence the execution of any work whatsoever upon the shore of the river Thames . . . without the consent in writing of the conservators of the river Thames, signed by the secretary of the said conservators," that is to say, before the defendants executed their works on the soil taken, the mode of execution was to be approved of by the plaintiffs. The plaintiffs gave a consent in the terms of this section, and it is said by the defendants that this consent was a licence to take the land, and that the plaintiffs therefore are not entitled to compensation. I am of opinion that the consent had no such effect, and I take the same view as that expressed by my brother Montague Smith in the case of *The Metropolitan Board of Works* v. *the Metropolitan Railway Company* (37 L. J. C.P. 281). That case was a similar one to the present, and the same argument was there used. In that case the railway company had by their works injured a sewer belonging to the Board of Works, who claimed compensation under an award made under the Lands Clauses Consolidation Act, and the answer was that no right had been injured, and even if so, still the board had given a licence which deprived them of any right to compensation. The section under which the licence was there given was very similar to the one in the present case; it

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provided that "no building should be erected in, over or under any sewer vested in the Commissioners without the consent of the Commissioners first obtained in writing," a consent which had been obtained. As the majority of the Court there held that no right existed to be injured, and that therefore there was no right to compensation, there was no occasion for it to express an opinion on the second point; but as my Brother Montague Smith differed, he was therefore obliged to dispose of the question as to the effect of the consent, and as to this he says: "Again, it was rather suggested than relied on as a distinct point, that the approval of the plans for the railway works by the board was equivalent to a licence to execute them; but this cannot, I think, be so. The approval is not a voluntary licence by the board, but a condition imposed on the railway company. It would be the duty of the board not to refuse their approval of the plans if at the time they appeared to afford sufficient security to their own works; but such approval so given in compliance with the Act does not, as it seems to me, carry with it the consequence of a voluntary licence, so that if any damage is done to the works of the board in the execution of the plans the railway company are absolved from making compensation." So here, it was the duty of the plaintiffs to give consent if satisfied that the works were proper, and such consent does not interfere with the right to compensation. As owners of the freehold the plaintiffs were to part with it in consideration of a pecuniary recompense, and therefore there is nothing in their position to prevent them from recovering compensation. It has been said that they have not parted with the land, and that if it be only injuriously affected the award is bad. If this were so, the objection would be valid; but the land has been taken; it is contained in the schedule of the Act, and was taken under it; the consent had nothing to do with the land, but was only an approval of the nature of the works. Why, then, are not the plaintiffs to be entitled to recover compensation under the Lands Clauses Consolidation Act? The remedy given by that statute is incorporated, and is the proper remedy, and therefore the plaintiffs are entitled to compensation, and have taken the proper mode of recovering it. I am of opinion, therefore, that the rule should be discharged, and as the demurrer to the second plea depends on the same point there must also be judgment for the plaintiffs on the demurrer.

MONTAGUE SMITH, J.—I am of the same opinion. The railway company built the bridge on the land of the plaintiffs. They have taken the land for the piers, in the ordinary course of the construction of the railway, which is no greater public benefit than other railways, and the plaintiffs' property having been injured and taken, they are entitled to be compensated. Here the conservators of the Thames are the owners of the land and seek compensation; it is for the company to shew that the Act deprives them of it, and this the company has failed to do. It is admitted that the land is included in the plans and schedule deposited, and the Act gives the company power to take these lands. The Lands Clauses Consolidation Act also is incorporated, and if the clauses of that Act stood alone the conservators clearly would have the same rights as other landholders; and they are so, unless there be some exception in the Acts which have been referred to in argument. It has been answered that the land is valueless, but there is no foundation for this, for the Conservancy Act shews, on the contrary, that it was considered valuable, inasmuch as power is given by sections 53, 56. and 57. to the conservators to grant licences to embark, make docks and erect piers; but that power is restricted by the condition that they are not to be granted without pecuniary compensation, to be assessed by a certain officer; there being an express provision in section 58 that no such licence shall be granted without a valuation being made by him. What then is there to shew that the railway company is to take the land without payment? I can find nothing. If so, the conservators, as owners, are entitled to the price. It is then said that the land was taken by agreement, and no price mentioned, and that therefore it was granted for nothing. This contention depends on sections 21 and 22 of 21 & 22 Vict. c. cxviii.; but it seems to me

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that they are consistent with our decision that the company is bound to pay. These clauses do not affect the compensation, but relate to the works; their object is to give to the public an additional security, and prevent the railway company from making the bridge over the Thames as they think fit; and the powers contained in them are analogous to the powers which have been inserted in other Acts, where the navigation of a river may be affected. The plaintiffs claimed in the double capacity of conservators of the river and owners of the soil; in the latter capacity they are entitled to compensation, in the former they have power to prevent an obstruction to the navigation. The main objections therefore fail. It is then said that the claim is not enforceable in this way, where there is consent; but what I have said is an answer to this; the consent has nothing to do with the land, and if compensation is contemplated by the legislature, it is more consistent to leave the amount to the machinery of the Lands Clauses Consolidation Act than to the conservators alone. The defendants have failed therefore in all their contentions, and the plaintiffs are entitled to have this rule discharged, and to have judgment on the demurrer.

BRETT, J.—The action is on an award made under the Lands Clauses Consolidation Act, and it is said that the plaintiffs are not entitled to succeed, first, because the matter is not within that Act; and secondly, because no compensation is due to them: the ground of the first contention being that the land was taken by agreement; of the second, that there was a consent to give the land without compensation. The whole of this argument seems to me to be based on a fallacious mixing up of the two characters of the plaintiffs, and of the consents in the two Acts of Parliament. The conservators became owners of the land by the Act 20 & 21 Vict. c. cxlvii., and under the powers of that Act they were enabled to give licences and consents; but the consent in question was not given under this Act, and the whole matter depends on the Railway Act, the 21 & 22 Vict. c. cxviii. By this Act the railway company is authorized to take the land and build the bridge. The land is in the schedule; and, as landowners, the conservators, just as other landowners, have a right to take proceedings under the Lands Clauses Consolidation Act to obtain compensation. But the conservators are also guardians of the navigation, and to protect it there are various sections (section 31. particularly,) which apply only to the mode of constructing the works, and it is provided that the works are not to be constructed on the land taken unless the conservators give their consent. This consent is not a consent to the taking of the land, but as to the mode of constructing the works. It is admitted that if the works are proper the conservators ought not to refuse that consent; and therefore this is the ordinary case of land not taken by consent, but by the Act, and if so the taking is subject to the provisions of the Lands Clauses Consolidation Act, which is to apply; and therefore the plaintiffs are entitled to compensation. It follows that the rule must be discharged, and it equally follows that the demurrer must be decided in the plaintiffs' favour.

Nov. 25, 1868.

INGS *v.* THE LONDON AND SOUTH-WESTERN RAILWAY COMPANY.

38 L. J. C.P. 8; L. R. 4 C.P. 17; 17 W. R. 120.

Discussed, *Hall Co.* v. *London, Brighton & South Coast Railway*, [1886] E. R. A.; 55 L. J. Q.B. 328; 17 Q.B. D. 230; 54 L. T. 713; 34 W. R. 558 (C. A.).

Costs—Action of Tort—Concurrent Jurisdiction with County Court—Operation of 30 & 31 *Vict. c.* 142. *s.* 5.

COSTS. I.—*On October* 5, 1867, *an action of tort was commenced; on November* 29 *a verdict was found for* 5*l. (no certificate), with leave to the*

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defendants to move; in Hilary Term, 1868, *the defendants moved, but eventually abandoned the matter; in May*, 1868, *the plaintiff applied to be allowed to tax his costs. But for the* 30 *&* 31 *Vict. c.* 142. *he would have been entitled to his costs, on the ground of concurrent jurisdiction*:—Held, *that the case fell within the* 30 *&* 31 *Vict. c.* 142. *s.* 5, *and the plaintiff was not entitled to costs.*

This was a rule calling on the defendants to shew cause why the plaintiff should not be allowed to tax his costs. The action was in tort. On October 5, 1867, the action was commenced; on November 29, 1867, the plaintiff obtained a verdict for 5*l.* damages (no certificate), with leave to the defendants to move to enter a verdict for themselves; in Hilary Term, 1868, a rule was applied for, but stood over at the suggestion of the Court, and on May 1, 1868, the motion was abandoned. In that month an application was made at chambers by the plaintiff to be allowed to tax his costs; this application was refused by the Master, and, on appeal, by Lush, J., also, without prejudice to an application to the Court. But for the 30 & 31 Vict. c. 142, the plaintiff would have been entitled to his costs on the ground of concurrent jurisdiction.

Mangles shewed cause.—It is conceded that but for the 30 & 31 Vict. c. 142, the plaintiff would be entitled to costs, on the ground of concurrent jurisdiction. But the 9 & 10 Vict. c. 95. s. 128. and the 15 & 16 Vict. c. 54. s. 4. were repealed by section 33. of that Act, which was passed in August, 1867, and by section 36. came into force on January 1, 1868; and it is submitted that section 5. of that Act applies, and prevents the plaintiff from having his costs. The case of *Wood* v. *Riley* (37 L. J. C.P. 24) was relied on for obtaining the rule, but there the action was commenced before January 1, 1868, whilst *Wood* v. *Hunt*[1] is in point. The cases of *Restall* v. *the London and South-Western Railway Company* (37 L. J. Ex. 89) and *Butcher* v. *Henderson* (37 L. J. Q.B. 133) were also referred to, but they do not apply here, because there the actions were commenced before August, 1867, and the only question was as to whether the Statute of Gloucester was repealed, just as was the case in *Mount* v. *Taylor* (37 L. J. C.P. 325). The case of *Morgan* v. *Thorn* (7 Mee. & W. 400; 10 L. J. Ex. 125) is in the defendants' favour, and also shews that the reservation of leave does not affect the question.

Wright, in support of the rule.—In *Wood* v. *Riley* (37 L. J. C.P. 24), it was held that section 5. did not come into force till January 1, 1868.

[BOVILL, C.J.—That is quite consistent with its then affecting cases, in which the action is brought after the passing of the Act.]

The plaintiff would have got his costs if no leave had been reserved, and it is unfair that the defendants by having leave and obtaining a rule which they afterwards abandoned, should prevent the plaintiff from getting them. In *Restall* v. *the London and South-Western Railway Company* (37 L. J. Ex. 89), Kelly, C.B. speaks of "the verdict which entitled the plaintiff as matter of right," and here the verdict was before January 1, 1868.

[BOVILL, C.J.—That action was commenced before the Act was passed.]

In *Mount* v. *Taylor* (37 L. J. C.P. 325) the effect of the Act has been discussed.

[BOVILL, C.J.—That action, also, was commenced before the Act was passed.]

As to *Morgan* v. *Thorn* (7 Mee. & W. 400; 10 L. J. Ex. 125), the statute there in question speaks of the verdict of the jury, which is not the case here. The motion being abandoned, the plaintiff is remitted back to the verdict, and is entitled under the Statute of Gloucester, if not otherwise.

BOVILL, C.J.—This action was commenced after the Act 30 & 31 Vict. c. 142. was passed, and the question is, whether the case is within section 5. of that Act. If it is, the Statute of Gloucester is out of the question, because as to cases within section 5. it is repealed. Does this case, then, come within section 5? The Act came into operation on January 1, 1868, and then operated

(1) Reported in *The Law Journal Notes of Cases*, 1868, page 102; see note at the end of this case.

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in those actions commenced after August 20, 1867; and there was no injustice in this, and it was not *post facto* legislation, because there was full notice as to what would happen on the Act coming into operation. The case is clearly within section 5, for the action was commenced after the Act was passed, and only 5*l.* was recovered, and that recovery was after January 1, 1868, for though the trial was in 1867, leave was reserved, so that there was no recovery then, and the recovery was after January 1, 1868. I am therefore of opinion that section 5. applies, and that the plaintiff is entitled to no costs.

KEATING, J.—I am of the same opinion. The questions turns on when the recovery was. It is said it was on November 29, 1867, and, if there had been an absolute verdict, this would be so; but there was a conditional verdict—conditional on the plaintiff keeping it, which he did eventually, but after January 1, 1868. Our decision does not impeach *Wood* v. *Riley* (37 L. J. C.P. 24), for there the judgment was before January 1; here it was not. It is said that when the motion was abandoned, the verdict by relation must be taken to have been on November 29, 1867; but we should violate the Act if we held this.

BRETT, J.—It is first said that the case is not within the Act, because the recovery was before January 1, 1868; but it seems to me that there is no recovery, at all events till judgment can be signed, and it could not here have been signed till after that date, therefore the case is within the statute. Secondly, it is said, even if this be so, still section 5. is to be read as if it were "any action after the Act comes into operation." The proper construction, however, is that it is to apply to any case commenced after the passing of the Act; and *Wood* v. *Hunt* so decides.

Rule discharged, with costs.

NOTE.—Report from *The Law Journal Notes of Cases*, 1868, page 102 :—

WOOD *v.* HUNT.

April 24, 1868.

Costs—County Court Act, 30 & 31 *Vict. c.* 142. *s.* 5.—*Action after Passing of Act.*

Day moved that the plaintiff might have his costs.—The action, which was for a debt of 4*l.* 0*s.* 6*d.*, was brought after August 20 last, and judgment was signed on January 2 last, one day after the County Court Act, 30 & 31 Vict. c. 143, came into operation. According to *Wood* v. *Riley* (37 L. J. C.P. 24), it was submitted that section 5, which deprives a plaintiff of costs where the debt is under 20*l.* in actions brought after the passing of the Act, must mean after the Act has come into operation.

[*Patch (amicus Curiæ)* stated that the Court of Queen's Bench had refused, this term, to grant a plaintiff costs where the action was commenced on August 23 last, on the ground that the concurrent jurisdiction of the superior Court ceased to exist on January 1 last.]

This COURT (Bovill, C.J., Byles and Keating, JJ.) also refused to grant a rule, being of opinion that although, as decided in *Wood* v. *Riley* (37 L. J. C.P. 24), the Act did not come into operation until January 1, 1868, it then spoke from August 20, 1867.

Rule refused.

IN THE EXCHEQUER CHAMBER. Nov. 30, Dec. 1, 3, 1868.

(Appeal from the Common Pleas.)

GRISSELL, *respondent;* BRISTOWE AND OTHERS, *appellants.*

38 L. J. C.P. 10; L. R. 4 C.P. 36; 19 L. T. 390; 17 W. R. 123: reversing, [1868] E. R. A. 1398; 37 L. J. C.P. 89; L. R. 3 C.P. 112; 17 L. T. 564; 16 W. R. 428 (C.P.).

Referred to, *Dickenson* v. *Jardine*, [1868] E. R. A. 1644; 37 L. J. C.P. 321; L. R. 3 C.P. 639; 18 L. T. 717; 16 W. R. 1169 (C.P.); *Coles* v. *Bristowe*, [1868] E. R. A. 77; 37 L. J. Ch. 737; L. R. 6 Eq. 149; 18 L. T. 459; 16 W. R. 690 (V.C.): reversed, [1869] E. R. A.; 38 L. J. Ch. 81; L. R. 4 Ch. 3; 19 L. T. 403; 17 W. R. 105 (L.C. & L. JJ.); *Langton* v. *Waite*, [1868] E. R. A. 362; 37 L. J. Ch. 345; L. R. 6 Eq. 165; 18 L. T. 80; 16 W. R. 508 (V.C.): reversed, [1869] E. R. A.; L. R. 4 Ch. 402; 20 L. T. 337; 17 W. R. 475 (L. JJ.).

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Followed, *Hodgkinson* v. *Kelly*, [1868] E. R. A.; 37 L. J. Ch. 837; L. R. 6 Eq. 496; 16 W. R. 1078 (M.R.). Discussed, *Maxted* v. *Paine* (No. 2), [1869] E. R. A.; 38 L. J. Ex. 129; L. R. 4 Ex. 203; 20 L. T. 748; 17 W. R. 886 (Ex.): affirmed, [1871] E. R. A.; 40 L. J. Ex. 57; L. R. 6 Ex. 132; 24 L. T. 149; 19 W. R. 527 (Ex. Ch.). Distinguished, *Maxted* v. *Paine* (No. 1), [1869] E. R. A.; 38 L. J. Ex. 41; L. R. 4 Ex. 81 (Ex.). Explained, *Davis* v. *Haycock*, [1869] E. R. A.; 38 L. J. Ex. 155; L. R. 4 Ex. 373; 20 L. T. 954 (Ct. of Ex.). Referred to, *Street* v. *Morgan*, 1869, 21 L. T. 432 (Ex.); *Allen* v. *Graves*, [1870] E. R. A.; 39 L. J. Q.B. 157; L. R. 5 Q.B. 478; 22 L. T. 677; 18 W. R. 919 (Q.B.). Explained, *Duncan* v. *Hill*, [1871] E. R. A.; 40 L. J. Ex. 137; L. R. 6 Ex. 255; 25 L. T. 59; 19 W. R. 894 (Ex.): reversed, [1873] E. R. A.; 42 L. J. Ex. 179; L. R. 8 Ex. 242; 29 L. T. 268; 21 W. R. 797 (Ex. Ch.). Followed, *Bowring* v. *Shepherd*, [1871] E. R. A.; 40 L. J. Q.B. 129; L. R. 6 Q.B. 309; 24 L. T. 721; 19 W. R. 852 (Ex. Ch.). Explained, *Merry* v. *Nickalls*, [1872] E. R. A.; 26 L. T. 496; 20 W. R. 531 (V.C.): reversed, [1872] E. R. A.; 41 L. J. Ch. 767; L. R. 7 Ch. 733; 27 L. T. 12; 20 W. R. 929 (L. JJ.): the latter decision affirmed, 1875, L. R. 7 H.L. 530; 32 L. T. 623 (H.L.).

Contract—Sale of Shares—Usage of Stock Exchange—Liability of Jobber to indemnify Vendor against Calls.

Stock Exchange. D. E.—*The plaintiff being the holder of eighty shares in a joint-stock company, employed B. & Co., who were stock-brokers and members of the Stock Exchange, to sell them; and B. & Co. sold the shares on the Stock Exchange to the defendants, who were stock-jobbers and members of the Stock Exchange. It is the practice of the Stock Exchange for jobbers on the re-sale of stock or shares bought by them to give the name of the party from whom, together with the price at which they have bought, to the broker of the parties buying from them on a ticket used for that purpose; and when the time for completing the purchase with the original seller arrives, for the broker of any sub-vendee to hand the ticket on which he has inserted the name of such sub-vendee, together with the quantity of stock bought and the price, to the broker of the original seller, who thereupon makes out a transfer of the stock or shares from his principal, the seller, to the sub-vendee named in the ticket, and, having procured the execution by his principal hands over the transfer to the broker of the sub-vendee on receiving the price due to the original vendor, any difference in the price being accounted for in settlement between the jobbers and the brokers. By the usage of the Stock Exchange (as interpreted by the Court), the jobber claimed a right to transfer the shares and be free from liability on giving the name of a proper transferee, who accepted the transfer and paid the price; and it was admitted by the plaintiff that the defendants had a right to substitute their vendee for themselves, as the parties by whom the shares were to be purchased. The defendants having re-sold the shares, the brokers of the ultimate buyers, in conformity with the usual practice, transmitted to B. & Co., as brokers for the seller (the plaintiff), the accustomed tickets and the names of the buyers, whereupon B. & Co. prepared transfers to such buyers, procured them to be executed by the plaintiff, and, acting on behalf of and with the authority of the plaintiff, delivered the transfers to the brokers of the buyers, and received from them the price of the shares; while, on the other hand, the brokers of the buyers received and accepted the transfers on behalf of their clients. The buyers did not, however, execute the transfers, or register themselves as shareholders, and were precluded from the possibility of registering, inasmuch as almost immediately after the transfer of the shares a petition was presented for winding up the company, and, an order to that effect having been made, the further registration of new shareholders became impossible. The plaintiff, thus remaining the registered holder of the shares, was compelled to pay a call made subsequently to the transfer; and the question was whether the plaintiff was entitled to be indemnified by the defendants:*—Held, *that there was nothing unreasonable in the usage; that the plaintiff was in the dilemma*

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that he must stand either on the contract of sale apart from the usage, in which case, having parted with his shares for a price, he could not perform his contract by a transfer to the defendants, or on the contract together with the usage, in which case, by the usage, having accepted the price from the transferees, he had released the defendants; that, as this was a case in which the contract was not sought to be repudiated but to be enforced, the defendants could only be made liable to the extent to which they had consented to be bound, that is to say, they could only be bound by the contract as qualified by the usage; that even if the defendants had only tendered persons able and willing to pay for and accept the shares the contract would have been fulfilled; but that, at all events, as the plaintiff had transferred the shares to other persons, he could not enforce the obligations of the contract against the defendants; and that he, therefore, was not entitled to be indemnified.

This was a SPECIAL CASE, in substance raising the question whether, under the circumstances disclosed, the plaintiff, who had sold shares to the defendants, was entitled to be indemnified by them against future calls. The Court of Common Pleas had decided that they were, and that decision was now appealed against. The case will be found fully set forth in the report of the case below, 37 L. J. C.P. 89.

The plaintiff, being the holder of eighty shares in the incorporated company of Overend, Gurney & Co. (Limited), employed certain persons named Barry & Co., who were brokers and members of the Stock Exchange, to effect a sale of the shares. Barry & Co. sold the shares on the Stock Exchange to the defendants, who were jobbers and members of the Stock Exchange. It is the practice of the Stock Exchange for jobbers, on the re-sale of stock or shares bought by them, to give the name of the party from whom, together with the price at which they have bought, to the broker of the parties buying from them, on a ticket used for that purpose; and, when the time for completing the purchase with the original seller arrives, for the broker of any sub-vendee to hand the ticket on which he has inserted the name of such sub-vendee, together with the quantity of stock bought and the price, to the broker of the original seller, who thereupon makes out a transfer of the stock or shares from his principal, the seller, to the sub-vendee named in the ticket, and having procured the execution by his principal, hands over the transfer to the broker of the sub-vendee, on receiving the price due to the original vendor, any difference in the price being accounted for in settlement between the jobbers and the brokers. The defendants having re-sold the shares, the brokers of the ultimate buyers in conformity with the usual practice, transmitted to Barry & Co., as brokers for the seller, the plaintiff, the accustomed tickets and the names of the buyers, whereupon Barry & Co. prepared transfers to such buyers, procured them to be executed by the plaintiff, and, acting on behalf of, and with the authority of the plaintiff, delivered the transfers to the brokers of the buyers, and received from them the price of the shares; while, on the other hand, the brokers of the buyers received and accepted the transfers on behalf of their clients. The buyers did not, however, execute the transfers, or register themselves as shareholders, and, in fact, were precluded from the possibility of registering, inasmuch as, almost immediately after the transfer of the shares, a petition was presented for winding up the company, and an order to that effect having been made, the further registration of new shareholders became impossible; and the plaintiff, thus remaining the registered holder of the shares, was compelled to pay a call made subsequently to the transfer.

The case also set forth evidence of a usage of the Stock Exchange exonerating the defendants from liability, as to the construction and admissibility of which there was much dispute;—the time at which, and circumstances under which, by the usage, the jobber became exonerated, and the reasonableness and binding effect on strangers thereof, being all subjects of contention, although there was no dispute as to the right of the defendants to substitute their vendees for themselves.

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Mellish (*Macnamara* with him), for the appellants.—The question relates to the respective liabilities of jobbers on the Stock Exchange and transferees of shares who have never executed the transfer, and is, whether the transferor is entitled to an indemnity from the jobbers; and it is submitted that he is not. A jobber is a person who buys and sells for the convenience of others, and has a commission. The broker of an intended purchaser or seller goes to him and simply asks the price; the jobber gives it, and is then told whether the broker desires to buy or sell. Inasmuch, however, as there may be a vast number of transactions in the same kind of shares on the Stock Exchange, the practice is for a member only to receive or give the difference between the number of shares bought and sold by him and any other member, the object being to get matters settled; and without an arrangement of this kind the jobbers and brokers could never do their business, certainly not complete it by the settlement-day. The method adopted to carry out this arrangement is this: the broker of the ultimate transferee of the shares (which may have passed through various hands) issues a ticket, with the name of the transferee, and the price at which he bought, and his own name as broker, and hands it over to the jobber from whom he bought; and it is then passed on till it reaches the broker who originally sold, the differences of price being settled between the various brokers and jobbers. By two o'clock on the same day the jobber who has bought from the first seller must give this ticket to the broker of that seller, who draws out a contract, inserts the name of the transferee, and what the transferee has to pay (which does not matter, as he settles the difference with the jobber), gets it executed within ten days by his client, and takes it to the broker of the transferee, who pays the price mentioned.—[To substantiate these statements, the learned counsel read the Rules, set forth at the end of the judgments (38 L. J. C.P. page 20).] The question is, if the transferee never executes, is the jobber or the intended transferee liable to indemnify the transferor for the consequences? And the question resolves itself into this, at what stage is the jobber discharged from liability? It is said, on the other side, that, till the transferee executes, there is no privity of contract between him and the transferor; but the answer is that the agent of the transferee, in effect, says he is willing to stand in the place of the jobber, if the transferor will accept him, for the original ticket is issued by the transferee's agent, and then by his agent the first seller acts on this offer by making out a transfer and delivering it to the transferee's agent, who takes it and pays the money. This being so, though it is impossible to say the jobber is released till the transferee is fixed to the transferor, it is equally impossible to say that the transferee is not fixed and the jobber released. A. transfers to B, B. to C, and by agreement between the parties A. accepts C; that is the whole matter, with the exception that here it is a part of the original contract that this shall be the case. In this particular case, instead of going through the whole transaction, a balance was struck; but that makes no difference, and, indeed, is part of the custom. The transferee having been accepted, and having paid through his agent, how can it be said that he is not liable to the transferor till he has executed? As to what has been said below about this being unreasonable, if the action were against the present plaintiff on the contract made by his agent, it might perhaps be open to him to repudiate, on the ground that he never authorized an unreasonable condition; but when he sues on it, he must take it as he finds it. The actual contract was verbal, and, according to common sense, must have been meant to be carried out by the rules; that clearly was meant. There is no necessity for the appellants to rely on a particular custom; they need not rely on what was actually done and the legal result of that. The legal result of what was done is to exonerate the jobber and bind the transferees. On looking to the authorities, it will be found that they are in the appellant's favour. It was settled in *Walker* v. *Bartlett* (18 Com. B. Rep. 845; 25 L. J. C.P. 156, 263) that where a transferee does not get registered he is liable to indemnify the transferor against calls, and that case shews that the liability depends on the transfer by the transferor. In *Shaw* v. *Fisher* (1 Jur. N.S. 971; 5 De Gex, M. & G. 596) a sub-purchaser's name was sent in

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and a transfer made to him; and it was held that the old privity was at an end and a new privity created, and the sub-purchaser liable; and that case is particularly valuable, because, the sale being by auction and not on the Stock Exchange, it shews there is liability apart from any custom. In *Hawkins* v. *Maltby* (37 L. J. Ch. 58) the judgment shews that the acceptance of the transfer and retention of the deed is sufficient evidence of a contract between the seller and sub-purchaser, and entitles the former to be indemnified by the latter. In *Sheppard* v. *Murphy* (16 W. R. 948; Irish Rep. 1 Eq. 490, below), on appeal, and in *Hodgkinson* v. *Kelly* (16 W. R. 1078) the transfer was accepted and payment made by the broker, who gave the name of the transferee; and it was held that the transferee was liable to indemnify the transferor. In none of these cases was there any execution by the transferee, but it was still held that there was a privity of contract between him and the transferor, and that the jobber was freed from liability. The case of *Coles* v. *Bristowe* (37 L. J. Ch. 737) will be relied on by the other side; but when that case was decided, there were both this case of *Grissell* v. *Bristowe* (37 L. J. C.P. 89) and also *Sheppard* v. *Murphy* (16 W. R. 948; Irish Rep. 1 Eq. 490, below) in the Irish Courts, which decided that the jobber was not released; but since then *Sheppard* v. *Murphy* (16 W. R. 948; Irish Rep. 1 Eq. 490, below) has been reversed, this case is now being argued on appeal, and *Coles* v. *Bristowe* (37 L. J. Ch. 737) has been argued on appeal, and time taken to consider[1].

J. Brown (*Llanyon* with him), for the respondent.—The shares were sold in the first instance to the jobber on his own account, and all the cases shew that a liability to indemnify follows. The usage that the jobber's liability is to cease on his giving a proper substitute who accepts and executes, is comprehensible; but the usage set up in the Court below was, that the jobber was discharged on merely giving a name, and the judgment of the majority of the Court was based on this, and not on there being an acceptance. The important question in this case is, whether some one else has become liable. The onus of shewing this is on the other side, and it ought to be shewn clearly; and as there is nothing distinctly to shew that the plaintiff had a good right of action against any other person, the jobbers must be held to continue liable; and the course taken in the Court below shews that the question of acceptance was never intended to be insisted on. Now, assume that the brokers acted with the authority of the transferees, and that the latter can be said to have accepted, yet the jobber's liability is not at an end; there is no substituted contract. By the rules of the Stock Exchange and the authorities, until the transferee executes the jobber remains liable. The respondent is not interested in disputing that the jobber does not remain liable longer than that. The contract of the seller is to sell to the jobber and transfer to him or his nominee; that of the buyer is to buy of the jobber and take transfers. And when matters are completed, only the original contracts are carried out, and no new privity is created. And there is no case of an action by the original seller against the ultimate transferee having been held to lie; for *Sayles* v. *Blane* (14 Q.B. Rep. 204; 19 L. J. Q.B. 19), the only case at all bearing on this, turned on the form of pleadings. The cases which have been cited are equity cases, and the Courts of equity interfere because a relation of trustee and *cestui que trust* is created, and also because equity considers what ought to be done as done. Further, in all the equity cases the authority of the broker was clearly shewn, and those cases only shew that then the Courts of equity on equitable grounds will compel a performance, and, at the most, that the plaintiff has a right to an equity suit. The consequence of the doctrine of the other side is this, that a man may find that instead of one action of law, he has several Chancery suits. Again, the sub-contracts may be at different prices, and though the seller gets the price, he does not usually get it all from the ultimate buyer; and though it matters not from whom he gets the money, yet this has an important bearing on the question of whether there be a transferor of the contract, or a new

(1) This case has since been decided on appeal.

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contract. Rule 79. shews that the original buyer is responsible for the price, and rules 84. and 90. shew that the parties regard the profits and liabilities as belonging to the purchaser from the time of the first purchase. And by the articles of association the execution by the transferor and transferee is necessary to compel registration, and till then the transferor is to be liable, and thus there is only a right to have the property, not a transfer of the property. By the execution of both parties, it is admitted that a new contract arises between the transferor and transferee, but the cases go no further than that. In *Shaw* v. *Fisher* (1 Jur. N.S. 971; 5 De Gex, M. & G. 596) it may be doubted if the ultimate transferee did not execute. In *Torrington* v. *Lowe* (17 W. R. 78) it was decided that the liability of the original buyer was gone when the transferor and ultimate transferee executed, because there a privity arose between those two. In *Evans* v. *Wood* (37 L. J. Ch. 159) both executed, and the money was paid, and therefore it was decided that a privity arose. These cases shew that there is a privity then, and it now will be shewn that till then there is none. In *Sheppard* v. *Murphy* (16 W. R. 948; I. R. 1 Eq. 490, below), though there was payment with authority, there was no execution, and the Vice-Chancellor held there was no privity, and in the Court above the one Judge declines to say that an action would lie, but says a relation of trustee and *cestui que trust* is constituted, whilst the other Judge, who, no doubt, uses expressions in favour of the other side, really decides only that an equitable contract exists. In *Coles* v. *Bristowe* (37 L. J. Ch. 737) the Vice-Chancellor says that even apart from *Grissell* v. *Bristowe* (37 L. J. C.P. 89) he should have come to the same conclusion, and in *Hodgkinson* v. *Kelly* (16 W. R. 1078) the Master of the Rolls goes far beyond anything which had been previously decided, and his judgment is open to much criticism, but even he does not dissent from the decision of this case of *Grissell* v. *Bristowe* (37 L. J. C.P. 89) in the Court below. *Hawkins* v. *Maltby* (37 L. J. Ch. 58), no doubt, is against the respondent, but that is the only case. Lastly, the form of the contract shews that it is one intended to be executed by both parties, and till then it is only inchoate.

Mellish was not called on to reply.

Cur. adv. vult.

The judgment of the Court[2] was delivered, on December 3, by

COCKBURN, C.J.—This is an action founded on an implied agreement by the defendants that on the sale by the plaintiff to them, or to such other person or persons as they should name, of certain shares in the incorporated joint-stock company of Overend, Gurney & Co., Lim., and the transfer of such shares to them or their nominees, they, or such nominees, would accept the same, and cause them to be registered in the names of the defendants, or of such nominees, as the owner or owners of the shares.

The shares having been transferred to the nominees of the defendants, but such nominees having omitted to execute the transfers, or to cause themselves to be registered as the owners, and the plaintiff thus remaining the registered holder of the shares and having been compelled to pay a call since made, he now brings his action against the defendants to be indemnified in respect of the payment so made. The defendants deny ever having entered into any such implied agreement, and deny their liability in respect of it.

The case is one of considerable importance as regards dealings on the Stock Exchange on the sale of stocks and shares; but when the facts are duly appreciated, and seen in their true light, the case does not appear to us to present any serious difficulty. The facts essential to the decision of the case may be briefly stated.

The plaintiff, being the holder of eighty shares in the incorporated company of Overend, Gurney & Co., Lim., employed Barry & Co., stock-brokers on the Stock Exchange, to effect a sale of the shares. Barry & Co. sold the shares

(2) Cockburn, C.J., Kelly, C.B., Bramwell, B., Channell, B., Pigott, B., and Lush, J.

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on the Stock Exchange to the defendants, who are what are there called "jobbers,"—that is to say, persons who buy stocks and shares on the Stock Exchange, not for the purpose of investment or speculation, but for that of immediate sale at a slight advance of price to persons wanting to buy, making a profit by what is termed the turn of the market. It is the practice of the Stock Exchange for jobbers, on the re-sale of stock or shares bought by them, to give the name of the party from whom, together with the price at which, they have bought, to the brokers of the parties buying from them, on a ticket used for that purpose. When the time for completing the purchase with the original seller arrives, the broker of any sub-vendee hands the ticket, on which he has inserted the name of such sub-vendee, together with the quantity of stock bought and the price, to the broker of the original seller, who thereupon makes out a transfer of the stock or shares from his principal, the seller, to the sub-vendee named on the ticket, and having procured the execution by his principal, hands over the transfer to the broker of the sub-vendee on receiving the price due to the original vendor, any difference in the price being accounted for on settlement between the jobber and the brokers. By this means the last purchaser obtains the shares at the price he has agreed to pay, and the seller, as he parts with his shares, receives the price at which he has sold. The transaction is frequently multiplied by intermediate sales, often at varying prices, of all which the particulars are entered on the ticket, but the result is the same. In the end the transaction becomes one which is to be carried out between the last vendee and the original seller, as though such vendee had purchased immediately of such seller.

Thus far both parties appear to be agreed. The plaintiff admits that the defendants had a right to substitute their vendees for themselves as the parties to whom the shares were to be transferred. But the question between them is as to how far a jobber under such circumstances becomes released from the obligations of his contract with the seller—a question which becomes all-important when the further facts connected with the case are detailed.

These facts are as follows: The defendants having re-sold the shares, the brokers of the ultimate vendees, in conformity with the usual practice, transmitted to Barry & Co., as brokers for the seller, the accustomed tickets with the names of the buyers; whereupon the plaintiff's brokers prepared transfers to such buyers, and procured them to be executed by the plaintiff, after which, acting on behalf of the plaintiff, and as we must, in the absence of anything to the contrary, assume, with the authority of the plaintiff, delivered the transfers to the brokers of the transferees, and received from them the price of the shares, while on the other hand, the brokers of the buyers received and accepted the transfers on behalf of their clients. There is nothing to lead us to suppose that the transaction, as regards the nomination of the proposed transferees by the defendants, or the acceptance of the transfers and payment of the price by the brokers, was not in all respects *bonâ fide* and regular, or that all that was done by the latter was not done in the ordinary course of their business as brokers acting for real and responsible parties. The transferees did not, however, execute the transfers, or register themselves as shareholders; indeed, they were precluded from the possibility of registering, inasmuch as, almost immediately after the transfer of the shares, a petition was presented for winding-up the company, and, an order to that effect having been made, the further registration of new shareholders became impossible. The plaintiff, thus remaining the registered holder of the shares, has been compelled to pay a call made subsequently to the transfer, and it is to be indemnified in respect of such payment that he brings this action.

That he is entitled to be indemnified in respect of such payment is undoubted: the question is, whether he is entitled to be thus indemnified by the defendants. We are of opinion that he is not.

It appears plain that the questions as to how far the defendants are absolved from their contract by the substitution of the parties to whom the shares have actually been transferred must depend on the usage, and its effect

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on the contract between the plaintiff and the defendants for the purchase of these shares.

It is admitted that, at least to some extent, the usage must be taken as having been imported into and governing the contract. The action is not brought against the defendants for a breach of contract in not accepting and paying for the shares. It is based on the admission that the defendants were at liberty to substitute other parties in their place as buyers, and on the assumption that it was an implied condition of the right to substitute others as buyers, that the defendants should guarantee that the parties thus substituted should, even after they had been accepted by the plaintiff, the seller, fulfil all the obligations and liabilities incidental to the original contract. We have consequently an admitted departure from the ordinary incidents of a contract of sale, such as would have attached on a contract for the sale of shares if effected outside the walls of the Stock Exchange. The action is, therefore, based on the contract of sale as qualified by the usage of the Stock Exchange, and we can therefore deal with it only according to the usage, as it is to be collected from the case before us, and as it is applicable to and incorporated with the contract. Admitting this to a certain extent, the plaintiff contends that the right of the defendants, as arising from the usage, is simply to have the shares transferred, under the original contract, to their nominees instead of to themselves, leaving them still liable to all the obligations of the original contract till these shall have been discharged by those to whom, by any sub-contract, they may have transferred their rights. The defendants, on the other hand, contend that, by the usage, they, as jobbers, are not only entitled, on nominating at the appointed time substitutes prepared and willing to accept the transfers and pay the price, to have the shares transferred to those substitutes, but that, on such acceptance and payment by the latter, they, the jobbers, become entirely released from all further liability on their contract to the seller.

Such being the conflict between the parties, it is necessary to see what the usage is, as it is to be gathered from the statement of the case before us. Now, on turning to the evidence as to the usage, we find no trace of any such limited or qualified usage as that for which the plaintiff contends, or of any such indemnity as that on which he insists. On the contrary, the evidence is, that when the nominee of the jobber has paid the price of the shares all further liability on the part of the jobber, the original buyer, is at an end. The sum and substance of the usage, as we collect it, after a careful consideration of the statement in the case, may be thus stated: It appears that in transactions between members of the Stock Exchange there is an implied understanding that on the purchase of stock the jobber shall be at liberty by a given day, commonly called "the name-day," to substitute, if he is able to do so, another party or parties as buyers, and so relieve himself from further liability on the contract, provided that such party or parties be persons to whom the seller cannot reasonably except, and that such party or parties accept the transfer of the shares, and pay the price agreed on between the seller and the jobber—in other words, become the buyers of the shares at the price originally agreed on. This appears to us to be the true statement of the usage.

It was, indeed, contended by Mr. Brown, with a view to shew that the usage was an unreasonable one, and therefore not binding in the absence of express agreement—or on anyone not being a member of the Stock Exchange, and not being aware of the usage—that the alleged usage was that the jobber was to be at liberty to recede from the contract and be exonerated from all further liability in respect of it on giving the name or names of any proposed transferee or transferees, as prepared to pay the price, though such transferees might be of insufficient ability to insure to the seller the performance of the obligations of the contract. But we are of opinion that the statement of the usage in the case must receive a reasonable intendment, and be understood as claiming for the jobber a right to transfer the contract and claim exemption from liability in respect of it, only on his giving the name of a buyer to whom the seller has no reasonable ground to object. And we are further of opinion,

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from the particulars of the usage, as stated in the case, that it is only when the nominee or nominees of the jobber have paid for the shares—in other words, have accepted the transfer and placed themselves in the position of buyers and taken upon themselves the obligations of the contract—that the jobber is held to be released. The usage being thus ascertained, the result appears to us to be fatal to the plaintiff's case.

On the part of the plaintiff, it is assumed that the right of a jobber purchasing shares under the usage is limited to the right of having the shares transferred to his nominees; and, starting from this assumption, it is contended, as matter of law, that the execution of the transfer to such nominees is merely a fulfilment of the contract with the jobber, and creates no privity of contract with the transferee, and no discharge of the jobber from all the obligations of the contract. But this mode of dealing with the question is to convert into matter of law that which is properly matter of fact. If it turns out, in point of fact, that by virtue of the usage the defendants were entitled, on producing a competent buyer, to withdraw from all the obligations of the contract, it follows that, the contract having been founded on the usage, as the defendants have produced buyers who have paid the price and accepted the shares, the case of the plaintiff fails. It is, however, said, as a reason why the plaintiff should not be bound by the usage,—first, that the usage is unreasonable, inasmuch as it deprives the seller of his hold on the first buyer, the jobber, a known and responsible person, and substitutes for the latter a party whom may be unknown and possibly insufficient; and, secondly, that the plaintiff was not aware of its existence. As regards the latter position, independently of the question as to how far the knowledge of the plaintiff's agents, the brokers, would not, in point of law, be the knowledge of the plaintiff, we should be prepared to draw the inference as one of fact, looking to the circumstance of the plaintiff having accepted the nominees of the defendants, having received the price from them, and having executed the transfers to them without any reference to the defendants, that he either knew of the usage beforehand, or, at all events, was made aware of it afterwards, and, having become aware of it, ratified the contract as made by his agents. It is, however, unnecessary, in the view we take of the case, to enter further into this question.

As regards the alleged unreasonableness of the usage, the ground suggested by the counsel for the plaintiff appears to us altogether untenable. There can be nothing unreasonable, any more than unlawful, in a person to whom it is proposed to purchase a particular thing saying, "I will agree to buy, provided that if when the time for completing the contract arrives it should suit me to substitute another buyer able and willing to take my place and perform the contract I shall be at liberty to do so." What would not be unreasonable in a single buyer would not be so in a class of persons dealing in a particular commodity, and if, from a long series of dealings, a habit or usage of always dealing on such an understanding, even when not expressed, should become established, such a usage would no more be unreasonable than such a stipulation would be if introduced expressly into each particular contract. Besides, a usage founded on a general convenience of all parties engaged in a particular department of business can never be said to be unreasonable. Now, the intervention of jobbers in these transactions is obviously for the advantage both of sellers and buyers, who are thus brought readily into contact. And there is no hardship or injustice on the seller in the substitution of another buyer. All that the seller desires is to find a customer who will pay the price, accept the shares, and relieve him from all further liability in respect of them. If a buyer is found as to whom the seller's broker is satisfied, the seller has all that he has sought for. In practice, no seller employing a broker to sell stock or shares for him thinks of limiting the authority of the broker to selling exclusively to a jobber. He is satisfied with the buyer whom the broker finds for him, and for the obvious reason that he has it in his own power, by reasonable diligence on the part of himself or his broker, to protect himself against loss. He need not part with his shares till the price is paid and the instrument of

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transfer is executed by the buyer. He may insist on the registration of the shares being made in the name of the new buyer as part of the transaction. On the other hand, it would certainly be a considerable hardship on the jobber if, for the small profit realized on the re-sale of stock or shares, he were to be held responsible in respect of any non-fulfilment of any part of the contract when the matter has passed out of his hands by the seller assenting to complete the transaction with the substituted buyer, or for loss occasioned, as in the present instance, by the laches of the seller in parting with the shares without insisting on the execution of the transfers by the party to whom he transfers them. Far, therefore, from being unreasonable, the usage appears to us to be fair and equitable with reference to the interests of all parties concerned.

But there is another, and a more conclusive answer to the objection thus urged against the usage. As has been already pointed out, the plaintiff, in taking his present ground of action, admits that the contract on which he sues was based on the usage, of which, as he alleges, the right of indemnity claimed constitutes a part. But the plaintiff, if he adopts the usage as forming part of the contract, must take it in its entirety—for better or worse; he cannot claim the benefit of it so far as it suits his purpose and reject the rest. He is in this dilemma—either he must take his stand on the contract of sale independently of the usage, in which case, having parted with the shares for a price, he would be unable to perform his part of the contract in transferring them to the defendants; or he must take the contract as incorporating the usage,—in which case, by the effect of the usage, having accepted the price of the shares from the transferees, he has released the defendants. There is another view of the case, to which, it seems to us, sufficient prominence has scarcely been given, and which is equally fatal to the plaintiff's claim. It is necessary to consider, as lying at the very foundation of the case, what was the contract to which the the defendants assented to become bound; for, however unreasonable the terms on which a contracting party may insist, he cannot be bound by a contract except so far as he has assented and agreed to its terms. The plaintiff may have known nothing of the usage of the Stock Exchange; his broker may have acted contrary to or exceeded his authority; the contract may have been one which the plaintiff, if so minded, might have been justified in repudiating: but when the contract is sought to be enforced against the defendants their liability can only be carried to the extent to which they consented to be bound. Now, it is not denied, and must be taken as an admitted fact, that the plaintiff's brokers and the defendants dealt with one another and entered into this contract on the footing of the usage in force on the Stock Exchange. The defendants can, therefore, only be bound by the contract as qualified by the usage; they are entitled to any immunity which the usage affords, and the extent of their liability must be determined by reference to the usage. Now, according to the usage, as stated in the case, the defendants were only bound to find a party, or parties, able and willing to stand in their place, and discharge the obligations of their contract, or, in the alternative, to fulfil the contract themselves. But the first of these alternatives the defendants have in fact performed. They have found parties able to perform the contract, and who, by accepting the transfers, have assented to stand in the position of buyers, and have bound themselves to the performance of all the remaining obligations of the contract. While, therefore, we agree that the defendants would not have satisfied the exigency of the contract as qualified by the usage by merely giving in the names of parties able to carry out the contract, unless those parties had placed themselves under the same obligations as they themselves were under; yet, as soon as they produced persons who paid the price and accepted the transfers, and thereby took upon themselves the ulterior liabilities of the contract, they had done all which, according to the contract, they undertook to do. If, then, the case had rested here, and all that appeared had been that the defendants had tendered parties able and willing to pay for and accept the shares, we should have been prepared to hold that the defendants had satisfied the contract they had entered into, and were exonerated from further liability. But, in the

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present instance, the case is infinitely stronger in their favour, for it appears that on receiving the names of the proposed sub-vendees, according to the accustomed course, the plaintiff's brokers prepared transfers to the proposed nominees, got those transfers, so filled up, executed by the plaintiff, received the price from the brokers of the transferees, and thereupon handed over the transfers. Now, by so doing, it is obvious that the plaintiff has for ever deprived himself of the power of transferring the shares to the defendants. Yet it was in consideration of having the property in the shares—which must always be assumed to have some value—conveyed to them in the event of their nominees not fulfilling their obligations as buyers that the defendants assented to be bound to the obligations of the contract. When, therefore, the plaintiff has, by his own act, put it out of his power to give to the defendants the consideration which formed the basis of the contract, and has transferred that benefit to another, it would obviously be unreasonable and unjust that he should be at liberty to enforce the obligations the consideration for which entirely fails. It is said, indeed, on behalf of the plaintiff, that in transferring the shares to the nominees of the defendants, the plaintiff has only acted on the original contract with the defendants to transfer the shares to such persons as they should appoint, leaving them responsible for the performance by the transferees of all the obligations of the buyer. In this view we are unable to concur. In our opinion the contract, as interpreted by the usage, was that the defendants, the first buyers, were to be at liberty to transfer the contract, with all its rights and obligations, to any sufficient buyers who would take it upon them with all its incidents. When, therefore, the seller adopted the substituted parties as the buyers, and the price was paid by the one and the property transferred by the other, a contract and the relation of vendor and vendees immediately arose between them. In this view alone could the seller be entitled to a specific performance of the contract by the transferees in the execution of the transfers and a registration of the shares, or an indemnity in respect of calls—a right which was held to exist by the Court of Appeal in Equity in Ireland in the case of *Sheppard* v. *Murphy* (16 W. R. 948; I. R. 1 Eq. 490), the circumstances of which were precisely similar to the present—a right which it seems impossible to doubt the seller would have against the transferees under the circumstances, and as to which it is only necessary to say that we entirely concur in the reasoning and conclusion of Lord Justice Christian, in the case referred to, and to which it seems to us impossible to add anything with advantage. But, assuming even that the view of the original contract contended for on the part of the plaintiff is correct, and that the defendants, the intermediate buyers, were bound to indemnify the seller against any loss by reason of the non-performance by the ultimate buyers of any part of the contract; still, this, like any other contract of indemnity, can only attach where the position of the party against whom it is sought to be enforced has not been unnecessarily deteriorated by the acts or laches of the party who seeks to enforce it. Now, here, the plaintiff by parting with the property in the shares, has obviously deprived the defendants of the alternative to which they were undoubtedly entitled, of themselves taking the shares and performing the contract. He has, by his own laches, in parting with the transfers, without insisting on the execution of them by the transferees, enabled the latter to obtain an advantage to which they were not entitled, by enabling them to acquire a property in the shares without fulfilling the obligations which ought, in the ordinary course of dealing, to have accompanied the transfer—an undue advantage as against the defendants, as well as against the seller, inasmuch as it took from the transferees the motives for fulfilling the ulterior obligations of the contract. It is by the act of the plaintiff himself that the state of circumstances of which he complains has been brought about—a state of circumstances, to which, as it seems to us, the implied indemnity relied on can by no reasonable intendment be held to apply.

In no point of view, therefore, in which the case can be looked at, can, in our opinion, the decision of the Court below be upheld; and our judgment,

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therefore, reversing that of the Court of Common Pleas, must be for the defendants.

KELLY, C.B.—I am desirous of adding a few words to the judgment delivered by the Lord Chief Justice, in every part of which I entirely concur, and the observation I wish to make is this: that when the practical effect of this usage or mode of dealing on the Stock Exchange comes to be considered it will be found that there is no hardship or injustice in it as regards the interests of the public, but the contrary. In the great majority of transactions which occur, the solvency or responsibility of the nominee or ultimate buyer is a matter of indifference to the seller; for when the settling-day arrives, the seller transfers and the buyer pays the price, or if he make default it is at once paid by the jobber, and the transaction is closed. It is only upon a sale of shares in a joint-stock company, with an unpaid-up capital, and of which the solvency is doubtful, or which (as was the case with Overend & Gurney at the time of the contract in question) has actually stopped payment, that it concerns the seller to ascertain that the ultimate buyer is a responsible man; and this he has an opportunity of doing under the regulations of the Stock Exchange. And surely there is nothing unreasonable or unjust in subjecting to whatever degree of trouble and risk may attend such a transaction the seller of shares, which are often worse than valueless, which he is glad to part with at an almost nominal price, or at a premium paid to the buyer for taking them, and which have become the symbols not of a title to profits and dividends, but of a liability to losses and calls. On the other hand, this practice affords to the public the very great advantage of being enabled, by means of a stockbroker and a jobber, to buy or to sell at any moment any quantity of stock, or any number of any description of shares, at the market price of the day, and concluding the transaction at the latest on the settling-day; whereas, without such practice, every one having any given amount of stock, English, foreign or colonial, or of debentures, or shares in railways or other joint-stock companies to buy or to sell must wait till a seller or a buyer could be found to sell or to buy the exact quantity of stock or shares which is to be parted with or acquired—a state of things which in this country, where some hundreds of these purchases and sales are effected every day, would be found intolerable, and would speedily demand a remedy than which no better could be devised than this practice, so long established, and which has never until now been called in question.

Judgment reversed.

Note.—The following Rules of the Stock Exchange in force at the time of sale, having in the present argument been referred to as important by counsel, it is thought advisable to insert them here, as they were omitted in the report below as unnecessary to it.—

Fulfilment of Bargains.—Legal Proceedings.

49. The Stock Exchange does not recognize in its dealings, any other parties than its own Members: every bargain, therefore, whether for account of the Member effecting it, or for account of a Principal, must be fulfilled according to the Regulations and usages of the House; and should a Principal, without the consent of the Committee, attempt to enforce by law a claim against a Member of the Stock Exchange, the Committee will decide as to the liability of the Broker or Agent of such Principal for any cost or damages incurred in consequence of legal proceedings.

Rules applicable to Shares and Stock of Public Companies.

81. Bargains in shares or stock, when no time is specified, and bargains made before twelve o'clock on name days, shall be considered to be made for the existing account.

82. The Committee will not take cognizance of any bargain in stocks or shares effected for a period beyond the end of the ensuing two accounts.

83. An offer to buy or sell an amount of shares or stock at a price named, is binding as to any part thereof, that may be a marketable quantity; and an offer to buy or sell shares or stock, when no amount is named, is binding to the amount of Ten shares, if in value under 500*l*., or a number not exceeding in value that sum, or to the amount of 1,000*l*. stock.

84. The seller of registered shares or stock is responsible for the genuineness and regularity of all documents delivered, and for such Dividends as may be received, until reasonable time has been allowed to the buyer to execute and duly lodge such documents for verification and registration. When the buyer shall have obtained an official certificate of the registration of such stock or shares, the Committee will not (unless bad faith is alleged against the seller) take cognizance of any subsequent dispute as to title, until the legal issue has been decided

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between the buyer and the company, the reasonable expenses of which legal proceedings shall be borne by the seller.

85. The Committee will not (except under special circumstances) interfere in any question arising from the delivery of shares, stock, bonds, or debentures in blank transfer.

86. When shares of railway or other companies have been converted into consolidated stock and are so quoted in the authorized list, buyers are required to pass names for stock, and not for shares.

87. The buyer of stock, shares, bonds, or debentures shall pass a ticket for the same at a marketable price, containing the names and address of the buyer in full, before twelve o'clock on the name-day, either in the Stock Exchange or at the office of the seller; and in the event of his not doing so, should the stock, shares, bonds, or debentures be sold out, the loss, if any, shall fall upon him; it is, therefore, required, if the ticket should not be passed before twelve o'clock, that the person taking it should certify the same on the back thereof. The time for selling out shall be from half-past two to three o'clock. If the ticket be regularly passed before twelve o'clock, the person holding it at two o'clock shall be responsible for the loss occasioned by selling out on that day, but should the stock or shares not be sold out until the following day, then the person who held the ticket at THREE o'clock on the preceding day shall be liable. When the name-day is fixed for a Saturday, the time of selling out shall be from half-past twelve to one o'clock, and the person holding the ticket at half-past twelve o'clock shall be liable. Every person passing a ticket is required to write on the back of the ticket the name of the Member to whom it is passed. A Member dividing a ticket shall retain the original ticket, that access may be had to it, should any portion of the shares have been sold out; and the Member who has passed on the original ticket shall be required to trace it, in the event of any portion of the stock or shares having been sold out. Tickets may be left at the office of the seller up to one o'clock on name-days. Every person who receives a ticket "after two o'clock," or "after three," on the name-day, shall notify the same on the back of the ticket, by drawing a line, or otherwise, in order to facilitate the tracing when shares are sold out; and any person neglecting to do so will be held responsible for any loss that may be incurred.

88. A Member who makes an alteration in a transfer ticket for stock or shares, or improperly detains the same shall make good any loss that may occur thereby.

89. The seller of shares or stock shall cause the same to be transferred at the price marked upon the ticket given him by the buyer; but the seller shall not be compelled to take a ticket at a price not quoted in the authorized list during the account, unless the bargain represented by such ticket shall have been made within the two preceding accounts.

90. The seller may, previous to delivery, pay any call made on registered shares, although not due, and claim the same of the buyer.

91. The buyer of transferable shares or stock, shall pay the *ad valorem* duty, and all expenses attending the conveyance of the same; and shall state on the ticket the amounts in which he may desire to have the shares or stock transferred (provided no such amounts require a higher stamp than 9*l.* 15*s.*)—and the seller shall pay any increased expense caused by the sub-division of a ticket. Split tickets must bear the name of the original buyer.

92. The buyer of shares or stock shall, in the event of his ticket being divided, pay for any portion which may be presented, provided the number be not less than 10 shares, or the value less than 200*l.*

93. The buyer of stock or shares may refuse to pay for a transfer unaccompanied by coupons or certificates, unless it be certified thereon officially that the coupons or certificates are at the office of the company. But if the transfer presented be perfect in all other respects, the stock or shares must not be bought in until reasonable time has been allowed to the seller to obtain the verification required. If the seller have a larger coupon than the amount of stock conveyed, or only one coupon, representing stock conveyed by two or more transfers, the coupon may be deposited with the Secretary of the Share and Loan Department of the Stock Exchange, who shall forward it to the office of the Company, and certify to that effect on the transfers, which shall then be a valid delivery. No person is to look to the Managers or Committee of the Stock Exchange, as being liable for the due or accurate performance of those duties, the Managers and Committee holding themselves, and being held, entirely irresponsible in respect of the execution, or of any mis-execution, or non-execution, of the duties in question.

94. The buyer is entitled to new stock or shares issued in right of old, provided that within reasonable time, he specially claim the same, in writing, from the seller. Claims should be entered as bargains, and as such be checked in the usual manner.—When practicable, claims are required to be settled by Letters of Renunciation, but if not practicable, and there be sufficient time for registration, the seller may, after due notice, require the buyer to complete the bargain in old stock or shares. If the new stock or shares cannot be obtained by Letters of Renunciation, or by the transfer of the old, the Committee will fix a price at which the same shall be temporarily settled, and which amount may be deducted by the buyer from the purchase-money of the old stock or shares, until the special settlement. The Committee will not entertain any dispute relating to unchecked claims, unless brought before them within ten days after the special settling-day.

95. A Member not refusing an antedated ticket, when tendered as such, takes it with all its liabilities; but if it be passed as an ordinary ticket, the liabilities remain with the Member putting such ticket again into circulation; and any person holding an undated ticket shall not be liable for any loss arising from the shares or stock having been bought in, if such ticket had not been ten days in his possession.

96. A Member who shall allow two clear days to elapse, without availing himself of his

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right to sell out shares or stock, shall release the buyer from all loss caused by the failure of any person, through whose default the ticket was not passed; and if the stock or shares be not delivered within fifteen clear days, the issuer of the ticket shall alone remain responsible.

97. When stock or shares are sold out, if a ticket be not given within half an hour after the time of sale, the transfer may be made into the name of the buyer; and if a name is guaranteed, the rule shall apply as if the stock or shares had been actually sold out.

98. Registered shares, or stock, if not delivered within ten days, may be bought in against the seller, at or after twelve o'clock on the eleventh day after the date of the ticket, and all loss incurred thereby shall be paid by him. The broker employed to buy in the shares is required to give one hour's public notice before proceeding to make such purchase, and if the purchase be not made or attempted within half an hour after the expiration of the time fixed, the notice shall be cancelled. Shares or stock thus bought in, and not delivered by one o'clock on the following day, may be repurchased for immediate delivery without further notice, and the loss, if any, shall be paid by the member causing such repurchase.

99. A Member, who shall allow fifteen clear days from the date of the ticket to elapse, without buying in, or attempting to buy in, registered shares or stock, shall release the seller from all loss, caused by the failure of any member, through whose default the shares or stock were not delivered, unless such right has been waived at the request, or with the consent of, the seller. The right to buy in shares or stock is limited to the original buyer, whether the name of the first buyer or that of any other Member is placed on the ticket to pay; but in order to identify the original ticket, the name into which the stock or shares are to be transferred must be stated on the order given to the broker employed to buy in, to whom holders of over-due tickets may apply.

100. On the day previous to, and on the name-day of, every settling-day in securities deliverable by transfer, the clerk of the House shall, at twelve o'clock, fix the making-up prices for such securities at the actual market prices, and no making up shall be binding, unless at such fixed prices. On name-days the clerk of the stock and share market shall (with the concurrence, if necessary, of a Member of the Committee) fix the price of shares at three o'clock (or on Saturdays at one o'clock), at which prices unsettled accounts shall be temporarily made up, and the differences paid in the usual way.

101. No person shall be required to pay for registered shares or stock presented after half-past two o'clock; or after one o'clock on Saturdays.

IN THE COMMON PLEAS. Nov. 7, 9, 1868.

HOLBOROW *v.* JONES.

38 L. J. C.P. 22; L. R. 4 C.P. 14; 19 L. T. 320; 17 W. R. 54.

Costs—County Court—Action on Bill of Exchange under 20*l.*

COSTS. I.—*The County Court Act* (19 *&* 20 *Vict. c.* 108. *s.* 4.) *has not deprived the County Court of its jurisdiction to issue a summons under the Bills of Exchange Act* (18 *&* 19 *Vict. c.* 67). *A refusal therefore of the officer of a County Court to give a plaintiff any other than the ordinary summons in respect of a claim for less than* 20*l. on a bill of exchange is no ground for allowing the plaintiff, under* 30 *&* 31 *Vict. c.* 142. *s.* 5, *his costs of proceedings under the Bills of Exchange Act in the superior Court; nor is it any ground for allowing such costs that the expense and delay of obtaining judgment in the County Court on the ordinary summons would be greater than that of obtaining judgment in the superior Court under the Bills of Exchange Act.*

W. Willis moved for an order for the plaintiff's costs. The action was brought under the Summary Procedure on Bills of Exchange Act, 18 & 19 Vict. c. 67, to recover the sum of 15*l.* 15*s.*, balance due upon a bill of exchange for 21*l.* 5*s.*

By an Order in Council, made on January 30, 1856, pursuant to the power given by section 9. of 18 & 19 Vict. c. 67, that Act was extended to all the County Courts in respect of actions upon bills of exchange where the sum claimed did not exceed 50*l.* The affidavit of the plaintiff's attorney in support of the present motion stated that before he commenced this action he applied to the proper officer of the Lambeth County Court, within the jurisdiction of which Court both the plaintiff and the defendant resided, for a summons under the Bills of Exchange Act, but he was told by that officer that he could not have such summons, as the claim was under 20*l.*, and that he must take an ordinary

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summons. The attorney also stated in such affidavit that he well knew the defendant would avail himself of every delay, and that he had ascertained that the hearing under the ordinary summons would be at the end of about twenty-one days, and by the rules of that Court payment would be ordered about ten days after such hearing; that a sum of 17*s.* would be required to be paid for the summons, and 1*l.* 12*s.* for hearing fees, besides expense of witnesses' and attorney's attendance, amounting to 3*l.* 10*s.*, beyond the fact of delay; whereas in the superior Court the costs to and including judgment, would amount to 2*l.* 14*s.*, and the judgment might be obtained in twelve days from service of the writ and enforced immediately.

By the County Court Act, 19 & 20 Vict. c. 108. s. 4, the provisions of that Act and of previous County Court Acts there recited, "which apply to any debt not exceeding 20*l.*, shall apply to such debt or any part thereof, although the same shall be secured by or claimed upon bills of exchange or promissory note, and notwithstanding the statute 18 & 19 Vict. c. 67." It was considered by the Judge of the Lambeth County Court that that 4th section has deprived the County Court of the jurisdiction which it had, by the application to such Court of the Summary Procedure of Bills of Exchange Act, 18 & 19 Vict. c. 67.

[MONTAGUE SMITH, J.—The language of the 4th section is not restrictive.]

No; and it is difficult to understand why the County Court had not jurisdiction to issue a summons under the Bills of Exchange Act.

[MONTAGUE SMITH, J.—How can we fix the defendant with costs in the superior Court because the County Court Judge has put a wrong construction on this Act?]

The 30 & 31 Vict. c. 142. s. 5, which has deprived a plaintiff of costs if less than 20*l.* be recovered in an action on contract, gives the Court or Judge a discretionary power to allow them; and the present, it is submitted, is a fit case for the exercise of such power.

[BRETT, J.—It may be morally right that the plaintiff should have the costs, but not that the defendant should have to pay them.]

It is shewn by the affidavit that, had the ordinary summons been taken out in the County Court, there would have been greater delay and more expense before judgment could have been obtained than by proceeding in the superior Court under the Bills of Exchange Act.

Cur. adv. vult.

The judgment of the Court (Montague Smith, J. and Brett, J.) was delivered on November 9, by—

MONTAGUE SMITH, J.—In this case we think there should be no rule. The action was brought to recover a balance of 15*l.* 15*s.* due on a bill of exchange. The application was made on two grounds: first, on the ground that the officer of the County Court refused to give a summons under the Bills of Exchange Act, although ready to issue an ordinary summons; and secondly, on the suggestion of the greater expense and delay in the County Court. It was stated at the Bar that the County Court refused the summons under the Bills of Exchange Act on the ground that the jurisdiction to do so was taken away by the 4th section of the 19 & 20 Vict. c. 108. That section, however, does not seem to us to take away any jurisdiction possessed by the County Court under the Bills of Exchange Act, and the learned counsel did not contend before us that the construction of the Act attributed to the Judge of the County Court was correct. This being so, we think the alleged refusal of the summons is not a ground for placing the costs of the action in the superior Court upon the defendant. The proper course would have been for the plaintiff to have applied for an order on the Judge. We also think that the suggested greater expense and delay is not a ground for allowing the costs. The legislature clearly intended, by the enactment in section 5. of 30 & 31 Vict. c. 142, that actions for small amounts which are defined by the Act should be brought in the County Courts, and that if brought in the superior Courts the plaintiffs, as a rule, should not be entitled to costs; and we think the expense and delay, if they really are

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greater in the County Court, do not form, in cases like the present, a sufficient exceptional ground for an order for costs. If the costs are really unduly heavy, or the delays unduly long, in the County Courts, no doubt their practice in these respects will be reformed in conformity with this view of the Act. The Court of Queen's Bench has already decided that the distance at which the plaintiff and defendant resides from each other, and the expense occasioned thereby, is no ground for allowing costs—*Thompson* v. *Dallas* (37 L. J. Q.B. 133; 3 L. R. Q.B. 258). This rule, therefore, must be refused.

Rule refused.

IN THE COMMON PLEAS. Nov. 25, 1868.

GUEST *v.* THE WORCESTER, BROMYARD AND LEOMINSTER RAILWAY COMPANY.

38 L. J. C.P. 23; L. R. 4 C.P. 9.

Scire Facias *against Shareholder—Shares allotted as Security.*

COMPANY. K.—*By agreement a railway company were to allot paid-up shares to A. and B, as trustees for a banking company, as security for overdrawing their account. The certificate stated that the shares were registered as paid up, but in the register there was no such entry, whilst in the call-book they were stated to have been deposited as security for an overdrawn account. A judgment creditor of the railway company applied for a* scire facias *against A. and B.—The Court* held *A. and B. not liable, but allowed the* scire facias *to issue so that the question might be taken to a Court of error.*

This was a rule calling on two persons, named Padmore and Abell, to shew cause why a writ of *scire facias* on the judgment obtained by the plaintiff in this action should not be issued against them as shareholders of the defendants' company, to enable the plaintiff to have execution upon the said judgment to the extent of the amount not paid up on their shares.

The following facts were admitted on behalf of the plaintiff.

The railway company, having an account with the Worcester City and County Banking Company, were desirous of overdrawing their account, and it was therefore agreed between the banking company and the railway company that the latter might overdraw to the extent of 5,000*l.* on giving to trustees for the former 1,500 paid-up shares in the railway company, as security, till debentures might be lawfully issued and exchanged for them. The railway company thereupon allotted to Padmore and Abell, as such trustees, 1,500 shares (value 10*l.* each), and gave them a certificate that they were registered proprietors, across which was written that the shares were registered as fully paid, and then overdrew the 5,000*l.* The register however, in fact, did not shew that any calls had been paid, though in the call-book various calls were entered as paid by other shareholders, whilst against these shares was merely written "deposited as security for draft overdrawn."

Mellish and *A. Wills* shewed cause.—The other side are in this dilemma, either these are paid-up shares if the transaction be good, or Messrs. Padmore and Abell are not shareholders if it be bad. As Lord Justice Turner said in the similar case of *Ex parte Currie; In re the Great Northern Coal Company* (32 L. J. Ch. 57), "The agreement with B. was either valid or invalid; if the agreement was valid, then neither B. himself nor any alienee from him can be called upon to contribute in respect of those shares; but if, on the other hand, that agreement is invalid, the transaction must be disregarded altogether." The creditors are in the same position as the company, and they could not make a call. Further, the point was in truth decided in *Ashworth* v. *Bristol* (15 L. T. 561) and *Ex parte Leifchild* (13 L. T. 267).

Bridge, in support of the rule.—On the register nothing appears to be

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paid, and therefore there was a holding out to the public which would induce credit to be given. The cases cited were between companies and their shareholders, and the difference between the cases of a company and creditors is shewn by *Oakes* v. *Turquand* (36 L. J. Ch. 949). It is said in 1 *Lindley on Partnership*, 618, 2nd edit., "But the issue of paid-up shares otherwise than for full value received is *primâ facie* a breach of trust on the part of the directors and the company, and its creditors are entitled to have such shares treated as not paid up," though certainly the cases there referred to hardly support the proposition. At all events, the Court will not now decide the question, but let the writ go, so that the question may go into error if desired.

BOVILL, C.J.—As the case is now put, the plaintiff accepts the facts stated in the affidavits, and, in truth, we cannot doubt the nature of the transaction, and that no liability was dreamt of. We can have on the facts no reasonable doubt that Messrs. Padmore and Abell are not liable. They accepted a certificate which stated that the shares were registered as fully paid up. If this be so, it disposes of the point that they held out that they were liable. The authorities which have been cited are strongly in favour of these gentlemen, and even without them we should come to the same conclusion. We are asked, however, not to exclude the plaintiff from going into error, and as there is a large amount at stake, if it be desired, we will not exclude him, and will let the writ go on condition, as the facts are undisputed, that the question be raised by special case to be stated within a month. If no notice be given within a fortnight this rule to be discharged without costs; but if the plaintiff goes on, the question of costs is reversed, and the general rule is to apply.

KEATING, J., and BRETT, J., concurred.

Judgment accordingly.

IN THE COMMON PLEAS. Nov. 7, 9, 1868.

(*Appeal from Revising Barrister's Court.*)

CHORLTON, *appellant;* LINGS, *respondent.*

38 L. J. C.P. 25; L. R. 4 C.P. 374; 19 L. T. 534; 17 W. R. 284; 1 Hop. & C. 1.

Distinguished, *Beresford-Hope* v. *Lady Sandhurst*, [1889] E. R. A.; 58 L. J. Q.B. 316; 23 Q.B. D. 79; 61 L. T. 150; 37 W. R. 548 (C. A.). Applied, *Reg.* (*Moore*) v. *Abbott*, 1897, 2 Ir. R. 362 (C. A.). Referred to, *Nairn* v. *University Court of the University of St. Andrews*, [1909] E. R. A.; 78 L. J. P.C. 54; [1909] A.C. 147; 100 L. T. 96 (H.L.); *Royal Naval School, Seymour* v. *The School*, [1910] E. R. A.; 79 L. J. Ch. 366; [1910] 1 Ch. 806; 102 L. T. 490 (Ch. D.); *Bebb* v. *Law Society*, [1914] 83 L. J. Ch. 363 (C. A.).

Parliament—Borough Vote—Women.

ELECTION LAW. A.—*Neither at common law nor by statute are women entitled to vote at elections for Members of Parliament.*

This was an appeal (consolidated with a great many others) from the decision of the Revising Barrister for the borough of Manchester.

CASE.

At the Court, held at the Town Hall, in the city of Manchester, on September 15, 1868, for the revision of the list of voters for members of parliament for the parliamentary borough of Manchester, before the Revising Barrister appointed to revise the said list, the name of Mary Abbott, appearing on the list, published by the overseers, of claimants to vote in the township of Manchester, was duly objected to by Matthew Chadwick, a person on the list of voters for the said parliamentary borough.

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The name of the said Mary Abbott appeared upon the said list of claimants in the following manner:

Christian Name and Surname of each Claimant at full length.	Place of Abode.	Nature of Qualification.	Street, Lane, or other like Place in this Township, and number of House, if any, where the Property is situated.
Abbott, Mary.	51, Edward Street.	House.	51, Edward Street.

It was was admitted that the said Mary Abbott was a woman of the age of twenty-one years and unmarried, and that she had for twelve months previously to the last day of July, 1868, occupied a dwelling-house, stated in the said claim, within the said township, and had been duly rated by the said overseers in her own name, for such occupation, and that she had paid the rates for the relief of the poor assessed in respect of such dwelling-house before July 20 last, and in other respects had complied with the requirements of the Registration Acts.

On behalf of the claimant it was contended that, under the existing statutes, the claimant was duly qualified and entitled to be registered as a voter, and when registered to vote in the election of a member of parliament; and that women for the purpose of being registered as electors and voting in elections for members of parliament are not subject to any legal incapacity. It was maintained on the part of the objector that, under the existing statutes, the claimant was disqualified on account of her sex.

The Revising Barrister held that Mary Abbott, being a woman, was not entitled to be placed on the register, and her name was erased from the said list of claimants.

If the Court should be of opinion that the said Mary Abbott was not entitled to have her name inserted in the list of voters for the said borough of Manchester, then her name was to remain erased; but if the Court should be of opinion that the said Mary Abbott was entitled to have her name inserted in the said list of voters, then her name was to be restored.

Coleridge (*Dr. Pankhurst* with him), for the appellant.—The contention on behalf of the appellant is, that women have the franchise, as men have, as a matter of law, and that they have in fact exercised it in ancient times in cases where men exercised it, and that no statute has taken away this identity of position of the sexes; in other words, it is contended that, as regards the franchise, there was no distinction of sex in early times, and that there is no statute which has altered the rights of women in this respect. In the first place, it is proposed to shew that women have exercised a right of voting for members of parliament in counties, because if they have in counties, this fact will go a great way towards shewing they also have done so in boroughs. The first statute as to counties is 7 Hen. 4. c. 15, which gives the franchise to all suitors in the County Court, and seems therefore to include women as well as men; and in the next statute, 1 Hen. 5. c. 1, the words are also large enough to include women. It is laid down in Black. Com. 178, that "Elections of knights of the shire must be proceeded to by the sheriffs themselves in person at the next County Court." From 1 *Reeve's History of the English Law*, 47, we find that by an ordinance of William the Conqueror the bishop with ecclesiastical causes was separated from the sheriff, that the sheriff presided at the County Court, and the freeholders were Judges there, and that at the tourn all persons, whether peers or commoners, clergy or laity, had to attend to hear the charge of the sheriff and take the oath of allegiance. By 52 Hen. 3. c. 10, it was enacted "De turnis vicecomitum provisum est ut necesse non habeant ibi venire archiepiscopi, episcopi, abbates, priores, comites, barones, nec aliqui viri religiosi, nec mulieres, nisi eorum presentia ob aliquam causam specialiter exigatur." Here

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"religiosi" agrees with "viri" as well as "mulieres," which shews that women had the right to be present, but that nuns were exempted from what was considered a burden in certain cases; and even if "religiosi" does not apply to "mulieres," still the argument equally applies, that women had the right, and as they are to come if called it shews there was a capacity in them to vote. *Prynne's Brevia Parliamentaria*, 152, 153, and certified copies from the Record Office now in Court shew that in 13 Hen. 4, 2 Hen. 5, 6 Edw. 6, 1 & 2 Ph. & M., 2 & 3 Ph. & M., and 14 Eliz., the indentures then used in parliamentary elections were sealed by women, which shews that they joined in returning members to parliament. *Heywood, on County Elections*, 255, 2nd edit., whilst he says that women are incapacitated, and cites Lord Coke, points out that women have interfered in elections in person, and gives several cases of return made by them; and from the burgess list of Lyme Regis given in 2 Luder, 13-15, it appears that women were entered as "burgenses, sive liberi tenentes." And Mr. Hallam, in his *Constitutional History*, ch. 13, whilst he lays down that the change in government which took place at the end of the thirteenth century was founded on the doctrine that those who had property were not liable to taxation unless they consented by their representatives, as respects women, goes no further than saying they have "been generally supposed capable of no political right, except reigning." These statutes and authorities shew that women had the right, and, in fact, exercised the right of voting in counties. Did, then, any of the restraining statutes alter this? On looking at 8 Hen. 5. c. 7, 10 Hen. 6. c. 2, 7 & 8 Will. 3. cc. 4, 25, 10 Ann. c. 23, 2 Geo. 2. c. 24, and 20 Geo. 3. c. 17, we find that the words are large enough to permit women still to vote. It is true that the word "man" is used in some, but that implies woman where there is no inconsistency, and "man" is frequently used in statutes where "woman" must be included. We now come to the statute 2 & 3 Will. 4. c. 45. ss. 18, 19, and it is curious to note the difference between the restraining and the enabling section. In section 18. the restraining one, the word "person," is used, whilst in section 19, the enabling one, we find "male person." The statute meant, therefore, not to take away from women any right they had more than from men, but, at the same time, not to give to women any fresh right. No doubt the appellant's great difficulty is, that, for centuries, women have not exercised this right, and have been considered not to have it, because it may be asked, why was this? But still, if the right existed, non-user cannot take it away. This being the case as to 40*s*. freeholders in counties, how does the matter stand as to boroughs? Mr. Hallam, in his *Constitutional History*, ch. 13, clearly shews that the burgesses were the electors in boroughs; and if this be so, then women were entitled, because, as has been shewn from the roll of Lyme Regis, they could be "burgesses." The 23 Hen. 6. c. 14, in its terms, would include women, and there are many statutes which, although they would not confer, at least would not take away the right. But, secondly, the Reform Act of 1867 has expressly given the right of voting to women, for it having been enacted, by 13 & 14 Vict. c. 21. s. 4, that words importing the masculine gender are to include females, unless the contrary be expressly provided, the Reform Act, 1867, uses the word "man" throughout, without any such provision, and therefore, by 13 & 14 Vict. c. 21, the word imports "woman" as well as "man." This being so, is there then any legal incapacity which prevents women from exercising the franchise? It is clear that mere non-user has not this effect. Is there then anything in the law of England which incapacitates them? It is submitted that there is not. In *Olive* v. *Ingram*, as reported in 7 Mod. 263, there are various dicta in favour of the right of women to vote. It was held in *The Queen* v. *Stubbs* (2 Term Rep. 395) that a woman might be overseer, because "the only qualification required by 43 Eliz. is that they shall be substantial householders; it has no reference to sex," and it was there pointed out that they might fill offices "of trust and likewise in a degree judicial." In *The Queen* v. *Crosthwaite* (17 Irish Com. Law Rep. N.S. 157, 463), where the question was whether women could vote under the Towns Improvement (Ireland) Act, 1854, which provides that the voters were to be "persons" of

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full age, who had occupied tenements in a particular way, four Judges of the Queen's Bench in Ireland held women qualified, and this decision, though overruled in the Exchequer Chamber, was overruled by only four Judges against three, so that seven Irish Judges, including the three chiefs, were in favour and only four against their qualification. And, in conclusion, it may be pointed out that the principle of taxation and representation going together has been considered the foundation of our constitutional liberty, and this principle entitles a woman to a vote as much as a man.

Mellish (*R. G. Williams* with him), for the respondent.—The question in this case turns entirely on section 3. of the late Act, 30 & 31 Vict. c. 102, for the franchises given by 2 Will. 4. c. 45. are given to every "male person." It is admitted that for centuries it has been understood that women could not vote, and that has much the same effect in construing statutes as that which is the law. Again, in construing old statutes, modern usage is always referred to in interpreting them; and it is admitted that for about three centuries there is not a scintilla of evidence that women have voted. Again, nothing is shewn that would satisfy an antiquary, much less a lawyer, that women ever voted at any period of our history. The doctrine that there could be no loss of a public right by non-user would be intolerable without the qualification that, where a certain construction has been adopted for a long period as law and acted on, it is to be taken to be correct. And if it has been supposed to be the common law, and has been acted on for years, that women in consequence of their sex are disqualified from voting, the Court will give the greatest weight to this consideration. Independently of Lord Romilly's Act, there really could be no question in the present case. If we can see plainly by the Act to be construed that the intention was otherwise, Lord Romilly's Act does not affect the construction; and surely, if it had intended to make such an alteration as is now contended for, the legislature clearly would have expressed itself otherwise. On referring to sections 56. and 59, it appears that 30 & 31 Vict. c. 102. and 2 Will. 4. c. 45. are to be construed together, and the law, as far as not altered by the later Act, is to remain the same, and as we are referred back to the first Act, Lord Romilly's Act does not apply, otherwise we could not have the same construction put on the two Acts, as the one would be construed by the light of Lord Romilly's Act, the other not. And if women were to be allowed to vote under 30 & 31 Vict. c. 102, whilst only men can vote under 2 Will. 4. c. 45, inconsistencies of qualification would arise which could not be intended. If the Court is convinced that the word "man" was used in 30 & 31 Vict. c. 102. as distinguished from woman and child, it must give it that construction notwithstanding Lord Romilly's Act. There are a multitude of Acts which have been passed to which Lord Romilly's clearly could not apply. Thus the annual Mutiny Act gives power to raise so many "men," and this certainly was not intended to apply to women. Even if "man" means "every person," still were not women incapable of the franchise. All the early statutes are, no doubt, general, yet in practice women have not voted for 40*s*. freeholds. Why was this? Because they were incapable. It is not said that idiots, &c. cannot vote, but they cannot, because they are under a legal incapacity. Now, are the authorities cited sufficient to shew that what has been held to be law for centuries is wrong? The utmost that can be said of the Statute of Marlbridge, c. 10, is that women at one time attended the sheriff's tourn, but the election is, according to 7 Hen. 4. c. 15, to be by the suitors or others present at the County Court, and the suitors there were the Judges, and no authority has been adduced to shew that women sat as Judges. By 1 Hen. 5. c. 1. the knights, esquires and others are to elect members, which does not seem to point to women. The registers which have been cited only shew a few cases where women have signed the indentures, but where they did they were generally the patrons, and possibly the returning officers, and all these indentures were signed with others, except in one case, and in that they were set aside. As to *Olive* v. *Ingram* (7 Mod. 263), the judgment of the majority of the Court was against the right. And, lastly, there

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is a recent decision of the Court of Session in Scotland directly in point against the right of women to vote.

Coleridge, in reply.—The common law of Scotland depends on the civil law, and the decision mentioned on the other side is therefore no authority. As to what has been said of the indentures, it may be remarked, that putting the seal to the indenture by statute is proof of taking part in the election. In King Ethelred's reign four abbesses were summoned and sat in the Witenagemot; and Selden states that, in 5 Edw. 1, and for twenty-nine years after, peeresses were summoned to and sat in parliament.

Cur. adv. vult.

On November 9 their Lordships delivered their judgments as follows:

BOVILL, C.J.—It is quite unnecessary to consider the general question of whether it is desirable that women should possess the franchise of voting at the election of members of parliament. What we have to determine is, whether by law they now possess that right. In the present case it is agreed that the right of the claimant to be inserted on the list of voters for the borough of Manchester must depend on the construction to be placed upon the "Representation of the People Act, 1867," and under that statute two questions arise: one, whether women are included under the words "every man"; and the other, whether women are "subject to legal incapacity." If women are not included in the terms of the Act, or are so incapacitated, then our judgment must be in favour of the respondent.

Upon the question of whether they are incapacitated, Mr. Coleridge, on the part of the appellant, contended that women had a right to the franchise at common law, that nothing had taken it away from them, and that they were, therefore, not incapacitated from voting. Indeed, in the first instance, I rather understood him to contend that women were now entitled to the franchise as a common law right, and he fully argued that question. The appellant has failed to produce before us the reported decision of any Court in favour of the right of women to exercise the franchise of voting for members of parliament, with the exception of the notes of cases which were referred to in the 7th volume of *Modern Reports*, and Mr. Coleridge was obliged to admit that for several hundred years no instance is to be found of the exercise by women of any such right. This alone is sufficient to raise a very strong presumption against the existence of the right in point of law. It is quite true that a few instances have been brought before us where in ancient times, viz., in the reigns of Henry the Fourth, Henry the Fifth and Edward the Sixth, women appear to have been parties to returns of members to parliament, and possibly other instances may be found in early times not only of women having voted, but also of their having assisted in the deliberations of the legislature. Indeed, it is mentioned by Selden, in his *England's Epinomis*, c. 2. s. 19, that they did so. But these instances are of comparatively little weight as opposed to uninterrupted usage to the contrary for several centuries, and what has been commonly received and acquiesced in as the law, raises a strong presumption of what the law is, and at least throws upon those who question it, the burthen of proving that it is not what it has been so understood to be. The statute 52 Hen. 3. c. 10, relieving women from attending at the sheriff's tourn, and the fact of their being included in the books of the borough of Lyme Regis under the head of "liberi homines" and "liberi burgenses," or "liberi tenentes," by no means prove that they were entitled to or did vote at the elections. The records which were produced of the time of Philip and Mary shew that Dame Elizabeth Copley was a party to an indenture as *returning officer*, and this may possibly be the explanation of the previous return from Gatton in the reign of Edward the Sixth. The same observation applies to the instance of Lady Packington joining in a return from Aylesbury, as appears from 7 Mod. at page 268, for the precept was directed to her *as lady of the manor* to return two members to parliament. With regard to the two cases mentioned in the report of *Olive* v. *Ingram* (7 Mod. 263), they appear to have been cited from a manuscript treatise by Mr. Hakewell; the

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statement of them varies in different parts of the report, and though the argument was several times adjourned, it does not appear that any satisfactory information could be discovered respecting them. They are not even mentioned in the report of the same case by Sir John Strange (2 Strange, 1114), and I think there is very little weight to be attached to them. If there were any such decisions—and one of the cases is said to have been decided in 14 Jac. 1.—it is difficult to understand why no further notice or trace of them is to be found, or why they should not have been acted upon. At this distance of time we have not the means of ascertaining accurately the particulars of those cases, or under what circumstances the returns which have been produced were made, or whether any question was ever raised respecting them. The decisions as to what offices women may hold, or whether they come within the description of particular statutes, do not materially assist us in this case. On the other hand Lord Coke, in 4 *Inst.* p. 5, treats it as clear law that in the time of James the First women were incapacitated from voting; and in the case of *Olive* v. *Ingram* (7 Mod. 263), 12 Geo. 2, the majority at least of the Judges, notwithstanding the two cases referred to, seem to have been of the same opinion. In the work of Mr. Serjeant Heywood, who was well acquainted with Election Law, published in 1812, women are classed amongst those who are incapacitated from voting (Heywood's County Elections, 225). The same view has been accepted by Mr. Hallam and others in modern times, and was to some extent recognized in the Act of 1832 by the legislature confining the franchise in boroughs to "*male* persons." There can be no doubt that at the time of the passing of the Act of 1867, the common understanding of both lawyers and laymen was, that women were incapacitated from voting; and the legislature must, I think, be assumed to have acted under that impression. The 56th section of the Act also expressly reserves all laws, customs and enactments then in force.

Mr. Coleridge has very forcibly contended that, if women were ever entitled to the franchise, nothing has occurred to take it away. But if no legislative enactment has taken it away, the fact of its not having been asserted or acted upon for many centuries raises a strong presumption against its having legally existed, and considering that no reported decisions or authority can be produced in favour of the right, that there are the opinions against it to which I have referred, and that there has been so long and uninterrupted a usage to the contrary, I come to the conclusion that there is no such right, and that women are legally incapacitated from voting within the meaning of the 3rd section of the "Representation of the People Act, 1867."

Assuming, however, that the claimant was not legally incapacitated within the meaning of the late statute, the question would then arise, whether the franchise has been conferred upon women by that Act, and by force of the provisions of Lord Romilly's Act. This depends upon the proper construction to be placed upon the language of the legislature in the 3rd section of the "Representation of the People Act, 1867," which enacts that every "man," possessing certain qualifications, shall be entitled to the franchise. In the Act of the 13 & 14 Vict. c. 21. s. 4. it is enacted, that in all Acts words importing the masculine gender shall be deemed and taken to include females, and the singular to include the plural, and the plural the singular, unless the contrary as to the gender or number is expressly provided. In construing the 3rd section of the "Representation of the People Act, 1867," regard must be had to the whole of the enactment, with a view to ascertain whether the word "man" is there used in the sense of "person," or as equivalent to the expression "male person." By the 56th section of the Act it is provided that "The franchises conferred by this Act shall be in addition to, and not in substitution for, any existing franchises. . . . . And subject to the provisions of this Act, all laws, customs and enactments now in force conferring any right to vote, or otherwise relating to the representation of the people in England and Wales, and the registration of persons entitled to vote, shall remain in full force, and shall apply, as nearly as circumstances admit, to any person hereby authorized to vote, and shall also apply to any constituency hereby authorized to return a member or

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members to parliament as if it had heretofore returned such members to parliament, and to the franchises hereby conferred, and to the registers of voters hereby required to be formed." By the 59th section it is enacted, that "This Act, so far as is consistent with the tenor thereof, shall be construed as one with the enactments for the time being in force relating to the representation of the people, and with the Registration Acts; and in construing the provisions of sections 24. and 25, of the 2 Will. 4. c. 45, the expressions 'the provisions hereinafter contained' and 'as aforesaid,' shall be deemed to refer to the provisions of this Act conferring rights to vote as well as to the provisions of the said Act."

Now, by the Reform Act of 1832, the occupation franchise in boroughs is expressly given to "*male persons*" who shall be qualified as therein mentioned. By the 33rd section it is enacted, that no other person is to be entitled to vote for a borough except in respect of some right conferred by that Act, "or as a burgess or freeman, or as a freeman and liveryman, or in the case of a city or town, being a county of itself, as a freeholder or burgage tenant, as hereinbefore (section 31.) mentioned." It is perfectly clear, therefore, that women would not be entitled to the franchise under that Act, and as the two Acts are to be construed as one, we should endeavour, as far as possible, to put such a construction upon the later Act as will make it consistent with the provisions of the former statute.

There is no doubt that in many statutes "man" may properly be held to include women, whilst in others it would be ridiculous to suppose that the word was used in any other sense than as designating the male sex, and we must look at the subject-matter as well as to the general scope and language of the provisions of the later Act in order to ascertain the meaning of the legislature. I do not collect from the language of this Act that there was any intention to alter the descriptions of the *persons* who were to vote, but rather conclude that the object was to deal with their *qualification*, and if so important an alteration in the personal qualification was intended to be made as to extend the franchise to women, who did not then enjoy it, and were in fact excluded from it by the terms of the former Act, I can hardly suppose that the legislature would have made it by using the term "man." Indeed, in the very next Act in the Statute Book (30 & 31 Vict. c. 103), where it was intended to extend the Factory Acts to them, "women" and "females" are expressly mentioned.

The conclusion at which I have arrived is that the legislature used the word "man" in the Act of 1867 in the same sense as "male person" in the former Act, and that this word was intentionally used in order to designate expressly the male sex, and that it amounts to an express enactment and provision that every man as distinguished from women possessing the qualification is to have the franchise. In that view, Lord Romilly's Act does not apply to the present case, and does not extend the meaning of the word "man" so as to include women. Upon this part of the case the decision of the Court of Session in Scotland is also in point, and in that decision I entirely concur.

Upon both grounds, therefore,—first, that women are legally incapacitated from voting for members of parliament, and, secondly, that section 3. of the "Representation of the People Act, 1867," is limited to men, and does not extend to women,—I think that women are not entitled to the franchise, and that the decision of the Revising Barristers in this and the other cases which depend upon it must be affirmed. It is not, however, a case in which costs should be given.

WILLES, J.—I am of the same opinion. The application of the Act called Romilly's Act contended for by the appellant is a strained one. It is not easy to conceive that the framer of that Act, when he used the word "expressly," meant to suggest that what is necessarily or properly implied by language is not expressed by such language. It is quite clear that whatever the language used necessarily or even naturally implies is expressed thereby. Still less did the framer of the Act intend to exclude the rule alike of good sense and grammar and law, that general words are to be restrained to the subject-matter

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with which the speaker or writer is dealing. Apply these conclusions and remember that the Act to be construed is not only to be interpreted according to these general rules, but that it expressly enacts (sections 56. and 59), that it is to be construed together with the previous Acts on the same subject, and especially the great Act of 2 & 3 Will. 4. c. 45. What is the result? It is that the legislature, up to the passing of the Act of 1867, was unquestionably dealing with qualifications to vote of men in the sense of male persons, and was providing what should entitle such individuals of mankind to vote at parliamentary elections; and, without going through the Act of 1867, I may say that there is nothing, unless it be the section now in question, to shew that the attention of the legislature ever was diverted from the question, what should be the qualifications entitling male persons to vote, to the question whether the personal incapacity of other persons to vote should be removed. The Act throughout is dealing, not with the capacity of individuals, but with their qualification. Assuming, therefore, that women would have had a right to vote by the common law, apart from the statute, it would require something further to establish that more modern legislation has done away with the restriction (if it was a restriction) imposed by the Reform Act, which in terms confines the right of voting in the new constituencies to male persons. It further appears to me that the Lord Chief Justice is right in holding that, assuming Romilly's Act to apply, it would not have worked the change that is desired in favour of women, because the Act of 1867 does, "expressly," in every sense, exclude persons under a legal incapacity, and women are under a legal incapacity to vote at elections. What was the cause, it is not necessary to go into, but admitting that fickleness of judgment and liability to influence have sometimes been suggested as the ground of exclusion, I must protest against its being supposed to arise in this country from any underrating of the sex, either in intellect or worth. That would be quite inconsistent with one of the glories of our civilization, the respect and honour in which women are held. This is not a mere fancy of my own, but will be found in *Selden, De Synedriis Veterum Ebræorum*, in the discussion of the origin of the exclusion of women from judicial and like public functions, where the author gives preference to this reason, that the exemption was founded upon notions of decorum, and was a privilege of the sex (*honestatis privilegium*)—vol. 1. tom. 2. *Selden's Works*, p. 1083. Selden refers to many systems of law in which this exclusion prevailed, including the Civil Law and the Canon Law, which latter, as we know, excludes women from public functions in some remarkable instances. With respect to the Civil Law, I may add a reference to the learned and original work of Sir Patrick Colquhoun, on the Roman Civil Law, vol. 1. p. 580, where he compares the Roman system with ours, and states that a woman "cannot vote for members of parliament nor sit in the House of Lords or Commons." As to this country in particular, there is the passage referred to by the Lord Chief Justice from *England's Epinomis*, 3 *Selden's Works*, p. 10, which has reference to the ancient Britons, whose custom was that women "had prerogative in Deliberative Sessions touching either peace, government or martial affairs." But this is stated as a peculiarity of the Britons; and coming down to the time of the Saxons, p. 13, of whom no such custom is recorded, it appears that women cannot have been admitted to their councils, where no one took part unless entitled to bear arms, and invested with them in the public assembly, which sort of investiture Tacitus likened to the assumption of the *toga virilis*, and Selden to being knighted. It is true that abroad the order of knighthood was sometimes conferred upon women, but this does not appear ever to have been the case in England, for Littleton, s. 96, and Co. Litt. 70 b, shew that a woman could not perform knight's service in person; and when land held by military tenure came to her by descent, she had to perform the duties by deputy. And here I may observe that in the cases of constable and sheriff, which latter is the highest authority produced by the appellant for the exercise of public functions by a woman, the reason given in the authority referred to as to the constable was that she could appoint a deputy (2 Hawk. c. 10. s. 37), which a voter or member of the House of Commons

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could not do; and in the solitary and exceptional case of the shrievalty of Westmoreland, Anne, Countess of Pembroke, took by descent pursuant to the grant to her ancestor De Vipont and his heirs general, an office which could have been, and usually is, discharged by deputy, although the Countess, being a person of unusual gifts, both of body and mind, thought fit to discharge the duty in person. Mr. Kemble in his *Saxons in England*, in which work he had the assistance of the invaluable labours of the Record Commissioners, at pages 185 to 196, and 198 of the second volume, discusses the Constitution of the Witenagemot in Anglo-Saxon times, and in page 198 he refers to "one or two charters," somewhat analogous to the returns referred to by Mr. Coleridge, signed by the Queen and other women, always, as Mr. Kemble believed, "ecclesiastics of rank and wealth," but he by no means draws the conclusion that women could regularly take part in the public councils of the Anglo-Saxons, and he considers that the abbesses who signed, if present at the Gemot, were so for the purpose of watching matters affecting the interests of their convents, and attesting its acts in such matters, without forming part of the regular body; just, it may be observed, as the Judges have at present a right to be in the House of Lords in order to advise but not to vote. And as to other women of distinction present, he suggests the probability of their names being put in by way of compliment, an explanation not unlikely, if, as I believe, it has not been uncommon in modern times—(I know of one instance in which it was done)—for persons who happened to be present when the indentures of returns were being signed to be asked to sign, even though they were not electors, and indeed it has been questioned whether indentures so signed were good, and decided that they were, if properly signed by the Returning Officer. Coming now to a more recent period, it is said that women might be suitors of the County Court, and must, therefore, have been among the voters for the election of knights of the shire; but even supposing that women could be present, could they act as suitors, who were in fact the judges of the questions that came before the Court? Apparently not, for we know, from authority as well as experience, that, except matrons in the case of a writ *de ventre inspiciendo*, or of an inquiry as to pregnancy, upon a plea in stay of execution by a woman capitally convicted, women could not sit on juries—*Lambard, Eirenarcha*, 397; and they could not be Judges—2 Inst. 119. It seems, therefore, that women, even when suitors, were excluded, or rather excused, by the common law from exercising the public functions of suitors, in which capacity it was suggested that they must have had the right of voting. The Lord Chief Justice has gone through the authorities against the alleged right, to which must be added that, on the other hand, no authority, within those limits to which we ought to confine ourselves as lawyers, has ever laid down the contrary, because in the course of the discussion of *Olive* v. *Ingram* (7 Mod. 263), Lee, C.J., appears to have at last satisfied himself that women could not vote for members of parliament.

And now let us see if no light can be thrown on the question from a neighbouring quarter. We have been dealing with the question whether women can be represented in the House of Commons, but take the case of a peeress in her own right, who, if of the other sex, would have a seat and voice in the House of Lords, can she appear and take her seat there? No, it is unquestionable that she can neither sit herself nor vote by proxy. She has most of the other privileges of her peerage, but what is her case with respect to her being represented in parliament?

It appears to have been supposed at one time that she could appoint a proxy, but this soon died out, and until still later times it was thought that if married she could be represented by her husband, who should be a peer in her right. Co. Lit., 29 b, refers to a record favouring that opinion, and adds that readers must form their own judgment whether the law is so or not. Lord Hale's note to that passage shews that he thought that after issue born the husband would or might have the right. However, that was questioned in a note of Mr. Hargreave, Co. Lit., 29 b.; and in a note of Mr. Butler, Co. Lit., 326 a., it is shewn that though, both in this country and also in France, it was once

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thought that there could have been such a right of representation, yet, to use Mr. Butler's expression, the right must now be considered as " extinct," or, perhaps, inasmuch as in our system there is no negative prescription against a law, it may be more correct to say that the right never existed. Can there be any difference in the case of women whose right to take part in the public councils, if it ever existed, would, in modern times, of necessity, have taken the form of choosing some one to represent them there? Can there be any more reason why a woman, not a peeress, should have a right to choose her representative in the House of Commons, than why a peeress should have a right to be represented in the other house, where the power of voting by proxy might even suggest a favourable distinction? It is clear that a woman has no such right in either case, and that the absence of such right is referable to the fact that in this country, in modern times, chiefly out of respect to women and a sense of decorum, and not from their want of intellect or their being for any other such reason unfit to take part in the government of the country, they have been excused from taking any share in this department of public affairs. In either point of view, therefore, whether looking at the true construction of the system of Acts founded upon 2 & 3 Will. 4. c. 45, or construing the Act of 1867 by itself, excluding, as it does, persons under a legal incapacity, and therefore, unaffected by Romilly's Act, I am obliged to come to the conclusion that this appeal ought not to prevail.

Byles, J.—I am of opinion that the Revising Barrister was right in expunging this lady's name from the list. I arrive at that conclusion in several ways: I think it clear from the words of the Act, 30 & 31 Vict. c. 102, that the word " man " in section 3. does not include a woman, but is confined to a man in the ordinary and popular signification of that word. No doubt the word " man " in a scientific treatise on zoology, or fossil organic remains, would include men, women and children as constituting the highest order of vertebrate animals. It is also used in an abstract and general sense in philosophical or religious disquisitions. But, in almost every other connexion the word " man " is used in contradistinction to " woman." Certainly this restricted sense is its ordinary and popular sense. Now, it is a well-known rule in the construction of statutes, that as they are framed for the guidance of the people, their language is to be construed in its ordinary and popular sense. But all doubt is removed by reference to the Reform Act, 1832, 2 Will. 4. c. 45, where, in a similar connexion, instead of the word " man " we find the expression " male person," for another rule of construction is, that Acts *in pari materia* are to be construed together, and to receive the like construction. And this is not only the general rule of construction, but is by section 59. of this Act expressly applied to the two Acts now under consideration; for section 59. expressly enacts that this Act shall be construed as one with the enactments for the time being in force relating to the representation of the people. And though we are not at liberty to construe an Act of Parliament by reference to the debates upon it in the legislature, yet it is impossible to suppose that parliament, while dealing with qualification, and qualification only, by the variation of a phrase (which, at least, *may* convey the same meaning as its predecessor in the Reform Act), intended to admit to the poll another half of the population. The consequence of such a construction would be that women would, in many cases, be admitted to the newly-created franchises, but not the old ones, without any reason for the distinction. Independently, therefore, of what is called Lord Romilly's Act (13 & 14 Vict. c. 21), it is plain that the word " man " does not in the recent Reform Act comprehend woman. But the statute 14 & 15 Vict. c. 21, commonly called Lord Romilly's Act, does not, as it appears to me, create any insuperable difficulty. It enacts, in section 4, that in all Acts of Parliament words importing the masculine gender shall be deemed to include females, unless the contrary be expressly provided. This statute, on the appellant's construction, would have created the same difficulty if the expression " male person " had been continued to be used. The difficulty, if any, is created by the use of the word " expressly." But that word does not necessarily mean " expressly excluded by words." On

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of a city or town, unless the extended meaning is expressly excluded by words. And, accordingly, it is so excluded by section 61. of the last Reform Act. The word "expressly" often means no more than plainly, clearly, or the like, as will appear on reference to any English dictionary. And, reading the first Reform Act with the last Reform Act,—as by the last Reform Act itself (section 59.) we are directed to do,—I think it does appear very clearly, and therefore "expressly," that, by the word "man" in the last Reform Act, is meant a male person only. But, supposing that to be otherwise, and that the word "man" in section 3. comprehends both sexes, still the statute excludes in terms all infants, and all who are subject to any legal incapacity. I agree in what has been already said by my Lord and my Brother Willes on this subject, in whose observations I concur. Women for centuries have always been considered legally incapable of voting for members of parliament; as much so as of being themselves elected to serve as members. The expression "legal incapacity" in the statute cannot be confined to total incapacity to do any legal act whatever, but must comprehend legal incapacity to do this particular act of voting, though there may be a capacity to do some legal acts; otherwise, an alien might vote for a member of parliament. In addition to all which we have the unanimous decision of the Scotch Judges. And I trust their unanimous decision and our unanimous decision will for ever exorcise and lay this ghost of a doubt, which ought never to have made its appearance.

KEATING, J.—Mary Abbott claimed to vote for members of parliament for the city of Manchester in respect of one of the franchises conferred by the 30 & 31 Vict. c. 102. s. 3. The claim was disallowed by the Revising Barrister, on the ground that, being a woman, she was not entitled to be placed on the registers of voters; and the present appeal is from that decision. The question depends upon the construction of the 3rd section of the "Representation of the People Act, 1867," which provides that "every man" of full age, "not subject to any legal incapacity," shall (upon compliance with certain conditions) be entitled to be registered as a voter; and it has been contended for the appellant, that, when the legislature enacted that "every man" should vote, they intended thereby to confer the franchise upon women also. Considering that there is no evidence of women ever having voted for members of parliament in cities or boroughs, and that they have been deemed for centuries to be legally incapable of so doing, one would have expected that the legislature, if desirous of making an alteration so important and extensive as to admit them to the franchise, would have said so plainly and distinctly; whereas, in the present case, they have used expressions never before supposed to include women when found in previous Acts of Parliament of a similar character, and have incorporated the Act in which they are now found, with other Acts *in pari materia* which confessedly exclude them. But it is said that the word "man" in the present Act must be construed to include "woman," because, by the 13 & 14 Vict. c. 21. s. 4, it is enacted that "in all Acts words importing the masculine gender shall be deemed and taken to include females, unless the contrary is expressly provided." Now, all that section 4. of the 13 & 14 Vict. c. 21. could have meant by the enactment referred to was, that, in future Acts, words importing the masculine gender should be taken to include females where a contrary intention should not appear. To do more would be exceeding the competency of parliament with reference to future legislation. But, in the present statute, it seems to me the legislature has clearly expressed the intention not to extend the franchise to women, not only by the absence of express words so extending it, but by the 56th and 59th sections, which place the new franchises as additional, and as far as possible upon the same footing as those created by the 2 Will. 4. c. 45, with which Act it is incorporated, and which in terms excludes females. Again, the 3rd section of the Act in question expressly applies only to persons "not subject to any legal incapacity" to vote. But it was contended on the part of the appellant, that women were not under any such incapacity

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as in ancient times they had voted for knights of the shire, and their right to do so had been recognized by authority. To make good this position, we were referred to two or three indentures of return for knights of the shire for the county of York, *temp.* Hen. 5, Hen. 7. and Edw. 6, which appeared to have been sealed by one or two females, by themselves or attorney. It is, however, not very difficult to suppose that, in those ancient times, when such proceedings were probably not very regular, a few seals should have been affixed without the legal right of women to vote being recognized; whereas, it is absolutely inconceivable that women should ever have possessed the parliamentary franchise, and yet should have ceased from its exercise for so long a time, without a trace being found of any Act to deprive them from their right of voting, or a suggestion in history or elsewhere of any cause why they should have been disfranchised, or of the fact that they ever had been disfranchised. We were also referred to the report in 7 Mod. 263, of the case of *Olive* v. *Ingram*, in which it was supposed that there were *dicta* favourable to the notion that in ancient times women voted for members of parliament. That case, however, when examined, is an authority the other way. It was a question as to whether a woman could vote in the election of a sexton; and Lord Chief Justice Lee, who is said to have referred to a manuscript case of Hakewell's, as shewing that a *feme sole* freeholder could vote for a member of parliament, afterwards, at one of the many adjournments of the case, distinctly wished it should not be understood that such was his own opinion; and the case was ultimately decided upon the ground that, " a sexton's duty being in the nature of a private trust," a woman might vote at the election. According to the report of the case in Strange, 1115, the ground of the decision is stated to have been that the office of sexton " did not concern the public "; and the Judges expressly guarded themselves from creating any precedent or authority for women having a right to vote in matters concerning the public. On the other hand, the opinion of Lord Coke, who clearly considered the law to be that women were disqualified at common law, would, under any circumstances, be of great authority; but when it is supported by centuries of usage, quite in accordance with his statement, the authority becomes such as it would be impossible for this Court to disregard. Mr. Coleridge, who ably argued the case for the appellant, made an eloquent appeal as to the injustice of excluding females from the exercise of the franchise. This, however, is not a matter within our province. It is for the legislature to consider whether the existing incapacity ought to be removed. But, should parliament in its wisdom determine to do so, doubtless it will be done by the use of language very different from anything that is to be found in the present Act of Parliament. I think the Revising Barrister was right, and that his decision ought to be affirmed.

Decision affirmed.

IN THE COMMON PLEAS. Nov. 9, 1868.

(Appeal from Revising Barrister's Court.)

WILSON, *appellant;* THE TOWN CLERK OF SALFORD, *respondent.*

38 L. J. C.P. 35; L. R. 4 C.P. 398; 19 L. T. 483; 17 W. R. 161; 1 Hop. & C. 44.

Parliament—Registration—Right of Appeal—Women.

ELECTION LAW. A.—*Women are not within section* 42. *of* 6 *Vict. c.* 18, *which gives the power of appeal from the decision of a Revising Barrister.*

In this case, stated on appeal from the decision of the Revising Barrister for the borough of Salford, it appeared that, acting under 6 Vict. c. 18. s. 13, the overseers had placed the name of Martha Wilson (who was the appellant) on the list of voters for the said borough. Martha Wilson was not objected to; but the case on appeal stated, that " the Revising Barrister held that the

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overseers had mistaken their duty in placing the name of Martha Wilson on the list of voters, as she was disqualified on account of her sex, and her name was expunged from the list."

J. A. Russell (*R. G. Williams* with him), for the appellant, contended that, assuming Martha Wilson to be *primâ facie* a woman, and therefore disqualified according to the decision of the Court in *Chorlton* v. *Lings* (38 L. J. C.P. 25), still notice of objection ought to have been given, since the person, though bearing the name of a woman, might be a man and duly qualified, and that, without objection having been previously made, the Revising Barrister had no power to expunge the name from the list.—[As, however, the case was met by the respondent and disposed of by the Court on a very different ground, it is unnecessary to state fully the argument in support of the appeal.]

Manisty (*Crompton* with him), for the respondent.—The appellant, being a woman, is incapable of appealing. The power of appeal from the Revising Barrister's decision is given by section 42. of 6 Vict. c. 18. That section enacts, that it shall be lawful for any person, whose name shall have been expunged from any list, and who shall be aggrieved, &c., "either *himself*, or by some person on *his* behalf, to give to the Revising Barrister in Court" . . . . "a notice in writing that *he* is desirous to appeal, and in such notice shall shortly state the decision against which *he* desires to appeal." Martha Wilson is not within that section.

[BOVILL, C.J.—This enactment was before 13 Vict. c. 21.]

Yes; and it has never been held that that Act has a retrospective operation. Moreover, it has now been decided that notwithstanding that Act, the words in the Representation of the People Act, 1867, importing the masculine gender do not include females.

J. A. Russell, in reply.—This is an objection to the jurisdiction of the Court, and ought to have been made in the first instance.

[BOVILL, C.J.—If we have no jurisdiction how can we hear this appeal?]

The 60th section of 6 Vict. c. 18. states that all appeals from the decision of any Revising Barrister "shall be prosecuted, heard and determined in and by Her Majesty's Court of Common Pleas, at Westminster, according to the ordinary rules and practice of that Court with respect to special cases," or in such manner as that Court shall direct. By not making the objection in the first instance, the respondent has acquiesced in the power to appeal, and cannot be allowed now to object that there is no such power.

BOVILL, C.J.—On this 42nd section the present appellant clearly has no *locus standi*. We have already decided that females have no right of voting for members of parliament, and from the statement of the case on appeal there is no doubt that the present appellant is a female, and therefore disqualified. The appeal must be dismissed.

BYLES, J.—I am of the same opinion. It is not necessary to give any opinion on the nature of the proceedings before the Revising Barrister. It is clear now from the case that Martha Wilson is a woman, and therefore she has no power of appealing.

KEATING, J.—I also think that this objection, which has been made by Mr. Manisty, is fatal, and that Martha Wilson has here no *locus standi*. In so deciding, I wish it to be understood that it is not, therefore, to be taken that I think an objection was necessary to have been made in order to have enabled the Revising Barrister to have done what he did.

Appeal dismissed.

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IN THE COMMON PLEAS. Nov. 9, 1868.

(Appeal from Revising Barrister's Court.)

CHORLTON, *appellant;* JOHNSON, *respondent;* BUNTING'S CASE.

38 L. J. C.P. 37; L. R. 4 C.P. 426; 19 L. T. 560; 17 W. R. 141; 1 Hop. & C. 49.

Parliament—County Vote—Leaseholder—2 Will. 4. c. 45. ss. 20, 25.—30 & 31 Vict. c. 102.

ELECTION LAW. A.—*A person entitled under the 2 Will. 4. c. 45. s. 20. to a county franchise in respect of his leasehold interest in a house in a borough which, before 30 & 31 Vict. c. 102, conferred no vote for the borough, loses his right to such franchise upon his tenant acquiring, under 30 & 31 Vict. c. 102. s. 3, a borough vote in respect of such house.*

At a Court held for the revision of the list of voters for the township of Ardwick, in the south-eastern division of the county of Lancaster, by the barrister appointed to revise the said list, Henry Bunting—described on the list of voters for the said township as follows:

Christian Name and Surname of each Voter at Full Length.	Place of Abode.	Nature of Qualification.	Street, Lane or other like Place in this Parish or Township and Number of House (if any) where the Property is situate, or Name of the Property, if known by any, or Name of the Occupying Tenant, or if the Qualification consists of a Rentcharge, then the Names of the Owners of the Property out of which such Rent is issuing, or some of them, and the situation of the Property.
Bunting, Henry	18, Ashton Road, Ardwick.	Leasehold Houses. Term over 60 years.	Nos. 33 and 35, Hyde Street.

—was duly objected to by Thomas Webster.

It was admitted that the said Henry Bunting was a lessee for a term of 999 years of the messuages or dwelling-houses described in the fourth column of the said list of voters, viz., at Nos. 33 and 35, Hyde Street.

The property, in respect of which the name of the said Henry Bunting was upon the register for the township of Ardwick, is situate within the borough of Manchester, but inasmuch as the clear yearly value of each of the said dwelling-houses did not amount to 10*l.*, it was admitted that the said Henry Bunting was, before the passing of the Representation of the People Act, 1867, entitled to be on the register of voters for the said township of Ardwick in the southern division of the said county. It was also admitted that since the passing of the Representation of the People Act, 1867, the said Henry Bunting would not be entitled to be put on the list of voters for the south-eastern division of the said county (which, by 31 & 32 Vict. c. 46, became a separate division of the said county) in respect of a new claim for such qualification, inasmuch as by the Representation of the People Act, 1867, mere occupation and payment of rates, irrespective of any amount in value of the house occupied, gives a vote for the borough.

It was objected that, by the 25th section of 2 Will. 4. c. 45, the said Henry Bunting was not entitled to have his name retained on the said list of voters for the township of Ardwick, each of the said dwelling-houses referred to in the said fourth column being now sufficient according to the provisions of

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the said 3rd section of the Representation of the People Act, 1867, to confer on the tenant or occupier thereof the right of voting for the said borough of Manchester.

On behalf of the said Henry Bunting it was contended that, inasmuch as his name was upon the register of voters for the said southern division of Lancashire at the time of the passing of the said Representation of the People Act, 1867, the right of the said Henry Bunting to have his name retained on such list of voters for the township of Ardwick, in respect of his county vote, was reserved by the said Representation of the People Act, 1867 (see section 56), and that the operation of the said statute was limited, and applied only to leaseholders claiming to be placed upon the register after the passing of the said Act.

The Revising Barrister held and decided that the said Henry Bunting was not entitled to have his name retained on the list of voters for the said township of Ardwick, and the name of the said Henry Bunting was therefore erased from the said list of voters for the said township of Ardwick.

Mellish (*Hopwood* with him), for the appellant.—Before the passing of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), Henry Bunting had a right to vote for the county in respect of the leasehold premises mentioned in the case; and the question is whether his name is to be taken off the register because his tenants have, by virtue of the 3rd section of 30 & 31 Vict. c. 102, acquired a right to be borough voters in respect of the same premises. The 20th section of the 2 Will. 4. c. 45. gave this franchise to leaseholders of a term originally created for a period of not less than sixty years; but the 25th section of that Act enacted that, notwithstanding anything thereinbefore contained, no person should be entitled to vote for the county in respect of his interest as such lessee or assignee of a house where such house would, "according to the provisions hereinafter contained," confer on him or on any other person the right of voting for any borough. The effect of that section was not to disfranchise anyone, but to prevent any person from acquiring a county franchise in respect of leaseholds which would confer on his tenants a right to a borough vote. As a general rule, the old Reform Act (2 Will. 4. c. 45.) preserved the rights of all then existing voters. Now, section 5. of the late Act, 30 & 31 Vict. c. 102, has altered the right to a county franchise in respect of leases for a term of sixty years and upwards by reducing the annual value of the premises from 10*l*. to 5*l*. The material sections are, however, the 56th and 59th. By the 59th section it is enacted that in construing the provision of the 25th section of 2 Will. 4. c. 45, the expression "the provisions hereinafter contained," is to be deemed to refer to the provisions of the Representation of the People Act, 1867, conferring rights to vote as well as to the provisions of the Act of 2 Will. 4. c. 45. But, on behalf of the appellant, reliance is placed on the words of the 56th section as impliedly shewing that all rights existing at the time of the passing of the Representation of the People Act, 1867, were to be reserved, and that there is therefore, for the purpose of the present case, a distinction between leaseholders who were entitled to the county franchise before the Representation of the People Act, 1867, and those who have since become so entitled. The 56th section says, "The franchises conferred by this Act shall be in addition to, and not in substitution for any existing franchises, but so that no person shall be entitled to vote for the same place in respect of more than one qualification."

Quain appeared for the respondent, but was not called upon.

BOVILL, C.J.—Reading the two Acts together, it is impossible to draw the distinction which Mr. Mellish has contended for. We are all of opinion that the Revising Barrister was right.

The other JUDGES[1] concurred.

Decision affirmed.

(1) Byles, J., and Keating, J.

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IN THE COMMON PLEAS. Nov. 9, 10, 1868.

(Appeal from Revising Barrister's Court.)

CHORLTON, *appellant;* JOHNSON, *respondent;* REE'S CASE.

38 L. J. C.P. 39; L. R. 4 C.P. 400; 19 L. T. 530; 17 W. R. 119; 1 Hop. & C. 54.

Referred to, *Alderson's Case*, [1869] E. R. A.; 38 L. J. C.P. 65; L. R. 4 C.P. 407; 19 L. T. 283; 17 W. R. 202 (C.P.).

Parliament—County Vote—Notice of Objection—Description of Voter—Separate Lists.

ELECTION LAW. A.—*Notwithstanding there are, since the* 30 *&* 31 *Vict. c.* 102. *s.* 30. *and* 31 *&* 32 *Vict. c.* 58. *s.* 19. *separate lists of voters for a county, it is sufficient if the notice of objection served on the overseers be in accordance with the form No.* 4. *in Schedule A. to* 6 *Vict. c.* 18. *s.* 7, *and the notice of objection to the person on the register be in accordance with form No.* 2. *in Schedule A. to* 28 *Vict. c.* 36. *s.* 6, *without, in either case, particularly specifying the list of voters to which the objection applies.*

At a Court held for the revision of the lists of voters for the township of Moss Side, in the south-eastern division of the county of Lancaster, by one of the barristers appointed to revise the said lists, Herman Philip Ree was described on the register of voters as follows:

Christian Name and Surname of each Voter at Full Length.	Place of Abode.	Nature of Qualification.	Street, Lane or other like Place in this Parish or Township, and Number of House (if any) where the Property is situate, or Name of the Property, if known by any, or Name of the Occupying Tenant; or if the Qualification consists of a Rentcharge, then the Names of the Owners of the Property out of which such Rent is issuing, or some of them, and the Situation of the Property.
Ree, Herman Philip	Whalley Range, Moss Side.	Freehold House and Land.	The Holme, Whalley Range.

—and was objected to by Thomas Webster.

It appeared that there were the following lists for the said township of Moss Side:—

1. A list of persons entitled to vote in respect of the franchises conferred by or existing previously to the 2 & 3 Will. 4. c. 45. (being the list upon which the name of the said Herman Philip Ree appeared), prepared according to the provisions of the Registration Act, 6 Vict. c. 18.

2. A list of persons claiming to vote in respect of the franchises conferred by or existing previously to the said statute 2 & 3 Will. 4. c. 45, and made out pursuant to 6 Vict. c. 18. s. 5, and form No. 3, in Schedule A.

3. A list of persons entitled to vote under and by virtue of the Representation of the People Act, 1867, and the Parliamentary Electors Registration Act, 1868, in respect of the occupation of lands and tenements within the said township of the rateable value of 12*l.* and upwards.

4. A list of persons omitted by the overseers from such list of occupiers, and who claimed a vote in respect of occupation of lands and tenements within the said township of the rateable value of 12*l.* and upwards, and made out

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pursuant to the Representation of the People Act, 1867, and the Parliamentary Electors Registration Act, 1868, s. 17.

A copy of each of the above lists was annexed to and formed part of this case.

The name of the said Herman Philip Ree appeared only on the list No. 1 above referred to.

The notice of objection given by the said Thomas Webster to the overseers of the said township of Moss Side, against the name of the said Herman Philip Ree was in the following form:—

"NOTICE OF OBJECTION.—To the Overseers of the Township of Moss Side, in the South-Eastern Division of the County of Lancaster.—I hereby give you notice that I object to the name of the person mentioned and described below being retained on the list of voters for the south-eastern division of the county of Lancaster:—

"CHRISTIAN NAME AND SURNAME OF THE VOTER OBJECTED TO, AS DESCRIBED IN THE LIST OR REGISTER: Ree, Herman Philip.

"PLACE OF ABODE AS DESCRIBED: Whalley Range, Moss Side.

"NATURE OF QUALIFICATION AS DESCRIBED: Freehold house and land.

"STREET, LANE OR OTHER LIKE PLACE WHERE THE QUALIFYING PROPERTY IS SITUATE, &C., AS DESCRIBED IN THE LIST OR REGISTER: The Holme, Whalley Range.

"Dated this 18th day of August, in the year 1868.

(Signed) "THOMAS WEBSTER,

of No. 41, Vine Street, Hulme, in the city of Manchester, on the register of voters for the township of Crumpsall."

And the notice to the persons objected to was in the form following:—

"Notice of Objection.—To Mr. Herman Philip Ree, of Whalley Range, Moss Side.—Take notice, that I object to your name being retained in the Moss Side list of voters for the south-eastern division of the county of Lancaster.

"And I ground my objection on the third column of the register.

"And the objection, so far as grounded on the third column, relates to the nature of your interest in the qualifying property; and to the value of the qualifying property.

"Dated this 18th day of August, in the year 1868.

(Signed) "THOMAS WEBSTER,

of No. 41, Vine Street, Hulme, in the city of Manchester, on the register of voters for the township of Crumpsall."

It was contended on behalf of the said Herman Philip Ree, the person objected to, that the notice to the overseers and the notice to the said Herman Philip Ree were respectively invalid for the following reasons: That inasmuch as there were two separate and distinct lists of persons entitled to vote for the said division of the county of Lancaster—viz., the lists above referred to as Nos. 1. and 3. respectively, and also two separate and distinct lists of persons claiming to vote, viz., the lists above referred to as Nos. 2. and 4. respectively —the notice to the overseers and the notice to the person objected to respectively ought to specify the list to which the objections refer, as directed in the note to form No. 10. in Schedule B. of 6 Vict. c. 18, and in the Representation of the People Act, 1867, ss. 59 and 61, and Parliamentary Electors Registration Act, 1868, s. 19.

It was contended on behalf of the objector, Thomas Webster, that it was not necessary to specify the list to which the objection referred, and that the said notices of objection respectively were valid, they being respectively in accordance with the forms given in the Schedule A. to the 6 Vict. c. 18, forms Nos. 4. and 5, and the Schedule to the 28 Vict. c. 36; the objections being to a county vote.

The Revising Barrister decided that both notices were valid, and as the

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said Herman Philip Ree was duly called and did not appear, his name was erased from the said list No. 1.

Mellish (*A. Wills* with him), for the appellant.—The question is whether a notice of objection to a county voter ought not to state the list in which his name appears? Formerly there was only one list of county voters, but now, since the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), there are two lists, and it is therefore submitted that the notice should specify the list on which the voter's name is to be found, as in the case of a notice of objection to a borough voter given to the overseers according to form 10, Schedule B, in 6 Vict. c. 18, in which case it has been held that the list should be mentioned where there are more than one list in the borough—*Barton* v. *Ashley* (2 Com. B. Rep. 4; 15 L. J. C.P. 36). The notices which were given in the present case followed, as regards the notice to overseers, the form No. 4. in Schedule A. to 6 Vict. c. 18. s. 7, and as regards the notice to the voter himself, the form No. 2. given in Schedule A. to 28 Vict. c. 36. s. 6. These forms do not specify any particular list, because at neither of the times when they were enacted was there more than one list for county voters. But by section 30. of 30 & 31 Vict. c. 102, the overseers are to make out a list of persons on whom a right to vote for a county is conferred, by that Act, in respect of occupation, "in the same manner, and subject to the same regulations, as nearly as circumstances admit, in and subject to which the overseers" . . . . "are required by the Registration Acts to make out, or cause to be made out, a list of all persons entitled to vote for a member or members for a borough," &c. The 19th section of 31 & 32 Vict. c. 58. declares that the names of the county voters having a qualification in respect of occupation "shall appear in a separate list after the list of voters in the parish," and that "such separate list shall be deemed to be part of the lists of county voters of such parish." By sections 56. and 59. of 30 & 31 Vict. c. 102, the Registration Acts are to apply to the franchises conferred by that Act, and to the registers of voters thereby required to be formed, and that Act is to be construed as one of the Registration Acts. When, therefore, the Registration Acts require, in the case of objection to a borough voter, that the list on which his name appears should be stated if there be several lists in the borough, it is submitted by analogy that in like manner the objection to a county voter should now specify the list, as separate lists in the county are required to be made, especially as the Representation of the People Act, 1867, directs that the regulations of the Registration Acts as to borough voters should apply as nearly as circumstances admit to county voters.

Quain (*Hopwood* with him), for the respondent.—There is nothing in any of the Acts requiring, or any reason why the forms of notices of objection to borough voters should be applied to county voters. Even as to borough voters there are different forms of notices, and the necessity for specifying the particular list is limited to notices to the overseers; so that the real question which is raised by the appellant is whether the form in Schedule B, No. 10, to 6 Vict. c. 18, which the 17th section gives for the case of borough voters only, is to be substituted for that in Schedule A, No. 4, of that Act, which section 7. gives for the notices to overseers of objections to county voters. It is said that there are now required by the late statutes separate lists for county voters, and that, therefore, the same reason for specifying the list to which the objection relates applies now to objections to county voters as well as to borough voters. It is true section 19. of 31 & 32 Vict. c. 58. says, that the 12*l*. occupiers are to appear in a separate list, but it says, also, that "such separate list shall be deemed to be part of the lists of county voters," so that one would rather consider the whole, in point of law, formed but one list of voters for a county. However, be that as it may, there is a marked difference between the form in Schedule A, No. 4, to section 7. of 6 Vict. c. 18, and the form in Schedule B, No. 10, to section 17. of that Act. In the latter of these forms, which applies to the borough voter, only the name of the voter is mentioned, but in the former, which applies to the county voter, the nature of his qualification as described

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on the register is required to be stated, so that ample information is given to the overseers or party objected to of the list on which the voter may be found. In the present case the description of qualification, " freehold house and land," would indicate that the voter was on the list of persons entitled, according to the old Reform Act of 2 & 3 Will. 4. c. 45, and certainly that his name was not to be found among the 12*l.* occupiers on whom a franchise had been conferred by the Representation of the People Act, 1867.

[KEATING, J.—If the voter's name is on both lists, and the objector desires to object to his name being on any of them, what is he to do in his notice?]

Describe both qualifications of the voter. But that case would hardly arise; for by section 19. of 31 & 32 Vict. c. 58, the Revising Barrister is to erase from the separate list of occupiers all persons who appear to be entitled to vote in respect of some other qualification. There is nothing in either the Representation of the People Act, 1867, or the Registration Act of 1868, to repeal section 7. of 6 Vict. c. 18, or the form in Schedule A, No. 4, there given, and which has been followed in the present case. Section 30. of the Representation of the People Act, 1867, on which the other side rely, has nothing to do with notices of objection, but only with the lists to be made out by the overseers, and there is nothing in sections 56. and 59. to compel the application of forms of objections to borough voters to objections to county voters.

Wills, in reply.—The Registration Act of 1868 (31 & 32 Vict. c. 58.) treats the lists as separate lists. Section 19. has the words " part of the lists of county voters of such parish," using the plural word " lists." Then, the 17th section of that Act shews, that section 30. of 30 & 31 Vict. c. 102. goes far beyond mere regulations to overseers, and is not to be limited in the way suggested by the respondent. That 17th section, after reciting the 30th and 59th sections of the 30 & 31 Vict. c. 102, and that doubts had been entertained, notwithstanding those provisions, whether section 15. of 6 Vict. c. 18. relating to claimants of borough votes, applies (with necessary variations) to the rectification of the lists of county voters, declares that such 15th section shall apply to the new county occupation voters.

BOVILL, C.J.—Throughout the Reform Act of 1832 (2 & 3 Will. 4. c. 45), and the Registration of Voters Act of 1843 (6 Vict. c. 18), a marked distinction is always made between borough and county voters. In the Reform Act of 1832, not only are the enactments different, but in the schedule the forms are different with reference to borough and county voters; and as regards notices of objections the forms applicable to boroughs are extremely general. The 6 Vict. c. 18. preserves the same distinction, and has distinct and different forms of notices of objection to the county, to those which it has for borough voters. Again, the Act of 28 Vict. c. 36, which makes further provision for registration, has reference only to county voters, and that Act makes no difference in the form of notice to the overseers which previously existed. It is true there are now required separate lists to be made out in a county, as formerly was the case with the borough only, but there is nothing in the Representation of the People Act, 1867, which makes it necessary or right to mix up the enactments and forms applicable to borough voters with those which have reference to county voters, and if this was attempted to be done it would lead, I think, to inextricable confusion. In the Registration Act of 6 Vict. c. 18. the forms which are given as to county and borough voters are essentially different. In the case of a county voter the party objecting is obliged, in his notice, to give the nature of the qualification as described on the register. With reference to a borough voter that was not required; but then if there was more than one list, as explained by the note to form No. 10. in Schedule B. to the 17th section, the notice of objection to the overseers was required to specify the list to which the objection referred. It is quite clear that the notice to the overseers of objection to county voters, by mentioning the nature of the qualification as described on the register, gives them full information of the list in which the voter's name is to be found; and in the present case, in which the nature of the qualification is described as being " freehold

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house and land," it is impossible to suppose that the overseers could have been in any doubt as to the list in which to look for the voter's name. Certainly they must have known that the name would not be found in the list of 12*l.* occupiers, and they could not, I think, have been misled by the notice. It is not, however, necessary to decide this case on that point, and I only refer to it to shew that the legislature thought that the information given by the notice of objection in Form No. 4, Schedule A. to 6 Vict. c. 18. s. 7. was sufficient. It is enough now to say, that the notice to the overseers here was in the form, and the only form, prescribed by the Act, and that there is no necessity for mixing up the different forms applicable to borough and county voters. I, therefore, think that the decision of the Revising Barrister was right, and that the appeal should be dismissed, with costs.

BYLES, J.—I am of the same opinion. A separate list of the persons entitled to the 12*l.* occupation franchise is to be made, which is to form part of the county list of voters for the parish. Why the legislature required such separate list of these I do not know; probably for facility of reference; but, however that may be, there is nothing in the face of there being separate lists to shew that the old form of notice of objection to county voters was not to be still applicable.

KEATING, J.—If the introduction of the old form would tend to mislead, and would not give sufficient information to the overseers where to look for the name of the voter objected to, then I think the words of the 30 & 31 Vict. c. 102. are sufficiently large to cause the necessary alteration to be made; but I think that Mr. Quain has sufficiently pointed out that no better information could be given than that which is mentioned in the form No. 4. in Schedule A. to section 7. of the 6 Vict. c. 18; and if that be so, it would be impossible to use the incorporation of the Registration Acts with the Act of the 30 & 31 Vict. c. 102. in order to defeat the object of the legislature. Form No. 4, by giving the nature of the qualification, gives sufficient information of the list in which to find the voter's name. I therefore think that the notice to the overseers was amply sufficient, and that the decision of the Revising Barrister ought to be affirmed; and as the objection was quite beside the merits, with costs.

BRETT, J.—I have not heard the whole of the argument, but I have heard sufficient to induce me to agree with the decision of the Court. I think the 17th section of the 31 & 32 Vict. c. 58, so far from being for is against the appellant in this case. In making out the list of voters for a county, the overseers formerly acted only ministerially, but that was not so as to borough voters, where they had to exercise a discretion, and if any person was omitted from the borough list, such person had to send in a claim. Now, under the new law, since the Representation of the People Act, 1867, the overseers are to exercise the same discretion with reference to making out the county list of the 12*l.* occupiers as was the case with reference to borough voters. Under these circumstances, it was only just that the persons so omitted from the county list should be allowed to send in their claims as in the case of boroughs, but there was a doubt whether the statute made this applicable to counties, and this is recited in the 17th section of 31 & 32 Vict. c. 58. Therefore the attention of the legislature was called to the matter; and that statute declares that the provisions of the 6 Vict. c. 18. as to the mode of claiming was to apply to the new county franchise, but it leaves the mode of objecting as it previously stood. Now, before that time, there were two ways of objecting: one applicable to county voters, and the other to borough voters. These are, therefore, left as before, and for the very good reason that the form applicable to the county voter points out the nature of his qualification, and gives therefore all the information that can be required.

Decision affirmed.

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IN THE COMMON PLEAS. Nov. 11, 1868.

(Appeal from Revising Barrister's Court.)

JONES, *appellant;* JONES, *respondent.*

38 L. J. C. P. 43; L. R. 4 C.P. 422; 19 L. T. 561; 17 W. R. 204; 1 Hop. & C. 95.

Referred to, *Nicholls* v. *Bulwer,* [1871] E. R. A.; 40 L. J. C.P. 82; L. R. 6 C.P. 281; 23 L. T. 542; 19 W. R. 282. (C.P.).

Parliament—County Vote—Description of Qualification.

ELECTION LAW. A.—*The voter's qualification was described in the list as "leasehold house and garden." The voter held the property under a lease to him for life, and if he died within sixty years, then for the remainder of sixty years:*—Held, *that the description was sufficient.*

This was a case stated by the Revising Barrister for the county of Merioneth.

CASE.

At the Court held at Penrhyn, in the county of Merioneth, on September 18, 1868, to revise the list of voters for several parishes, John Humphrey Jones duly objected to the name of John Jones being retained in the list of voters for the said county.

The name and qualification of John Jones appeared on the said list as follow:

Christian Name and Surname, &c.	Place of Abode.	Nature of Qualification.	Street, Lane, &c.
Jones, John	Caerffynon.	Leasehold House and Garden.	Caerffynon, Self Tenant.

The objector contended that the description of the qualification in the third column was not correct. The said John Jones, in support of his claim, produced a lease of the qualifying property, dated November 7, 1865, granted to him by Hugh Beaver Roberts. The following is a copy of the *habendum* in the said lease: "To hold the said premises hereby demised unto the said lessee, his executors, administrators and assigns, from the 29th day of September last past, for and during the term of the natural life of the said lessee; but, in the event of his dying within sixty years from the 29th day of September last, then for and during the remainder of a term of sixty years, to be computed from the 29th day of September, 1865, at the yearly rent of 10*s.*" The objector contended that the said John Jones (for whose life the qualifying property had been demised) had a present freehold interest in the premises, and that the interest in the term of years did not accrue till the death of the lessee. I decided that the said John Jones had, under the said lease, a sufficient present interest in the term of years to entitle him to a vote in respect thereof, and therefore I retained his name in the said list of voters.

If the Court of Common Pleas should be of opinion that my decision as to the interest of the said John Jones in the premises under the said lease was wrong, the name of the said John Jones should be expunged from the register of voters for the county of Merioneth.

Dowdeswell, for the appellant.—Before the 2 Will. 4. c. 45, there was a right of voting in respect of 40*s.* freeholds; that statute, by section 18, put certain restrictions on this right as respected estates for lives; and, by section 20, conferred the right of voting on certain lessees for years, 30 & 31 Vict. c. 102. simply making an alteration in value. A man, therefore, might have a vote either as a freeholder or a leaseholder; and in the present case the respondent

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was clearly a freeholder, being seised of an estate for life, and should have been described accordingly.

R. E. Turner, for the respondent.—In *Coke upon Littleton*, 546, it is said, " If a man letteth lands to another for life, the remainder to him for twenty-one years, he hath both estates in him so distinctly that he may grant away either of them "; and in *Williams on Executors*, 6th edit. 662, it is said, " On the whole, the difference seems to be this: that, if a lease be made for life or years, with a remainder to the executors of the lessee, it shall be a vested interest in the lessee; . . . . but if there be a lease for ninety-nine years, if the lessee live so long, with a proviso that if he die within the term that it should be to his executors for forty years, this last term shall not vest in the lessee." The respondent, therefore, had a term for years as well as a freehold.

[BOVILL, C.J.—The term for years was not in possession.]

At all events there was power to amend under 6 Vict. c. 18. s. 40.

Dowdeswell, in reply.—The forms contained in Schedule H. to 2 Will. 4. c. 45, shew that the description is bad; the value in cases of freeholds and terms for years is different, and they should be distinguished; and if there be any ambiguity, this description is bad.

[BOVILL, C.J.—Does not the case fall within the 6 Vict. c. 18. s. 101?]

That section does not apply.

BOVILL, C.J.—I am of opinion that the decision of the Revising Barrister was correct. The objection is, that the respondent had a present freehold interest, and that the interest in the term of years did not accrue till the lessee's death. Now the respondent had a present interest for life, with a term of years afterwards, and the description is " leasehold house and garden." Most persons would think that a lease for life was a lease, though by law it is a freehold; and the 6 Vict. c. 18. s. 101. provides, " that no misnomer or inaccurate description of any . . . . thing named or described in . . . . any list or register of voters . . . . shall in anywise prevent or abridge the operation of this Act with respect to such . . . . thing, provided that such . . . . thing shall be so denominated in such . . . . list or register . . . . as to be commonly understood "; and in *Flounders* v. *Donner* (1 Lutw. 371; 15 L. J. C.P. 81) Tindal, C.J., says: " I think the words ' commonly understood ' mean some clumsy description which, nevertheless, might point out the particular qualification relied on." This was a popular description, and was sufficient.

BYLES, J.—It would be dangerous to require that the description should be unexceptionably correct; but here the description is right. The respondent's interest is described as " leasehold." Now there are leases for lives or years, and unless a man were a lawyer he could not know that the former were in law freeholds. And it seems to me that the description is strictly legal.

KEATING, J., concurred.

BRETT, J.—Assuming the interest to be freehold, yet it was created by a lease; and therefore possibly the description is strictly applicable; but if not strictly so, then it is within section 101.

Decision affirmed.

IN THE COMMON PLEAS. Nov. 10, 17, 1868.

(Appeal from Revising Barrister's Court.)

ALDRIDGE, *appellant;* MEDWIN, *respondent.*

38 L. J. C.P. 45; L. R. 4 C.P. 464; 19 L. T. 452; 1 Hop. & C. 67.

Parliament—Borough Vote—Notice of Objection served on the Overseers —6 Vict. c. 18. s. 17, Schedule B, No. 10, and s. 101.

ELECTION LAW. A.—*A notice of objection to a borough voter, served on the overseers of the only parish in such borough, objected to the voter " being*

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retained on the list of persons entitled to vote in the election of a member for the said borough." There were two lists published by such overseers, one of persons entitled to the occupation franchise, and on which list was the voter's name, and the other of persons entitled in respect of reserved ancient rights, and on which last list there was the name of only one person, viz., that of the objector. It was proved on the part of the overseers that they were not misled by the notice, but that they knew perfectly well that the objection was intended to apply to the list of persons entitled to the occupation franchise and not to the other list, and they accordingly so acted thereon, and duly published the name of the voter in the list of persons objected to:—Held, *that, under these peculiar circumstances, there was enough to warrant the Revising Barrister coming to the conclusion that the notice did sufficiently specify the list on which the voter's name appeared, and the Revising Barrister having in substance found that the description was such as would be commonly understood to apply to the list of occupiers, the Court could not say that he was wrong on these facts, or hold as a matter of law that the notice was bad.*

At a Court holden by the Revising Barrister for the revision of the list of persons entitled to vote in the election of a member to serve in parliament for the borough of Horsham, Pilford Medwin objected to the name of John Aldridge being retained on such list.

There was only one parish within the said borough, namely, the parish of Horsham. The objector gave in evidence and duly proved the serving on the said John Aldridge of a notice of objection according to the Form No. 10. in Schedule B. of the statute 6 Vict. c. 18; and he also gave in evidence and duly proved the service on the overseers of the said parish of a notice of objection to the name of the said John Aldridge being retained on the list of persons entitled to vote in the election of member for the said borough. The notice served on the said overseers was in the following words:

"To the Overseers of the Parish of Horsham.

"I hereby give you notice that I object to the name of John Aldridge being retained on the list of persons entitled to vote in the election of a member for the borough of Horsham.

"Dated this 25th day of August, 1868.

(Signed) "PILFORD MEDWIN,

of Horsham, on the list of persons entitled to vote in the election of a member for the borough of Horsham in respect of property occupied within the parish of Horsham."

In the borough of Horsham the overseers make out and publish two separate lists of persons entitled to vote in the election of a member for the said borough, viz., one of persons entitled to vote in respect of the occupation of property within the said parish of Horsham, and the other of persons entitled to vote in respect of reserved ancient rights.

The name of the said John Aldridge appeared only in the first-mentioned list, his qualification being there stated under the third column to be "buildings and land." At the time the two lists were made out and published there was and for some time previously there had been only one person entitled to vote in the election of a member for the said borough in respect of such reserved ancient rights, viz., the said Pilford Medwin, and the list made out and published by the overseers of the persons entitled to vote in respect of such reserved ancient rights contained the name of the said Pilford Medwin only. The overseers duly published in the usual form the list of persons objected to as not being entitled to vote in the election of a member for the borough of Horsham, and in that list there was the name of the said John Aldridge, with his place of abode and qualification, as they appeared in the said occupation of property list.

It was objected, on the part of the said John Aldridge, that the said notice of objection served on the said overseers was informal and insufficient, inasmuch as it did not specify the particular list to which the objection referred, pursuant to the directions given in Schedule B, No. 10, of the 6 Vict. c. 18, and that the

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said John Aldridge ought not to be called on to prove his title to vote. It was proved on the part of the overseers that they knew perfectly well that the objection was intended to apply only to the list of persons entitled to vote in respect of the occupation of property, and not to the said list of persons entitled to vote in respect of such reserved ancient rights as aforesaid, and that they the said overseers were not in any manner misled by the said notice.

The Revising Barrister held, upon the facts proved, that the notice of objection served on the said overseers was sufficient, and he called upon the said John Aldridge to prove his title to vote in respect of the occupation of property within the said parish, which he failed to do, and therefore his name was expunged from the list of such occupiers.

The question for the opinion of the Court was, whether upon the facts stated the said notice of objection served on the said overseers was or was not sufficient in law to call upon the said John Aldridge to prove his title to have his name retained on the list of persons entitled to vote in the election of a member for the said borough of Horsham in respect of property occupied within the said parish of Horsham.

Pickering, for the appellant.—The notice of objection was bad for not specifying on which of the lists the name of the person objected to was to be found. The 17th section of 6 Vict. c. 18. requires the notice to the overseers to be according to Form No. 10 in Schedule B, and in the note appended to that form it is stated that "if more than one list of voters, the notice of objection should specify the list to which the objection refers." The case of *Barton* v. *Ashley* (2 Com. B. Rep. 4; 15 L. J. C.P. 36) expressly decides that where there is more than one list the notice of objection to the overseers under this 17th section must specify the particular list to which the objection refers. Does it make any difference that there is only one name on one of the lists? If so, where is the line to be drawn? It is no answer to say that the overseers were not in fact misled. In *Barton* v. *Ashley* (2 Com. B. Rep. 4; 15 L. J. C.P. 36) Tindal, C.J., said, "All that can be said is, that the omission to specify the particular list did not in fact create any confusion or difficulty. But I think it is much more convenient that the overseer should have his attention distinctly called to the list, and that it is safer to adhere to the words of the Act, and to hold that the notice must be in strict conformity with it in this respect."

Keane (*Lumley Smith* with him), for the respondent.—If the overseers are satisfied with the notice they have received, what is it to the voter that the notice is somewhat imperfect, and may therefore have occasioned the overseers some additional trouble?

[BYLES, J.—That argument might be carried to the extent of no notice at all being given to the overseers, provided they did not object.]

In *Huggett* v. *Lewis* (15 Com. B. Rep. 249; 24 L. J. C.P. 38) the notice to the overseers was held to be sufficient although, instead of distinctly specifying in which list was the voter's name, it merely described the list as "the list of persons entitled under the Reform Act to vote."

[KEATING, J.—There the notice did sufficiently indicate the list, namely, that of the 10*l*. occupiers.]

No doubt; but Maule, J., considered that if the overseers were satisfied, it was not the business of the voter to take the objection. If the overseers were not misled by the notice, but acted upon it, as they did in the present case, any irregularity as to its sufficiency may be waived. It is not necessary that the form given by the Act should be strictly complied with. The 17th section says according to Form 10 or to the like effect. The notice is given for the purpose only of giving information to the overseers. It is sufficient if it has given the information required, so that the overseers have been able to act and have acted on it *Godsell* v. *Innous* (15 Com. B. Rep. 295; *s.c. nom. Godsell* v. *Innons*, 25 L J. C.P. 79) and *Jones* v. *Innous* (15 Com. B. Rep. 290; *s.c. nom. Jones* v. *Innons*, 25 L. J. C.P. 78). Next, this is a case within section 101 of the 6 Vict. c. 18, which says "that no inaccurate description of any person, place or thing named or described" . . . "in any notice required by this Act shall in

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anywise prevent or abridge the operation of this Act," &c., " provided that such person, place or thing shall be so denominated in such notice as to be commonly understood." The finding in this case shews in effect that it was commonly understood to which list the notice of objection referred, and where that is the case, the inaccuracy is cured by this 101st section—*Lambert* v. *the Overseers of St. Thomas, New Sarum* (2 Lutw. 222; 12 Com. B. Rep. 643; 22 L. J. C.P. 31).

Pickering, in reply.—In *Tudbull* v. *the Town Clerk of Bristol* (5 Man. & G. 5; 13 L. J. C.P. 49) and *Bright* v. *Devenish* (36 L. J. C.P. 71; 2 L. R. C.P. 102) the notice of objection, though it followed the Form in the Schedule B., to the 6 Vict. c. 18, was held to be insufficient in not properly describing the list on which the objector's name was, and it was never suggested, in either of those cases, that this could be cured by section 101. There were not two lists in *Lambert* v. *the Overseers of St. Thomas, New Sarum* (2 Lutw. 222; 12 Com. B. Rep. 643; 22 L. J. C.P. 31), and the only question was, whether the notice to the voter was sufficient to inform him that his county vote was objected to. The present case is not one of inaccurate description, but of no description at all, and therefore it is not within the 101st section.

Cur. adv. vult.

The judgment of the Court[1] was delivered, on November 17, by—

BOVILL, C.J.—The question in this case was, whether a notice of objection to the overseers which did not specify the list upon which the voter's name appeared was good. The statute, no doubt, directs that the list shall be specified, namely, by a note to Form No. 10 in the Registration Act, 6 Vict. c. 18. It was decided in this Court, in the case of *Barton* v. *Ashley* (2 Com. B. Rep. 4; 15 L. J. C.P. 36), that it was necessary the notice should specify the list. The same rule was laid down by the Court in respect of a description of the objector in the case of *Crowther* v. *Bradney* (15 Com. B. Rep. N.S. 536; 33 L. J. C.P. 70). By the 6 Vict. c. 18, section 101, an inaccurate description will not vitiate the notice if the description is such as to be commonly understood. The circumstances of this case were very peculiar, there being a list of voters properly so called entitled to the occupation franchise, and there being also a paper which, in one sense, may be called a list of voters entitled to vote in respect of reserved rights. This paper did only contain the name of one person, that person being the objector, Mr. Medwin. This circumstance, according to the statement in the case, had existed for some time previously, and it was found, on the part of the overseers, that they knew perfectly well that the objection was intended to apply only to the list of occupiers, and not to the paper containing the name of Mr. Medwin alone. We feel some difficulty in coming to the conclusion that this notice did sufficiently specify the list; but under the very peculiar circumstances of the case, and looking to the evidence on the part of the overseers, we cannot say there was not sufficient to warrant the Revising Barrister coming to the conclusion that the notice did sufficiently specify the list on which the voter's name appeared; and he having in substance found that the description was such as would be commonly understood to apply to the list of occupiers, we cannot say he was wrong on these facts, or hold as a matter of law that the notice was bad. The decision of the Revising Barrister, therefore, must be affirmed, but without costs, for the case is a very peculiar one, and it certainly is not to be considered as forming a precedent for any other.

Affirmed, without costs.

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(1) Bovill, C.J., Byles, J., Keating, J., and Brett, J.

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IN THE COMMON PLEAS. Nov. 17, 1868.

(Appeal from Revising Barrister's Court.)

MASON, *appellant;* BENNETT AND OTHERS, *respondents.*

38 L. J. C.P. 48; L. R. 4 C.P. 502.

Parliament — Borough Vote — Occupier — Composition of Poor-Rate— 13 & 14 Vict. c. 99. s. 4.—Liability of Owner—30 & 31 Vict. c. 102. s. 7.

ELECTION LAW. A.—*The owner of premises, the occupier of which claimed to be entitled to a borough vote in respect of such occupation, under* 30 *&* 31 *Vict. c.* 102, *had, prior to that Act, entered into an agreement, under the Small Tenements Act* (13 *&* 14 *Vict. c.* 99. *s.* 4), *for a year, from March,* 1867, *to March,* 1868, *to pay a composition instead of the full ordinary poor-rate in respect of such premises, whether occupied or not*:—Held, *that the liability of such owner to be rated instead of the occupier did not cease on August* 15, 1867, *the date of the passing of the* 30 *&* 31 *Vict. c.* 102, *but continued to September* 29, 1867, *inasmuch as such agreement to pay such composition was a "composition" within the meaning of proviso* (1) *to section* 7 *of that Act.*

This was a consolidated appeal from the decision of the Revising Barrister appointed to revise the list of voters for the borough of Whitehaven. John Mason, on the list of voters for the said borough, objected to the names of John Bennett and others, whose names appeared in the schedule annexed to the case, being retained on the list of voters for the said borough.

The following facts appeared by the CASE: The respondents were inserted in the said list of voters in respect of their occupation of dwelling-houses within the said borough. The Small Tenements Acts (59 Geo. 3. c. 12. and 13 & 14 Vict. c. 99.) have for many years been applied to this borough; and, under section 4. of the latter Act, the owner of the premises in question entered into an agreement in 1867, which was to remain in force from March 25, 1867, until March 25, 1868, to pay a composition instead of the full ordinary rate in respect of these premises, whether they were occupied or not. Two rates for the relief of the poor were made in 1867, viz., on March 13 and September 5, and the names of the respondents appeared upon the rate-books as occupiers in respect of both these rates. It further appeared from the rate-books that the owner paid in one gross sum a composition in respect of these premises as soon as it became due, under each of the said rates. In part consideration of their services as workmen, the respondents (who were all employed as colliers by the owner of the premises they occupied) paid no rent for such premises; but the compounded rates which were paid by the owner, under the said rates of March 13 and September 5, 1867, were on each occasion deducted from the wages of the respondents which became due next after such payment by the owner. The said rate made upon September 5, 1867, was the rate for the time being, and remained in force until superseded by another made on February 13, 1868. In respect of the last-mentioned rate, the names of the respondents appear on the rate-books rated as ordinary occupiers in respect of the premises; and many of them have, in fact, paid the full rates payable by them on that rate.

On behalf of the said John Mason it was contended: first, that the respondents were not entitled to vote, inasmuch as they had not complied with the conditions prescribed by section 3 of the said Act; secondly, that under section 7 of the said Act, the liability of the owner to be rated instead of the occupier ceased on and after the passing of the said Act; thirdly, that they had not brought themselves within section 8 of the said Act, inasmuch as they had not been duly rated as ordinary occupiers to all poor-rates in respect of the premises after the liability of the owner to be rated had ceased; nor had they paid all poor-rates payable by them as ordinary occupiers in respect of the premises up to the preceding January 5. On the other hand, it was contended in support of these votes: first, that, by virtue of proviso (1) in section 7 of the

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said Act, the liability of the owner to be rated to the poor-rate did not cease until September 29, 1867, and therefore that the compounded rates paid in respect of the rate made on September 5, 1867, were properly paid; secondly, that the respondents were entitled to be registered under section 8 of the said Act.

The Revising Barrister decided that, under proviso (1) of section 7 of the said Act, the liability of the owner to be rated did not cease until September 29, and that the respondents were entitled to be registered under section 8 of the said Act. He therefore disallowed the objections and retained the names of the respondents upon the list.

Keane, for the appellant.—The question is, whether the liability of the owner to be rated instead of the occupiers, in respect of the dwelling-houses mentioned in the case, did or did not cease on August 15, 1867, the date of the passing of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102). It is submitted that it ceased on that day; and, as the respondents were not assessed as ordinary occupiers to the September rate, they were not entitled to be registered as voters. The 7th section of 30 & 31 Vict. c. 102. enacts, that "Where the owner is rated at the time of the passing of this Act to the poor-rate in respect of a dwelling-house," &c., "instead of the occupier, his liability to be rated in any future poor-rate shall cease, and the following enactments shall take effect with respect to rating in all boroughs: 1. After the passing of this Act, no owner of any dwelling-house or other tenement, situate in a parish either wholly or partly within a borough, shall be rated to the poor-rate instead of the occupier, *except as hereinafter mentioned*. 2. The full rateable value," &c., "and the name of the occupier shall be entered in the rate-book. Where the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor-rate. Provided as follows: (1.) That nothing in this Act contained shall affect any composition existing at the time of the passing of this Act, so nevertheless, that no such composition shall remain in force beyond September 29 next. (2.) That nothing herein contained shall affect any rate made previously to the passing of this Act, and the powers conferred by any subsisting Act for the purpose of collecting and recovering a poor-rate shall remain and continue in force for the collection and recovery of any such rate or composition." Previously to this enactment, the overseers would, by virtue of the 13 & 14 Vict. c. 99. s. 4, have rated the owner, and not the occupiers, in such a case as the present. So that, when the 30 & 31 Vict. c. 102. was passed, the owner, and not the occupier, was the person liable to be rated. Then the 7th section of the last Act expressly states when such liability of the owner is to cease; namely, the time when the Act passed. The only exception to this, and to which the words "except as hereinafter mentioned" refer, is where the tenement is wholly let out in apartments or lodgings. In that case the owner, and not the occupier, is to be rated, as was decided in the recent case of *Stamper* v. *the Churchwardens of Sunderland-near-the-Sea* (37 L. J. M.C. 137; 3 L. R. C.P. 388). The respondents rely on proviso (1) in the 7th section; and the question is, what does the word "composition" there mean. If it means an agreement for a composition, then it would be existing when the September rate in question was made, and that rate would be good; but if it means, as on behalf of the appellant it is contended it does, "a rate compounded for," the September rate, which was made after the passing of the Act, would be bad. It cannot mean an agreement for a composition, because, by proviso (2), it is declared that the powers of collecting and recovering a poor-rate shall remain for the collection of any such rate or composition, which evidently shews the rate compounded is the composition which is here contemplated; for who ever heard of recovering an agreement for a composition? Then the 8th section, which enables the occupier to be registered, though the owner had been rated at the time of passing the Act, requires him to have fulfilled, *inter alia*, this condition—"that he has been duly rated as an ordinary occupier to all poor-rates in respect of the premises after the liability of the owner to be rated to the poor-rate has ceased under the provisions of this

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Act." It does not say "after the composition or agreement for a composition has ceased," but "after the liability of the owner to be rated," &c., has ceased; it follows the words of the earlier part of section 7, where it is enacted that such liability shall cease at the time of the passing of the Act. The true principle of the Act is, that (except in the case where the tenement is wholly let out in apartments) the owner shall not be rated after the passing of the Act; but where there was a composition then existing, the moneys to be collected under it shall continue to be recoverable up to September 29, but not afterwards. If the construction were such as the respondents contend for, it would be possible, between the passing of the Act and September 29, to make a rate on the owner for another year, and so continue the composition in force even beyond September 29, quite contrary to the intention of the legislature.

Manisty (*Kemplay* with him) appeared for the respondents, but was not called on by the Court.

BOVILL, C.J.—I think this a very clear case. Mr. Keane has argued the case for the appellant very ingeniously, but he has failed to raise any doubt in my mind. The object of the enactment was to prevent the owner from being rated to the poor-rate, instead of the occupier, after the passing of the statute. That was the general principle, and with regard to some cases it is said distinctly that after the passing of the Act the owner shall not be rated. In the class of cases, however, in which the tenement is wholly let out in apartments or lodgings the Act says that the owner shall still continue to be rated. There is another case, namely, where there has been a composition entered into by the owner, with the overseers, under the Small Tenements Act, 13 & 14 Vict. c. 99. s. 4, in respect of tenements occupied or unoccupied, and which, according to that Act, would continue for a year ending March 25. The case of tenements wholly let out in apartments is dealt with by the concluding part of the 7th section; then proviso (1) which follows, and which overrides all the previous part of the section, states "that nothing in this Act contained shall affect any composition existing at the time of the passing of this Act, so, nevertheless, that no such composition shall remain in force beyond September 29 next." Mr. Keane has argued that that proviso means, that nothing shall affect any rate made under a composition and existing at the time of the passing of the Act. If that were so, proviso (2) states "that nothing herein contained shall affect any rate made previously to the passing of the Act," and expressly continues the powers of recovering any such rate, and shews, therefore, that proviso (1) was intended to apply to something different from a rate under a composition. It indicates to my mind that the statement in proviso (1), "that no such composition shall remain in force beyond September 29 next," refers to the agreement for a composition, and not to the payment under it. The word "composition" has often different meanings, as is illustrated when it is used in its popular sense of a composition with creditors." Sometimes it is used to describe the agreement, and sometimes the money paid under it. Here, in the first proviso to the 7th section, I think "composition" means the agreement, and that it is not to be affected by the Act except that it is not to continue after September 29, 1867. This view of it, I think, is confirmed by the language of the 8th section, which relates to where the occupier has not, but the owner has, been rated, and enacts that "such occupier shall, notwithstanding he may not have been rated prior to September 29, 1867, as an ordinary occupier be entitled," subject to certain conditions, to be registered as a voter. That clearly points to a period other than the passing of the Act, and has reference to September 29, 1867, and the first condition for carrying out this enactment in the 8th section, instead of stating that such occupier must be rated "after the passing of the Act," as it would if the contention of Mr. Keane were the right one, states that the occupier must be rated "after the liability of the owner to be rated to the poor-rate has ceased under the provisions of this Act." That embraces both the case of an owner who has been rated against his will and whose liability is to cease on the passing of the Act, and the case of an owner who has entered into a composition which exists

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after the passing of the Act, but is to cease on September 29, 1867. I have failed to find any ground for holding that the present case does not fall within proviso (1) to the 7th section. There was here a composition which had been entered into, which was existing at the time of the passing of the Act, and which would have remained in force until March, 1868, but for the 30 & 31 Vict. c. 102, and by that Act it was not to remain in force beyond September 29, 1867. I therefore think that the decision of the Revising Barrister was right.

BYLES, J.—I also am of opinion that the Revising Barrister was right, and I rest my decision on proviso (1) to section 7 of the 30 & 31 Vict. c. 102. The disqualifying enactments of that section do not apply to this case.

KEATING, J.—I am of the same opinion. I have been unable to discover where there is any doubt. The facts seem to me to bring the case distinctly within the terms of the first proviso of section 7, and therefore I think the Revising Barrister was right.

Decision affirmed.

IN THE COMMON PLEAS. Nov. 17, 18, 1868.

(Appeals from Revising Barrister's Court.)

TROTTER, *appellant;* TREVOR, *respondent.*

HANKS, *appellant;* JONES, *respondent.*

38 L. J. C.P. 51; L. R. 4 C.P. 502.

Parliament—Borough Vote—Rating of Owner instead of Occupier—30 & 31 Vict. c. 102. s. 7.

ELECTION LAW. A.—*The word "composition" in 30 & 31 Vict. c. 102. s. 7. proviso (1) applies not only to the case of an owner paying less than the full amount of the poor-rates by agreement, but also to the case where he pays a less amount, simply by order of the vestry under the Small Tenements Act.*

TROTTER v. TREVOR.

This was an appeal from the decision of the Revising Barrister appointed to revise the list of voters for the borough of Northallerton. The name of William Alderson on the register of voters for the said borough was duly objected to.

The facts of this CASE were as follows:

The said William Alderson was on the last day of July, 1868, and during the whole of the preceding twelve calendar months, an inhabitant occupier, as tenant, of a dwelling-house, in the township of Brompton, within the said borough of Northallerton, of a net yearly rateable value of less than 6*l*.

The Small Tenements Act (13 & 14 Vict. c. 99), had been duly adopted in the township of Brompton, and was in force in that township at the time of the passing of the Representation of the People Act, 1867, and the owner of the premises occupied by the said William Alderson was assessed to the rates for the relief of the poor, and to all other rates and assessments in respect of which the owner of such premises was rateable, pursuant to the provisions of that Act and the 3rd section of 14 & 15 Vict. c. 39.

It was customary in the township of Brompton to make all poor-rates prospectively, to meet the future expenditure. The first rate for the relief of the poor within the township of Brompton, made after the passing of the Representation of the People Act, 1867, was duly made and allowed by two Justices on September 4, 1867, and in that rate the said William Alderson's name was inserted in the column headed "Name of occupier," and the owner's name was inserted in the column headed "Name of owner," and the owner was assessed, as he previously had been, in pursuance of the Small Tenements

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Act, at three-fourths of the amount at which the said William Alderson would have been rateable had the Small Tenements Act not been adopted within the township of Brompton. The amount so assessed was paid by the owner. The owner of the premises occupied by the said William Alderson had not at any time availed himself of the provisions contained in the latter part of the 4th section of the Small Tenements Act.

The said William Alderson had not claimed to be rated instead of the owner in respect of the rate of September 4, 1867. No other rate for the relief of the poor was made for the said township before January 5, 1868.

The next subsequent poor-rates made in the year ending on July 31, 1868, were respectively made on February 14 and May 21, and in both those rates the said William Alderson was rated as an ordinary occupier, and paid an equal amount in the pound to that payable by other ordinary occupiers.

It was contended, on behalf of the objector, that the said William Alderson had not during the whole of the twelve calendar months preceding the last day of July, 1868, been rated as an ordinary occupier in respect of the premises occupied by him to all rates made for the relief of the poor in respect of such premises, and had not on or before July 20, 1868, paid an equal amount in the pound to that payable by other ordinary occupiers, in respect of the same premises, up to the preceding January 5, according to the provisions of the 3rd section of the Representation of the People Act, 1867. That the liability of the owner to be rated or assessed to any subsequent rate for the relief of the poor ceased on the passing of the Representation of the People Act, 1867, under the provisions of section 7 of that Act. That this liability was in nowise affected by the first proviso to the last-mentioned section, as the word "composition," in such proviso, related only to cases where the owner had, under the provisions of the latter part of the 4th section of the Small Tenements Act, compounded for the rates for a year, in respect of all his tenements occupied or unoccupied within the township, of a rateable value of not more than 6*l.*, and to special local Acts.

It was contended, on behalf of the said William Alderson, that the rate made on September 4, 1867, was not payable by him in respect of the premises then occupied by him, but by the owner thereof; and that therefore the fourth paragraph of section 3 of the Representation of the People Act, 1867, was not applicable. That a composition within the meaning of that word in the first proviso to section 7 of the Act existed in the township at the time of the passing of the Act; and that, as the rate was made before September 29, 1867, and as the said William Alderson had actually been rated as an ordinary occupier in all subsequent rates, he must be taken to have been sufficiently rated under the 7th and 8th sections of the Act for the purposes of being on the register.

Upon the above facts the Revising Barrister decided that the said William Alderson was entitled to have his name retained on the register.

Manisty (*Lovesey* with him), for the appellant.—The present case differs from that of *Mason* v. *Bennett* (38 L. J. C.P. 48), as there was not here, as in that case, an agreement between the owner and the parish for the owner being assessed at the reduced rate in respect of the premises, whether occupied or unoccupied; but the owner, without his consent, was here assessed instead of the occupier, under the Small Tenements Act (13 & 14 Vict. c. 99); and the question is, whether such last-mentioned assessment is a composition within the meaning of proviso (1) to section 7 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102). It is submitted that it cannot be a composition within the meaning of such proviso except it be by agreement. If the vestry determine to apply the 13 & 14 Vict. c. 99, and make accordingly the order for rating the owner instead of the occupier of the small tenement, it is compulsory on the overseers, by sections 3 and 4 of that Act, to rate the owner at three-fourths of what would otherwise be the full rate. That cannot be a composition; indeed, the word "composition" is not used in the Small Tenements Act.

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[*Gray*, for the respondent, referred to section 3 of 14 & 15 Vict. c. 14, where the word "composition" is used.]

The 14 & 15 Vict. c. 14. s. 3, which enables the occupier, when claiming to be rated, to tender only what is payable under the composition with the landlord, must have reference to the 2 & 3 Will. 4. c. 45, which, by section 30, gives power to the occupier to be rated in order to qualify for the franchise.

[BRETT, J.—The question is whether section 3 of 14 & 15 Vict. c. 14 does not apply to a composition of both kinds namely, where it is compulsory as well as where it is by agreement.]

It is submitted it only applies to a composition to which the landlord is an assenting party. Then, the general principle of the Representation of the People Act, 1867, is, that the borough voter should be rated to and pay the rates for the parish equally with the other occupiers. That is the effect of section 3 of that Act. Then section 7 has provided that, where the owner instead of the occupier was rated at the time of the passing of that Act—that is to say, where the Small Tenements Act applied—the owner's liability to be so rated shall cease, except as thereinafter mentioned. One of those excepted cases is where the tenement has been wholly let out in apartments, as in *Stamper* v. *Churchwardens of Sunderland-near-the-Sea* (37 L. J. M.C. 137); the other is the case within proviso (1), which has been decided in *Mason* v. *Bennett* (38 L. J. C.P. 48) to apply, where there was a composition by agreement existing at the time of the passing of the Act. It is submitted that it is limited to such, and that the composition which is continued until September 29, 1867, can only mean one by agreement, and cannot mean a compulsory assessment on the owner under the Small Tenements Act. This alone makes intelligible proviso (2) to section 7, which contiunes the power of collecting and recovering "any such rate or composition," where the rate has been made previously to the passing of the Act.

Gray (*Cave* with him), for the respondent.—It is submitted that the word "composition" in proviso (1) to section 7, of the Representation of the People Act, 1867, applies to any case where the owner, and not the occupier, was rated, and where the rate which the owner had to pay was less than that of the other occupiers in the parish.

[BOVILL, C.J.—Can you suggest any other class in which an owner was so rated instead of the occupier, except where it was so done by consent, or by the overseers under the Small Tenements Act or some local Act?]

No; but there may have been cases where the owner was rated instead of the occupier without its being so done under any Act of Parliament. The words "composition" and "compound householder" do not appear in the Small Tenements Act, 13 & 14 Vict. c. 99; but they acquired their meaning after that Act, and it is necessary to see what was the meaning they had so acquired. That is shewn by the 14 & 15 Vict. c. 14, which was passed to do away with the necessity of renewing the claim to be rated and tendering the rate. The title to that Act refers to "compound householders" as a well-known expression; and section 3 expressly alludes to composition with the landlord for a less sum than the full rate, and enables the tenant to be qualified if he pays or tenders only the amount payable under such composition. That clause clearly was not necessarily restricted to a composition by agreement. There is no reason, then, why September 29, should be mentioned in proviso (1) to section 7 of the Representation of the People Act, 1867, as applicable to only one kind of composition. It meant, it is submitted, to apply to both descriptions; that is to say, to all cases where there was existing the class of compound householders, and the owner paid an abated rate to the parish.

Manisty replied.

Cur. adv. vult.

HANKS v. JONES.

This was an appeal from the decision of the Revising Barrister for the borough of Malmesbury.

This CASE stated facts raising the same question as in *Trotter* v. *Trevor*,

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the Barrister's decision, however, being in favour of the objection to the voter being retained on the list. The Court desired that this case also should be argued.

Macnamara (the *Attorney-General* and *Keane* with him), for the appellant. —It is submitted that in the present case it was right to put the owner on the rate; it has been decided that this is so where the owner pays one-half the rate by agreement, and there is no reason for distinguishing between cases where one-half and three-quarters are paid, as in both cases it is done by order of the vestry, and less than the full amount is paid. By Sturges Bourne's Act, 59 Geo. 3. c. 12, the owner might be rated at one-half; and then came 14 & 15 Vict. c. 14, which was intended to include that Act.

[BOVILL, C.J.—No; 59 Geo. 3. c. 12, excepts parliamentary boroughs.]

But section 30 of 2 Will. 4. c. 45, is recited in 14 & 15 Vict. c. 14, and that section applies to both kinds of composition; and 14 & 15 Vict. c. 39, is equally general.

[BRETT, J.—It must not be forgotten that 14 & 15 Vict. c. 14, is a Registration Act. BOVILL, C.J.—There are differences between the two cases: in the one the arrangement is general over the parish, and continuing; in the other, it applies only to owners who give notice. The amounts may be different, and it exists only for a period.]

No doubt that is so; but still there is no reason why, for the purposes of 30 & 31 Vict. c. 102, there should be any distinction between the two cases, and the word " composition " not apply to both.

[BOVILL, C.J.—It would be well to refer to some of the local Acts as to rating, and see what are the provisions inserted in them.]

Mellish (*Dowdeswell* and *G. T. Howard* with him), for the respondent.— The question turns on the meaning of the word " composition " in proviso (1), in the 7th section of 30 & 31 Vict. c. 102, and on whether or not it applies not only where there is an agreement with the owner, but also where there is none. It is submitted that it only applies in the former case, where there is an agreement. The word " composition " means naturally an agreement, by which a composition for a less sum is made, and is not referable to a general law. According to the other construction, in no case would the owner's liability cease at the passing of the Act, and the proviso would nullify the principal enactment. Where the Small Tenements Act is adopted the vestry could make an end of it as to future rates where there was no agreement, and the Act, therefore, did only what the parish could do, which was fair; but where there was an agreement for a year the parish could not, and therefore the legislature thought it would be unjust to put an end to such agreement. Again, the word " rate " is used in the one place, " composition " in the other, which points to the difference between the one case, where there is a rating, though to a smaller amount, and the other, where there is no rating but an agreement, whereby even unrateable property is to be paid for. The 14 and 15 Vict. c. 14, draws a distinction between the two cases. Section 1 would apply to the case of owners rated at three-fourths, and would not apply to a composition by agreement, which is not a rate, because it is in respect of unoccupied (and therefore unrateable) property as well as occupied, whilst section 3 speaks of a " composition with the landlord," which can only relate to an agreement; and no possible doubt could have arisen if the words " with the landlord " had been in the present Act.

[BRETT, J.—By 2 Will. 4. c. 45. s. 30, the occupier may claim to be rated; then, by 14 & 15 Vict. c. 14. s. 1, he need only claim once; and then, by section 3, to prevent any doubt, it is provided that he need only tender the lesser amount, and it applies to both cases.

The Walsall Act, 11 & 12 Vict. c. clxi., which may be taken as a sample of the local Acts, provides, by section 53, that owners in certain cases may be rated instead of occupiers at the full amount, and by section 56, that owners in certain cases may give notice of their intention to compound by paying a

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reduced rate, whether the premises be occupied or not, and then pay two-thirds of the full amount. But this does not affect the present argument.

[KEATING, J.—If the owner may be rated for the occupier to the full amount we get a case which would satisfy the principal enactment and yet not fall within the proviso.]

It is submitted that the Act now in question only applies to pure cases of composition with particular landlords, not to general enactments.

Macnamara, in reply.—September 29 is mentioned because it is a quarter-day, and therefore a convenient time as respects the arrangements of landlord and tenant, and applies equally to both cases. A composition does not necessarily infer an agreement, and 14 & 15 Vict. c. 14, recites 2 Will. 4. c. 45. s. 30, which applies to both cases.

BOVILL, C.J.—The question in this case and in the case of *Trotter* v. *Trevor* is the same, and entirely depends on what is the construction of the words, "composition existing at the time of the passing of this Act," in 30 & 31 Vict. c. 102. s. 7 (proviso (1), which enacts, "that nothing in this Act contained shall affect any composition existing at the time of the passing of this Act, so nevertheless that no such composition shall remain in force beyond the 29th day of September next." If the proviso included every case within the principal enactment in section 7, the difficulty would present itself of the one stultifying the other, and my great difficulty was to see what case there was which being within the principal enactment was not also within the proviso. Towards the close of the argument, however, we were referred to various local Acts, which provide that the owners of tenements below a certain rateable value, or let in a particular way, shall be rated and pay rates instead of the occupiers, and also that such owners may give notice of their intention to compound by paying a reduced rate, whether the premises are occupied or not, in which latter case they are to pay only two-thirds. And thus it seems that the system adopted in some cases was that the owners were assessed for the occupiers, although there was no diminution in the amount of the rates, and that there was also power given for making a composition with a landlord by which a less sum was to be paid by him, and paid irrespective of whether the premises were occupied or not. This system was in existence in various places when the Small Tenements Act, 13 & 14 Vict. c. 99, was passed, which authorized the vestry of a parish to order that owners of tenements of a yearly rateable value, not exceeding 6*l*., should be rated instead of the occupiers, and rated at only three-fourths of the ordinary assessment, such order to continue in force for at least three years, but be determinable in a particular way at that or any future date. The Act also authorized the landlords of such tenements to agree to pay for one year, and be assessed at a sum not less than one half the usual assessment, whether the premises were occupied or not. Consequently, under that Act, there were two cases: the first where all the owners of such tenements paid a less sum instead of the occupiers, the second where particular owners undertook to pay a less sum whether the premises were occupied or not; and under various local Acts the owners paid the full amount or paid by agreement less than the full amount in place of the occupier. Then came the 14 & 15 Vict. c. 14; but this statute, as has been pointed out, is a Registration Act, and seems to have no operation on 13 & 14 Vict. c. 99, for when 14 & 15 Vict. c. 14, was passed the occupation franchise was in respect of a 10*l*. annual value, and therefore that Act could have no application to tenements not exceeding 6*l*. value. This Act would not apply to Sturges Bourne's Act, 59 Geo. 3. c. 12, because the latter (section 23.) is not to apply to parliamentary boroughs, and it could not apply to the Small Tenements Act, 13 & 14 Vict. c. 99, because the Small Tenements Act applied only to 6*l*. tenements. Therefore, 14 & 15 Vict. c. 14, must apply to the local Acts, under which the owner might, according to circumstances, pay either the full amount of or a less amount than the ordinary assessment—a conclusion which is fortified by reference to sections 1 and 3 of the Act, for section 1 speaks of a person tendering the "full amount of the rate or rates (if any) due," which seems to refer to the case where by a

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local Act the owner pays the full amount, and section 3 refers to "cases where, by any composition with the landlord, a less sum shall be payable than the full amount of the rate": so that the distinction is made between the payment of the full and a less amount. The 30 & 31 Vict. c. 102. s. 7. enacts that "where the owner is rated at the time of the passing of this Act to the poor-rate in respect of a dwelling-house or other tenement situate in a parish wholly or partly in a borough instead of the occupier, his liability to be rated in any future poor-rate shall cease, and the following enactments shall take effect with respect to rating in all boroughs: 1. After the passing of this Act, no owner of any dwelling-house or other tenement situate in a parish either wholly or partly within a borough shall be rated to the poor-rate instead of the occupier except as hereinafter mentioned," words which would apply to every case but for the exception. Then, by proviso (1), it was provided "that nothing in this Act contained shall affect any composition existing at the time of the passing of this Act, so nevertheless that no such composition shall remain in force beyond the 29th day of September next." Now, if "*composition*" is there used for the purpose of designating where less than the full amount is paid, there is no difficulty in the construction of the Act, and though, as I pointed out during the argument, the two cases under the Small Tenements Act, 13 & 14 Vict. c. 99, differ in various respects, for instance, the one applying universally, the other to particular cases, the one coming into force without, the other with the agreement of the owner, and the one remaining in force for one period, the other for another period, I have yet failed to discover any reason why the legislature should make the then existing state of things come to an end in the one case on August 15, and in the other on September 29, 1867. It has been said that the reason is that September 29 is a quarter-day, and was fixed with a view to the convenience of arrangements between landlords and tenants, but as far as I can see there is equal reason as respects landlords and tenants for fixing on this day in the one case as in the other, and it is difficult to see why there should be a difference of six weeks in the two cases. In the particular case before us, it is true that as more than three years had elapsed from the original order, the vestry could put an end to the arrangement when they pleased; but there might be cases in which this was not so, and no argument can therefore be founded upon it. Looking, then, to the 14 & 15 Vict. c. 14, and seeing the distinction there taken between the payment of the full and a less amount, I conclude that the legislature meant the word "composition" in 30 & 31 Vict. c. 102. s. 7. (proviso (1) to apply to cases where a less sum was paid. We have already held in *Mason* v. *Bennett* (38 L. J. C.P. 48) that the case where less than the full amount is paid by agreement, is clearly within the proviso, there is no reason why the case where a less sum is paid without agreement should not equally be within it, and I think the proviso applies to all cases where less than the whole amount is to be paid by the owner. Section 8 is quite consistent with our decision, the result of which is that the rating of an owner to the full amount is to cease on the passing of the Act, and where the landlord is rated to a less amount, such rating is to cease on September 29. I am of opinion, on the whole, that the rating of the owner (though there be no agreement) at a smaller sum than the ordinary and full assessment, is a "composition" within the 30 & 31 Vict. c. 102. s. 7. proviso (1), and therefore that the decision of the Revising Barrister must be reversed in the one case and affirmed in the other.

BYLES, J.—I am of the same opinion, as there is no reason for any distinction between the cases of the owner being rated at a smaller sum by agreement and without it.

KEATING, J.—I am of the same opinion. There are two cases where the owner is rated at a less sum, the one where it is by agreement, the other where it is not. Each case is popularly known as a "composition." I can see no reason, and no satisfactory reason has been suggested, why there should be a

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difference between the cases, and if the legislature had intended to exclude one of them, one would expect that language would have been used which would expressly shew that intention.

BRETT, J., concurred.

Decision in Hanks *v.* Jones *reversed, and affirmed in* Trotter *v.* Trevor.

IN THE COMMON PLEAS. Nov. 11, 13, 1868.

(Appeal from Revising Barrister's Court.)

JONES, *appellant;* BUBB, *respondent.*

38 L. J. C.P. 57; L. R. 4 C.P. 468; 19 L. T. 483; 17 W. R. 205; 1 Hop. & C. 128.

Referred to, *Ainsworth* v. *Creeke*, [1869] E. R. A. 1452; 38 L. J. C.P. 58; L. R. 4 C.P. 476; 19 L. T. 824; 17 W. R. 229 (C.P.); *Boon* v. *Howard*, [1874] E. R. A.; 43 L. J. C.P. 115; L. R. 9 C.P. 277; 30 L. T. 382; 22 W. R. 535 (C.P.).

Parliament—Borough Vote—Poor-Rate "made" within 30 *&* 31 *Vict. c.* 102. *s.* 3.

ELECTION LAW. A.—*A rate for the relief of the poor, is not a rate "made" within the* 30 *&* 31 *Vict. c.* 102. *s.* 3. *at the time when it is signed by the overseer, nor at the time when it is allowed by the Justices; and it must be both signed and allowed within the year of occupation.*

This was an appeal from the decision of the Revising Barrister for the borough of Malmesbury.

CASE.

At a Court held, on September 22, 1868, by me, the Barrister appointed to revise the lists of voters for the borough of Malmesbury, William Stephens Jones, a person on the list of voters for the borough, duly objected to the name of William Bubb being retained upon the list of persons entitled to vote in the election of a member for the said borough, in respect of his occupation of a dwelling-house, in the parish of Somerford Magna, within the said borough. The ground of objection was that the respondent had not been duly rated. A rate made for the relief of the poor of the said parish was produced by the overseers. By the "heading" thereof this rate purported to have been made by the overseers on July 18, 1867, and on each page thereof, in the usual form there were the words, "Rate made the 18th day of July, 1867." The rate was duly allowed on September 4, 1867, and that date appeared in the entry of such allowance as the date thereof. The rate was duly published on September 8, 1867. The respondent was not rated to the said rate. The appellant contended that this was a rate made during the twelve calendar months preceding July 31, 1868; that the date in the heading of the rate was not the time when it was "made" within the meaning of the 3rd section of the Representation of the People Act, 1867, and that the said rate was not so "made" until the day of the allowance thereof, or until the day of the publication thereof, and that not being rated therein, the said respondent was not entitled to be registered under the said 3rd section of that Act. Apart from the question raised by this objection, the respondent's qualification was proved to my satisfaction. I decided that although a rate is of no force until it has been allowed and published, yet that, after allowance and publication, it is to be deemed to have been made on the day on which it purports to have been made by the overseers, upon whom the duty of making it devolves; that the word "made" in the 3rd section of the said Act is to be thus construed, and as such day in respect of the rate in question

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was prior to the qualifying twelve months' occupation of the respondent, I disallowed the objection and retained his name on the said list.

The question for the opinion of the Court is, whether the said rate was a rate " made " during the twelve calendar months preceding the last day of July, 1868, within the meaning of the 3rd section of the Act aforesaid; and if the Court should be of opinion that it was, the name of William Bubb is to be expunged from the said list.

Dowdeswell (*G. T. Howard* with him), on behalf of the appellant, contended that the rate was not " made " till it was allowed by the Justices.

Macnamara, on behalf of the respondent, contended that the rate was " made " when signed by the overseers.

The following statutes and authorities were referred to: 43 Eliz. c. 2, 17 Geo. 2. c. 3, 6 & 7 Will. 4. c. 96. ss. 1, 2, 30, and Forms, 2 Will. 4. c. 45. s. 27, 6 Vict. c. 18. s. 16, 12 & 13 Vict. c. 14; *The King* v. *Dorchester* (1 Str. 393); *The Queen* v. *the Earl of Yarborough* (12 Ad. & E. 416; 9 L. J. M.C. 62); *The Queen* v. *St. Mary Kalander* (9 Ad. & E. 626; 8 L. J. M.C. 54); *The Queen* v. *Fordham* (11 Ad. & E. 73; 9 L. J. M.C. 3); *Wright* v. *Stockport* (5 Man. & G. 33; 13 L. J. C.P. 50); *The King* v. *Newcomb* (4 Term Rep. 368); *The Queen* v. *Godolphin* (1 Dowl. & L. P.C. 830; 13 L. J. M.C. 57); *Stevens* v. *Evans* (2 Burr. 1152); *The Queen* v. *Gadsby* (1 Nev. & P. 472); *Reily's Case* (2 Ir. Com. Law Rep. 560); *Malcolmson's Case* (15 Ir. Com. Law Rep. 375); *Lorant* v. *Scadding* (13 Q.B. Rep. 687; 3 H.L. C. 418; 16 L. J. M.C. 163; 19 L. J. M.C. 5); *Bushell* v. *Luckett* (2 Com. B. Rep. 111; 15 L. J. C.P. 89); *Sibbald* v. *Roderick* (11 Ad. & E. 38; 9 L. J. M.C. 76); and *Fox* v. *Davies* (6 Com. B. Rep. 11; 18 L. J. C.P. 48; 2 Lutw. 97). But in consequence of the decision the Court ultimately came to, it is unnecessary to set forth the arguments.

BOVILL, C.J.—This case has been most ably argued on both sides, but in the view that we take of it we do not think it necessary to take time to consider our judgment. There is no doubt that in various Acts of Parliament the making and allowance of a rate have been treated as distinct matters, but whatever may be the effect of the word " made " in the Poor Law Acts, we have to consider what is its meaning in the 30 & 31 Vict. c. 102. s. 3, sub-section 3. On the one side it has been contended, that a rate is made when signed by the overseers; on the other, that it is not made till allowed by the Justices; and extreme cases may be, and have been put which present difficulties in either construction, and, indeed, in the construction at which the Court has arrived. It is impossible, however, for the Court to deal with extreme cases, and we must assume that the legislature acted on the assumption that what ought to be done would be done. After the very full discussion which has taken place, I have come to the conclusion that neither contention is correct, but that when the legislature used the language " has during the time of such occupation been rated as an ordinary occupier in respect of the premises so occupied by him within the borough to all rates (if any) made for the relief of the poor in respect of such premises," it meant rates completely made within the year of occupation, that is to say, made by a signing by the overseers and an allowance by the Justices, both of which are within that period. This being so, it becomes unnecessary to determine what is a making of a rate within the statutes relating to the relief of the poor, and the decision of the Revising Barrister must be confirmed.

BYLES, J., and KEATING, J., concurred.

BRETT, J.—I have had great difficulty in coming to a decision in this case, but looking at the 30 & 31 Vict. c. 102. s. 3, and comparing it with the 2 Will. 4. c. 45. s. 27, I agree that the only safe way is to construe " made " in the former to mean " entirely made," that is to say, to mean that every step should be taken within the year.

Decision affirmed.

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IN THE COMMON PLEAS. Nov. 18, 20, 1868.

(Appeal from Revising Barrister's Court.)

AINSWORTH, *appellant;* CREEKE, *respondent.*

38 L. J. C.P. 58; L. R. 4 C.P. 476; 19 L. T. 824; 17 W. R. 299; 1 Hop. & C. 141.

Referred to, *Medwin* v. *Streeter*, [1869] E. R. A.; 38 L. J. C.P. 180; L. R. 4 C.P. 488; 19 L. T. 827; 17 W. R. 380 (C.P.); *Boon* v. *Howard*, [1874] E. R. A.; 43 L. J. C.P. 115; L. R. 9 C.P. 277; 30 L. T. 382; 22 W. R. 535 (C.P.).

Parliament—Borough Vote—Poor-Rate "made" within 30 & 31 Vict. c. 102. s. 3.—Ratification of Act of Landlord in getting Tenant's Name put on the Rate.

ELECTION LAW. A.—*A rate for the relief of the poor, in order to be "made" within 30 & 31 Vict. c. 102. s. 3, must be entirely made within the year of occupation, and it is so entirely made if the signing of the overseers, allowance by the Justices and publication be within that year, and it is immaterial that the steps previous to such signing were taken before the commencement of the year.*

A landlord, who paid the poor-rates, and by arrangement with his tenant, charged a higher rent in consequence, got the overseers to put his tenant on the rate instead of himself without communicating with his tenant, who, however, appeared before the Revising Barrister to claim a vote in respect of the premises: —Held, *that, even if this act of the landlord could by ratification be made a claim by the tenant to be rated, the ratification must be within the year of occupation; and that, therefore, the tenant's appearance before the Barrister after the end of such year could not be a ratification.*

This was an appeal from the decision of the Revising Barrister for the borough of Burnley.

CASE.

At a Court held by me to revise the list of voters for the borough of Burnley, Harry Creeke duly objected to the name of Thomas Ainsworth being retained on the list of voters for the township of Habergham Eaves, in the said borough, whereupon the qualification of the said Thomas Ainsworth was proved in every respect, except as regarded rating and payment of rates. With respect to these two points, the facts as established by the evidence were as follows: A rate for the relief of the poor in the township of Habergham Eaves, in the borough of Burnley, was signed and allowed by two Justices on August 16, 1867, and was published on the Sunday following, viz., on August 18, 1867. At the head of this rate in the rate-book were the following words: "An assessment for the relief of the poor of the township of Habergham Eaves, in the county of Lancaster, and for other purposes, chargeable thereon according to law, made this 18th day of April, in the year of our Lord 1867, after the rate of 1*s.* 8*d.* in the pound." Then followed a form of declaration, to be copied and signed by the parish officers, at the end of the rate, as follows:

"We, , do declare the several particulars in the respective columns of the above rate to be true and correct, so far as we have been able to ascertain them, to which end we have used our best endeavours.

"We do also declare that the above rate amounts in the whole to the sum of pounds shillings pence.

" Overseer.
" Overseer.
" Churchwarden.
" Churchwarden."

The heading at the top of each page of the rate-book was in these words and

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figures: "Township of Habergham Eaves.—Poor-rate made the day of ,186 ." At the end of the names in the rate-book was this declaration by the overseers:

"We, the undersigned, do hereby declare that one of us, or some person on our behalf, has examined and compared the several particulars in the respective columns of the within rate, with the valuation list made under the authority of the Union Assessment Committee Act of 1862, in force in this township; and the several hereditaments are, to the best of our belief, rated according to the value appearing in such valuation list.

"We do also declare that the within rate amounts in the whole to the sum of 4,835*l.* 15*s.* 10*d.*

"JAMES DUGDALE, jun.,
"GEORGE SLATER,
"JOHN MAGERISON, } Overseers."

This declaration was not dated, but it was signed within a week before the signature and allowance of the rate by the Justices, which immediately followed it in the rate-book, and of which the following is a copy:

"Lancashire, to wit. } We, the undersigned, being two of Her Majesty's Justices of the Peace in and for the said county (one whereof is of the quorum), do hereby consent unto the foregoing rate or assessment.

"Dated this 16th day of August, 1867.

"JAMES FOLDS, jun.
"JOHN HEELIS."

Two days after the rate was thus signed and allowed, viz., on Sunday, August 18, in the same year, it was duly published according to law. The rate-book containing this rate was put in evidence for the purpose of proving that the said Thomas Ainsworth was duly rated to it, in respect of premises occupied by him in Low Water Street, in the said township, during the twelve months immediately preceding the last day of July, 1868; and in respect of which premises, so far as rating and payment of rates were concerned, his qualification was in dispute. Upon examining the rate-book I found the name of Thomas Ainsworth in the column headed "Arrears," and the name of John Holmes in the column headed "Name of Occupier." The latter name had been struck through with a pen, but was still legible as under:

Number. 1.	Arrears. 2.	3.	Name of Occupier. 4.	Name of Owner. 5.	Description of Property rated. 6.	Name or Situation of Property. 7.
			(Other names)	John Dugdale & Bros.	House	7, Low Water Street.
				,,	,,	8 ,,
				,,	,,	9 ,,
				,,	,,	10 ,,
				,,	,,	12 ,,
				,,	,,	13 ,,
				,,	,,	13 ,,
8.	Thomas	Ainsworth	JohnHolmes*	,,	,,	14 ,,

* This name had been struck through.

The rate-book thus disclosing an ambiguity on the face of it, I instituted an inquiry into the circumstances under which the name of John Holmes had been struck through and the name of Thomas Ainsworth inserted. In the course of that inquiry the following facts were established by the evidence: Thomas Ainsworth was a tenant of John Dugdale & Brothers, a firm carrying on business in the borough of Burnley (one member of this firm, viz., Mr. James Dugdale, jun., had signed the rate in question as overseer), and had occupied as such tenant for more than twelve months previous to July 31, 1868, the premises,

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No. 14, Low Water Street, which appeared in the rate-book on the same line with his name and the name of John Holmes, as shewn above. Some time after August 18, 1867, the day on which the above-mentioned rate was published, Mr. Shaw, a partner of the said firm of John Dugdale & Brothers (who had at the time been invited to stand as a candidate for the representation of the borough of Burnley in Parliament, but who had not then accepted the invitation), without mentioning the name of Thomas Ainsworth, and without in any way communicating with him, or with any other of the tenants of the said firm on the subject, requested the assistant overseer for the township of Habergham Eaves in general terms to insert the names of the tenants of John Dugdale & Brothers in the rate-book containing the said rate of August 16, 1867. The assistant overseer, anticipating some difficulty in ascertaining the names of the said tenants, acted upon a suggestion made by Mr. Shaw, and sent the rate-book above mentioned to the office of John Dugdale & Brothers. The names of Thomas Ainsworth and other tenants of Messrs. Dugdale were inserted in pencil in the said rate-book, whilst it thus remained in the office of the said firm, by one of their clerks, and when that had been done the rate-book was returned to the assistant overseer. The name of Thomas Ainsworth and the names of the other tenants, which had been written in as above stated in pencil, were then written in ink at the assistant overseer's office by his clerks, and the names of John Holmes and others, which stood in the occupiers' column in the rate-book when the said rate was signed, allowed and published, were struck through with a pen after the manner shewn above. On December 10, 1867, the rate due in respect of the premises occupied as before mentioned by Thomas Ainsworth, and also the rates due in respect of the other tenants of John Dugdale & Brothers, were demanded by the overseer, and paid by Mr. Shaw by a cheque, in the name of the firm, for the sum of 350*l*. In return for the above cheque receipts were handed over to the firm made out in the name of each tenant separately, and amongst them one in the name of Thomas Ainsworth. Messrs. Dugdale had paid their tenants' rates in a similar manner in full and without any composition for nearly forty years past, and there was a clear understanding between the tenants when they entered into occupation and the firm, that the rates were included in the rent; and the tenants had to pay an additional rent in consideration of the firm undertaking to pay the rates. The overseer, thus looking to the Messrs. Dugdale for payment, had been indifferent as to what names appeared in the rate-book as occupiers of the several premises belonging to the firm.

Upon this state of facts it was contended, on behalf of the objector, first, that the rate signed and allowed by the Justices on August 16, 1867, and published on Sunday, August 18 in the same year, was "made" when it was signed, allowed and published, and not before, and that consequently it was a rate "made" during the twelve months immediately preceding July 31, 1868, and that it was necessary that the name of Thomas Ainsworth should have been inserted in it before it was signed, allowed and published as aforesaid as having been rated in respect of the qualifying premises, 14, Low Water Street, so occupied by him during the twelve months immediately preceding the last day of July, 1868, in order to entitle him (in the absence of any sufficient claim and payment or tender of rates due) to have his name inserted in the list of voters for the said township in the said borough on the said last day of July, 1868; secondly, that the request of Mr. Shaw to the assistant overseer to insert the names of his tenants in the rate-book, made as it was in general terms and without any communication with Thomas Ainsworth, was not a sufficient claim to be rated on behalf of Thomas Ainsworth within the meaning of 2 Will. 4. c. 45. s. 30; thirdly, that, even if it were a sufficient claim to be rated on behalf of the said Thomas Ainsworth within the meaning of the said section of the said Act, nevertheless the subsequent payment of the rates on December 10, 1867, in a gross sum by Mr. Shaw as above stated, was not an actual payment, or a sufficient payment, within the meaning of the said section last above mentioned to render such claim to be rated valid.

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It was, on the other hand, contended, amongst other matters, on behalf of Thomas Ainsworth, that the rate in question was "made" (within 30 & 31 Vict. c. 102. s. 3. subdivision 3.) on April 18, 1867, and not when it was signed, allowed and published as aforesaid, in the month of August as aforesaid. That three Acts are necessary in order to the complete "making" of a rate: first, the assessment of such a rate at so much in the pound; secondly, the signatures by the overseers and the signatures and allowance by the Justices; and thirdly, the publication in due course according to law. That two only of the above three requisite Acts for the making of a rate were done after July 31, 1867, and within the twelve months immediately preceding the last day of July, 1868, and that the other requisite Act, viz., the assessment at so much in the pound, having been done before July 31, 1867, the rate in question was not altogether and entirely "made" within the twelve months aforesaid. That the signatures of the overseers and Justices in the month of August, 1867, must be taken as relating back to the date of the assessment, viz., April 18, 1867, and that consequently it was not necessary that Thomas Ainsworth should have been rated to the rate in question at all, or should have paid any rates in respect of it. Secondly, that, supposing the rate in question was a rate to which Thomas Ainsworth ought to have been rated, that then the request of Mr. Shaw to the assistant overseer to insert the names of Messrs. Dugdale's tenants in the rate-book was, under the circumstances, a sufficient claim to be rated on behalf of Thomas Ainsworth, and that no rates being payable until they became due on the said December 10, 1867, no payment or tender was necessary until that day. Thirdly, that, supposing the rates became due on publication of the rate in August, and not on demand, the subsequent payment of the tenants' rates as made on December 10 aforesaid by Mr. Shaw was a sufficient payment by Thomas Ainsworth, within the meaning of 2 Will. 4. c. 45. s. 30, to render the said claim to be rated a valid claim, and to justify the overseers in putting the name of Thomas Ainsworth on the said rate.

I decided that the rate in question was made when it was signed, allowed and published in the month of August, 1867, and not on April 18 in the said year, as was contended on behalf of Thomas Ainsworth; that therefore it was a rate made during the twelve months immediately preceding July 31, 1868, and that Thomas Ainsworth ought to have been rated to it in respect of the premises No. 14, Low Water Street, so occupied by him as aforesaid, before the said rate was signed, allowed and published, in order to entitle him (in the absence of a sufficient claim to be rated, and an actual payment or tender there and then of the rates due) to have his name inserted in the said list of voters on the said last-mentioned day of July.

Secondly, that the request of Mr. Shaw to the assistant overseer to insert the names of the tenants of John Dugdale & Brothers in the rate-book was not, under the circumstances, as stated above, a sufficient claim to be rated on behalf of Thomas Ainsworth.

Thirdly, that the rate became due on the publication thereof, and before demand by the overseer; and that even if the request of Mr. Shaw to the overseer to insert the names of John Dugdale & Brothers' tenants in the rate-book amounted in law to a sufficient claim to be rated, that, nevertheless the subsequent payment of the tenants' rates by Mr. Shaw, by cheque, on December 10 aforesaid, was not, under all the circumstances, a sufficient payment within the meaning of 2 Will. 4. c. 45. s. 30. to render such claim to be rated a valid claim, and I expunged the name of Thomas Ainsworth from the said list. Due notice of appeal from my decision was given.

If the Court should be of opinion that my decision on the first point was wrong, and that the rate in question was made on April 18, 1867, and not when it was allowed, signed and published, in the month of August in the same year, then the register is to be amended by retaining the name of Thomas Ainsworth on the said list of voters, and there will remain no further question for the Court to decide. If the Court, on the other hand, should be of opinion that my decision on the above point was right, then the opinion of the Court is further

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requested, first, whether under the circumstances as stated, there was any sufficient claim on behalf of Thomas Ainsworth to be rated to the said rate of August 16, 1867, within the meaning of 2 Will. 4. c. 45. s. 30; secondly, whether the payment by Mr. Shaw of the tenants' rates, and of the rates of Thomas Ainsworth amongst the number, was, under the circumstances stated above, a sufficient payment within the meaning of 2 Will. 4. 45. s. 30, to render such claim to be rated valid. If the Court should be of opinion that my decision was wrong on both the above points, then the register is to be amended by retaining the name of Thomas Ainsworth on the said list of voters.

Quain (*Shield* with him), for the appellant.—First, the rate was made before the year of occupation. It is said on the other side that the signing of the declaration by the overseers constitutes the making: but this is not so. Before the 6 & 7 Will. 4. c. 96. there was no necessity for any declaration, and at that time the making must clearly have been the drawing up of the rate. Then, by that statute, a certain Act was superadded to the making of the rate, and the words of the statute and form of declaration treat the making of the rate as something which had taken place before the signing of the declaration, for the Act says it shall be before "the rate" is allowed, and the form speaks of "the above rate" being correct. *The Queen* v. *Barrat* (2 Dougl. 465) and *Lorant* v. *Scadding* (13 Q.B. Rep. 687; 3 H.L. C. 418; 16 L. J. M.C. 163; 19 L. J. M.C. 5) fortify this view, the former shewing it was thought that the rate might be altered till allowed, and the latter also shewing that the signature related back. If reliance be put on the provision in 6 & 7 Will. 4. c. 96, that if not signed the rate is to be a nullity, the answer is that 17 Geo. 2. c. 3. contains similar words as to the publication, without which a rate has been decided to be a nullity—*Sibbald* v. *Roderick* (11 Ad. & E. 38; 9 L. J. M.C. 76); *Fox* v. *Davis* (6 Com. B. Rep. 11; 18 L. J. C.P. 48; 2 Lutw. 97); and yet it cannot be contended that the publication is the making of the rate. Again, if the signature of the declaration does not relate back to the drawing up of the rate great difficulties will be presented in cases where people leave their houses between the investigation of the overseers and the signing, which may be long afterwards, for no time or date is prescribed, and 17 Geo. 2. c. 38. s. 12. will not get over these difficulties. For these reasons, the signature should be taken to relate back to the actual making, which must be taken to be at the date at the head of the rate. At all events, the drawing up of the rate is part of the making, and therefore, as it has been decided in *Jones* v. *Bubb* (38 L. J. C.P. 57) that the rate must be entirely made within the year, this rate was not made within the year according to the construction already given to the Representation of the People Act, 1867. Secondly, by the arrangements between landlord and tenant, the landlord was to pay the rates and charge a higher rent, and it has been decided that this is a payment by the tenant. This being so, the landlord had authority to claim for the tenant to have his name put on, at all events at the time of payment, if not before; and even if this be not so, the landlord's act was ratified by the tenant appearing and claiming his vote.

Manisty (who was desired only to address himself to the second point), for the respondent.—It never was the intention of the legislature that the landlord should put the tenant on the rate against his will and without communication with him; and the ratification was ineffectual as too late, even if there were one, which, it is submitted, there was not.—(He was then stopped.)

Bovill, C.J.—The first question is, whether the appellant has during the qualifying year of occupation "been rated as an ordinary occupier in respect of the premises so occupied by him within the borough to all rates (if any) made for the relief of the poor, in respect of such premises." This depends on whether a rate professing to be made before that year, but signed by the overseers, allowed by the Justices and published within the year, was a rate made within the year. It is said that it is not, because on its face it professes to be made on April 18, 1867, and that it must be deemed to have been made at that date. We have already decided, in *Jones* v. *Bubb* (38 L. J. C.P. 57), that a rate must be completely made as respects the signing by the

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overseers, and the allowance by the Justices within the year; but a new point is now raised, and it is said that the rate must be assumed to be made by the overseers before it is signed, and must be taken to be made by them at the date put in the heading. It is difficult to say when it is made by them, unless when it is signed. If it be not, when can it be said to be made by the overseers? Is it when they commence putting down the names, or when they have completed a few columns? Or, supposing they believe they have completed, and discovering afterwards that they must alter it, do so, is it then? Whatever may have been the difficulty before the year 1836, the matter is put at rest by the Parochial Assessment Act, 6 & 7 Will. 4. c. 96, passed in that year, because section 2 of that Act enacts, that the churchwardens and overseers "shall, before the rate is allowed by the Justices, sign the declaration given at the foot of the said form, and otherwise the said rate shall be of no force or validity"; and in *The Queen* v. *Fordham* (11 Ad. & E. 73; 9 L. J. M.C. 3) it was held that though the precise form given by the Act need not be followed, yet if the declaration be omitted the rate is a nullity. And looking to the statute and various laws relating to this matter, I think that a rate is not made within the Representation of the People Act, 1867, till it is signed. Then as to the date on its face, *primâ facie* that may be the date of the making, but if the date be wrong this may be shewn, and if this rate was not made till August, then the heading is not sufficient to make it a rate made on the day there mentioned; and therefore this rate was made within the qualifying year. The cases of *Lorant* v. *Scadding* (13 Q.B. Rep. 687; 3 H.L. C. 418; 16 L. J. M.C. 163; 19 L. J. M.C. 5) and *The Queen* v. *Barrat* (2 Dougl. 465) have no application.

The next question is, whether, if the rate were made within the qualifying year, the appellant has been rated and paid the rate. His name was not originally on the rate, and therefore he cannot be considered to have been rated in the ordinary sense; but by 2 Will. 4. c. 45. s. 30. a tenant is allowed, on claiming to be rated and tendering or paying the rate, to be put on the rate; and it is said that the appellant has complied with this section, and therefore is in the same position as if he had originally been on. No doubt one of his landlords, in a sense, claimed that the appellant should be put on, and his name was inserted in the manner described in the case, on or before December 10, 1867. According to the arrangements between the landlords and the tenant, they had been in the habit of paying the rates and charging a higher rent, and it was a matter of indifference who was on the rate; but the landlord, without any communication with the tenant, had his name inserted in the rate, and had no authority from him to do so. It is, hoever, said, that there was a ratification of the landlord's act by the tenant appearing before the Revising Barrister, and that this ratification had a retrospective effect. Assume, however, that the claim by the landlord was on behalf of the tenant, *Bird* v. *Brown* (4 Ex. Rep. 786; 19 L. J. Ex. 154) shews that a ratification, to be of any effect, must take place at a time and under circumstances when the ratifying party might himself have lawfully done the act which he ratifies; and if this be so, the ratification was not sufficient in this case, as there was none until the qualifying year had expired. I am, therefore, of opinion that the decision of the Revising Barrister was right, and should be affirmed.

BYLES, J.—I am of the same opinion. I agree that the rate was void till signed, and though there may possibly be cases where the signing has a retrospective effect, as to which I will offer no opinion, for the purposes of this case it has not. As respects the ratification, I also agree with what has already been said, and will only add that by 6 Vict. c. 18. s. 40. the duty of the Revising Barrister is thus laid down: "Every such Barrister shall then require it to be proved that the person so objected to was entitled on the last day of July then next preceding, to have his name inserted in the list of voters," so that the question for the Barrister to decide is whether *rebus sic stantibus*, the person was *then* entitled.

KEATING, J.—I am of the same opinion. I think the rate was, for the

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purposes of the Representation of the People Act, 1867, not made before August, when it was first authenticated by the signatures of the overseers. Looking to the form given in 6 & 7 Will. 4. c. 96. my opinion is, that it was the intention of the legislature that the date of the rate and the signing by the overseers should be contemporaneous; but it is not necessary to decide this. Cases of inconvenience, which may arise from dating the rate far back, have been put during the argument, and it is to be hoped that after this decision overseers may be more particular in making the declaration and the date as nearly contemporaneous as possible, and in getting the rate allowed and published as soon after as may be. I also agree that there was no claim within 2 Will. 4. c. 45. s. 30; the legislature provides most clearly that the claim to be rated should be, by an act of the will of the party, for it provides that the omitted person is to claim; and it is not necessary to say whether there was a ratification or not, as it is sufficient to say that if the ratification be after the qualifying year has expired the claim is not sufficient. No doubt the arrangements here between landlord and tenant would have enabled the claimant to acquire the franchise if it was wished; but the course pointed out by section 30. has not been pursued, and therefore it has not been acquired.

BRETT, J.—I am clearly of opinion that the decision of the Revising Barrister was right. I think it is plain that within the meaning of the Representation of the People Act, 1867, the rate was made within the year of occupation; and that there is no pretence for saying there was a claim to be rated by appearance before the Barrister, and equally no pretence for saying there was a ratification. Whether or not a ratification can be sufficient, here, at all events, it is quite clear that the ratification, not being till after the year of occupation, was insufficient, as a man cannot ratify at a time when he cannot do the original act.

Decision affirmed.

IN THE COMMON PLEAS. Nov. 11, 1868.

(Appeal from Revising Barrister's Court.)

BENNETT, *appellant;* BRUMFITT, *respondent;* ALDERSON'S CASE.

38 L. J. C.P. 65; L. R. 4 C.P. 107; 19 L. T. 283; 17 W. R. 202; 1 Hop. & C. 89.

Parliament—County Vote—Notice of Objection to 12l. Occupier.

ELECTION LAW. A.—*The notice of objection to an occupier of a tenement of the rateable value of 12l., put on the list of voters by the overseers, must state the grounds of objection.*

This was an appeal from the decision of the Revising Barrister for the South-West Division of South Lancashire.

CASE.

One John Alderson was inserted in the list, published by the overseers of the township of Bootle-cum-Linacre, in the said Division, of persons entitled to vote, as the occupier, as owner or tenant, of lands or tenements within the said Division of the county, of the rateable value of 12*l.* or upwards, in respect of a house occupied by him in Derby Road, in the said township.

Richard Bennett, the appellant, objected to the name of the said John Alderson being retained on such list.

The facts were these: A notice of objection against the name of the said John Alderson being so retained, had been duly served upon the overseers of

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the said township by the appellant, but the notice of objection, which was also duly served upon the said John Alderson, by the said appellant, was as follows:

"Derby Road.

"To Mr. John Alderson.

"I hereby give you notice that I object to your name being retained in the list of voters for the South-West Division of the County of Lancaster.

"Dated this 17th day of August, 1868.

Signed) "RICHARD BENNETT, of No. 18, Upper Beau Street, in the township of Everton, in the county of Lancaster, on the Register of Voters for the parish of Liverpool."

It was objected on behalf of the said John Alderson, that such notice of objection was bad in law, because the ground or grounds of objection were not specifically stated therein, by naming the column or columns of the list on which the objector grounded his objection, pursuant to the 6th section of The County Voters' Registration Act, 1865.

On the other hand, it was contended by the appellant that the form of notice of objection given in No. 2, Schedule A. of The County Voters' Registration Act, 1865, clearly pointed out that the notices wherein the grounds of objection were required to be specifically stated were only those to be given to parties already on the register, and that although the list of 12*l.* occupiers might not strictly be a "list of claimants," it was in the nature of a list of claimants, whilst it was most certainly not "the register"; and that, therefore, a general notice of objection given to such occupier, in the form directed by the 7th section of the principal Act (6 Vict. c. 18.) was a valid notice of objection.

I decided that the said John Alderson was not a claimant within the meaning of the Representation of the People Act, 1867, and the Registration Acts therein referred to, and that therefore the said general notice of objection was bad; and I retained the name of the said John Alderson upon the list of voters.

If the Court of Common Pleas should be of that opinion, the list is to stand without amendment; but if the Court should be of a contrary opinion, then the list is to be amended by expunging the name of the said John Alderson from the said list.

M'Intyre (*W. T. Charley* with him), for the appellant.—The provision in the 6th section of 28 Vict. c. 36, which requires the notice of objection to a county voter to state the nature of the objection, applies only to a notice of objection given to persons whose names are on the register of voters for the county, and does not apply to the new 12*l.* occupation franchise conferred by the 30 & 31 Vict. c. 102, because the person claiming such new franchise are in the nature of claimants, and therefore a general notice of objection to them is sufficient. There is no reason why a general objection should not suffice in this case, as well as in that of a claimant under the old system, or rather the case is an *à fortiori* one, for the claimant under the old system has to prove several matters, whereas here only one thing in reality is to be proved. There are two classes of persons, those who have established their rights and those who have not; and the intention is that the former must have a specific objection, but not the others, who are to be prepared to prove everything; and the new 12*l.* occupiers fall within this latter class: they have never been on before, and are only put on for a year. This new franchise is given by 30 & 31 Vict. c. 102. s. 6, and by section 30 of that Act, and 31 & 32 Vict. c. 58. s. 17, it is provided that the new voters are to be put on the list by the same process as that which applied to 10*l.* occupiers in boroughs. This procedure is given by 6 Vict. c. 18, which, in section 13, provides for the overseers making out a list of persons entitled to vote, and in section 17 says that the notice of objection to such persons shall be according to Form 11. in Schedule B, which is general and not specific; whilst sections 37, 38 and 39 provide for persons omitted coming and proving their qualification and being opposed by an objector. And as respects 28 & 29 Vict. c. 36. s. 6, Form 2 in the Schedule, is altogether inapplicable.

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C. Crompton, for the respondent.—By 30 & 31 Vict. c. 102. s. 56, the existing regulations are to apply; by 28 & 29 Vict. c. 56. s. 6, a special notice is to be given, except in the case of a claimant, and Alderson was not a claimant, but a person put on the list by the overseers.—(He was then stopped.)

BOVILL, C.J.—I am of opinion that the decision of the Revising Barrister was right, and that the notice was insufficient, because the ground of objection was not specifically stated. The express object of the 28 & 29 Vict. c. 36. was to require specific objections in every case but that of a person described as a "claimant," and looking to the legislation as to lists of voters, I think that Alderson was not a claimant. If this had been the case of a borough voter, he certainly would not have been a claimant, but a person placed on the list by the overseers, who are in a position to be likely to know who are entitled to the franchise; and by 30 & 31 Vict. c. 102. the same machinery that was provided for forming the register of occupiers in boroughs is to apply to the case of 12*l.* occupiers in counties. That being so, there are also express enactments as to what is to be the list of voters for counties. According to the early Acts, it was the copy of the old register and the list of voters who sent in their claims. The 30 & 31 Vict. c. 102. added a new class, viz., the 12*l.* occupiers, and, by section 17 of 31 & 32 Vict. c. 58, express provision was made that persons omitted by the overseers might claim to be inserted, like persons omitted from a borough list; and by section 19 of 31 & 32 Vict. c. 58. it is enacted that there is to be a separate list of the county voters qualified by 30 & 31 Vict. c. 102, which is to be deemed part of the list of voters. When this Act had passed, the list of county voters consisted of the copy of the old register and the list of claimants prepared by the overseers from the claims sent to them, with the addition of the 12*l.* occupiers; but it is not said that the list of persons claiming to be placed on the 12*l.* list is to be part of the list of voters, and the very fact that this express enactment as to the list made out by the overseers being part of the list of voters is entirely silent as to persons who send in claims shews that the latter are only claimants. Again, as respects persons strictly claimants, the objection in boroughs was not for the purpose of compelling them to prove their qualification (for they were obliged to do so), but in order to let in the objector, and therefore a general notice was allowed; whether there be an objection or not, the claim in either case in a borough is to be proved. That being so, the object of the statute is, to put the making of the list of 12*l.* occupiers in counties on the same footing as that of 10*l.* occupiers in boroughs. By section 59 of 30 & 31 Vict. c. 102, that Act, so far as is consistent with it, is to be construed as one with the Registration Acts, and we must endeavour to put a consistent interpretation on the whole. The question in this particular case arises on section 6. of 28 & 29 Vict. c. 36, which provides, that "any notice of objection to any person on the list of *claimants* . . . may be given according to the provisions of the 7th section of the principal Act; but, with that exception, no notice of objection given under the provisions of the said 7th section, other than a notice to the overseers, shall be valid unless the ground or grounds of objection be specifically stated therein." We ought to give effect to this useful section if we can; and, in my opinion, it is applicable to this case. I think Alderson was not a claimant, and that a specific objection was required. It is true that the words used in the section for shewing what is sufficient in stating the grounds are not applicable, but we ought not to reject what is applicable because another part of the section does not apply, especially as "*no* notice of objection" (unless within the exceptions) is to be valid unless the grounds are specifically stated. It has also been contended that Form 2 in the Schedule A to 28 & 29 Vict. c. 36. is to control section 6 of the Act; but I think it has not that effect. I am therefore of opinion that Alderson was not a claimant, and that the Revising Barrister was right.

BYLES, J.—I am of the same opinion. The question entirely depends on section 6 of 28 & 29 Vict. c. 36. Alderson was put on the list by the overseers,

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and did not himself claim. If he was a claimant the exception would apply, but not being one he was not within the exception, and was therefore within the requirement that a special notice is necessary. Form 2 in the schedule, to which reference has been made, is not repugnant, and section 6 is imperative.

KEATING, J.—I also agree that the decision of the Revising Barrister should be confirmed. I have had considerable and still have some doubt whether Alderson was not a claimant within the section, but the rest of the Court are clear that he was not and my doubts are not sufficiently strong to induce me to differ, especially as the rule now laid down seems to me to be according to the spirit of the statutes.

BRETT, J.—The question may be divided into three: first, what was the law before the statutes 30 & 31 Vict. c. 102. and 31 & 32 Vict. c. 58? secondly, has that law been altered by those statutes? thirdly, if not, how is the old law to be applied to the present case? The first question depends on 6 Vict. c. 18. and 28 & 29 Vict. c. 36. By these statutes notices of objection may be given to anyone on a list of voters for the county, those on the old register to have a special objection, those who have claimed and who are put on the list of claimants to have only a general one; and as at this time these were the only lists of voters, the form in the schedule was framed accordingly. This seems to me to be the true construction of section 6 of 28 ' 29 Vict. c. 36. Secondly, this being the law, was it altered by 30 & 31 Vict. c. 102. and 31 & 32 Vict. c. 58? It is said that it was altered by section 17 of 31 & 32 Vict. c. 58, but I do not think that it was, for this section applies to the mode of making up the lists, not to the mode of giving notices of objection. And in my opinion section 19, which was relied on, alters the law no more than section 17; nor does section 30 alter it. Therefore I am of opinion that the 30 & 31 Vict. c. 102. and 31 & 32 Vict. c. 58. did not alter the then existing law as to notices of objection in counties, and that the legislature declined to deal with that part of the case. Then, thirdly, how are we to apply the old forms of the law to this case? Now, it seems to me clear that Alderson was not a claimant, for he has not claimed, but the overseer has acted on his own motion; yet there are to be claims, for those omitted by the overseers may claim—31 & 32 Vict. c. 58. s. 17. How is this state of things to be met? Section 59 of 30 & 31 Vict. c. 102. says that the old Registration Acts are to apply; and by section 6 of 28 & 29 Vict. c. 36. claimants are to have only a general objection, and those not claiming, that is, all others, are entitled to a specific objection. And as we are told to adapt the old regulations to the new state of things, the specific notice is to be given as nearly as may be in the old specific form. It appears to me, therefore, that the Revising Barrister was right.

Decision affirmed.

IN THE COMMON PLEAS. Nov. 11, 1868.

(Appeal from the Revising Barrister's Court.)

JONES v. PRITCHARD.

38 L. J. C.P. 67; L. R. 4 C.P. 414; 19 L. T. 563; 17 W. R. 175; 1 Hop. & C. 91.

Parliament—County Vote—Notice of Objection—Description of Abode of Objector.

ELECTION LAW. A.—*In a notice of objection the abode of the objector was simply put as "Bronygraig." Evidence was tendered to shew that the person objected to, on going to C., the town and parish where the property qualifying the objector was, could easily have found the objector by inquiry, and that Bronygraig was well known there, and could easily be found. The Revising Barrister decided that the notice was bad in law on its face, and could not be*

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affected by such evidence, or by the fact that, under the particular circumstances, the notice gave the requisite information:—Held, *that the sufficiency of the description of the objector's place of abode was matter of evidence, and that the decision was wrong.*

This was a case stated by the Revising Barrister for the county of Merioneth.

CASE.

At a Court, held at Corwen, in the county of Merioneth, on September 14, 1868, to revise the list of voters for the several parishes in the county of Merioneth, Walter Butler Clough Jones objected to the name of Thomas Pritchard being retained on the list of persons entitled to vote in respect of property situate within the parish of Llandrillo.

The name of Thomas Pritchard appeared on the register of voters thus:

Christian Name and Surname, &c.	Place of Abode.	Nature of Qualification.	Street, Lane, &c.
Pritchard, Thomas	Plassdinam.	Rateable Value above 12*l.*	Plassdinam.

The notice of objection was duly served, and was in the following form:

"To Mr. Thomas Pritchard.

"Take notice that I object to your name being retained in the Llandrillo list of voters for the county of Merioneth.—Dated the 18th day of August, in the year of our Lord 1868.

(Signed) "WALTER BUTLER CLOUGH JONES,
of Bronygraig,
On the register of voters for the parish of Corwen."

The notice of objection to the overseers was duly served and published, and was in the following form:

"To the Overseers of the Parish of Llandrillo.

"I hereby give you notice that I object to the name of the person mentioned and described below being retained on the list of voters for the county of Merioneth.

"Dated the 18th day of August, in the year 1868.

(Signed) "WALTER BUTLER CLOUGH JONES,
(Place of abode) "Bronygraig."

Christian and Surname of the Voter objected to as described in the List.	Place of Abode as described.	Nature of Qualification as described.	Street, Lane or other like Place where the Qualifying Property is situate, as described in the List.
Pritchard, Thomas	Plassdinam.	Rateable value above 12*l.*	Plassdinam.

The said Walter Butler Clough Jones is described on the register as residing at Plasyndre, Corwen, but he has left that house, and for some months past he has resided at Bronygraig, distant about one mile from the town of Corwen.

It was argued on the part of the said Thomas Pritchard that the description of the place of abode of the objector was insufficient on its face, and could not be deemed in point of law a good description of the place of abode without adding Corwen, the nearest town to the place called Bronygraig, Corwen being also the name of the parish.

On the part of the objector it was argued that evidence was admissible to shew that the notice gave reasonable information to the person objected to. It was accordingly proved, and admitted, that if Thomas Pritchard went to Corwen, the town and parish in which the qualifying property of the objector

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is situated, the objector would be easily found on inquiry there, and that Bronygraig is well known there, and could be found without any difficulty.

I decided that the notice was bad in law on its face, and could not be affected by such evidence or by the fact that, under the particular circumstances, the notice gave the requisite information.

The qualifications of the said Thomas Pritchard were inquired into, and if I had been of opinion that the notices of objection were valid his name would have been expunged from the list of voters in which it appears.

If the Court of Common Pleas should be of opinion that my decision as to the insufficiency in law of the description of the place of abode of the objector was wrong, the name of the said Thomas Pritchard should be expunged from the register of voters for the county of Merioneth.

Dowdeswell, on behalf of the appellant, cited *Thackway* v. *Pilcher* (36 L. J. C.P. 73).

R. E. Turner, on behalf of the respondent, cited *Woollett* v. *Davis* (4 Com. B. Rep. 115; 1 Lutw. 607; 16 L. J. C.P. 185).

BOVILL, C.J.—The decision of the Revising Barrister was "that the notice was bad in law on its face, and could not be affected by such evidence or by the fact that, under the particular circumstances, the notice gave the requisite information." We must take it that the notice gave the requisite information, and there is no authority for saying it is bad on its face. If it be doubtful whether it gave the requisite information, that is matter of evidence. The description might or might not give such information, and we cannot say whether it is bad or not, and therefore it cannot be said to be bad on its face.

BYLES, J.—According to this decision, even if the description had been Alton Towers or Blenheim it would be bad, and no evidence could cure it. The decision is wrong.

KEATING, J., and BRETT, J., concurred.

Decision reversed.

IN THE COMMON PLEAS. Nov. 18, 1868.

(Appeal from Revising Barrister's Court.)

NORRIS v. PILCHER.

38 L. J. C.P. 69; L. R. 4 C.P. 417; 19 L. T. 563; 17 W. R. 225; 1 Hop. & C. 173.

Referred to, *Noseworthy* v. *the Overseers of Buckland-in-the-Moor* [1874] E. R. A.; 43 L. J. C.P. 27; L. R. 9 C.P. 283; 29 L. T. 675; 22 W. R. 155 (C.P.).

Parliament—County Vote—Notice of Objection—Description of Objector's Abode.

ELECTION LAW. A.—*If an objector to prove service of his notice of objection, produce a duplicate stamped at the post-office, and the person objected to then produce the notice actually served to prove the duplicate incorrect, the objector may rely on this notice actually served.*

In a notice of objection the abode of the objector was described thus—"(Place of abode as described on the register), 22, Southampton Street, Bloomsbury, London, W.C.; (present place of abode), 110, Guilford Street, Russell Street, W.C."; the Revising Barrister decided this case misleading: First, because it did not state in what city, town or place Guilford Street, Russell Street, W.C., was situate; secondly, because in the W.C. district there was only one Russell Street, viz., Russell Street, Covent Garden, a long distance from Guilford Street, and another street called Great Russell Street, also a long distance therefrom:—Held, *that as the reasons were given the Court would review the decision, and that, as there was only one Guilford Street in the W.C.*

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district, and a person taking the whole notice together would conclude the present direction was London, W.C., the decision was wrong.

This was a case stated by the Revising Barrister for the Eastern Division of the County of Kent.

CASE.

At the Court holden at Deal, on September 26 last, for the revision of the lists of voters for the parish of Deal, in the polling district of Deal, the names of Edward Appleton and Thomas Wilmhurst appeared in the official list of persons objected to by third parties, as not entitled to be registered or to vote. On the motion of the agent for the said Edward Appleton and Thomas Wilmhurst, I called upon the objector, Frederic Norris, to prove due service of his notices of objection upon the said Edward Appleton and Thomas Wilmhurst, whereupon the said objector produced in proof thereof documents purporting to be duplicates of notices sent by him, by post, to each of the said Edward Appleton and Thomas Wilmhurst, under and subject to the regulations of the 100th and 101st sections of 6 Vict. c. 18, stamped by the postmaster at Charing Cross as being such duplicates, which alleged duplicates were regular in all respects; and wherein the place of the abode of the said objector, as stated on the register, and his true then present place of abode, were described thus: "(Signed) Frederic Norris; (place of abode as described on the register), 22, Southampton Street, Bloomsbury, London, W.C.; (present place of abode), 110, Guilford Street, Russell Square, W.C." Whereupon, in disproof of such service, the agent for Edward Appleton and Thomas Wilmhurst, the persons objected to, produced the original documents or notices which had been actually received by each of them (so received within due time and by post), which corresponded in all respects with the alleged duplicates thereof produced in evidence by the said objector, except as follows: In the notices so received by Edward Appleton and Thomas Wilmhurst, the place of abode of the objector on the register, and his true then present place of abode were described thus: "(Signed) Frederic Norris; (place of abode described on the register), 22, Southampton Street, Bloomsbury, London, W.C.; (present place of abode), 110, Guilford Street, Russell Street, W.C."

I decided that due service of the notices of objection upon Edward Appleton and Thomas Wilmhurst had not been proved, inasmuch as the stamped documents produced by the objector in proof of such service were not duplicates of the original notices, as required by the same 100th and 101st sections of 6 Vict. c. 18, but differed therefrom in an essential particular, namely, the true then present place of abode of the said objector—held necessary to be stated therein by the Court of Common Pleas, in the cases of *Melbourne* v. *Greenfield* (K. & G. 261; 29 L. J. C.P. 81) and *Courtis* v. *Blight* (K. & G. 475; 31 L. J. C.P. 48), and that consequently the objector had not complied with the regulations prescribed by the said statute for the service through the post-office of such notices; such regulations requiring that the notice sent to the person objected to, and the stamped document produced by the objector to prove due service thereof, should be duplicates.

Upon such decision being given, the objector claimed to take up the notice so produced by the agent for Edward Appleton and Thomas Wilmhurst (in disproof of due service of notices of objection upon them), and to make them evidence on his the objector's behalf, that a proper formal notice of objection had been duly served upon and received by each of the said Edward Appleton and Thomas Wilmhurst from him the said Frederic Norris, contending that the words "Russell Street" were surplusage, and that there was no other No. 110 in Guilford Street in London.

Upon such contention I decided—first, that the last-mentioned original document or notice, although so produced by or on behalf of the persons objected to, for the particular purpose of disproof before mentioned, could not, under the circumstances, be made evidence to prove due service of a notice of objection upon either of them. Because the objector having elected to adopt the

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particular mode of service of notices by post, pointed out and regulated by the said 100th section of 6 Vict. c. 18, and having failed in proving the same, had no longer any *locus standi* in the Court of Revision. And because no mode of service of any notice of objection by post is provided by the said statute, except in conformity with and subject to the regulations prescribed by the 100th and 101st sections thereof, which in these instances had not been complied with. Secondly, I further decided that the last-mentioned notices themselves were upon the merits informal and invalid, inasmuch as the description therein of the objector's then true present place of abode was incorrect, defective, misleading, and not set forth so as commonly to be understood, especially by persons resident at a distance from London. Because the same do not state in what city, town or place Guilford Street, Russell Street, W.C., is situate. Because, in fact, there is (in ordinary parlance) no such street within the western central postal district of London as Guilford Street, Russell Street, there being only one Russell Street *simpliciter* therein, namely, Russell Street, Covent Garden, which is a long distance from Guildford Street, and has no connexion therewith, and another street called Great Russell Street, which is also a considerable distance from Guilford Street, and does not adjoin thereto, and is in another parish.

On these grounds I decided that the said notices of objections were wholly invalid; and I retained the names of Edward Appleton and Thomas Wilmhurst on the list of voters for the parish of Deal.

If the Court should be of the contrary opinion, the names of Edward Appleton and Thomas Wilmhurst ought to be struck out of the same list of voters.

Manisty (*Lumley Smith* with him), for the appellant.—As respects the first point, it is impossible to conceive how the decision can be supported.

[The COURT expressed a decided opinion that this was so.]

And as to the second, the case is decided by *Sheldon* v. *Flatcher* (5 Com. B. Rep. 14; 17 L. J. C.P. 34), for the voter would clearly see that the direction was London, and could have no difficulty in finding Guilford Street, and as there does not appear to be more than one in the W.C. district; and the Court can see from the notice that this is so, and that the reasons for the decision are wrong, and will reverse it.

Tindal Atkinson, Serjeant, for the respondent.—As the Court seems clearly of opinion that the decision on the first point is wrong, it will not be pressed. As respects the second, there is nothing to shew that the objector was living in London. The old direction cannot be looked to in aid of the new one; nor, even if it can, does it follow that the new one is in London. There was a Russell Street in the district which would mislead, and the Barrister has decided as a fact that the direction was insufficient and calculated to mislead; and as this is the case of a vote for the county of Kent, *Sheldon* v. *Flatcher* (5 Com. B. Rep. 14; 17 L. J. C.P. 34) does not apply, because there it was a borough vote, and so the direction was taken to be in the borough.—[He referred to *Knowles* v. *Brooking* (2 Com. B. Rep. 226; 15 L. J. C.P. 197), *Melbourne* v. *Greenfield* (7 Com. B. Rep. N.S. 1; 29 L. J. C.P. 81) and *Woollett* v. *Davis* (4 Com. B. Rep. 115; 16 L. J. C.P. 185).]

Manisty, in reply.—Putting merely a district may be sufficient—*Thackway* v. *Pilcher* (36 L. J. C.P. 73).

BOVILL, C.J.—As a general rule the Revising Barrister is to decide a matter of fact; and though in some cases it is difficult to distinguish whether a matter is one of law or fact, and it may be a mixed question of law and fact, yet where the matter is one of fact, the Court, as a general rule, will not interfere. But in the present case the Revising Barrister has given his reasons for his decision, referred to us the question whether they are sufficient, and decided that if they be not we are to reverse his decision; and this being so the Court will entertain the question. In my opinion, neither of the grounds on which the Revising Barrister decided the notice of objection to be bad is to be supported. We must construe the notice by the words used on its face; and I think that any

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person reading the notice would conclude that the present abode was in London, W.C., as well as the one on the register, and that the case is, as respects this point, not distinguishable from *Sheldon* v. *Flatcher* (5 Com. B. Rep. 14; 17 L. J. C.P. 34). And as respects the words "Russell Street" being used, there was but one 110, Guildford Street in the W.C. district; and I think the use of Russell Street by mistake for Russell Square was not such a misdescription as vitiates the notice. Both the grounds on which the Revising Barrister decided being bad, and the Court being unable to find any other ground on which the decision can be supported, we think it should be reversed.

BYLES, J.—I am of the same opinion. In *Sheldon* v. *Flatcher* (5 Com. B. Rep. 14; 17 L. J. C.P. 34) Coltman, J., said, "It is not necessary for the Barrister to give his reasons, but if we saw enough on the face of the document to shew that the statement was not reasonably sufficient, we should say as a matter of law that his decision was wrong." Here the Barrister has given his reasons, and asks our opinion thereon, and I think that they are invalid, and that the decision should be reversed.

KEATING, J.—I am of the same opinion. If the notice had not contained the former direction I should have felt considerable difficulty, but the whole notice is to be looked to in order to decide whether practically the voter would understand where the objector lived; and I agree that the words "London, W.C.," may, without straining, be connected with the description of the present abode, in the absence of evidence of the voter having been actually misled. The general rule is, that the Revising Barrister is the judge of matters of fact; but here his reasons are given with the intention that we should decide as to their propriety; and we differ from him, and therefore his decision should be reversed. As to the other point, it has hardly even been argued that the Barrister was right, and it is unnecessary to notice it.

BRETT, J.—In *Woollett* v. *Davis* (4 Com. B. Rep. 115; 16 L. J. C.P. 185) it was decided that the register could not be coupled with the notice to make the latter good; but in *Sheldon* v. *Flatcher* (5 Com. B. Rep. 14; 17 L. J. C.P. 34) the direction "Sherborne Street" was aided by the word "Cheltenham" in another part of the notice, and it was held that if, taking the whole notice, the voter would understand where the objector lived, it was sufficient; and it was further held, that though the sufficiency was matter of fact, yet, if the Court can see that the direction is sufficient, it will hold it so, whatever be the finding of the Barrister. And I think that here it is sufficient on the face of the notice, and that this case is within *Sheldon* v. *Flatcher* (5 Com. B. Rep. 14; 17 L. J. C.P. 34).

Decision reversed.

IN THE COMMON PLEAS. Nov. 9, 1868.

(Appeal from Revising Barrister's Court.)

BENNETT, *appellant;* BRUMFIT, *respondent;* ASHCROFT'S CASE.

38 L. J. C.P. 72; L. R. 4 C.P. 399; 19 L. T. 452; 17 W. R. 142; 1 Hop. & C. 48.

Parliament—Consolidated Appeals—6 Vict. c. 18. s. 44.—Practice.

ELECTION LAW. A.—*If appeals have been consolidated by the Revising Barrister which do not depend upon the same point of law, the Court will dismiss the consolidated appeal.*

This was a consolidated appeal, raising the question as to the validity of certain notices of objection for not stating therein the grounds of objection. It appeared that some of the persons objected to were women, but whose names had been retained by the Revising Barrister on the list of voters, whilst the other

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persons objected to were men. The Revising Barrister, considering the objections depended on the same point of law, had consolidated the appeals.

Mellish, for the appellant, admitted that there was a difficulty in hearing this case, as the Court had decided that women were not entitled to vote, and the rights of the parties to the present consolidated appeal were therefore different. The appeals ought not to have been consolidated under 6 & 7 Vict. c. 18. s. 4.—*Prior* v. *Waring* (5 Com. B. Rep. 56; 17 L. J. C.P. 73) and *Robson* v. *Brown* (1 Com. B. Rep. N.S. 34; 26 L. J. C.P. 81).

Manisty (*W. T. Charley* with him) appeared for the respondent.

BOVILL, C.J.—Since those cases of *Prior* v. *Waring* (5 Com. B. Rep. 56; 17 L. J. C.P. 73) and *Robson* v. *Brown* (1 Com. B. Rep. N.S. 34; 26 L. J. C.P. 81) the practice has been to dismiss appeals improperly consolidated which do not depend on the same point of law. This appeal must therefore be dismissed.

BYLES, J.—I am of the same opinion. When either the facts or points of law are different, the practice has been to dismiss the consolidated appeal, and the cases which have been cited seem to shew that it is on the ground of there being no jurisdiction to hear it.

KEATING, J.—It is impossible to distinguish this case from those which have been cited, and which shew we have no jurisdiction to hear such an appeal.

Appeal dismissed.

IN THE COMMON PLEAS. Nov. 30, 1868.

DAVIDSON AND OTHERS *v.* BURNAND.

38 L. J. C.P. 73; L. R. 4 C.P. 117; 19 L. T. 782; 17 W. R. 121.

Referred to, *Thames & Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.*, [1887] E. R. A.; 56 L. J. Q.B. 626; 12 A.C. 484; 57 L. T. 695; 36 W. R. 337 (H.L.): reversing, 1886, 17 Q.B. D. 195 (C. A.).

Marine Insurance—Perils of the Sea—Negligence of Crew.

MARINE INSURANCE. D.—*By a policy in the ordinary form of a Lloyd's policy, in which the perils insured against were "of the seas," &c., "and all other perils, losses," &c., goods were insured at and from any port in Jamaica in a certain steamer. Shortly after the goods were put on board, and whilst the vessel was in port, sea water penetrated into the hold of the vessel and damaged the goods. The water, to the height of several feet, remained there for about six hours, and the pumps failing to reduce it were discontinued for a short time, when survey having been made of the vessel without discovering any leakage the pumps were resumed, and the water began immediately to reduce rapidly, and ultimately the vessel became free of water. The report made on such survey was that the vessel was seaworthy, and the conclusion come to by the surveyors was that the main discharge-pipe from the engine-room becoming below the water level, when the goods had been put on board, the water could have found its way beneath the valve in such discharge-pipe and through the valves of the air-pump, bucket, &c., when if any cocks or valves had been inadvertently left open the water would have found its way into the ship, and so the accident would be accounted for*:—Held, *that the injury to the goods by the water so getting into the vessel by the negligence of the crew in leaving cocks or valves open as suggested was a loss caused by the perils insured against.*

This was an action brought to recover an average loss upon three policies of insurance, which were declared to follow and succeed one another, for 5,000*l.* each, upon coffee, sugar, pimento, and other produce, at and from Jamaica to New York, in the vessel "*Montezuma.*"

The cause came on for trial, before Bovill, C.J., at the London Sittings

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after Hilary Term, 1868, when, by consent, a verdict was entered for the plaintiffs, subject to the opinion of the Court upon a SPECIAL CASE, and the following are the material facts which were stated therein:

The plaintiffs, who were merchants, at Kingston, in Jamaica, under the firm of Davidson, Colthirst & Co., effected with the defendant, an underwriter at Lloyd's, the three policies of insurance on which this action was brought, and copies of which were annexed to and formed part of the case. The policies were upon coffee, sugar, pimento, and other produce at and from any port or place in Jamaica to New York, in the ship the "*Montezuma.*" Each was in the ordinary form of a Lloyd's policy, in which the risks which the assurers were contented to bear were stated as in the ordinary printed form to be "of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of marc and countermarc, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes and people, of what nation, condition or quality soever; barratry of the master and mariners, and all other perils, losses and misfortunes that have or shall come, to the hurt, detriment or damage of the said goods and merchandises and ship, &c., or any part thereof."

On February 5, 1866, certain goods within the meaning of the policy were shipped by the plaintiffs on board the said vessel the "*Montezuma,*" at Kingston, a port in Jamaica within the meaning of the said policy.

On the following morning it was discovered that sea-water had penetrated into the hold of the said vessel, and the goods so loaded were greatly damaged thereby.

The vessel and cargo were then surveyed, and, by agreement between the parties, the following report of the survey, and also the protest of the master of the "*Montezuma,*" were to be read and received as evidence of the facts set forth therein, and as if the several parties by whom the said documents respectively purport to have been signed had deposed to the statements in the said documents respectively made, and the facts stated therein were for the purposes of this case admitted to be true:

"Report of Survey.

"Kingston, Jamaica, February 8, 1866.

"We, the undersigned, having been called on by Messrs. Davidson, Colthirst & Co., consignees, and Joseph Hamshaw, master, of the steamship "*Montezuma,*" now lying alongside the wharf in the port of Kingston, to survey that vessel in consequence of the discovery, 6 a.m. this morning, that there was a large quantity of water in the vessel, we proceeded on board at noon, and found her there with 8 feet 4 inches of water in the after compartment and 5 feet 6 inches of water in the foremost one, seven pumps (including two powerful fire-engines which had been procured from the shore as speedily as possible) were at work, having been found impossible to get up steam in consequence of the water being above the furnaces, but they did not reduce the height of water from that time up to 12.30. Pumping was then discontinued by our directions until 2.10, when, upon examination of the several compartments, it was found that the water had not risen. Upon measuring the difference of the level of the water on the outside and inside of the ship, it was found to be 13 feet 3 inches, the vessel's keel being at this time at least 2 feet in the soft mud; this was done to ascertain if there were any defects in the top sides. On our arrival on board we found that the cargo was being rapidly discharged, and we recommended that this should be continued, so as, if possible, to discover any leak in the vessel's bilge. Upon going to the engine-room the chief engineer, Mr. Charters, assured us that all cocks and valves leading from his department to the sea were closed, and that he had himself paid especial attention to them on the previous evening before leaving the engine-room, and that he had also looked into the engine-room and stoke-hole at 11.30 p.m., and found all right. Failing to discover any leak or appearance of a leak in the vessel and finding that the height of water in the hold remained stationary, the pumps were again set to work at 2.10 p.m., and immediately the water began to reduce rapidly, which continued up to the

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time of our departure at 5.40 p.m. We think it right to state that prior to our arrival Captain Hamshaw had procured the services of three divers to thoroughly examine the bottom of the ship, and as a precaution had the water-closet pipes plugged up, which pipes have since been carefully examined by us, the plugs being out, and found intact.

"Feb. 7.—Upon proceeding on board this morning at 9.30, we found that the vessel was free of water except in the after compartment, which had not been pumped out below 22 inches. Captain Hamshaw informed us that the pumps had not been at work since 5 a.m. On a thorough examination of the vessel we see no reason to suppose that she leaks to any injurious extent whatever, but that she is a sound and strongly-built vessel and thoroughly seaworthy. It appears that the bulkheads are not sufficiently water-tight, from the fact of the water having found its level throughout the ship.

"The only conclusion, after mature consideration, at which we can arrive is, that as the draft of the vessel increased in consequence of the cargo she was taking on board up to 12.30 a.m. of the 6th inst., the main discharge-pipe from the engine-room became below the water level; the water could thus find its way beneath the india-rubber valve in the discharge-pipe, and through the valves of the air-pump, bucket, &c., filling the condensers and cylinders, when if any cocks or valves, such for instance as pet cocks on cylinders and swifting valves on condensers, had been inadvertently left open the water would find its way into the ship and account for the whole accident. Such, we are of opinion, has been the case in the present instance. We recommend that a rod with a flat weight attached should be suspended through the stop of the discharge-pipe in the engine-room, so that it could be lowered and rest upon the india-rubber valve whenever the vessel is in harbour, and thus prevent any ingress of water through that pipe in future. We also recommend that the logwood in the fore and after holds be removed in order that all the loose coffee may be taken out to prevent the pumps from being choked.

(Signed) "John Simons, staff commander H.M.S. '*Aboukir.*'
"Joseph D. Ellis, chief engineer H.M.S. '*Constance.*'
"Thos. J. Rowe, master Brit. barque '*Clarendon.*'"

The case then set out the master's protest, the facts stated in which did not differ from the facts mentioned in the above report of the survey.

At the trial the following evidence was given by Thomas Scott, a witness on behalf of the plaintiffs:

"I am an engineer and ship surveyor, and was for eleven years managing engineer to Messrs. Rennie & Co., the well-known engineers, and for twelve years at sea in the service of the Royal Mail Steam-Packet Company; after that I was manager of the Humber Ironworks. I have had considerable experience in building ships and in the construction of marine-engines. I have read the report signed by Captain Simons and the others, and assuming the facts stated in the survey to be correct, in my judgment I should think the effects referred to would be likely to occur in the way mentioned, and in none more likely. Assuming the facts to be correct, there might be another mode of accounting for them: the water might get in through the bilge pumps, that is, through the pipe; by the vessel going down in the water, the leakage would take place; at least the water would get into the vessel. I say this would be quite consistent with the vessel being sound and seaworthy.—*Q.* "In your judgment, that vessel was seaworthy, notwithstanding what you read in the report." *A.* "Yes, according to what I read there. If a splinter got into the valve it would account for what I see in the report, because as the cargo went into the vessel and the aperture for the discharge got lower, there would be a sufficient passage for the water to get in."—Being cross-examined, the witness further said: "I say what occurred was quite consistent with the vessel being seaworthy. There might be nothing wrong with the construction of the valve, or there might be something wrong. I cannot answer for the construction. If the valve were broken or out of order it would be the same. A splinter might do it." On re-examination the witness further stated: "I see no trace in the survey of

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a broken valve, or anything of that sort. The state of the valve is a matter of no consequence when the vessel is under way. If I found the leak ceased while she was lying in the harbour, that would enable me to form an opinion as to whether it was a temporary obstruction, or anything floating in the valve. It would be possible to take a staff of any description which might touch the valve in such a way as to knock the splinter out and then become tight at the same time. If the leak ceased in the harbour, I should form the opinion that it was from a temporary accidental cause."

The declaration was in the common form upon the said policies of insurance; and the material pleas were, first, that the loss was not caused by the perils insured against; and, secondly, that the ship was unseaworthy.

The questions for the opinion of the Court were, first, whether the evidence given at the trial as above mentioned was evidence which ought properly to have been left to the jury upon which they might reasonably find a verdict for the plaintiffs upon the issue joined on the plea, that the said goods were not, nor was any part thereof, lost by the perils insured against; and, secondly, whether or not the said evidence at the trial was evidence which ought properly to have been left to the jury upon which they might reasonably find a verdict for the plaintiffs on the issue joined on the plea that the said ship at the time of the commencement of the risk was not seaworthy.

Sir G. Honyman (*Watkin Williams* with him), for the plaintiffs.—There was evidence to go to the jury that the goods were lost by the perils insured against. They were damaged by sea-water getting into the hold of the vessel. The report of the survey shews that this arose from some temporary accidental opening of the valve in the discharge-pipe.—(He was then stopped by the Court).

Mathew (*Lodge* with him), for the defendant.—It is submitted that there was no evidence that the loss was brought about by any peril of the sea.

[WILLES, J.—The question is, whether it comes within the words of the policy, "and all other perils, losses," &c., which follow the enumerated perils.]

They must be perils *ejusdem generis* with those mentioned previously. The plaintiffs must shew a loss from a peril within the meaning of the policy. The underwriter by this policy does not insure against damage by sea-water. The burthen of proof is on the plaintiffs to shew that the loss was one within the meaning of the policy. They do not prove this by suggesting various theories for accounting for the accident. The evidence given points as much to the loss having arisen from negligence of the crew, or from some defect in the valve, as from a mere accidental cause. The recommendation in the survey to have a rod suspended through the top of the discharge-pipe, shews that the pipe or valve was considered defective in its construction. It is submitted that if the water got in through some cocks having been carelessly left open, and so did the damage to the goods, that would not be a damage by perils of the sea or perils *ejusdem generis*. In *Pothier, Traité du Contrat d'Assurance*, chap. 1. par. 49, it is said "L'assureur se charge par le contrat d'assurance des risques de tous les cas fortuits qui peuvent survenir par force majeure durant le voyage, et causer à l'assuré une perte dans les choses assurées, ou par rapport aux dites choses." A loss from rats entering holes in the ship's bottom, or from the ship being destroyed by worms, is not within the perils insured against by the common form of a policy—*Hunter* v. *Potts* (4 Campb. 203) and *Rhol* v. *Parr* (1 Esp. 446). The case of *Manus* v. *Buttemer* (11 Com. B. Rep. 876; 21 L. J. C.P. 119) also shews that the underwriter is not liable as for a loss from perils of the sea where the vessel was injured by straining in consequence of taking the ground when the tide was low whilst she was moored in harbour. In *Thompson* v. *Whitmore* (3 Taunt. 227) the ship, whilst hove down on the beach within the tideway for repair was thereby damaged, and it was held that that was not a loss occasioned by the perils of the sea.

[WILLES, J.—That was one of those unfortunate cases, in which the plaintiff was nonsuited on account of a variance of the evidence with the

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allegation in the pleadings. It would otherwise be inconsistent with *Phillips* v. *Barber* (5 B. & Ald. 161).]

It is submitted that *Thompson* v. *Whitmore* (3 Taunt. 227) belongs to that class of cases in which the assured has been held not entitled to recover, because the accident did not arise from any "*force majeure.*" It was not suggested in that case that the plaintiff was rightly nonsuited by reason of any variance.

[BRETT, J.—It is treated as a case of variance in *Phillips* v. *Barber* (5 B. & Ald. 161), where Lord Tenterden says, the plaintiff there "has not entangled himself by any particular allegation, but has shewn fully the manner, time and place of the loss."]

The case of *Paterson* v. *Harris* (1 Best & S. 336; 30 L. J. Q.B. 354) also supports what is now contended for, that this was not a loss from perils of the sea. The subject of that action was a policy of insurance on the Atlantic Electric Telegraph Cable, and a loss by the ordinary action of the sea-water upon the cable was held not to be caused by perils of the sea within the meaning of the policy.

[BRETT, J.—That case would be in your favour, if the damage here was not caused by any of the cocks or valves having been negligently left open.]

It is submitted the underwriter would not be liable for a damage arising from the negligence of the crew, unless there was also a peril insured against which caused the loss. In *Dixon* v. *Sadler* (5 Mee. & W. 405; 9 L. J. Ex. 48) there was clearly the intervention of the perils of the sea as well as the conduct of the crew.

[WILLES, J.—That case shews that the negligence of the crew of the vessel insured does not stand on a different footing from the negligence of strangers. What, then, do you say to a loss from a collision with another vessel? The subject is discussed by Emérigon (See 1 Emérigon, Traité des Assurances, chap. xii. sec. 14).]

Negligence alone will not, it is submitted, render the underwriter liable—*Philpot* v. *Swann* (11 Com. B. Rep. N.S. 270; 30 L. J. C.P. 358). Then, as to the question whether the vessel was seaworthy when the cargo was put on board. The result of the evidence, which proved the getting in of the water without any apparent cause whilst the vessel was in port, shifted the onus of proving whether the vessel was seaworthy or not from the defendant to the plaintiffs. The statement in the evidence that she was seaworthy meant only when the vessel was on the sea; but it is quite consistent with that that when the vessel was in the port she was unfit to receive cargo—1 *Parson's Maritime Law*, 387.

WILLES, J.—Notwithstanding the able argument of Mr. Mathew, I am of opinion that our judgment ought to be for the plaintiffs. The only question is, whether there was evidence for a jury such as might reasonably have induced them to have found a verdict for the plaintiffs. So far as regards the question of seaworthiness, that is disposed of by the statement of the case and the evidence of competent persons that the ship was seaworthy; and it seems, therefore, after that, impossible for us to say that in our judgment the vessel was unseaworthy. Although the onus of proving unseaworthiness is on the underwriters, yet I agree that, if a vessel were shewn to be lost by leaking as soon as she left the port, the onus of proving her capacity for the sea would be shifted. But that does not apply here, for the owners gave an explanation in this case, and no answer was made to it by the other side. Then, assuming the vessel to have been seaworthy, the question is, whether the loss occurred by perils of the sea, or by some peril analogous thereto. If it were necessary to determine with grammatical precision whether this was a loss by perils of the sea it might—remembering the case of *Thompson* v. *Whitmore* (3 Taunt. 227)—be arguable that this was properly not a loss occasioned by the perils of the sea. The reason given in *Thompson* v. *Whitmore* (3 Taunt. 227) why the loss was not considered as occasioned by the perils of the sea was because the vessel was ashore when the damage happened to her; and the question would be, whether that would be an authority for saying that an injury from

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should, if necessary, have amended it, but it is not necessary to consider this, because the declaration is drawn alleging generally a loss by the perils insured against, and so raises the question considered in *Cullen* v. *Butler* (5 M. & S. 461), as to what is the loss which comes within the general words of the policy, "all other perils, losses," &c. The question therefore is, not whether the loss here was strictly one occasioned by the perils of the sea, but whether it was such other loss within the policy which, of course, must be a loss of the same or a similar kind to one happening from the perils of the sea. Now, a loss from perils of the sea would include the case of a loss from another vessel coming in collision with and making a hole in the vessel, the subject of the policy, of the same capacity as that through which the water must have got into this vessel, the "*Montezuma*"; and whether that accident happened in port or not, in smooth water or in rough water, the underwriter would be equally liable under the policy. Then, unless some distinction can be made between a loss from an accident happening through the negligence of the crew of another vessel and a loss from an accident happening either in the way it has been suggested it did in the present case, from a splinter getting into the valve, or from such negligence of the crew, as was suggested in the report of the survey, the loss would be a loss occasioned by the perils of the sea. As to there being any such distinction between a loss caused by the negligence of the crew of the vessel insured and one caused by the negligence of the crew of another vessel, all such distinction has been swept away by the judgment of Lord Wensleydale, as I understand it, in the case of *Dixon* v. *Sadler* (12 Mee. & W. 405; 9 L. J. Ex. 48). On the whole, it is not necessary, I think, to say whether these goods were damaged by perils of the sea, as the damage to them was clearly caused by perils of the sea or the like within the words of the policy. I wish to add, that my judgment adopts the report of the survey itself as to the accident probably arising from a negligence referable to leaving cocks and valves open rather than the evidence suggesting that the accident might have happened by a splinter getting into the valve, and I only referred to that last by way of illustration.

KEATING, J.—I also am of opinion that there was clearly evidence to go to the jury which was sufficient for them to find the defendant liable in this action. There was evidence that the injury occurred not from the construction of the valve, but from a temporary accident. It seems to me that that is what may be inferred from the report of the survey. The accident was caused by a flow of sea-water which got in during the course of six hours, and the only way suggested by which it could have got in was clearly by the valve in the discharge-pipe. The pumps at first produced no effect ultimately they succeeded, and the ship became free of water. Nothing, however, had been done in the meantime, and therefore there was strong evidence that the cause of the accident was only temporary, and not the original construction of the valve. If that be so, it is clear that the loss was from a peril sufficiently akin to perils of the sea to be within the policy. As to the question of seaworthiness, there was certainly evidence sufficient to go to the jury of the vessel being seaworthy.

BRETT, J.—The underwriter declined at the trial to call any evidence, and he said then, and now contends, that there was no evidence on which the jury ought to find either that the loss was caused by the perils insured against, or that the ship was seaworthy. The question is whether there was any evidence of either of these. I agree that we ought not to take the suggestion of the witness as to a splinter getting into the valve and so causing the accident, because it is not an opinion founded on a fact proved, but a mere suggestion: but that witness agrees with the report on the survey, and that report, which is to be taken as if those who made it had given evidence on the trial and on which this case must mainly rest, explains how probably the accident happened: namely, that by reason of some cock being left open in the discharge-pipe the water got into the ship and so damaged the cargo. If that was so, the water

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got in, not by the happening of any ordinary occurrence in the ordinary course of a voyage, but by the accidental circumstance of some cock having been left open by the negligence of the crew. That is, in my opinion, sufficient to make the underwriter liable. The question is the same as it would have been if by the falling of a mast through the vessel, or other negligent act of the crew, the vessel had sunk in deep water; and I think the loss sufficiently comes within the doctrine of one happening by a *vis major*, and is within the meaning of the policy, a loss caused by the perils insured against. With reference to whether the vessel was seaworthy, I hardly think that the burthen of proof was shifted: but even if it was, I think that there was sufficient evidence to go to the jury that the ship was seaworthy and fit to receive the cargo.

Judgment for the plaintiffs.

IN THE COMMON PLEAS. Nov. 2, 1868.

KNOCK *v.* THE METROPOLITAN RAILWAY COMPANY.

38 L. J. C.P. 78; L. R. 4 C.P. 131; 19 L. T. 239; 17 W. R. 10.

Railway Clauses Act — Compensation — Premises injuriously affected — Damage to Goods.

COMPULSORY PURCHASE.—*The occupier of a house and premises injuriously affected by the execution of the works of a railway company in exercise of the powers given to them by their Act of Parliament, is entitled, under the Railway Clauses Consolidation Act, 8 & 9 Vict. c. 20. ss. 6 and 16, to compensation for damage done to his goods in such house by reason of the exercise of such powers.*

This was an action on an award made by a surveyor under the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18. The award contained, *inter alia*, the following recitals:

"Whereas George Knock, of, &c., claims and contends that in and by the execution of the works authorized by and in exercise of the powers contained in the Metropolitan Railway (Notting Hill and Brompton Extension) Act, 1864, and the several Acts of Parliament incorporated therewith, the Metropolitan Railway Company had injuriously affected the house, land and premises 27, Alfred Terrace, Queen's Road, Bayswater, in the county of Middlesex, belonging to the said George Knock; and that he, George Knock, has sustained, and would sustain, damage by reason of the injurious affecting of the said house, land and premises by the execution and use of the works so authorized as aforesaid. And whereas, by a notice in writing under the hand of the said George Knock, bearing date May 8, 1867, he, the said George Knock, gave the said company notice that he was possessed of and interested in the said house, land and premises under and by virtue of a lease, &c.; and further gave the said company notice that he required them to pay him compensation for the injurious affecting of the said house, land and premises; and that the amount of compensation claimed by him by reason of the premises was 1,650*l.*, and further gave the said company notice that, unless they were willing to pay him the said sum, and should enter into a written agreement with him for that purpose, within twenty-one days after the receipt by them of that notice, then he desired to have the amount of such compensation settled by arbitration, according to the provisions of the Act or Acts of Parliament in that behalf; and whereas the said George Knock, by an instrument, &c., did in pursuance of the provisions of the Lands Clauses Consolidation Act, 1845, in that behalf nominate and appoint me, the said W.M., to be an arbitrator on the part and behalf of him the said George Knock, to settle and determine the compensation to be paid by the said company to him the said George Knock for the damage sustained and to be sustained by him by reason of the execution by the said

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company of the works authorized by the first-mentioned Act, and the exercise by the said company of the powers of the said Act and the several Acts of Parliament incorporated therewith."

The award by the arbitrator on the matters so referred to him, was in the following words:

"1. I find, award, and determine that the said house, land and premises before mentioned, and the said interest of the said George Knock therein were injuriously affected by the execution of the works authorized by and in the exercise of the powers contained in the said several Acts of Parliament, and that the said George Knock has sustained and will sustain damage by reason of the injurious affecting of the said house, land and premises by the execution and use of the said works.

"2. I find, award and determine that the amount of compensation to be paid by the said company to the said George Knock, for and in respect of such injurious affecting, and of the damage so sustained, and to be sustained by him as aforesaid, is as follows:

(1) For structural damage to the said house and premises the sum of	£200	0	0
(2) For damage and injury occasioned to goods of the said George Knock therein	486	0	0
(3) For depreciation in the value of the said leasehold interest of the said George Knock in the said house, land and premises	340	0	0
Amounting in the whole to the sum of	£1,026	0	0

"

The action was tried, before Bovill, C.J., at the Middlesex Sittings, after last Trinity Term, when a verdict was entered for the plaintiff for the amount claimed.

Day now moved, pursuant to leave reserved, at the trial, for a rule *nisi* to set such verdict aside and to enter a verdict instead for the defendant, or to reduce the damages by 486*l*., on the ground that the plaintiff was not entitled to recover compensation for injury done to the goods upon the premises, and that the award was therefore bad in respect of its having given compensation for such injury.—The remedy for settling the claim for compensation by award is given by the 68th section of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, but the right to compensation depends on the construction of the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20. ss. 6. and 16. Section 6 states that "in exercising the power given to the company by the special Act to construct the railway and to take lands for that purpose, the company shall be subject to the provisions and restrictions" contained in that Act and the Lands Clauses Consolidation Act, "and the company shall make to the owners and occupiers of, and all other parties interested in any lands taken or used for the purpose of the railway, or injuriously affected by the construction thereof, full compensation for the value of the land so taken or used, and for all damage sustained by such owners, occupiers, and other parties by reason of the exercise, as regards such lands, of the powers by this or the special Act, or any Act incorporated therewith, vested in the company." It is submitted that this section points only to damage sustained in respect of land, and does not extend to damage in respect of goods on such land. Then, the 16th section, which gives various powers to a railway company for the purpose of constructing the railway, contains this proviso: "Provided always, that in the exercise of the powers by this or the special Act granted the company shall do as little damage as can be, and shall make full satisfaction in manner herein and in the special Act and any Act incorporated therewith, provided, to all parties interested for all damage by them sustained by reason of the exercise of such powers." That section, it is submitted, must be read with the 6th, to which it impliedly refers, and by which it must be considered as controlled. The 68th section of the 8 & 9 Vict. c. 18, which provides the remedy, is limited to cases where a person is entitled to compensation in respect of lands, or of any interest therein.

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[BOVILL, C.J.—That 68th section is not the only section which provides a remedy for obtaining compensation from companies.]

No; it is admitted there are earlier sections in that Act where provisions are made for proceedings before the Justices or a jury, but the 68th section shews that in all these cases the legislature intended the compensation to be limited to injuries with respect to land, and not to mere chattels.

[KEATING, J.—If the injury has been done to the goods in the exercise of powers conferred on the company by Act of Parliament, so that the right of action has been taken away, the plaintiff is remediless if he is not entitled to compensation under the Railways Clauses Act.]

That may be so in one sense, but he has the remedy of removing the goods from the premises and so preventing their being injured, and such removal might prevent his beneficially occupying the house, and entitle him to claim for loss of such occupation; but if he is remediless that is no reason for saying the company are liable under this Act, 8 & 9 Vict. c. 20, on which alone the rights of the plaintiff are based.

BOVILL, C.J.—Mr. Day has not produced any authority in favour of the proposition for which he contends. He relies upon the meaning of the Act of Parliament. According to my experience, extending over a considerable period, no doubt has ever been suggested in a case of this description that a claimant would be entitled to compensation for damage done to property in premises where the premises have been injuriously affected by the execution of the works of a railway company. What was referred to the arbitrator? The claim was for compensation for damage "by reason of the injuriously affecting of the house, land and premises of the plaintiff, by the execution of the works so authorized as aforesaid." The appointment of the arbitrator was for the purpose of determining the amount of compensation to be paid by the company to Mr. Knock "for the damage sustained by him by reason of the execution by the company of the works authorized by the Act, and the exercise by the company of the powers of their Act and several Acts of Parliament incorporated therewith." It seems to me that this sufficiently follows the Act of Parliament in terms and in substance, and that the arbitrator was perfectly authorized to enter upon the whole question of the damage sustained by reason of the execution of the powers of the Act. The award is, that the house, land and premises, and the interest of Mr. Knock therein, were injuriously affected by the execution of the works authorized by, and in the exercise of the powers contained in, the several Acts of Parliament; and that Mr. Knock has sustained, and will sustain damage by reason of the injurious affecting of the said house, land and premises by the execution of the said works. Then the award proceeds to find and award that the amount of compensation to be paid by the company to Mr. Knock, for and in respect of such injurious affecting, and of the damage sustained and to be sustained by him, is as follows. Then follow three heads of damage; but those are all with reference to the previous terms and finding of the award. The first was for structural damage to the house, 200*l*., which is not disputed. The third is for diminution in value of the leasehold interest, which is also not disputed. Mr. Day contends that, although the claimant is entitled for injury to his house in respect of depreciation of his leasehold interest, he is not entitled to any compensation whatever for the injury that has been done to the goods which were in the house, which injury was caused by the execution of the works aforesaid, in the exercise by the company of the powers contained in their Act. Now it seems to me that the case is one distinctly within the provisions of the Act of Parliament. It is not necessary to go further than the 16th section of the 8 & 9 Vict. c. 20, the Railways Clauses Act, which contains this proviso at the end, to which all the rest of the section is subject: "Provided always that, in the exercise of the powers by this or the special Act granted the company shall do as little damage as can be, and shall make full satisfaction in manner herein, and in the special Act, and any Act incorporated therewith, provided, to all parties interested, for all damage by them sustained by reason of the exercise of such powers." This is a damage sustained by reason of the execution of such

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powers. Now I find no such limitation as Mr. Day suggests in that clause of the Act of Parliament, and the practice, as I said before, has been, I believe, universally to include such matters within the compensation. I think that principle has been properly adopted, and therefore there is no ground for a rule in this case.

BYLES, J.—I am of the same opinion. It seems to me that this is a case which falls within the very words of the 6th section of 8 & 9 Vict. c. 20, which section provides, first, for compensation for the value of the land where the land is taken; secondly, for compensation for the injuriously affecting the land where the land is injuriously affected and not taken; and then, further, it goes on to provide for compensation for "all damage sustained by such owners," &c., which must mean all *other* damage sustained by such owners, &c., since compensation for damage in respect of lands taken, or of lands injuriously affected, had already been provided for. If the damage to this personal property were such that it would not have arisen if the personal property had been removed, that is a subject for the consideration of the arbitrator; but he has found that it was damage caused by reason of the exercise of the powers of the Acts of Parliament; and therefore it seems to me that what he has done is justified by the power conferred upon him by the said 6th section of the 8 & 9 Vict. c. 20.

KEATING, J.—I am entirely of the same opinion. We are to take it upon this award, that the arbitrator was satisfied that the damage done to the goods in question was done in exercise of the powers conferred upon the railway company by their Acts of Parliament; and if they were, why then the remedy by action would be taken away, and, according to Mr. Day's argument, a party who had been so injured would be without remedy if compensation for such damage did not fall within the Act of 8 & 9 Vict. c. 20. That is a conclusion which we would be slow to arrive at. It seems, however, to me that the case is strictly within the 8 & 9 Vict. c. 20, because the 6th section provides, not only for the party receiving compensation for the land taken or injuriously affected, but also "for all damage sustained" by reason of the exercise of the powers given to the company by their own or such Act of Parliament; and the arbitrator finds that this damage was sustained by the exercise of such powers.

BRETT, J.—I am of the same opinion, for the reasons given by my Brother Byles.

Rule refused.

IN THE EXCHEQUER CHAMBER. Dec. 2, 1868.

(Appeal from the Court of Common Pleas.)

KELLY, C.B., BRAMWELL, CHANNELL, and PIGOTT, BB., HANNEN and HAYES, JJ.

RANDOLPH AND OTHERS *v.* MILMAN AND OTHERS.

38 L. J. C.P. 81; L. R. 4 C.P. 107; 17 W. R. 262: reversing, [1867] E. R. A. 1821; 36 L. J. C.P. 28; L. R. 2 C.P. 60; 15 W. R. 156; 12 Jur. N.S. 941 (C.P.).

Cathedral Church of St. Paul—Members of Chapter—Canons—Non-residentiary Prebendaries—Stat. 3 & 4 Vict. c. 113.

ECCLESIASTICAL LAW.—*The non-residentiary prebendaries of the Cathedral Church of St. Paul are entitled to vote at a meeting of the Chapter on the occasion of an election of a proctor to represent the Chapter in Convocation, such right being reserved by 3 & 4 Vict. c. 113.*

This was an appeal from the decision of the Court of Common Pleas, reported 36 L. J. C.P. 28.

The question was whether the non-residentiary prebends of the cathedral church of St. Paul were entitled to vote at a meeting of the Chapter on the

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occasion of an election of a proctor to represent the Chapter in Convocation, and it turned on the construction of 3 & 4 Vict. c. 113.

The Court of Common Pleas had decided the question in the negative.

The facts will be found fully stated in the report of the case in the Court below.

Sir R. Palmer (*J. D. Coleridge* with him), for the appellants.—It is a principle of law that rights vested in any person or persons are not to be taken away except by express words, and that saving clauses are to be construed beneficially, and in favour of such rights. In the 3 & 4 Vict. c. 113, the statute to be construed, there are two saving clauses, one of which includes the right now in question, and there is nothing in the Act to exclude it. Section 51, after taking away certain property and emoluments, provides that "All other rights and privileges whatsoever now by law belonging to any of such dignities, offices or prebends . . . . shall continue to belong thereto, except so far as any of such rights or privileges may be controlled or affected by any of the provisions of this Act respecting the right of election now exercised by any chapter." Now, it is clear that the non-residentiaries of St. Paul's had this right of voting. What provisions then are there as to the rights of election then vested in them? There are none which affect this right of voting for a proctor. By sections 24, 25, 26, an alteration is made in certain elections, but they do not touch the present matter; and sections 22, 41, 75 are simply immaterial, and the statute may be searched in vain to find any provisions taking away this right so reserved. What, then, is there in the Act which is to have a counter effect? It is said that the combined effect of section 1 and the interpretation clause, section 93, gets rid of the reservation. But the whole effect of section 1 is to call non-residentiaries canons, and it is a mere clause of style, and section 93 does not apply, and cannot apply, to it, but applies to enacting clauses. If the words "residentiary member of chapter," used in section 93, be put for "canon" in section 1 they make nonsense; and taking the substance and not the form it is equally obvious the Court below were wrong in depending on this combined effect. To confirm their conclusion section 44 was referred to by the Court, and it is said that a distinction is there taken between non-residentiaries and members of chapter, and that this fortifies such conclusion. But that section has no bearing on the matter. It relates to patronage, and for purposes of patronage, property, election and other matters, the Chapter may be differently constituted, persons who may be members in one case not being so necessarily in another. How an interpretation clause is to take away rights is incomprehensible, and yet the Court below has given such a clause that effect. Where the legislature intended exclusion, as in section 23, express words are used to exclude. If the interpretation clause applies to section 1, it simply confines it to residentaries, if not, then the non-residentiaries are canons, that is all; and in either case the section is innocuous to the present right. In truth, an interpretation clause cannot apply to a clause of style. It certainly could never have been intended that whether resident or non-resident the rights of prebends were to be affected according as they happened to be called canons previously or not, and yet that would be the result of the interpretation put on this statute by the Court of Common Pleas. The fallacy of the decision has been to mistake the effects of a clause of style and an interpretation clause, and to make them take away vested rights.

Mellish (*Lindley*, with him), for the respondents.—The mandate shews that the proctor is to be appointed by the Chapter, and that only members of Chapter are to vote, and the question is then, are non-residentiaries still members of Chapter? The Act was a scheme of uniformity; thus there being in old foundations many non-residentiary prebends, and in the new only canons residentiary, the Act whilst it made these non-residentiaries mere honorary members, created (section 23) honorary members where they did not exist before. And the question is, is not the intention of the statute to confine the Chapter to residentiaries? And it will be found that throughout the Act "Chapter" always means residentiaries. Sections 1, 2, 93 must be taken

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together, and their effect is this: members of Chapter are to be called canons, the canons of St. Paul's are to be four, and canons are to be resident, and therefore the Chapter is to consist of four. The Court below, in effect, says that looking to the whole Act the words " styled canon " mean " be canon," and it is submitted that this is correct. Throughout the Act " canon " is used to mean a resident, and " Chapter " to mean resident members, and it was never meant that a non-resident was to be called a canon. Sections 3, 47, 68 shew this, and in section 44 non-residential prebends are distinguished from members of Chapter. One would have expected some definition of the respective rights of residents and non-residents if the other construction were the true one. The Court of Common Pleas decided that section 51 reserved individual rights, not rights belonging to a person simply as a member of Chapter; and it is submitted that the meaning of the Act is, that if before the Act any right existed in a canon or prebend, as a member of Chapter, such right is to be excepted from the reservation in section 51.

Sir Roundell Palmer, in reply.—The statute contains no definition of the word " Chapter," and the then existing statutes are recognized, and this word is left to be interpreted by the various statutes then in force in various places. The effect of the interpretation clause is to confine the operative part of the Act to residents, and section 2, referred to on the other side, in truth recognizes the existence of a canon non-residentiary. As to the other clauses relied on by the respondents, they only assume that there are members of Chapter who are canons within the interpretation clause, and nothing more. As has been already pointed out, the words used in section 44 were used because persons may be members of Chapters for some purposes and not others, and in the case of patronage only residents might be entitled to a voice, and a non-resident might or might not be a member. As respects the contention that only individual rights, and not rights as mere members of Chapter, were intended to be reserved, in section 51 we find that the exception to the proviso only relates to rights of election, which are not individual rights but rights of Chapter, which shews to what the proviso pointed, and that it did not mean to deal with only individual rights, for otherwise the exception would be needless.

KELLY, C.B.—The question submitted to us is whether the residentiary prebendaries of the Cathedral Church of St. Paul are, as well since the passing of 3 & 4 Vict. c. 113. as before that Act, entitled to vote in Chapter at the election of proctors to represent the Chapter in Convocation.

The Chapter, no doubt, formerly consisted of thirty prebendaries, of whom (at all events at the time of the passing of this Act) four only were resident and twenty-six were non-resident. Now, this order of men, consisting of high officers of the church, has existed for many centuries, and during that length of time has possessed, and enjoyed, and has exercised many rights and privileges; they were entitled to considerable property and emoluments, and were entitled also to an amount of patronage which may be called considerable, and also they were entitled to have the privilege of voting in Chapter, among other occasions, upon the occasion of an election of proctors to represent the Chapter in Convocation.

It may be observed, however, that they were not for all purposes, strictly speaking, to be deemed members of the Chapter; they were not entitled to a seat in Chapter except upon certain particular occasions specified, and distinctly and expressly enumerated in the case now before us; and the question is whether, under the provisions of this Act of Parliament, the privilege is still continued or preserved to them, of voting at these elections in Chapter.

Now, it will be remembered that the order of men or officers itself still continues, and still is in existence, and is still preserved; and for many purposes it still continues not only to exist, but to be entitled to certain rights and privileges; and upon the question whether the right or privilege of voting in Chapter on the election of proctors to serve in Convocation is preserved or not, we must interpret the 51st section of the Act of Parliament.

Now, we agree entirely on the rule or principle of law which was enunciated

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at the outset by Sir Roundell Palmer, viz., that the rights and privileges existing in any men, or any order of men, are not to be taken away or deemed to be extinguished unless by force of express words in the statute, or by necessary intendment or implication. And it will be found on reference to the statute in question not only that there is no express extinguishment of these rights, and no necessary intendment or implication to that effect, but that these rights and privileges come directly within the terms of the section of the Act of Parliament to which I shall refer; and by the express words of that section are preserved and continued to the non-resident prebendaries.

Now the Act makes, no doubt, many alterations in the constitution of these Chapters, and in the rights and powers of future officers of cathedral churches, and the church in question; but when we come to the 51st section, after various provisions, no doubt equally affecting the future rights and enjoyment of property and patronage by non-resident prebendaries, we find this provision: "That all lands, tithes and other hereditaments, except any right of patronage, and all other emoluments and endowments whatsoever belonging to the deaneries of Wolverhampton, Middleham, Heytesbury and Brecon, and to the dignity and office of the sub-dean, chancellor of the church, vice-chancellor, treasurer, provost, precentor, or succentor, and to any prebend not residentiary in any cathedral or collegiate church in England, or in the cathedral churches of St. David's and Llandaff, or in the collegiate church of Brecon, or enjoyed by the holder of any such deanery, dignity, office or prebend, as such holder, shall as to all such of the said deaneries, dignities, offices and prebends respectively as may be vacant at the passing of this Act, immediately upon its so passing, and as to all others immediately upon the vacancies thereof respectively, without any conveyance or assurance in the law other than the provisions of this Act, accrue to and be vested absolutely in the Ecclesiastical Commissioners of England and their successors for the purposes of the Act." By this provision, in substance, "property and emoluments" attached to this office of non-residential prebendary are for ever and entirely taken away. Then follows this provision: "Provided always, that all other rights and privileges whatsoever now by law belonging to any of such dignities, offices or prebends, except the last-named deaneries, shall continue to belong thereto, except so far as any of such rights or privileges may be controlled or affected by any of the provisions of this Act, respecting the right of election now exercised by any Chapter."

In the first place, is there or not "a right or privilege now by law belonging" (that is, at the time of the Act of Parliament passing) to the prebendal office to choose a proctor? It is not to be doubted there is.

Mr. Mellish has endeavoured to raise a distinction between a right or privilege belonging to the prebend as prebend, and a right or privilege belonging to a prebend as a member of the Chapter. But if they are to be taken for this, or any or all purposes to be members of the Chapter, it is as prebends residentiary or non-residentiary that they are members of the Chapter, and therefore there is a right or privilege clearly and directly belonging to that prebendal office, or to those non-residentiary prebends in the cathedral church in question, and therefore being a right or privilege belonging to them as non-resident prebends, it is here by the express terms of the Act of Parliament preserved to them, unless it be found to come within the exception; and there is this exception, "except so far as any of such rights or privileges may be controlled or affected by any of the provisions of this Act respecting the rights of elections now exercised by any Chapter."

The question is, whether this right or privilege—the right of voting in Chapter at the election of a proctor—is controlled or affected by any of the provisions of this Act respecting the right of election now exercised by any Chapter? We have looked in vain through the Act for any provisions at all concerning any election, which touches the right of these non-resident prebendaries to vote at the election of proctors to serve in Convocation. We do find several provisions concerning (and I need not repeat the terms of the statute), controlling and affecting the right of election exercised by Chapters. We find in the 24th section of the

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Act an enactment, that the dean of the cathedral and three canons of St. Paul's are, after the passing of the Act, to be appointed by the Crown, instead of by the Chapter, who before appointed them. There are other provisions, into the particulars of which I need not enter. There are the 25th and 26th and several other sections of the Act of Parliament directly and expressly controlling or otherwise affecting the rights of election in Chapter. But we find no provision at all, no words which can bear any such interpretation throughout the statute, as to taking away, or in any manner whatsoever affecting the rights of these non-resident prebendaries, to vote in the chapter on any election to the office of proctor in Convocation. If the case rested there, therefore, it would clearly appear that inasmuch as this is a right or privilege belonging to an office which itself is expressly within the Act of Parliament, the right or privilege in question is expressly preserved. But it is said that there are two or three sections of the Act of Parliament which in express terms, or otherwise, put an end to the right to vote at these elections on the part of the non-residentiary prebendaries. However, before I refer to these sections I will turn for a moment to the 75th section. It appears that whereas, under the 51st section, all the property and interest or emoluments of these non-resident prebendaries are taken away with respect to the vacancies which may occur after the passing of the Act of Parliament; by the 75th section it is provided "that nothing in this Act contained respecting the division of corporate property, the diminution of the income of any deanery or canonry, the severance of separate property, or the limitation of the exercise of patronage possessed in right of separate property, shall affect any dean, canon, prebendary, dignitary or officer in possession at the passing of this Act, except as hereinbefore expressly enacted; but every dean, canon, prebendary, dignitary and officer hereafter appointed shall be subject to such regulations as shall be made in pursuance of this Act." We find here no provision whatever for continuing to existing prebendaries the right to vote, and some other privileges which may hereafter come in question appertaining to them by virtue of their office. Now, how is it possible to suppose it was not the intention of the legislature that all property and emoluments, patronage, rights and privileges of existing prebends shall be preserved to them, yet we find in the 75th section no notice is taken of the rights or privileges of voting, while the emolument attached to the office and the patronage attached to the office are expressly preserved to existing prebendaries, so that such rights and privileges would not be preserved unless by the proviso to which I have already referred; those rights and privileges, including the right and privilege of voting at such elections in Chapter, are preserved already, not only to existing prebendaries, but to all future prebendaries, by the provision in the 51st section to which I have already referred. It appears, therefore, perfectly natural, and it is the manifest intention, and it is the express language of, the Act of Parliament to preserve to existing prebendaries not only the rights and privileges, but also the property, enjoyment and emoluments, and certainly to preserve also to the prebendaries both present and to come whatever rights and privileges they possessed at the time of the Act attaching to prebendal offices.

But the judgment of the Court below and the argument before us to-day, in favour of the defendants, proceeds on two, or it may be on three sections of the Act of Parliament, the 1st, 2nd and 93rd.

Now, by the 1st section we find "that from henceforth all members of Chapter except the dean," and so forth, "shall be styled canons," and then we find in the 93rd section, "that in the construction of this Act the term 'canon' shall be construed to mean only every residentiary member of Chapter, except the dean, heretofore styled either prebendary, canon, canon residentiary, or residentiary," and so forth, and then follows an exposition of the term "minor canon." Now it is argued that because every member of the Chapter is, at the time of the passing of the Act, to be named or styled a canon, and because in the construction of the word "canon" we find in the Act that we are to take them to be canons residentiary and canons residentiary only; that this,

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by some implied principle of construction, amounts to an enactment that all members of Chapters shall thereafter be confined to canons, and that means canons residentiary, and canons residentiary only. In the first place, it is only necessary to read this first section (as it seems not unreasonable to read it) as if it had been in these terms—that all the members of the Chapter except the dean, and so forth, and whether canons resident or non-resident—whether prebendary residentiary or prebendary non-residentiary, shall be styled canons; and then we have a real express enactment of something which is at least reasonable, or which we cannot think altogether unreasonable. And when we look at another section of the Act of Parliament, which, for another purpose, has been relied on by Mr. Mellish, we find, with respect to the cathedrals of the new foundation that a new order of men is to come into existence who, in effect, are to be non-resident prebendaries in the churches upon these new foundations, and we find this new order corresponding for many purposes—not indeed for all—with the non-resident prebendary already in existence, and which has existed for centuries; and we find the statute itself confers on them the style or title of honorary canons. Why then are we to say there is anything unreasonable or contradictory to a provision which would apply to non-resident prebendaries already in existence the title of canon, when we find a corresponding body of men brought into existence for the first time and the term honorary canon expressly applied to them by the provision itself? And when we look to the 93rd section, it falls short altogether of the effect which has been contended for on the part of the defendants. The words are only that the word "canon"—that is, in the construction of this Act, "the term 'canon' shall be construed to mean only every residentiary member of the Chapter," that only means that when we find in the operative or enacting provisions of this Act of Parliament that the term canon is used, then the term canon is to be construed canon residentiary; and beginning with the 2nd section and going on throughout the Act of Parliament down to the 93rd section, there is no one instance to be found in which the word canon is introduced and is made the subject of any enactment at all, but that it may legally receive the construction put upon it by the 93rd section, and be applied to canon residentiary, and canon residentiary alone. Whereas, when we turn to the 1st section, we find it is not an enactment on the subject of canons, but is concerning that class of persons, whosoever they may be, or however composed, who are called members of the Chapter, and that it says that they may be styled canons. We do not feel ourselves called upon to put a construction on the word "Chapter" as it is to be found in various sections of the Act of Parliament. The legislature has not thought fit to do so itself. There is an interpretation clause applied to the term "canon," and the other term, "minor canon"; but there is no such provision as applied to the word "Chapter," and we must therefore take the word wherever we find it with reference to the context and according as we may think the real meaning may be, and the construction a proper one and a just one. It may have one construction for one purpose and another construction for another, with reference to those prebendaries who are constituted a part and portion of the Chapter itself. The non-resident prebendaries, whose rights are now in question, though constituting an integral portion of the chapter itself, had not for all purposes a seat in the Chapter—they were not summoned to attend, and they were not entitled to attend on all occasions, as members of the Chapter would be; they were merely summoned on particular occasions, and among others, in the election of officers, and whether they are to be termed for all purposes members of the Chapter or not, is a question that does not arise in this case, and we are not called upon to determine it.

Looking, therefore, at the principle of the law, that we are not to take away rights that have been held and enjoyed for centuries by an order of men, members of the Church, unless we find they are taken away expressly or by necessary implication, and finding that so far from these rights and privileges being taken away by any express or necessarily implied provision of the Act of Parliament, they, as it appears to us, have expressly and in direct terms been

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preserved to this order of officers in the Church, we are of opinion that the judgment of the Court of Common Pleas must be reversed, and that there must be judgment for the plaintiffs.

Judgment reversed.

IN THE EXCHEQUER CHAMBER. Dec. 2, 1868.

(Appeal from the Court of Common Pleas.)

KELLY, C.B., CHANNELL, B., PIGOTT, B., HANNEN, J., and HAYES, J.

MORGAN *v.* THE METROPOLITAN RAILWAY COMPANY.

38 L. J. C.P. 87; L. R. 4 C.P. 97; 19 L. T. 655; 17 W. R. 261: affirming, [1868] E. R. A. 1585; 37 L. J. C.P. 265; L. R. 3 C.P. 553; 18 L. T. 568; 16 W. R. 1013 (C.P.).

Referred to, *R.* v. *Vaughan*, [1869] E. R. A.; 38 L. J. M.C. 49; L. R. 4 Q.B. 190; 17 W. R. 115 (Q.B.). Followed, *Tyson* v. *Mayor of London*, [1872] E. R. A.; 41 L. J. C.P. 6; L. R. 7 C.P. 18; 25 L. T. 640; 20 W. R. 112 (C.P.).

Company—Notice to take Tenements—Special Act—Lands Clauses Act (8 & 9 *Vict. c.* 18), *s.* 18.—*Obligation of the Company—Action for Mandamus—Damages.*

COMPULSORY PURCHASE.—*The special Act of a railway company enacted, that before the company entered upon or took any tenement under the powers of the Act, they should give to the occupier thereof six months' previous notice of their intention to take; and incorporated the Lands Clauses Consolidation Act* (8 & 9 *Vict. c.* 18):—Held, *first, that a six months' notice of the company's intention to take certain premises given to the occupier thereof in pursuance of that enactment, was a good notice, binding the company to proceed under the Lands Clauses Consolidation Act* (8 & 9 *Vict. c.* 18); *secondly, that such occupier was entitled to maintain an action of mandamus to compel the company to serve a notice to treat under section* 18 *of the Lands Clauses Consolidation Act* (8 & 9 *Vict c.* 18), *and take all steps necessary to assess compensation; thirdly, that in such action the plaintiff might recover more than nominal damages.*

This was an appeal from the decision of the Court of Common Pleas (reported 37 L. J. C.P. 265), upon a special case.

The case is fully set forth in the report below, and the following statement will be found sufficient for the purposes of the present report.

By the Metropolitan Railway (Tower Hill Extension) Act, 1864, s. 13, the defendants were directed to give six months' notice before they entered upon and took any tenement. The said Act also incorporated the Lands Clauses Consolidation Act, 1845. The defendants having given a notice under the said section 13 of their special Act, refused to take the premises or take steps to assess compensation, and the plaintiff (who had acted on the notice and removed) thereupon brought this action, in which he claimed damages and a mandamus calling on the defendants to issue their warrant to the sheriff, to serve a notice to treat, and to take all steps necessary to assess compensation.

The questions for the opinion of the Court were: First, was the plaintiff entitled to an action of mandamus to compel the defendants to issue their warrant to the sheriff; secondly, if not, whether he was entitled to an action of mandamus to compel them to serve a notice to treat; thirdly, whether, under the circumstances he was entitled to more than nominal damages.

The Court of Common Pleas had decided the first and second questions in the affirmative.

Horace Lloyd (*Keane* with him), for the appellants.—This case is very like *Fotherby* v. *the Metropolitan Railway Company* (36 L. J. C.P. 88), and

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one question will be whether that case is good law to its full extent. The defendants were acting under an Extension Act passed in the year 1864, which contained (section 13) a section (similar to sections contained in all the Metropolitan Railway Acts of that year) which provides that before entry the company must give six months' notice. This section was intended merely to prevent the company from taking compulsorily without giving the occupier a reasonable time to get a new house, and not to alter the course of procedure under the Lands Clauses Consolidation Act. A notice under section 13 was given by the company, and no other notice to treat has been given; and the question is, whether the company can be compelled to proceed by an action of mandamus. It is said that they can, because this was a notice to treat, or, even if it be not, that the company at least have exercised an option, and cannot recede, but must give a notice to treat. It is submitted, however, that this contention is erroneous, that this notice is merely a further step, and is only intended to prevent the company from taking for six months after they are bound by a notice to treat to take the premises, and that nothing equivalent to a notice to treat has been given. First, then, is this a notice to treat? Under the Lands Clauses Consolidation Act, ss. 16, 17, and 18, the company is enabled to give all persons entitled to property, which the Act of the company entitles them to take, a notice that the company is willing to treat as to its price. This notice can never be withdrawn, and the owner on the one hand must not increase the value of the land afterwards, and on the other hand he can force the company on, and make them buy. Everything hangs on the notice, and if it be given within time, all the other steps may be taken after the compulsory powers have ceased to exist. Now, the notice given here does not contain what is required under section 18 of the Lands Clauses Consolidation Act, but is expressly under section 13 of the company's Extension Act. By sections 84 and 85 of the Lands Clauses Consolidation Act the company could have taken immediately by paying the purchase-money or giving security, but as this would be a hardship on an occupier, especially in the metropolis, in every Metropolitan Railway Act of the year 1864 there was introduced a section like section 13, which means that although the company has given notice to treat, it must give six months' previous notice before it can enter, and it was intended that the company should still previously give notice to treat under the Lands Clauses Consolidation Act.

[HANNEN, J., referred to *The King* v. *the Commissioners for Improving Market Street, Manchester* (4 B. & Ad. 333 n.). KELLY, C.B., referred to *The King* v. *the Hungerford Market Company* (4 B. & Ad. 3).]

It may be there was an election, but yet this may not be a notice to put the Lands Clauses Consolidation Act in motion. Secondly, assume this notice is an election which cannot be retracted, yet this action of mandamus does not lie. The decision in *Fotherby* v. *the Metropolitan Railway Company* (36 L. J. C.P. 88) was wrong. There cannot be such a right, unless there be a right of action, and no action lies here. *Benson* v. *Paul* (6 El. & B. 273; 25 L. J. Q.B. 274) even decides that a person cannot have an action of mandamus to compel the performance of a contract. It is submitted that there is no right to a mandamus, or, at least, no right to an action of mandamus. The real test is whether or not there is a right of action. The intention was merely to simplify procedure, and obviate the necessity of a person being driven into equity as well as law. In *Marriage* v. *the Eastern Counties Railway Company* (27 L. J. Ex. 185; (House of Lords) 31 L. J. Ex. 73) the plaintiff had a right of action. The fact that replevin and ejectment are expected in section 68 of the Common Law Procedure Act shews it was intended that there should be a right of action to which the mandamus might be an adjunct.

Sir G. Honyman (*W. G. Harrison* with him) was not called on.

KELLY, C.B.—We are of opinion that the judgment of the Court of Common Pleas in this case must be affirmed. It appears that the defendants, under the Extension Act which they have obtained in respect of their railway, were entitled to take the premises in question belonging to or in the occupation of the plaintiff, and that under that Act of Parliament, by the 13th section, they

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from the date of that notice, which was November 17, 1865. It appears that they have since taken no other step whatever; and when we come to look to their Act of Parliament we find, besides this 13th section, which renders it compulsory upon them to give the notice six months before they shall take possession of any premises under their Extension Act, that the Lands Clauses Act is incorporated, and that consequently they are bound under the 18th section of that Act of Parliament to take other steps before, on the one hand, they are enabled to call for particulars of the premises first, and then proof of title, and, on the other hand, the claimant, the owner or occupier of the premises, is enabled to obtain in due course of law the amount of compensation to which he may be entitled. Now, as far as I can see, by this 18th section of the Lands Clauses Act, upon which it was necessary that the defendants should proceed, they must, in the first place, give a notice to treat. That confers certain advantages upon both parties: it entitles the railway company to require particulars of the premises, and it entitles the owner or occupier of the premises to be taken to give those particulars, and also enables him to proceed afterwards to obtain compensation either by arbitration, if the claim be within a particular amount, or by proceeding before a jury, if that shall be the course which the Act shall authorize. It appears that no notice of that kind was given; that the six months elapsed; that the plaintiff, who quitted his premises, gave notice that he had done so, and was about to take or had taken others, and some time after the expiration of the six months, actually did obtain and take possession of other premises, incurred other expenses and resorted to other measures; and that at last, after some very long lapse of time, he commenced this action.

Now, two points are made on behalf of the defendants. In the first place it is contended that the action does not lie at all; that it is an action for damages and also for a mandamus, and that the Common Law Procedure Act, which gives an action for mandamus, and enables in fact the mandamus to be so obtained, does not authorize such action under these circumstances. But upon looking to the case of *Fotherby* v. *the Metropolitan Railway Company* (36 L. J. C.P. 88), we find that it is expressly laid down, in a case which is undistinguishable in principle from the case now before the Court, that where a notice to take premises has been given and the premises have not been taken, and the railway company fail to resort to those proceedings and to take those steps which are necessary in order to enable both parties, the owner of the premises to be taken and the railway company who are to take the premises, to bring the matter to a conclusion, for compensation to be made to the claimant, and for the possession of the premises, with a good title, to be delivered to the railway company,—that in a case of that nature, where the defendants have failed to take the steps which were necessary to bring the matter to a conclusion, such action under the Common Law Procedure Act is maintainable. Lord Chief Justice Erle, in delivering his opinion in that case, after adverting to the facts, which are really quite undistinguishable from those which are now before the Court, observes that, in former times persons in the position of the plaintiff have had recourse to the writ of mandamus issued by the Court of Queen's Bench to enforce their right, but this remedy was fraught with the disadvantages and vexations so concisely and forcibly set out in the Report of the Commissioners upon which the Common Law Procedure Act, 1854, was framed. "The question," he says, "for us to determine is, whether the plaintiff can now avail himself of the remedy of action for a mandamus given in that statute. I am with Mr. Harrison on both the points that he has made. I think that the Common Law Procedure Act, 1854, entitles the plaintiff to bring an action for a mandamus against the defendants for not issuing a warrant when he can shew that he has a right to have the warrant issued, and is personally interested in it, whether he is entitled to any damages for its non-issue or not." Now in this case, in consequence of the notice that has been given, the plaintiff is undoubtedly entitled to call, not for the issuing of a warrant, but to call for the

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first step, whatever it may be, to be taken in order to bring the matter to such a termination, or to such a conclusion as will enable him to obtain compensation and the railway company to obtain possession of the property. And it appears upon the statement of the case that that step is the issuing of a notice to treat, in confirmity with the 18th section of the Lands Clauses Consolidation Act; and that notice not having been issued, we are of opinion that this action for mandamus is maintainable.

A question has arisen as to what is the time at which the notice to treat ought to be issued. It is quite unnecessary for us to determine whether the plaintiff would be entitled to call for it before the expiration of the six months. It has been contended that he is not entitled to call for it until the time for exercising the compulsory powers of the Act shall have expired. But there is here no particular clause limiting the time for the exercise of the compulsory powers of the Act; therefore, if no other step had been taken on the part of the company, he would probably have had such time as was necessary to complete the railway works, or as is allowed by the Act of Parliament for the completion of those works, and that probably would be between four and five years.

It is said that, notwithstanding the notice the company have served, they are not bound to take the premises, and that, at all events, it is optional during the whole time before the powers of the Act of Parliament have expired, to issue the notice to treat or not at their pleasure.

But we are of opinion that they are bound to issue the notice to treat, in point of time, at latest, within a reasonable time after the expiration of the six months; otherwise the plaintiff, who is apprised by the notice that his premises will be taken away from him, and knows that if proper steps are taken on the part of the company they might be taken at the expiration of six months, would be reduced to the alternative of either being turned out of house and home, having no premises wherein to dwell or wherein to carry on his business at the expiration of the six months, or he must proceed to take premises before the expiration of that period. Under these circumstances it is quite clear that, if the company are bound by this notice at all, it is competent to the plaintiff to call upon them to issue their precept if that be the first step, but as the first step to be taken appears to me to be to serve and deliver the notice to treat, they are bound to deliver such notice, and so put the matter in further course of inquiry within a reasonable time after the expiration of the six months.

Then comes the question whether this notice is obligatory upon them at all. Now, ever since the decision of the Court of Queen's Bench, in the case of *The King* v. *the Hungerford Market Company* (4 B. & Ad. 327), it has been held, that, where a railway company, or any other public joint-stock company, are entitled under the compulsory powers contained in their Act to purchase and take possession of premises, if they give a notice of their intention to take those premises they agree to take them, and the notice, in fact, operates as a contract between them and the owners or occupiers of the premises,—an undertaking from them to the owner or occupier of the premises to become the purchaser of the premises in question. That case, which was decided as long ago as the year 1832, has never yet been questioned, and the result is that, considering its effect upon the case now before this Court, the company having given this notice, in November, 1865, of their intention to take the premises at the end of six months, they have agreed to become the purchasers of the premises, and as, under the Lands Clauses Consolidation Act, which is incorporated into their own Act, a number of different steps are to be taken in succession in order to enable the occupier of the premises to obtain compensation, and to enable the company to take possession of the premises which they have thus bound themselves to purchase, they are equally bound, within a reasonable time, to proceed to take all such steps as may be necessary for that purpose; and the case of *The King* v. *the Hungerford Market Company* (4 B. & Ad. 327) having decided that a notice of this kind is obligatory upon a public company, and the case of *Fotherby* v. *the Metropolitan Railway Company* (36 L. J. C.P. 88; L. R. 2 C.P. 188) having decided that an action lies for a breach of that duty or

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obligation, we are of opinion that this action is maintainable, and that the plaintiff is entitled to recover damages by reason of the defendant's not proceeding to take those steps which were necessary to entitle him to compensation and enable him to obtain compensation by force of law, and likewise that he is entitled to a mandamus in the terms prayed.

The particular form of mandamus it is unnecessary to enter upon; but if, as I have observed more than once, the first step to be taken is to be taken by the company, and that first step is the service of a notice to treat in conformity with the 18th section of the Lands Clauses Consolidation Act, the mandamus should be for the delivery and issuing of that notice, and to take all other steps which may be necessary in order to enable the plaintiff to obtain the compensation to which, under the Act of Parliament, he shall turn out to be entitled.

A further question is raised by the appeal which is now before us, and that is whether the plaintiff is entitled to nominal damages only, or to more than nominal damages.

With the amount of damages we have nothing to do; but we are all of opinion that in a case of this nature it may well be that the claimant has sustained much beyond nominal damages, therefore he is entitled to recover in this action whatever damages he may have sustained in addition to the remedy which he prays by the writ of mandamus.

Therefore, the judgment of the Court of Common Pleas is affirmed.

Judgment affirmed.

IN THE COMMON PLEAS. Nov. 5, 1868.

BEARDMORE *v.* WILSON.

38 L. J. C.P. 91; L. R. 4 C.P. 57; 19 L. T. 282; 17 W. R. 54.

Referred to, *Hyde* v. *Warden*, [1878] E. R. A.; 47 L. J. Ex. 121; 3 Ex. D. 72; 37 L. T. 567; 26 W. R. 201 (C. A.); *Bryant* v. *Hancock & Co.*, [1898] E. R. A.; 67 L. J. Q.B. 507; [1898] 1 Q.B. 716; 78 L. T. 397; 46 W. R. 386 (C. A.): affirmed, [1899] A.C. 442 (H.L.); followed, *Lewis* v. *Baker*, [1905] E. R. A.; 74 L. J. Ch. 39; [1905] 1 Ch. 46; 91 L. T. 744 (Ch. D.).

Lease—Lease for Whole of Lessor's Interest operating as Assignment.

LANDLORD AND TENANT.—*A demise for a term of years, if it be by deed, and for the whole term which the lessor has in the premises, operates as an assignment.*

Pollock *v.* Stacey (9 Q.B. Rep. 1033; 16 L. J. Q.B. 132) *commented on.*

Action for non-repair by the plaintiff, as administrator of the reversioner, against the defendant, as assignee of the lessee.

Plea, *inter alia*, denying that the demised premises came to the defendant by assignment. Issue thereon.

The cause was tried, before Byles, J., at the London Sittings after Trinity Term, 1868, when it was shewn in evidence that one William Beardmore had, by a lease made on October 8, 1804, demised the premises for the non-repair of which the action was brought, to one Robert Foot, for a term of sixty-one years, from June 24, 1804, and which therefore expired on June 24, 1865, with the usual covenant to repair on the part of the lessee and his assigns. The said William Beardmore died in 1809, having previously bequeathed his reversion in the said demised premises to one Joseph Beardmore, the legal personal representative of whom was the plaintiff.

In October, 1805, the said R. Foot, the lessee, assigned the premises for the residue of the said term of sixty-one years to one Thorn, and ultimately, in 1829, the said premises and term were vested in the two executors of the will of one Richard Lea,—namely, Joseph Wilson of Highbury and Joseph

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Wilson of Clapham. The defendant was the executrix of the will of the survivor of these two Joseph Wilsons, and, as such, was sought to be made liable as assignee of the term. For the defence, a deed was given in evidence, which was dated May 8, 1829, by which the said J. Wilson of Highbury and J. Wilson of Clapham, as such executors, and at the request of Sarah Bousfield, daughter of the said Richard Lea, demised and leased the said premises, which were the subject of the action, to one Thomas Satchwell for thirty-seven years, from June 24, 1828, and which therefore expired on June 24, 1865, being the same time when the said lease to Foot expired. Consequently, it was contended, on behalf of the defendant, that this deed, though purporting to be a lease, operated in law as an assignment; and that, therefore, there was no term in the surviving Wilson when he died. The learned Judge, being of that opinion, directed a verdict to be entered for the defendant, with liberty to the plaintiff to move to set it aside and to enter it for him; it being agreed that, if the plaintiff was entitled to the verdict, the amount of damages should be referred to a Master.

C. Pollock now moved accordingly for a rule *nisi* to enter a verdict for the plaintiff.—The question is whether the deed of May 8, 1829, being a lease for the whole of the term, operated as an assignment. The question is discussed in the notes to *Spencer's case* (1 Smith's Lead. Cas. 6th edit. 86), as to whether the relation of landlord and tenant can be created between assignor and assignee upon a conveyance of the entire residue of a term without any reversion, either in fact or by estoppel. It is treated there as an open question, and one which had been revived by the decision of the Court of Queen's Bench in *Pollock* v. *Stacey* (9 Q.B. Rep. 1033; 16 L. J. Q.B. 132), where it was held that a demise for the whole of a term will not be deemed an assignment against the intention of the parties, though nothing be left in the party demising. That case is, no doubt, contrary to the opinion of the Court of Exchequer in *Barrett* v. *Ralph* (14 Mee. & W. 348; 14 L. J. Ex. 308); but there, as observed by the Court in giving judgment in *Pollock* v. *Stacey* (9 Q.B. Rep. 1033; 16 L. J. Q.B. 132), there was no decision on the point, as the case was compromised; and also there the parties probably intended an assignment, and not a lease. It is submitted that, in these days, the Court will not treat the deed as operating against the intention of the parties.

Bovill, C.J.—In *Parmenter* v. *Webber* (8 Taunt. 593) it was decided by this Court that an agreement between the plaintiff and the defendant (who was the lessee of two farms), by which "the plaintiff was to have the two farms during the leases of the same, the plaintiff to remain tenant to the defendant during the leases," operated as an absolute assignment of the defendant's interest in the two farms. That was considered to be settled law. And, moreover, in *Sheppard's Touchstone*, 266, note a, it is stated, "If a lessee should intend to make an under-lease, but should demise the premises for as long or a longer term than he had in them, the instrument, though on the face of it purporting to be a demise, would in reality be an assignment." Also in *Wollaston* v. *Hakewill* (3 Man. & G. 297; 10 L. J. C.P. 303), in the year 1841, the same question arose and was carefully argued, and in delivering the judgment of the Court, after time had been taken for its consideration, Chief Justice Tindal, said "The only question is whether if lessee for ninety-nine years demises for a longer term, such demise operates in law as an assignment; and we entertain no doubt but that for a very long period the law has been held that it has such operation and may be so treated in pleading. The resolution of the Court in *Hicks* v. *Downing* (1 Ld. Raym. 99) is in point. So, if lessee for three years assigns his term for four years, or demises the house for four years, he does not by this gain any tortious reversion, and it does but amount to an assignment of his interest." I should, therefore, have thought that the matter was as clearly settled as it could be, and that such a demise as that by the deed of 1829 would amount to an assignment. It is true that the question was sought to be raised again in *Pollock* v. *Stacey* (9 Q.B. Rep. 1033; 16 L. J. Q.B. 132), but in that case it was not necessary for the decision that there should have been any actual assignment or demise, for the action was brought there for use and occupation.

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It was contended in that case for the defendant that a parol letting for the whole of the landlord's interest amounted to an assignment, but there was nothing there which could operate by way of an assignment; and accordingly Lord Denman, C.J., in delivering the judgment of the Court, said, "The parties intended to contract the relation of landlord and tenant, and to pass the right of possession by parol lease. This they were at liberty to do by law, and we therefore carry their lawful intention into effect. If we were to decide that the transaction was an assignment we should at the same time decide that it was no assignment, being by parol only, and we should construe that which was expressed and intended to be a lease to be an assignment merely *ut res pereat*, which is against a known salutary maxim." There the letting could not have operated as an assignment, and if it had been construed as amounting to an assignment it would have passed no right. That case was decided upon the special circumstances attending it, and upon the plaintiff's right to sue for use and occupation; but if it is to be supposed to controvert the old rule of law as settled by the cases of *Parmenter* v. *Webber* (8 Taunt. 593) and *Wollaston* v. *Hakewill* (3 Man. & G. 297; 10 L. J. C.P. 303) this Court is not prepared to assent to that as law. I therefore think that there is no ground for granting any rule.

BYLES, J.—I am of the same opinion. A lease of all the lessor's interest operates as an assignment, at least where it can.

KEATING, J.—I also think that there should be no rule. The case of *Pollock* v. *Stacey* (9 Q.B. Rep. 1033; 16 L. J. Q.B. 132) rests on the peculiar circumstances of that case. There are some expressions in the judgment which appear, it is true, to militate against the previous authorities, but, as has already been pointed out by my Lord, it is not necessary to overrule that case for the decision of the present, since it is capable of being distinguished; but if it were necessary I think we ought to do so.

BRETT, J., concurred.

Rule refused.

IN THE COMMON PLEAS. Nov. 16, 1868.

DUTHIE AND OTHERS *v.* HILTON AND OTHERS.

38 L. J. C.P. 93; L. R. 4 C.P. 138; 19 L. T. 285; 17 W. R. 55.

Referred, *Asfar* v. *Blundell*, [1896] E. R. A.; 65 L. J. Q.B. 138; [1896] 1 Q.B. 123; 73 L. T. 648; 44 W. R. 130 (C.A.): affirming, [1895] 2 Q.B. 196 (Q.B. D.).

Shipping—Freight—Bill of Lading—Freight Payable before Delivery of Goods—Readiness to Deliver.

SHIPPING. B.—*The defendants shipped a quantity of Portland cement on the plaintiffs' ship to be carried from London to Sydney, under a bill of lading by which "freight was to be paid within three days after the arrival of the ship, and before the delivery of any portion of the goods." After the arrival of the ship at Sydney, and before the expiration of such three days, the ship was obliged to be sunk in order to extinguish an accidental fire which had occurred in her hold. When the ship was afterwards raised, the defendants' goods were found to be no longer existing as cement, and the consignees accordingly refused to accept them or to pay freight*:—Held, *that as the plaintiffs were not during the three days after the arrival of the ship at Sydney ready and willing to deliver the goods, they could not recover freight.*

This was an action, brought for the recovery of 86*l.* 12*s.* 6*d.* for freight for the conveyance of goods from England to Australia, and for work done; and,

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by the consent of the parties and a Judge's order, a CASE was stated for the opinion of the Court, of which the following are the material facts:—

The plaintiffs in this action are owners of the ship called the "*John Duthie*," the plaintiff Phillips being her commander. The defendants are cement-manufacturers carrying on business in London.

In September, 1866, the defendants shipped on board the "*John Duthie*," then in the East India Docks, 300 casks of Portland cement, to be forwarded to Sydney, under a bill of lading, of which the following is a copy:—

"Shipped in good order and well conditioned, by C. J. Hilton & Co., in and upon the good ship '*John Duthie*,' whereof is master for this present voyage, J. D. Phillips, and now riding at anchor in the river Thames, and bound for Sydney, to say, 300 casks Portland cement, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of Sydney, New South Wales (the act of God, the Queen's enemies, fire and all and every other dangers and accidents of the seas, rivers and navigation of whatever nature and kind soever excepted), unto Messrs. Rabone, Feez & Co., merchants, of Sydney, or to their assigns, he or they paying freight for the said goods, 86*l.* 12*s.* 6*d.*, as per indorsement, with primage and average accustomed. In witness thereof I, the said master of the said ship, have affirmed to four bills of lading all of this tenor and date, the one of which bills being accomplished, all the others to stand void.

"Dated in London, September 5, 1866.

"JNO. D. PHILLIPS.

"Weight and contents unknown, and not accountable for leakage, breakage, rust or destruction by vermin. Freight to be paid within three days after arrival of ship, and before the delivery of any portion of the goods specified in this bill of lading."

There was no charter-party or other document signed by any of the parties in addition to the above bill of lading.

The "*John Duthie*" sailed from the Port of London on or about September 10, 1866, and arrived at Sydney and anchored there in the harbour on or about December 19, 1866. On the night of the said December 19, and after her arrival in Sydney, a fire was discovered to be raging in the hold. Every endeavour was made by the captain and the crew to arrest the progress of the fire, but without avail. By the advice of Lloyd's agent, and several commanders of other vessels, who had come on board to render assistance, and of the harbour-master, the plaintiff Phillips ordered the ship to be scuttled and sunk, as the only means of extinguishing the fire, and for the purpose of afterwards raising, and thereby saving the ship and cargo. The ship was accordingly scuttled. She was raised on December 24, 1866, and what remained of the cargo was afterwards discharged at Sydney, and the ship was repaired. The fire was accidental.

The defendants' goods were raised in the vessel, but were found to have been rendered useless. The cement no longer existed as cement, it having been hardened into solid masses by the action of the water, a circumstance which also involved the destruction of the casks. On application being made to the consignees, they refused to accept the goods or pay the freight, and the goods were brought back to England by the plaintiffs, in whose possession they remained.

The question for the opinion of the Court was, whether, under the circumstances, the defendants ought to pay the plaintiffs the amount of the freight, or otherwise pay to them remuneration for the conveyance of the goods.

Mellish (*Macnamara* with him), for the plaintiffs.—The plaintiffs are entitled to be paid the freight. The arrival of the ship with the goods at Sydney, and not the delivery of the goods, was made by the bill of lading the only condition precedent to the freight being payable. No doubt, freight is usually only payable on the safe delivery as well as on the arrival of the goods at their port of destination, but this may always be altered by the terms of the bill of lading—*Kirchner* v. *Venus* (12 Moore P.C. 361). In the present case, what is expressly stipulated for in the bill of lading is, that the freight "be paid

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within three days after arrival of the ship, and before the delivery of any portion of the goods."

[MONTAGUE SMITH, J.—Suppose within the three days after the arrival of the ship the shipowners had refused to deliver the goods.]

The defendants perhaps would have had a right of action, but that would not have discharged their liability to pay freight. In *Dakin* v. *Oxley* (15 Com. B. Rep. N.S. 646; 33 L. J. C.P. 115) it was decided that a charterer whose cargo had been damaged by the fault of the master and crew so as upon arrival at the port of discharge to be worth less than the freight, was not entitled to excuse himself from payment of freight by abandoning the cargo to the shipowner.

[BRETT, J.—If this had been the case of an ordinary bill of lading, I suppose you would hardly have contended that the plaintiffs would have been entitled to freight.]

Perhaps not. It is difficult to say when for this purpose the article may be said to cease to exist in specie. In *Garratt* v. *Melhuish* (4 Jur. N.S. 943) the bricks had turned into dust, and yet Vice-Chancellor Stuart decided that the shipper could not resist payment of freight, and that his remedy was only by a cross-action. In 2 *Parson's Maritime Law*, p. 381, the question as to the meaning of the word "specie" is discussed, and several instances are cited by way of illustration.

[BRETT, J.—In the present case the loss under a policy of insurance on the goods would have been a total loss.]

The point here depends entirely on the construction of the bill of lading, and it is submitted that the freight became payable on the arrival at Sydney, though the goods afterwards ceased to exist in specie.

Manisty (*Butt* with him), for the defendants.—There must have been a readiness and willingness on the part of the plaintiffs to deliver the goods to entitle them to be paid the freight; at all events, during the three days during which the freight was payable the plaintiffs were bound to be in a condition to deliver. What was meant by the stipulation in the bill of lading about payment of freight was this, that the defendants, if they did not take, as they might and were entitled to do, the goods within three days after the arrival of the vessel, were still obliged to pay the freight all the same. That did not relieve the plaintiffs from the obligation of being ready and willing during such three days to deliver the goods. Freight is the reward for carriage and delivery, and it cannot be earned where there is a failure in either of these. Suppose the plaintiffs had sold the goods, could it be contended that they might still have sued for their freight, leaving the defendants to the remedy of a cross-action? The contract between the parties was for the carriage and delivery of the goods; and three days were allowed for such delivery, during which time at least the plaintiffs were bound to be ready and willing to deliver.

Mellish, in reply.—The plaintiffs were not bound to be ready and willing to deliver within such three days. The arrival mentioned in the bill of lading means arrival at the port, and not when the goods are ready for delivery.

KEATING, J.—I think the defendants in this case are entitled to our judgment. The case turns on the terms of the bill of lading. Under an ordinary bill of lading the freight would be payable only on the delivery of the goods, which would be within a reasonable time for that purpose. In the present case the parties do not, I think, intend to dispense with a delivery by the shipowner, but they assume it would take three days to deliver, and accordingly three days for that purpose is substituted for a reasonable time. During that time of three days the shipowners must be ready to deliver the goods; but it is clear the plaintiffs were not, as the goods had then become destroyed, and they must be taken to be non-existing. Under these circumstances, therefore, I think the plaintiffs are not entitled to freight.

MONTAGUE SMITH, J.—I am of the same opinion. Freight is generally payable only on the right delivery of the cargo. The bill of lading in this case

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has provided three days for the delivery of the goods. By an accident the goods, which consisted of cement, had before the expiration of that time ceased to exist as cement. I agree that the intention of the parties was that payment of freight was to have taken place at the end of three days after arrival, but that was provided the contract had been fulfilled to the extent of the goods having been carried and ready for delivery during those three days, should the consignees have chosen to have had them then.

BRETT, J.—I think that the bill of lading, though containing unusual terms, ought to be construed according to what would have been the case had it been in the ordinary form, in order to see how far the parties have altered it. Now, ordinarily the shipowner must be ready and willing to deliver the goods before he can demand freight, and he cannot be deemed to be ready and willing to deliver without he is able to do so. We have now to determine how far this has been altered by this bill of lading. It seems to me that during the three days after the arrival of the ship the ordinary contract was existing. If during such three days the consignees tendered the freight, they would be entitled to have the goods, and the shipowners could not during such three days have sued for freight without being ready and willing to deliver the goods; but after that time the ordinary state of things was changed, and the shipowners under this bill of lading would have been entitled to have sued without shewing that they were then ready to deliver the goods. During, however, those three days it was necessary for them to have been ready and willing to deliver, and as they were not so, in this case, they cannot, I think, recover freight.

Judgment for defendants.

IN THE EXCHEQUER CHAMBER. Dec. 1, 1868.

(Appeal from the Court of Common Pleas.)

FUENTES AND ANOTHER *v.* MONTIS AND ANOTHER.

38 L. J. C.P. 95; L. R. 4 C.P. 93; 19 L. T. 364; 17 W. R. 208: affirming, [1868] E. R. A. 1450; 37 L. J. C.P. 137; L. R. 3 C.P. 268; 16 W. R. 900 (C.P.).

Referred to, *Vickers* v. *Hertz*, 1871, L. R. 2 Sc. App. 113 (H.L. Sc.). Explained, *Cole* v. *North-Western Bank*, [1874] E. R. A.; 43 L. J. C.P. 194; L. R. 9 C.P. 470; 30 L. T. 684; 22 W. R. 861 (C.P.): affirmed, [1875] E. R. A.; 44 L. J. C.P. 233; L. R. 10 C.P. 354; 32 L. T. 733 (Ex. Ch.). Referred to, *Johnson* v. *Crédit Lyonnais*, 1877, 2 C.P. D. 224; 36 L. T. 254 (C.P. D.): affirmed, [1878] E. R. A.; 47 L. J. C.P. 241; 3 C.P. D. 32; 37 L. T. 657; 26 W. R. 195 (C. A.); *Oppenheimer* v. *Frazer*, [1907] E. R. A.; 76 L. J. K.B. 276; [1907] 1 K.B. 519 (K.B. D.): partly affirmed and partly reversed, [1907] E. R. A.; 76 L. J. K.B. 806; [1907] 2 K.B. 50; 97 L. T. 3 (C. A.).

Principal and Agent—Factors Act, 5 & 6 Vict. c. 39—Agent intrusted—Revocation of Authority.

PRINCIPAL AND AGENT. I.—*A person, who has been intrusted with goods, or the documents or title thereto, as agent for sale, is not, after his authority as agent has been revoked, "an agent intrusted" within the meaning of the Factors Act, 5 & 6 Vict. c. 39. s. 1, so as to protect a pledge by him to an innocent pledgee.*

This was an appeal from the decision of the Court of Common Pleas, reported 37 L. J. C.P. 137.

It was an interpleader issue to try the question whether certain casks of sherry were the property of the plaintiffs, as against the defendants, under the following circumstances. The plaintiffs consigned the casks, from Spain, to one De Ponte, in London, as their agent, for sale, but afterwards demanded

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them of him, and required him to deliver them up. De Ponte, however, refused to deliver them up unless the accounts between them were settled (such refusal being improper, and nothing in fact being due to him), and afterwards pledged the wine as his own to the defendants, who *bonâ fide* advanced money on the security of dock warrants given them by De Ponte, and had no knowledge of De Ponte having no right or authority to pledge the casks of wine.

The Court of Common Pleas had decided that, as De Ponte's authority had been revoked, he was not "an agent intrusted" within the meaning of the Factors Act, and could confer no title on the defendants, and that the plaintiffs therefore were entitled to the wine.

C. Pollock (*Archibald* with him), for the appellants.—The question depends on the Factors Act, 5 & 6 Vict. c. 39, and is whether, where a factor who has at one time been authorized to act as factor and been intrusted with goods pledges them to a *bonâ fide* pledgee, this transaction can be got rid of by the principal alleging that he had revoked the authority by a demand of the goods, and a wrongful detainer by the factor, who had refused to deliver till certain accounts were settled; such detainer, it may be observed, not presenting the case of a man acting in pure wrong, which might be a denial of his character as factor, although it is admitted that the accounts would not shew a good answer to the principal. Best, C.J., in *Williams* v. *Barton* (3 Bing. 139), Mr. Story in his *Treatise on Agency*, s. 113, n., and Chancellor Kent in his *Commentaries*, 628, point out the evil which existed in our common law, which allowed a concealed person who had intrusted another with property or its documents of title to recover it from an innocent transferee of the person who thus appeared to be the true owner, and protest against its injustice. It was to remedy this evil that the Factors Acts were passed, and if the construction adopted in the Court below be adopted, the Acts have not remedied it. The Court of Common Pleas held that De Ponte had ceased to be agent, and therefore had no power under these Acts. Now, 4 Geo. 4. c. 83. contains no mention of agency, nor does 6 Geo. 4. c. 94, in which Act the word "intrusted" must mean "has been" not "is" intrusted, for it would be mere casuistry to allow a man to evade its provisions by saying that the authority had been revoked, for it would practically become useless. In consequence of certain defects in these Acts pointed out in *Phillips* v. *Huth* (6 Mee. & W. 572; 9 L. J. Ex. 326), *Hatfield* v. *Phillips* (9 Mee. & W. 647; 11 L. J. Ex. 425; 14 Mee. & W. 666), and other cases, the 5 & 6 Vict. c. 39. (on which the appellants rely) was passed, in order to extend the protection afforded by statute. In the 1st section of that Act no doubt the word "agent" is used, but that must mean not merely a person who at the very time of the transaction is agent, but who has been agent, and has obtained the goods or documents as agent, or the statute would really be ineffectual to remedy the evils contemplated; and this is fortified by the use of the words "having been" in the 4th section. The other construction would put a limitation on the Act which does not exist in the common law, which does not allow a person to avail himself of a secret revocation when he has held out another as having authority, of which doctrine *Trueman* v. *Loder* (11 Ad. & E. 589; 9 L. J. Q.B. 165) may be taken as an example. But then it may be said that there was no holding out of authority in the present case; the answer, however, to this is, that the object of the Act was to make the documents of title equivalent to such a holding out of authority. For these reasons, it is submitted that the words "agent who shall be intrusted" mean "person who has been intrusted."

Sir G. Honyman (*Channell* with him), for the respondents, was not called upon.

COCKBURN, C.J.—It appears clear to us[1] that the judgment of the Court of Common Pleas ought to be affirmed. The appellants have admitted that but for the last Factors Act they would have no *locus standi*. By the common law a person could only transfer such property as he had himself; but the Act

(1) Cockburn, C.J., Kelly, C.B., Channell, B., Pigott, B., and Hayes, J.

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excepts the case of an agent who is intrusted with goods or the documents of title thereto. The result of the appellants' contention is, that when a man is no longer agent he is yet to be taken to be an agent within the Act, and when his trust is at an end he is yet to be taken to be intrusted within the Act. It seems to us that the legislature would have put the past tense if this had been the intention, and that it did not contemplate the present case; but however this may be, we must take the words as we find them, and we cannot read them in the sense suggested by the appellants.

Judgment affirmed.

IN THE COMMON PLEAS. Nov. 10, 1868.

(Appeal from Revising Barrister's Court.)

MOON, *appellant;* ANDREW, *respondent.*

38 L. J. C.P. 97; L. R. 4 C.P. 461; 19 L. T. 452; 1 Hop. & C. 75.

Referred to, *Allen* v. *Giddes*, 1870, L. R. 5 C.P. 291 (C.P.); *Hall* v. *Cropper*, 1879, 5 C.P. D. 76 (C.P. D.).

Parliament—Borough Vote—Notice of Objection—Description of Objector —6 & 7 Vict. c. 18. *s.* 17, *Schedule B. No.* 11.

ELECTION LAW. A.—*The parliamentary borough of Penryn and Falmouth consists of six places, viz., the old borough of Penryn, the town of Falmouth and four parishes; and each of these six places has separate overseers, and a separate list. In a notice of objection given to a voter for the borough, the objector, whose name appeared on the said borough list, was described as "on the list of voters for the borough of Penryn":*—Held, *that the notice was good, as it sufficiently pointed out the list on which the objector's name would be found.*

This was a consolidated appeal from the decision of the Revising Barrister for the borough of Penryn and Falmouth.

Notice of objection to the respondent William Andrew was given by the appellant Charles Moon, in the following form:

"To Mr. William Andrew, of Jorhan Street, in the town of Falmouth.

"I hereby give you notice that I object to your name being retained on the list for the town of Falmouth of persons entitled to vote in the election of members for the borough of Penryn.

"Dated August 24, 1868.

"CHARLES MOON, of St. Thomas Street, Penryn,
on the list of voters for the borough of Penryn."

The borough of Penryn and Falmouth, for parliamentary purposes, consists of six several places having separate overseers and rates and separate lists, namely, the borough of Penryn, the parish of St. Gluvias, the parish of Mylor, the town of Falmouth, the parish of Falmouth, and the parish of Budock. In the first of these places there were two separate lists published by the overseers of the poor, one containing the scot and lot voters, and the other the 10*l.* householders and the inhabitant occupiers; the latter list included all the names on the scot and lot list.

The name of Charles Moon, the objector, appeared on both these lists, and his residence also appeared thereon, as mentioned in the notice.

The Revising Barrister held that the description of the objector Charles Moon as being of St. Thomas Street, Penryn, on the list of voters for the borough of Penryn, did not sufficiently describe on which of the six lists of the parliamentary borough of Penryn Charles Moon's name was to be found.

The Revising Barrister therefore decided that the notice was bad, and retained on the list the name of the person objected to.

O'Malley (*Horne Payne* with him), for the appellant.—In the Boundary

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Act of 1832, viz., 2 & 3 Will. 4. c. 64, Schedule O, and the Boundary Act of 1868, 31 & 32 Vict. c. 46, Schedule the First, the parliamentary borough is described as the borough of Penryn and Falmouth, and that is in fact the proper name of the borough, and it comprises *inter alia* the old borough of Penryn. The objector's name not being on any of the parish lists within the parliamentary borough, form No. 11. in Schedule B., 6 & 7 Vict. c. 18. s. 17, could not be strictly followed—*Tudball* v. *the Town Clerk of Bristol* (5 Man. & G. 57; 13 L. J. C.P. 49); *Bright* v. *Devenish* (36 L. J. C.P. 71; L. R. 2 C.P. 102). The description sufficiently indicates the list. In *Gadsby* v. *Warburton* (7 Man. & G. 11; 14 L. J. C.P. 41) it was held to be sufficient for the objector to state in the notice that he was "on the register of voters for the township of Manchester."

[BOVILL, C.J.—"The list of voters for the borough of Penryn" cannot mean the list of voters for the parliamentary borough, because there is no such list.]

No, it can only refer to the old borough list.

The COURT then called on

Atkinson, Serjeant (*Lumley Smith* with him), for the respondent.—The borough of Penryn is treated generally as meaning the parliamentary borough of Penryn and Falmouth; and a voter receiving this notice would understand the expression "Borough of Penryn" as having that meaning, and would therefore not be sufficiently informed on which of the six lists in the parliamentary borough the objector's name would be found. In *Crowther* v. *Bradney* (16 Com. B. Rep. N.S. 563; 33 L. J. C.P. 70), the objector described himself as "on the list of persons entitled to vote in the election of a member for the borough of Kidderminster, in respect of property occupied in the parish of Kidderminster"; and as there were two lists for the borough, one in respect of property occupied within the borough, and the other in respect of property occupied within the foreign of the parish, the objection was held to be bad for not specifying the list on which the objector's name would be found.

[BOVILL, C.J.—There was nothing there to describe the list, and it was impossible to see from the notice on which list the objector's name was.]

It is submitted that the present notice equally fails to describe the list. Moreover, it appears from the case that, in the old borough of Penryn, there are two lists, and the notice does not indicate on which of them the objector's name is.

[BYLES, J.—That is not the point raised on this appeal. The objection to the notice was, that it did not sufficiently describe on which of the six lists of the parliamentary borough the objector's name was to be found.]

O'Malley was not called on to reply.

BOVILL, C.J.—It seems to me that the notice is sufficient. It appears very clearly that when the expression "the borough of Penryn" is used it is sometimes in one sense and sometimes in another. In the early part of the notice the objector objects to the voter's name being "on the list for the town of Falmouth of persons entitled to vote in the election of members for the borough of Penryn," and it is plain that, in that part, the expression "the borough of Penryn" is used in the sense of the parliamentary borough of Penryn and Falmouth. Afterwards the objector, at the end of the notice, describes himself as "on the list of voters for the borough of Penryn." Now, in the first place, there is no list for the parliamentary borough, but there is one for the old borough of Penryn; and finding how, in the early part of the notice, the objector speaks of the voter's name being on the list for the town of Falmouth, I should have understood by the description "on the list of voters for the borough of Penryn" that the objector was describing the list for the old borough of Penryn, and not the parliamentary borough. Manifestly the expression "the borough of Penryn" is used in this notice in two senses; and I think it is used at the end of the notice in the sense of meaning the old borough, and in that sense the description is abundantly sufficient; and therefore the decision of the Revising Barrister must be reversed.

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BYLES, J.—I am of the same opinion. I think the description "borough of Penryn," at the end of the notice, means the old borough, and is the description which the statute requires.

KEATING, J., and BRETT, J., concurred.

Decision reversed.

IN THE COMMON PLEAS. Nov. 24, 1868.

(Appeal from Revising Barrister's Court.)

CUTHBERTSON, *appellant;* BUTTERWORTH, *respondent.*

38 L. J. C.P. 98; L. R. 4 C.P. 523; 21 L. T. 140; 17 W. R. 465; 1 Hop. & C. 188.

Referred to, *Smith* v. *Lancaster*, [1870] E. R. A.; 39 L. J. C.P. 33; L. R. 5 C.P. 246; 21 L. T. 492; 18 W. R. 170 (C.P.); *Thompson* v. *Ward*, [1871] E. R. A.; 40 L. J. C.P. 169; L. R. 6 C.P. 327; 24 L. T. 679 (C.P.).

Parliament—Borough Vote—House—Building—2 Will. 4. c. 45. s. 27—Room in a Set of Chambers.

ELECTION LAW. A.—*The voter occupied as tenant a room in a set of chambers, which, though severed from and having no direct communication with the other room of the set, communicated with a vestibule common to both rooms. The door of the vestibule opened on the landing of a public staircase, and the voter had a right of way over the vestibule, and in common with his landlord, who occupied the other room of the said set, had control over the door communicating with the said landing:*—Held, *that the subject of the voter's occupation was not a house or building within the meaning of* 2 *Will. 4. c. 45. s. 27, and therefore the voter was not entitled to the borough franchise in respect of such occupation.*

This was an appeal from the decision of the Revising Barrister for the city of London.

The appellant duly objected to the name of the respondent being retained on the list of persons entitled to vote for the city of London, in respect of the occupation of chambers in the Inner Temple.

The material facts, as stated in the case, were as follows: The landlord of the respondent rented a set of chambers in the Inner Temple. This set of chambers formed part of one of the floors of the building in the Temple, which part was so structurally severed from the rest of the buildings as to be of itself a house. This set of chambers consists of two rooms and a vestibule; each room is severed from the others, there being no direct communication between the two. Each communicates by its own door with the vestibule, which communicates with the landing on a public staircase by a door. The subject of the respondent's occupation was one of these rooms. The respondent had occupied for the statutory period, exclusively and as sole tenant, this room, over the door of which, communicating into the vestibule, he had exclusive control. Under or by virtue of his tenancy he had a right of way over the vestibule and in common with his landlord, who occupied the other room, perfect control over the door communicating with the landing, so as at all times to command free ingress and egress to and from the room which he occupied as aforesaid from and to the said landing. The respondent was a barrister-at-law; and he occupied the said room for the sole purpose of transacting the business which came to him in his pursuit of the profession of a barrister, and not for a dwelling-house.

It was objected that, having regard to the above facts, the subject of occupation of the respondent was not sufficient in kind to qualify him as tenant within any of the qualifications enumerated in the 27th section of the Act, 2 Will. 4. c. 45.

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The Revising Barrister held, upon the above facts, that the respondent occupied as tenant a sufficient tenement to entitle him, if duly registered, to vote in the election of members for the City of London within the meaning of the 27th section of the said Act.

Prentice appeared for the appellant, but the COURT called on—

Underdown, for the respondent, to support the decision of the Revising Barrister.—It is submitted that the respondent was entitled to be registered as occupying as tenant "a building" within the meaning of 2 Will. 4. c. 45. s. 27. He had the exclusive occupation of the room in question, and exclusive control of its door, which opened upon the common vestibule. A room in a factory, approached by a common staircase leading from the entrance to the factory, or by a separate outside staircase, or by a door opening into the yard, has been held to be a building within the meaning of the Act—*Wright* v. *the Town Clerk of Stockport* (5 Man. & G. 33; 13 L. J. C.P. 50)—and chambers in the Inns of Court are recognized as separate buildings in *Henrette* v. *Booth* (15 Com. B. Rep. N.S. 500; 33 L. J. C.P. 61). That case and *Bryan Kearney's case* (*Alcock's Registry Cases*, 22) shew that a room may be a house for the purpose of conferring the franchise where there is a sufficient severance of it from the rest of the building. It is submitted that the voter in the present case occupied a separate tenement, and not merely an apartment or lodging in the house of another, as was the case of the claimant in *Wilson* v. *Roberts* (11 Com. B. Rep. N.S. 50; 31 L. J. C.P. 78).

BOVILL, C.J.—No case has been cited which goes at all near to establish that a room like this in a set of chambers is a house. It does not come within the principle of those cases which have decided that chambers with one outer door, and structurally used as a separate dwelling, may be considered a house within the meaning of the Act of Parliament; but it seems to me that the very description of the room in the present case, as being part of a set of chambers, shews that it is essentially part of a house only, and not a house or building within the meaning of the statute.

BYLES, J.—I am of the same opinion.

KEATING, J.—I am of the same opinion.

BRETT, J.—This room is not a house within the meaning of 2 Will. 4. c. 45. s. 27, nor is it a part of a house separately rated so as to come within the Representation of the People Act, 1867.

Decision reversed.

IN THE COMMON PLEAS. Jan. 25, 1869.*

(Appeal from Revising Barrister's Court.)

TROTTER, *appellant*; WATSON, *respondent*.

38 L. J. C.P. 100; L. R. 4 C.P. 434; 19 L. T. 785; 17 W. R. 330; 1 Hop. & C. 216.

Parliament—County Vote—Lease of unexpired Term of Sixty Years— 30 & 31 *Vict. c.* 102. *s.* 5.

ELECTION LAW. A.—*By an agreement made between the owners of an estate, the trustees of a building society, and one C., the land was to be security for the advance by C. of moneys to be expended in building cottages thereon, and the owners were to grant to the occupiers of the cottages leases for ninety-nine years on the request of C., with the consent of the trustee. By a subsequent agreement between the trustees and the claimant who occupied one of the cottages so built, it was agreed that on his paying certain moneys*

* This case was decided in Hilary Term, but is inserted here with other Registration Cases for the sake of convenience.

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by instalments, and satisfying all the terms of the agreement, and the rules of the society, the trustees should procure him a conveyance for ninety-nine years. Only a part of the money had been paid; no request for a lease had been made by C., and none had ever been granted:—Held, *that the claimant was not entitled to the county franchise given by the* 30 *&* 31 *Vict. c.* 102. *s.* 5. *as lessee or assignee for the unexpired residue of a term originally created for not less than sixty years.*

This was a consolidated appeal from the decision of the Revising Barrister for the Northern Division of the county of Durham.

CASE.

At a Court for the revision of the list of voters for knights of the shire, held on September 15, 1868, at Jarrow, in and for the northern division of the county of Durham, and by adjournment on October 7, 1868, at the city of Durham, in and for the said northern division, before me, one of the Barristers appointed to revise the list of voters for the said division. George Stillman duly objected to the name of Robert Anderson being retained in the list of voters for the township of Hedworth Monkton and Jarrow, in the said northern division of the county of Durham.

The name and qualification of the said Robert Anderson appeared on the list of claimants published by the overseers of the said township in the subjoined form:

Christian Name and Surname, &c.	Place of Abode.	Nature of Qualification.	Street, Lane, &c.
Anderson, Robert.	16, Clayton Street, Jarrow.	Leasehold House.	16, Clayton Street, Jarrow.

The following facts were established by the evidence: By memorandum of agreement, dated May 1, 1863, and made between Sir Walter Charles James, Bart., and Dame Sarah Caroline his wife of the first part; John M'Intyre, George Sharp, Robert Armstrong and William Bell of the second part, and John Clayton of the third part; and which said memorandum is to be taken as part of this case, after stating that certain parcels of ground part of the Jarrow Grange estate, over which the said Dame Sarah Caroline James had an absolute power of appointment, had been laid out as sites for 100 workmen's dwelling-houses, and that it was intended that the said 100 dwelling-houses should be built by means of the monthly contributions of 100 workmen, who should be selected by the said parties thereto of the second part, and that in the mean-time, until such contributions should have been fully paid up, such sum and sums of money, not exceeding in the whole 7,000*l.*, as should be required for the completion of the said dwelling-houses over and above the contributions from time to time accruing, should be advanced by the said John Clayton, and should be repaid to him, with interest after the rate of 5*l.* per cent. per annum out of such contributions. And that a lease for ninety-nine years from that day, at the rent of 9*s.* 6*d.* per annum, should be granted to each of such workmen of the site of each such dwelling-house when and so soon as the said John Clayton, with the consent in writing of the said parties thereto of the second part, should require the same to be granted. It was declared and agreed that in the meantime and until such leases should be granted, the said parcels of land and the houses and buildings which should from time to time be erected thereon, should be a security to the said John Clayton for so much and such part of the sum and sums of money which should be advanced by him from time to time as aforesaid as should from time to time remain due and unpaid, with interest thereon at the rate of 5*l.* per cent. per annum, and that such further instruments necessary to give effect to such security should be executed on the request of the said John Clayton. And the said several persons parties thereto of the second part agreed to superintend the erection of the said

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dwelling-houses, collect the contributions of the workmen for whom the same were intended to be built, and pay the amount monthly to the said John Clayton until the amount of his advances should be repaid, with interest after the rate of 5*l*. per cent. per annum.

Leases of six or seven of the said sites, with dwelling-houses erected thereon, had actually been granted to workmen who had fully paid to the said parties of the second part the sums agreed on between them as the price of such sites and houses respectively, which sums had been handed over by the said parties of the second part to the said John Clayton, in part payment of his said loan and interest. The remainder of the sites had been sold by the said parties of the second part to workmen, under agreements in the form and of the tenor and effect of the agreement between the said parties of the second part and the said claimant, Robert Anderson, as next hereafter mentioned; but leases of the same have not yet been actually granted. At the date of these agreements respectively the houses were in some cases not built, and in other cases only partially so. Where not actually built they were subsequently completed by the respective purchasers, the cost being defrayed out of money which was part of the 7,000*l*. hereinbefore mentioned, and agreed to be advanced by the said John Clayton, and which said sum has been partly repaid by the contributions aforesaid.

By memorandum of agreement, dated July 18, 1864, and made between the said John M'Intyre, William Bell, George Sharp and Robert Armstrong, therein described as trustees to the Jarrow Building Company (and who and their successors are thereinafter referred to as "the said trustees"), of the one part, and the said claimant, Robert Anderson (thereinafter referred to as "the said purchaser") of the other part (and which said memorandum is to be taken as part of the case), the said trustees agreed to sell and the said purchaser agreed to purchase the leasehold piece of ground, dwelling-house and premises situated in No. 16, Clayton Street, on the Jarrow Grange estate aforesaid, and more particularly described by the plans and specifications already agreed to by the said purchaser to be held for a term of ninety-nine years, subject to an annual ground-rent of 9*s*. 6*d*., to be paid thereout to the said Sir Walter Charles James, or his agents, at or for the price or sum of 74*l*. And it was agreed that the said purchase-money of 74*l*. should be paid by fortnightly instalments of 5*s*. 6*d*., being after the rate of 10*l*. per cent. per annum on the contract price of each house, 5*l*. per cent. per annum to be deducted therefrom for interest on the debt standing against the said purchaser at the commencement of each twelve months, the remainder to be applied to the reduction of the debt standing against the said purchaser at the commencement of each succeeding twelve months. And if the purchaser should neglect or refuse to make any of the said fortnightly payments when the same respectively should become due, he should forfeit and pay to the said trustees as and for liquidated damages the sum of 3*d*. for the first neglect or default, 6*d*. for the second, 1*s*. for the third, and so on, the sums increasing in the same ratio for each succeeding neglect or default until such sums should be equal to the amount the said purchaser had paid to the said trustees as regular subscriptions. And that, if at any time such should be the case, the said trustees should have full power to enter on the said ground, house and premises, and hold the same as if the now reciting agreement had not been made, and forcibly to expel the said purchaser without any ejectment or other legal process, and to plead the now reciting agreement as conclusive evidence of leave and licence. And it was also agreed that the said purchaser should have possession of the said premises from and after the signing of the now reciting agreement, and should pay all ground-rent, taxes, rates, cesses and outgoings in respect thereof. And that the said purchaser, his heirs and assigns, should keep and maintain the said dwelling-house and premises in good condition and repair. And that until all moneys which might be due or payable to the said trustees, or their successors, under the now reciting agreement, or the rules of the Jarrow Building Company aforesaid, should have been duly satisfied, the said trustees should have full

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power to insure the said dwelling-house and premises against loss or damage by fire, in such name and for such sums as they might think necessary; and all moneys which the said trustees should pay in so doing should be repaid by the said purchaser on demand, and should until and in default of payment thereof be a charge on the said premises. And that the said purchaser should not sell or transfer his interest in the said house and premises to any person or persons whomsoever without the consent or approval of the said trustees. And that within three months after all the moneys due or payable under the now reciting agreement, and the rules of the Jarrow Building Company aforesaid had been duly satisfied, and provided the said purchaser should have observed and performed all and every the conditions and agreements therein contained, and also all and every the rules and regulations for the time being of the said company, and on his part to be observed and performed, the said trustees, or their successors, should at the request and costs of the said purchaser give him a proper conveyance in duplicate of the said leasehold premises, subject to the said annual ground-rent and the powers for raising the same. Upon the execution of this agreement the claimant was let into possession of the said dwelling-house and premises therein comprised. Since the making of the contract he has duly paid all instalments according to the contract, and has observed all the rules and regulations of the said building company. All the houses referred to in the firstly-recited agreement had been erected on the said land by the said trustees, money having been advanced from time to time for that purpose by the said John Clayton to the amount of 7,000*l*., which amount, together with the monthly contributions of the said workmen from time to time made, covered the whole cost to the trustees of the erection of the said houses. Since the said houses were built the agreed ground-rent of 9*s*. 6*d*. has been yearly paid by each individual purchaser to Sir Walter James in respect of each house.

Out of the monthly payments of the persons for whom the dwelling-houses were built, the interest upon the said sum of 7,000*l*., together with part of the principal, has been repaid, so that only the sum of 5,000*l*. was, on July 31, 1867, due to the said John Clayton for principal and interest on account of his said loan. Since that date the amount due to him had at no time exceeded that sum, and on July 31, 1868, and at the time of the revision, was less. The part of the said parcels of ground mentioned in the said agreement of May 1, 1863, and the houses built thereon not included in the leases already granted, were, on July 31, 1867, and have since continued, a sufficient security for the amount due to Mr. Clayton for principal and interest. The aggregate amount of the respective balances of purchase-money and interest due and unpaid from the respective purchasers to the said trustees for sites and houses not yet actually leased has always exceeded the said amount due at any time to Mr. Clayton. With respect to many of the said sites and the houses thereon, the annual value of the same, after deducting interest at 5*l*. per cent. on the unpaid balance of purchase-money, the ground-rent of 9*s*. 6*d*. and insurance, appeared to be less than 5*l*., and I accordingly disallowed the claims of the purchasers of such sites and houses to be registered. With respect to others of the said sites, the houses thereon, after being built by the trustees, had been added to and improved by the expenditure of capital and labour thereon by the respective purchasers thereof, among whom was the claimant, Robert Anderson. House property in the neighbourhood had also generally increased in value; and I found as a fact that, after deducting from the annual value of the said claimant's house interest at 5*l*. per cent. upon the balance of purchase-money due on July 31, 1867, to the trustees, the agreed ground-rent of 9*s*. 6*d*., the cost of repairs and premium for fire insurance, there remained 5*l*. clear. If the whole of the fortnightly instalments of 5*s*. 6*d*. was to be considered as an annual charge upon the said house, then its clear yearly value was less than 5*l*. If the yearly value of the claimant's estate and interest is to be measured by and consist of only a fair rate of interest (having regard to the nature of the property) upon so much of the instalments of price as consist of principal paid

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to the trustees, plus any increased value by reason of improvements made by the purchaser and any general rise in the value of house property, but excluding the difference between the contract price and the amount thereof actually paid, then the clear annual value would be less than 5*l*.

Upon these facts it was contended on behalf of the objector, first, that the claimant was not entitled either as lessee or assignee to the said house for the unexpired residue of any term originally created for a period of not less than sixty years, so as to entitle him to be placed on the register; secondly, that the clear value of the claimant's interest (if any) in the said house was less than 5*l*. over and above all rents and charges payable out of or in respect of the same.

On the other hand, it was contended on behalf of the claimant, first, that although no term had been actually created at law, yet there was a valid and binding contract partly performed between Sir Walter and Lady James, their mortgagee, Mr. Clayton, and the trustees of the building company for the granting of leases to their nominees of sites and houses thereon for ninety-nine years from May 1, 1863, and that he (the claimant) having contracted with the trustees that he should be named as one of such lessees, and having paid part of the purchase-money and been let into possession of the premises to be demised to him, was entitled in equity to have the lease granted to him on Mr. Clayton's debt being paid off, and was therefore *cestui que trust* in actual possession, and had a sufficient equitable estate as lessee for an unexpired term of not less than sixty years. Secondly, that Mr. Clayton's mortgage-debt must be treated as apportioned upon and borne by the various unleased sites and the houses thereon in proportion to the balance of price remaining due and unpaid for the same, and that a Court of equity would so apportion such debt. Thirdly, that, deducting together with ground-rent, fire insurance and cost of repairs, interest at 5*l*. per cent. upon such unpaid balance of price, the yearly value of the claimant's estate and interest in the house in question was not less than 5*l*. I was of opinion that the arguments on behalf of the claimant were sound, and allowed his name to remain on the register.

The questions for the Court are, first, whether the claimant had such an estate or interest in the house and premises in his possession as to entitle him to be registered? Secondly, whether the annual charge upon his premises in respect of the balance of price unpaid to the trustees of the building company, or in respect of Mr. Clayton's mortgage-debt, was properly held not to exceed 5*l*. per cent. upon such unpaid balance of price. Thirdly, is the yearly value of the claimant's equitable leasehold estate and interest (if any) in the site and the house thereon to be estimated as consisting only of interest upon the part of the price paid on July 31, 1867, to the trustees *plus* any increased value of the premises owing to the improvements made by the claimant and any general rise in the value of house property, but excluding the balance of the principal of the purchase-money constituting the difference between the contract price and the portion thereof paid? Fourthly, or is the yearly value of the claimant's said estate and interest to be estimated at the whole present yearly value of the premises subject to the agreed ground-rent and fire insurance, upon whatever facts such value depends, less interest at 5*l*. per cent. on the unpaid balance of the agreed purchase-money?

If the Court should be of opinion that the first, second and fourth of these questions should be answered in the affirmative, and the third in the negative, then the name of the claimant is to remain upon the register. But if the Court decide any one or more of these first, second and fourth questions in the negative, or the third in the affirmative, then the name of the claimant is to be erased from the register.

Manisty (*Lovesy* with him), for the appellant.—The claim is made under the 30 & 31 Vict. c. 102. s. 5[1], which gives the county franchise to any person

(1) 30 & 31 Vict. c. 102. s. 5. "Every man shall, in and after the year 1868, be entitled to be registered as a voter, and, when registered, to vote for a member or members to serve in parliament for a county, who is qualified as follows; (that is to say,)

"1. Is of full age, and not subject to any legal incapacity, and is seised at law or in

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entitled as lessee or assignee for the unexpired residue of any term originally created for not less than sixty years, of a clear yearly value not less than 5*l.* over and above all rents and charges payable in respect thereof. It is submitted, first, that the claimant has no such estate legal or equitable as is required by the section, but has at most an inchoate right by contract, which right may or may not become a perfect one on a contingency; secondly, that even if there be such a term as is required, yet the claimant is not the lessee or assignee of that term; and, thirdly, that the value is not sufficient. And as respects the first point, it is contended, first, that there must be a legal interest; secondly, that if an equitable interest is enough, still there must be a legal term created as a foundation for it; thirdly, that even if an ability to get a lease in equity would be sufficient, yet here the claimant could not get one, and indeed may never be in such a position, for till he has paid off the 74*l.*, which would take years, and fulfilled the rules, he is not to have a lease; and, in truth, not even then, for the whole sum advanced must be paid off before Clayton could be compelled to require Sir W. and Lady James to grant a lease.

[*Joshua Williams.*—The contention on behalf of the claimant will be that he is mortgagor in possession, and therefore entitled under the 6 Vict. c. 18. s. 74.]

It will be observed that in the 30 & 31 Vict. c. 102. s. 5. the franchise is given to persons "seised at law or in equity" of freeholds, &c., but that nothing is said as to equitable rights in leaseholds. That difference in the words as to freeholds and leaseholds shews that an inchoate interest giving neither a legal nor an equitable interest is not sufficient. The words of the Irish Reform Act, 2 & 3 Will. 4. c. 88. s. 5, are nearly identical with those of the 2 Will. 4. c. 45. ss. 19, 20, which correspond with the new Act, 30 & 31 Vict. c. 102. s. 5, and in *Brohan's case (Carlow Election)* (K. & Omb. 411) the House of Commons held that no person is entitled until a lease be *bonâ fide* executed and delivered to the voter.

[KEATING, J.—In *Gainsford* v. *Freeman* (35 L. J. C.P. 92) it seems to have been assumed that an equitable interest would do.]

That was a cause of a *cestui que trust*. In *The King* v. *Geddington* (2 B. & C. 129), decided under the 9 Geo. 1. c. 7. s. 5, one of the Poor Law Settlement Acts, where a man bought an estate, the price payable by two instalments, the conveyance to be made on payment of both, but possession to be given on payment of the first, and he paid the first and was let into possession, it was held that he had not acquired any equitable estate; and in *The King* v. *Llantillio Grossenny* (5 B. & C. 461), the Court gave a similar decision, the only difference between the two cases being that in the latter case there was only a parol agreement and the whole money was paid afterwards.—(He was then stopped.)

Joshua Williams (of the Chancery bar), for the respondent.—When a contract of purchase is signed, in equity the estate becomes the estate of the vendee, and the vendor has only a lien for the amount of purchase-money not paid. In *Sugden's Vendors and Purchasers*, 146, 13th edit., it is laid down that, "Equity looks upon things agreed to be done as actually performed, consequently when a contract is made for sale of an estate equity considers the vendor as trustee for the purchaser of the estate sold, and the purchaser as a trustee of the purchase-money for the vendor"; and it is said in a note, "A lessee insured his house, the lease expired, and he contracted for a new lease. Then the house was burnt; and the office insisted that at the time of burning

equity of any lands or tenements of freehold, copyhold, or any other tenure whatever, for his own life, or for the life of another, or for any lives whatsoever, or for any larger estate, of the clear yearly value of not less than 5*l.* over and above all rents and charges payable out of or in respect of the same, or who is entitled, either as lessee or assignee, to any lands or tenements of freehold or of any other tenure whatever, for the unexpired residue, whatever it may be, of any term originally created for a period of not less than sixty years (whether determinable on a life or lives or not), of the clear yearly value of not less than 5*l.* over and above all rents and charges payable out of or in respect of the same:

"Provided that no person shall be registered as a voter under this section unless he has complied with the provisions of the 26th section of the Act of the 2 Will. 4. c. 45."

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it was not the plaintiff's house: but it was held otherwise.—*Printed Cases*, D.P. 1730. Neither a contract, nor even a mere conveyance while the seller remains in possession, will give a right of voting"—*Audry* v. *Lewis* (2 Jur. N.S. C.P. 164).

[BOVILL, C.J.—That was an insurance case, and the only question was whether there was an insurable interest, not whether there was an estate.]

In *Paine* v. *Meller* (6 Ves. 349), where it was held that a purchaser was bound to complete though the premises were burnt, the Lord Chancellor says, "If the party by the contract has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his, chargeable as his, capable of being incumbered as his; they may be devised as his, they may be assets, and they would descend to his heir."

[BOVILL, C.J., and BYLES, J.—There the estate existed which was contracted to be sold.]

In *Seton* v. *Slade* (7 Ves. 273), the Lord Chancellor says, "But there is another circumstance. The effect of a contract for purchase is very different at law and in equity. At law the estate remains the estate of the vendor; and the money that of the vendee. It is not so here. The estate from the sealing of the contract is the real property of the vendee. It descends to his heirs, it is devisable by his will, and the question whose it is, is not to be discussed merely between the vendor and vendee, but may be to be discussed between the representatives of the vendee." Lord St. Leonards does not cite in his book the cases cited by the other side, because perhaps he thought that they depended on the words of the statute 9 Geo. 1. c. 7. The claimant's possession has the protection of the Courts of equity, though he cannot call for the lease till the money is paid; and as he has a contract but has not paid, he is a mortgagor in possession, or a *cestui que trust*. In *Holroyd* v. *Marshall* (10 H.L. C. 209; 33 L. J. Ch. 193) it was held by the House of Lords that a contract to substitute future-acquired machinery in equity transfers the property therein when acquired; and the Lord Chancellor, in delivering judgment, says, "The question was, whether as to the machinery added and substituted since the date of the mortgage, the title of the mortgagees or that of the judgment creditor ought to prevail. It was admitted that the judgment creditor had no title as to the machinery originally comprised in the bill of sale, but it was contended that the mortgagees had no specific estate or interest in the future machinery. It was also admitted that if the mortgagees had an equitable estate in the added machinery, the same could not be taken in execution by the judgment creditor. The question might be easily decided by the application of a few elementary principles long settled in Courts of equity. In equity it is not necessary for the alienation of property that there should be a formal deed of conveyance. A contract for valuable consideration by which it was agreed to make a present transfer of property, passed at once the beneficial interest, provided the contract was one of which a Court of equity would decree specific performance. In the language of Lord Hardwicke, the vendor became a trustee for the vendee, subject of course to the contract being one to be specifically performed. And this was true, not only of contracts relating to real estate, but also of contracts relating to personal property, provided that the latter were such as a Court of equity would direct to be specifically performed. A contract for the sale of goods, as, for example, of 500 chests of tea, was not a contract which would be specifically performed, because it did not relate to any chest of tea in particular; but a contract to sell the 500 chests of a particular kind of tea which 'are now in my warehouses in Gloucester,' was a contract relating to a specific property, and which would be specifically performed. The buyer might maintain a suit in equity for the delivery of a specific chattel, when it was the subject of a contract, and for an injunction (if necessary) to restrain the seller from delivering it to any other person. The effect in equity of a mere contract, as amounting to an alienation, might be illustrated by the law relating to the revocation of wills. If the owner of an estate devised it by will, and afterwards contracted to sell it to a purchaser, but died before the contract was performed, the will

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was revoked as to the beneficial or equitable interest in the estate, for the contract converted the testator into a trustee for the purchaser; and, in like manner, if the purchaser died intestate before performance of the contract, the equitable estate descended to his heir-at-law, who might require the personal representative to pay the purchase-money." It is laid down in *Dart's Vendors and Purchasers*, 161, 3rd edit., that, "from the time of the owner of an estate having entered into a binding agreement for its sale, he holds the same in trust for the purchaser, subject to payment of the purchase-money; and if the agreement be binding on the purchaser, he, on the other hand, is, as a general rule, under a personal equitable as well as legal liability to the vendor for payment of the purchase-money. And the agreement equally binds the estate, although the vendor be a trustee or a mere donee of a power of sale instead of absolute owner." And here the trustees are donees of a power. A contract to give a fee passes the fee; the same is the case of a contract to give a term; in each case if the vendee enters subject to payment of money, he is mortgagor in possession.

[BOVILL, C.J.—In this case the subject-matter is not created. Again, the conditions are not simply as to payment of money; and further, the claimant is not to have a lease till Clayton asks for it, and he is not paid off.]

The amount may be apportioned for registration purposes—*Moore* v. *Carisbrook* (12 Com. B. Rep. 661; 22 L. J. C.P. 64). In the present case the other conditions are merely subsidiary to the payment of the money; and if the matter be substantially a mortgage it is considered one in the Courts of equity. Clayton's interest is that of mortgagee, and the claimant is mortgagor in possession. Clayton is bound to cause a lease to be granted when he is paid off, and as the condition is a money one, the equitable estate as mortgagor in possession of the term passed to the claimant. In *Nunn* v. *Fabian* (35 L. J. Ch. 140) there was a parol agreement to grant a lease. The intended lessee entered and paid rent, and it was held that he was entitled to specific performance. Here, if the claimant paid 74*l*. he would have a right to a lease, and this being so, he has an estate in equity subject to be determined in certain events. The trustees have a right to 74*l*. Clayton has a right to 7,000*l*. The rest of the estate consists of a legal estate in the Jameses subject to the equitable estate of the claimant. In *Reddin* v. *Jarman* (16 L. T. 449) there was a condition as to building, not merely as to payment of money. A person who enters into a contract of sale with the owner of an estate, even if he is not to have a conveyance till payment, still has an equitable estate, and the vendor has only a lien; and if the vendor has only a lien the other must have an equitable interest.

BOVILL, C.J.—The question is whether the claimant is entitled to vote under section 5. of the Representation of the People Act, 1867, which gives the county franchise to every person of full age and not subject to any legal incapacity, "who is entitled either as lessee or assignee . . . . for the unexpired residue . . . . of any term originally created for a period of not less then sixty years" of a certain yearly value. The statute draws a distinction in the first place between the case of a person seised for life or lives or any greater estate and the case of a person entitled to a term of years, the words in the first part of the section relating to the first case, being "seised at law or in equity," whereas in the latter part of the section, relating to terms of years, nothing is said as to equitable estates. But, giving a liberal construction to the section, and assuming that an equitable interest in a term of years of the requisite length and value will do, the question is, does this case come within the words of the section? Mr. Williams has contended that there is an equitable estate in the claimant, and has cited various propositions of equity to the effect that where there is an agreement for the sale of an estate equity considers that the estate has passed to the vendee, and no doubt he has an equitable estate in such a case, but this case is without those principles. Here the freehold was vested in Sir Walter and Lady James, who for the purposes of this case may be said to appear as freeholders, and any other interests must spring from them; but they have not agreed with the claimant, who is no party to the agreement with them, and they are only bound to the trustees of the society and Clayton. By this

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the first agreement Clayton is to advance 7,000*l.*, and the Jameses create a charge on the property to that extent, and Clayton to that extent is mortgagee. The money so advanced is to be spent in certain houses built according to approved plans, of which houses the Jameses agree to grant leases on the request of Clayton, with the consent in writing of trustees. By the second agreement, made between the trustees and the claimant, the trustees agree in substance for the creation of a term of ninety-nine years; but before the claimant is entitled to have a lease he must have paid all money due and observed the conditions of the agreement and the rules of the society. At this time his position is this: the money is not paid, and even assuming (though there is nothing to shew it) that the rules have been observed, still Clayton has not asked for nor have the trustees given their consent to a lease to the claimant, and therefore no term has been created or is in existence. It is not indeed disputed that there is no legal term in existence, but it is said that there is an equitable one. I am quite at a loss to see how this can be when the time has not arrived for the granting of the lease to the claimant, and when there are various conditions to be performed before he can be entitled to one. He is in possession, no doubt, but he is not in possession for a term of ninety-nine years. It seems to me that the cases cited by Mr. Manisty are in point, and that no estate in equity has been created, but only an inchoate right to have a lease, only an equity to have a lease at a future time, but no equitable estate. Mr. Williams founded his argument on various passages in the books, which lay down that as between a vendor and a purchaser who has partly paid the purchase-money and been let into possession, the purchaser is deemed in equity to have the estate; but as respects those cases the Master of the Rolls, in *Wall* v. *Bright* (1 Jac. & W. 501), says, "Before it is known whether the agreement will be performed, he is not even in the situation of a constructive trustee; he is only a trustee *sub modo*, and provided nothing happens to prevent it. It may turn out that the title is not good, or the purchaser may be unable to pay; he may become bankrupt, then the contract is not performed, and the vendor again becomes the absolute owner; here he differs from a naked trustee, who can never be beneficially entitled. We must not therefore pursue the analogy between them too far. The agreement is not for all purposes considered to be completed. Thus the purchaser is not entitled to possession unless stipulated for; and if he should take possession it would be a waiver of any of the objections to the title. The vendor has a right to retain the estate in the meantime, liable to account if the purchase is completed, but not otherwise. Till then, it is uncertain whether he may not again become sole owner; the ownership of the purchaser is inchoate and imperfect; it is in the way to pass but it has not yet passed." And although there are many expressions as to the effect of agreements between vendors and purchasers they are all far short of shewing that here there is a creation of an estate as distinguished from an equitable right. I think that if we follow the decisions of the Court of Queen's Bench the right rule will be laid down. I am therefore of opinion that, although perhaps when there is nothing to pay the time may come, still, whilst the matter is encumbered with the stipulations of the agreements, there is no term at law or in equity for sixty years; and that consequently the decision of the Revising Barrister should be reversed.

BYLES, J.—I am of the same opinion, and have no doubt about the matter. The words of the statute are "unexpired residue . . . . of any term originally created" for a certain period. Therefore there must have been a created term, and here there is none, either legal or equitable. And, further, the claimant should have power at least to call for it: but he cannot, for he cannot without Clayton be a party, and he may refuse.

KEATING, J.—I am of the same opinion, and think the claimant is not within the statute. The Reform Act of 1832 first gave the qualification now in question, and the present Act extends it to terms of years of a less value, in words which, no doubt, admit of an argument as to whether an equitable interest in a lease for years is enough—a point as to which I should have had

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doubt, if it had not been decided by an Irish Judge that an equitable interest in an ascertained lease would satisfy the corresponding section in the Irish Act: after which decision I hold clearly that an equitable interest in an ascertained legal lease is enough. Whether a mere equitable lease would do I still doubt, but it is unnecessary to decide this point, because I agree with the rest of the Court that even if an equitable right to a lease under an agreement were sufficient, the circumstances of the case do not bring the claimant within the Act, for I agree that where a person has only a contract for the future acquirement of a lease, which he cannot get at present because certain acts remain to be done in order to entitle him to it, such contract gives him no right under this section of the late statute.

MONTAGUE SMITH, J.—I am of the same opinion, and I think that the claimant is not entitled as "lessee or assignee . . . for the unexpired residue . . . . of any term originally created for a period of not less than sixty years." It seems to me necessary to establish, under section 5, that a term has been created of which the claimant is lessee or assignee; it is said that an equitable term will do; but, however that may be, here, if the claimant has anything, it must be as lessee, and I think it cannot be said that he is lessee of any term. There is no dispute as to the elementary rules of equity, and it may be that where there is an agreement to grant a lease on the payment of money simply there may be an equitable term, but that could only exist where the transaction is of such a nature that there is merely a debt on one side, and a lien on the other; but where there are other future conditions to be fulfilled we cannot say that there is even in equity a term. There may be a right, but not a term: at all events not a term within the meaning of the Act. Here the lease cannot be obtained unless the two agreements are performed, and Clayton has asked for one, and he is not bound to do so till all his money is paid, and the other claimants also have performed the stipulations of the agreements. Suppose an agreement to grant a lease to A.B. if he paid certain rent and performed certain covenants, and if, further, C.D. took the next adjoining land, and paid certain rent and performed certain covenants; though such an agreement may result in a lease, we cannot say that there is a term, even though A.B. fulfilled the matters he had to perform; and the present complicated arrangement results in much the same case. Under these circumstances, therefore, I agree that the claimant is not entitled under section 5, and that the decision of the Revising Barrister should be reversed.

Decision reversed.

IN THE COMMON PLEAS. Nov. 24, 1868.

(Appeal from Revising Barrister's Court.)

CUTHBERTSON, *appellant;* HAINS, *respondent.*

38 L. J. C.P. 109; L. R. 4 C.P. 525; 17 W. R. 465; 1 Hop. & C. 184.

Parliament—Borough Vote—Occupier—Part of a House—Separately Rated —30 & 31 Vict. c. 102. s. 61.—2 Will. 4. c. 45. s. 30.

ELECTION LAW. A.—*A. occupied exclusively and as sole tenant rooms in a dwelling-house, which were not so severed from the rest of the building as to constitute a house. A. gave notice to the overseers that he occupied a part of the dwelling-house, and that he claimed to be rated for the same to the relief of the poor, and the overseers thereupon entered his name in the rate-book jointly with the other occupiers of the dwelling-house, but no separate rating was made with reference to A.*:—Held, *that it not appearing that the part of the house which A. occupied was separately rated, A. was not the occupier of a dwelling-house within the meaning of the Representation of the People Act,* 1867 (30 & 31 *Vict. c.* 102. *s.* 61).

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Appeal from the decision of the Revising Barrister appointed to revise the list of voters for the City of London.

The respondent occupied exclusively and as sole tenant for his dwelling certain rooms in a house, No. 2, St. James's Place, in the parish of St. James Garlick Hithe, in the City of London. Such rooms were not so structurally severed from the rest of the building as to constitute of themselves a house. The respondent had the exclusive control over the adjoining passage, and he had under or by virtue of his tenancy a right of way over the passage from his room to the house-door, and, in common with the other occupiers resident in the house, perfect control over the house-door, so as at all hours to command free ingress and egress from and to the street. The respondent had in due time served upon the overseers of the parish of St. James Garlick Hithe a claim to be rated in respect of the said premises in the following form:

"To the overseers of the parish of St. James Garlick Hithe.—I hereby give you notice, that I occupy a part of a house at No. 2, in St. James's Place, in your parish, in successive occupation from , and I claim to be duly rated for the same to the rates made for the relief of the poor in your parish, pursuant to the English Reform and Parliamentary Registration Acts.

(Signed) "JAMES HAINS.

"Residing at No. 2, St. James's Place."

In pursuance of such claim, the overseers of the said parish had entered the name of the respondent in the occupier's column of the rate-book for the said parish, bracketed jointly with the other occupiers of the said house, and the names, the rental, rateable value and rate in the pound of the whole house alone appeared. No separate rating or assessment was carried out opposite the name of or with reference to the said respondent. In all other respects the respondent was proved to be qualified to be registered.

It was objected that, having regard to the above facts, the subject of the respondent's occupation was not a part of a house occupied as a separate dwelling and separately rated to the relief of the poor within the meaning of the 61st section of the Representation of the People Act, 1867.

The Revising Barrister held upon these facts, that the respondent had, by his occupation of the said premises in manner aforesaid, occupied part of a house as a separate dwelling, and that the same must be deemed to have been and had been separately rated to the relief of the poor, and that therefore he had been an inhabitant occupier of a dwelling-house within the meaning of the said Act; and the said barrister accordingly retained the respondent's name on the list.

Prentice, for the appellant.—The decision of the Revising Barrister was wrong. The respondent was only a lodger in the rooms he occupied, for they were not so structurally separated as to constitute of themselves a house or building within the meaning of the 2 Will. 4. c. 45. It does not appear from the case what was the value of these rooms. Therefore, if the respondent should be entitled to vote, any lodger might equally be so entitled whatever might be the annual value of his lodgings. The respondent has endeavoured to bring himself within the meaning of section 61. of the 30 & 31 Vict. c. 102, which declares that the term "dwelling-house" "shall include any part of a house occupied as a separate dwelling and separately rated to the relief of the poor," and he claimed accordingly to be rated for part of a house, but he did not say for what part; neither was he separately rated, nor did he tender, or could he do so, payment of any rate.

Underdown, for the respondent.—The statute 2 Will. 4. c. 45. s. 30. puts a person who has claimed to be rated in the same position as if he had been rated. It says "upon such occupier so claiming and actually paying or tendering the full amount of the rate or rates, if any, then due in respect of such premises, the overseers of the parish or township in which such premises are situate are hereby required to put the name of such occupier upon the rate for the time being; and in case such overseers shall neglect or refuse so to do, such occupier shall nevertheless, for the purposes of this Act, be deemed to have been rated

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to the relief of the poor in respect of such premises from the period at which the rate shall have been made in respect of which he shall have so claimed to be rated as aforesaid."

[KEATING, J.—The respondent never paid nor tendered the rate, as required by that Act. He could not have done so, because there was no separate rate made in respect of part of the house.]

It is submitted that it is not for the Court now to inquire whether the respondent paid or tendered the rate, as it must be assumed that the overseers, who have inserted his name on the rate together with those of the other occupiers, did their duty.

BOVILL, C.J.—The decision must be reversed. It is clear that we have no materials before us to shew that the part of the house which the respondent occupied was separately rated at all. I by no means express any opinion whether the occupier of part of a house separately rated may not be entitled to the franchise.

KEATING, J., and BRETT, J., concurred.

Decision reversed.

IN THE COMMON PLEAS. Nov. 12, 1868.

ASTLEY AND ANOTHER *v.* GURNEY AND OTHERS.

38 L. J. C.P. 111: reversed, [1869] E. R. A.; 38 L. J. C.P. 357; L. R. 4 C.P. 714; 18 W. R. 44 (Ex. Ch.).

Bankruptcy—12 & 13 *Vict. c.* 106. *s.* 171—*Mutual Credit—Deposit of Bills of Exchange as Collateral Security for Advances—Authority to Receive.*

BANKRUPTCY. H.—*The defendants accepted certain bills for J. & Co., who undertook to provide funds before maturity, and, as collateral security, deposited with the defendants goods and bills, which bills were indorsed by J. & Co. to the defendants, and became due on the same day as the said acceptances of the defendants. Before that day J. & Co. were adjudged bankrupts, having previously given their assent to the sale of the goods and to the defendants receiving the proceeds. The bills which had been deposited as such collateral security were paid at maturity, and these, together with the proceeds of the sale of the goods, left a balance after providing for the said acceptances of the defendants for securing which the deposit had been so made. In an action for such balance by the plaintiffs who were assignees in bankruptcy of J. & Co.:* Held, *that, as regards the proceeds of the sale of the goods, the bankrupts had given credit to the defendants within the meaning of the mutual credit clause of the Bankrupt Act,* 12 & 13 *Vict. c.* 106. *s.* 171, *but that as regards the money received from the bills which had been so deposited as collateral security, no such credit had been given, and that therefore the defendants were not entitled to retain such last-mentioned money against a sum due to them from the estate of the bankrupts.*

This was an action brought to recover a sum of 1,816*l.* 12*s.* 3*d.*, as money received by the defendants to the use of the plaintiffs as assignees in bankruptcy of Charles Joyce & Co.

By a Judge's order the following case was stated for the opinion of the Court.

CASE.

The plaintiffs are the assignees of the estate of Charles Joyce & Co., merchants, of London, who were adjudicated bankrupts on May 19, 1865.

The defendants for many years, up to August, 1865, carried on business in partnership as money-dealers and bill-brokers under the firm of Overend, Gurney & Co.

According to the evidence of William Bors, who was for many years

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managing clerk to Overend, Gurney & Co., the business of Overend, Gurney & Co. embraced money dealings of all sorts—discounting bills, advancing on securities, advancing credits, receiving money on deposit, holding securities for customers and receiving dividends and holding money at call against which the customers drew. Where the securities were bills of lading or bills of exchange they were indorsed by the customer and handed to Overend, Gurney & Co. In the ordinary course the customer would repay the sum advanced and then realize the securities. If the customers wished to realize they gave Overend, Gurney & Co. a borrowing ticket, who then allowed the customer to have the securities for the purpose of realizing and paying the proceeds to Overend, Gurney & Co.

Charles Joyce & Co. had for upwards of five years before their bankruptcy been customers of Overend, Gurney & Co.

On March 30, 1865, Overend, Gurney & Co. received from Charles Joyce & Co. the following letter:

"60, Moorgate Street, London,
"March 30, 1865.

"Charles Joyce & Co.
"Messrs. Overend, Gurney & Co.

"Dear Sirs,—Referring to letters of Messrs. Joyce & Co., of Alexa., dated the 20th inst., advising having drawn on you 5,000*l.* at 3 m.d. from that day, we will thank you to accept same, and as collateral security for your so doing we beg to hand you herewith documents as per memo. annexed.

"We undertake to provide funds one day before maturity of said bills. Both the coffee and cotton are duly and fully covered by insurances on our floating policies, and we hereby transfer our interest in same to yourselves until our acceptance is paid as agreed.—We remain, yours truly,

(Signed) "CHARLES JOYCE & Co."

The following is a copy of memorandum annexed to this letter:

"Memo. of Securities.

B.L.	59	Bf	cotton,	✾	*Marathon* (insured for) ...	£280	valued @		
,,	47	Bf	,,	✾	*Atlas*	1,000			
,,	20	Bf	,,	✾	*Melita*	500			
,,	24	Bf	,,		,, ...	580			
,,	4	Bf	,,		,, ...	100			
,,	5	Bf	,,		,, ...	120			
,,	71	Bf	,,		,, ...	1,500	@ £25 per bale	£5,350	
302	3	24	coffee, per *Hollenside*			1,363	@ 76/ per cwt.	1,050	
216	1	8	per *Seafield*			812	@ 60/	648	
						£6,255		£7,048	

The goods mentioned in the above letter were parcels of cotton and coffee then shortly expected to arrive, which had been shipped from Alexandria, consigned to Charles Joyce & Co., and for which they held the bills of lading. In accordance with the terms of the letter, Overend, Gurney & Co. accepted the drafts for 5,000*l.* and received the bills of lading, all of which were indorsed to them by Charles Joyce & Co.

On April 5, 1865, Overend, Gurney & Co. received from Charles Joyce & Co. the following letter:

"61, Moorgate Street, London,
April 5, 1865.

"Charles Joyce & Co.
"Messrs. Overend, Gurney & Co.

"Dear Sirs,—We beg to inclose letters from Messrs. Joyce & Co., of Alexandria, advising having drawn on you to the extent of 5,000*l.* on sundry appoints @ 3 m.d. from 27th ult., and due June 30.

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"We will thank you to accept same, and as collateral security we beg to inclose you herewith the following documents, say,

B.L.13	Bf cotton, ℔ *Erin*		
,, 8	Bf ,, ℔ ,,		
,, 16 ,, 99	Bf ,, ℔ ,,	valued @	£4,280
Bill on T. Bingham, due June 30	... ...		400
Do	do		600
Bill on G. Fulche	do		1,000
J. C. on Thurn, due April 10	... ...		400
			£6,680

"We undertake to provide funds before maturity to keep you out of cash advance. The above cotton is covered by insurances on our floating policy, and we hereby transfer our interest in same to yourselves.—We remain, yours truly,

"CHARLES JOYCE & Co."

The goods mentioned in this letter were also parcels of cotton shortly expected to arrive, of which Charles Joyce & Co. were the consignees, and for which they held the bills of lading.

In accordance with the terms of this letter, Overend, Gurney & Co. accepted drafts for the further sum of 5,000*l.*, and received the bills of lading and bills of exchange mentioned in the letter, which were respectively indorsed to them by Charles Joyce & Co.

At the dates of these letters Charles Joyce & Co. were already liable to Overend, Gurney & Co. upon their acceptances of bills discounted by Overend, Gurney & Co. to a very large amount, and exceeding the sum claimed in this action; these acceptances were dishonoured at maturity, and are now debts provable by Overend, Gurney & Co. against the estate of Charles Joyce & Co.

Charles Joyce & Co., before their bankruptcy, gave their assent to the sale by Overend, Gurney & Co. of the cotton and coffee mentioned in the above letters, *and to their receiving the proceeds.*[1] All the cotton was sold before the bankruptcy of Charles Joyce & Co. and the net proceeds thereof, except 59*l.*, were handed to Overend, Gurney & Co. before the said bankruptcy. The coffee arrived after the bankruptcy of Charles Joyce & Co., and was after its arrival sold by the brokers in the ordinary course. The coffee realized 1,721*l.* 9*s.* 7*d.* This sum and the above 59*l.*, part of the proceeds of the cotton, were afterwards paid over by the brokers to Overend, Gurney & Co. The bills of exchange mentioned in the letter of April 5 were shortly after April 28 re-discounted by Overend, Gurney & Co., and were paid by the acceptors at maturity.

The goods described in the letter of March 30, 1865, realized 5,176*l.* 12*s.* 3*d.*, and the securities described in the letter of April 5, 1865, realized 6,640*l.*, leaving, after providing for the acceptances mentioned in the letter which Overend, Gurney & Co. were compelled to pay at maturity, the sum of 1,806*l.* 12*s.* 3*d.*, sought to be recovered in this action.

There is now due from the estate of Charles Joyce & Co. to Overend, Gurney & Co. 20,116*l.*, or thereabouts.

The plaintiffs, as assignees, seek to recover the said sum of 1,816*l.* 12*s.* 3*d.*, as the amount of surplus proceeds of the securities lodged with Overend, Gurney & Co., for, as the plaintiffs contend, the special purpose of protecting the above-mentioned acceptances. Overend, Gurney & Co. claim to retain this sum against the general balance due to them from Charles Joyce & Co. at the time of their bankruptcy, and allege that there was a mutual credit and mutual debts between them and Charles Joyce & Co., in respect of which they are entitled to retain the above sum against the much larger amount due to them from the estate of Charles Joyce & Co.

(1) The case was amended during the argument by adding the above words in italics.

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It is agreed that the Court shall draw such inferences or conclusions as the jury ought to draw.

The question for the opinion of the Court is, whether the defendants are entitled to retain the above amount against the balance of account due to them from Charles Joyce & Co. at the date of the bankruptcy, and provable against the estate.

Field (*Lord* with him), for the plaintiffs.—The defendants have no right to retain the sum claimed in this action against the general balance due to them from the bankrupts. It is not a case of mutual credit. There were two transactions; in the first there was a deposit of coffee and cotton, and in the second, a deposit of cotton and bills, each deposit being as collateral security for Joyce & Co. providing funds to meet the defendants' acceptances of the bills for 5,000*l.* and 5,000*l.*; the first set of 5,000*l.* bills being due on June 23, 1865, and the other set of 5,000*l.* bills being due on June 30, 1865. The bankruptcy occurred on May 19. The cotton was sold before the bankruptcy, and the proceeds, moreover, with the exception of 59*l.*, were received by the defendants before the bankruptcy, but the coffee arrived and was sold after the bankruptcy, and this, with the 59*l.*, would alone give the plaintiffs a verdict for nearly the amount claimed. But by the terms of the original deposit, until Joyce & Co. failed to meet the bills which the defendants had accepted from them, the defendants would have had no right to have dealt with the goods deposited with them; therefore there was no credit given by the bankrupts which would in its nature terminate in a debt. Indeed, so far from ending in a debt, as there was a balance of upwards of 1,800*l.* in favour of Joyce & Co., after satisfying the acceptances for which the securities were deposited, it is more than probable that Joyce & Co. would have redeemed the securities in due time. It is within the principle laid down in *Buchanan* v. *Findlay* (9 B. & C. 738); *Hill* v. *Smith* (12 Mee. & W. 618; 13 L. J. Ex. 243); and *Alder* v. *Keighley* (15 Mee. & W. 117; 15 L. J. Ex. 100). The question came before this Court in the recent case of *Naoroji* v. *the Chartered Bank of India* (37 L. J. C.P. 221; L. R. 3 C.P. 455), from which this case is distinguishable.

[Bovill, C.J.—It is stated in the present case that Charles Joyce & Co., before their bankruptcy, gave their assent to the sale by the defendants of the cotton and coffee, but it does not state the terms, whether they were to receive the proceeds, or what they were to do with them. The case had better be amended as to this.[2]]

After the amendment it is difficult, no doubt, to distinguish this case, so far as relates to the goods deposited, from that of *Naoroji* v. *the Chartered Bank of India* (37 L. J. C.P. 221; L. R. 3 C.P. 455); but as regards the deposit of the bills, mentioned in the letter of April 5, 1865, the terms on which they were deposited were never afterwards altered. Three of these bills, amounting in the aggregate to 2,000*l.*, were not due until June 30, which was after the bankruptcy, and as that amount exceeds the surplus proceeds of the securities, after providing for the acceptances of the defendants, it is sufficient if the plaintiffs succeed as to these bills. It is submitted that it was always competent for Joyce & Co., before June 30, to have paid the defendants the amount of the 5,000*l.* and have taken back these bills, which had been deposited only as security for such payment. The case is not distinguishable from that of *Young* v. *the Bank of Bengal* (1 Moore P.C. 150). The case of *Rose* v. *Hart* (8 Taunt. 499; 2 Smith's Lead. Cas. 267, 6th edit.) disposed of several of the previous cases, and the decision there is in favour of the plaintiffs. Parke, B., in *Alsager* v. *Currie* (12 Mee. & W. 751; 13 L. J. Ex. 203), points out *Young* v. *the Bank of Bengal* (1 Moore P.C. 150) as a case to be supported.

Mathew, for the defendants.—It is submitted that, notwithstanding the case of *Young* v. *the Bank of Bengal* (1 Moore P.C. 150), credit was given to the defendants at the time of the original deposit of these bills. They were

(2) By agreement the amendment was then made by adding the words "and to their receiving the proceeds," as mentioned *ante*, in note (1).

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indorsed by Joyce & Co. to the defendants, and it is submitted that the terms of their deposit were in effect to authorize the defendants to realize them, and receive the proceeds, if the 5,000*l.* advanced by the defendant's acceptance were not paid at maturity. That was a giving of credit within the meaning of the statute. The case of *Naoroji* v. *the Chartered Bank of India* (37 L. J. C.P. 221; L. R. 3 C.P. 455) shews that such credit would be held to be given if in any event the defendants could have received the proceeds of these bills. It was there argued that the authority to receive the moneys on the bills which had been given to the bank for collection was revocable, and that, therefore, there was no giving of credit which would end in a debt; but the Court said that this did not prevent such credit arising, as the bank would receive the money unless something was done to stop it. Here the bills were indorsed to the defendants, and that empowered the defendants to negotiate them.

[BOVILL, C.J.—Not if they were deposited only as collateral security. The case is only brought by you within that of *Young* v. *the Bank of Bengal* (1 Moore P.C. 150), where, in default of payment, there was an authority given to the bank to sell the paper, in order to reimburse the amount advanced.]

If that decision is to stand an authority, it is difficult to say more on this part of the case for the defendants.

[BOVILL, C.J.—We never intended to overrule it in the case of *Naoroji* v. *the Chartered Bank of India* (37 L. J. C.P. 221; L. R. 3 C.P. 455); on the contrary, we expressly distinguished it from that last case.]

Then, as to the cotton and coffee, there was clearly an authority given to realize, so as to bring it within the case of *Naoroji* v. *the Chartered Bank of India* (37 L. J. C.P. 221; L. R. 3 C.P. 455).

[BOVILL, C.J.—The plaintiffs are now willing to give you the benefit of that.]

BOVILL, C.J.—With regard to the proceeds of the sale of the cotton and coffee, it is quite clear from the case as now amended that the money so received was, by agreement before the baukruptcy, to be received in the ordinary course of things by Overend, Gurney & Co., and the case, therefore, in this respect is not distinguishable from that of *Naoroji* v. *the Chartered Bank of India* (37 L. J. C.P. 221; L. R. 3 C.P. 455). With regard to the bills of exchange, I think the case is equally not distinguishable from that of *Young* v. *the Bank of Bengal* (1 Moore P.C. 150). In that case it was only in default of repayment of the advance that the Bank of Bengal were to be allowed to sell the company's paper deposited with them; so here, it was only in case of default by Charles Joyce that the amount of the three bills, amounting in the aggregate to 2,000*l.*, was to be received. This Court, in the case of *Naoroji* v. *the Chartered Bank of India* (37 L. J. C.P. 221; L. R. 3 C.P. 455), did not mean to interfere with the decision of the Privy Council in *Young* v. *the Bank of Bengal* (1 Moore P.C. 150); on the contrary, this Court distinguished it from the case in the Privy Council on the ground on which the present case is not distinguishable from the case in the Privy Council, namely, that the money here would be receivable only in the event of default by Charles Joyce & Co. Here, as in *Young* v. *the Bank of Bengal* (1 Moore P.C. 150), it never was any part of the bargain that the bills should be applied differently from their original appropriation, which was as a security for the repayment of the advance, and the observation of Parke, B., in *Alsager* v. *Currie* (12 Mee. & W. 751; 13 L. J. Ex. 203) is very applicable to this case, that the bills were deposited for a particular purpose and nothing else. If there had been here no bankruptcy, Charles Joyce & Co. would probably have redeemed the bills, and in the event of bankruptcy it was the duty of their assignees to have redeemed them. No credit was given for the surplus, and under these circumstances the plaintiffs are, I think, entitled to our judgment.

KEATING, J., concurred.

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this Court in *Naoroji* v. *the Chartered Bank of India* (1 Moo. P.C. 150) intended to overrule or did overrule that case.

Judgment for the plaintiffs.[3]

IN THE COMMON PLEAS. Nov. 6, 21, 1868.

EDMUNDS *v.* GREENWOOD.

38 L. J. C.P. 115; L. R. 4 C.P. 70; 19 L. T. 423; 17 W. R. 142.

Referred to, *Villesboisnet* v. *Tobin*, [1869] E. R. A.; 38 L. J. C.P. 146; L. R. 4 C.P. 184; 19 L. T. 693; 17 W. R. 322 (C.P.); *Inman* v. *Jenkins*, [1870] E. R. A.; 39 L. J. C.P. 258; L. R. 5 C.P. 738; 22 L. T. 659; 18 W. R. 897 (C.P.); *Hill* v. *Campbell and Wife*, [1875] E. R. A.; 44 L. J. C.P. 97; L. R. 10 C.P. 222; 32 L. T. 59; 23 W. R. 336 (C.P.); *Davis* v. *Gray*, 1874, 30 L. T. 418 (C.P.); *Fisher* v. *Owen*, [1878] E. R. A.; 47 L. J. Ch. 681; 8 Ch. D. 645; 38 L. T. 577; 26 W. R. 581 (C. A.).

Interrogatories—Libel—Tendency to criminate the Party interrogated—Discretion of the Court.

DISCOVERY. D.—*In the exercise of its discretion the Court refused, in an action for libel, to allow interrogatories to be administered to the defendant where the direct tendency of them was to make the defendant criminate himself, and there were no special circumstances for allowing them to be put.*

This was a motion for a rule to shew cause why the plaintiff should not be at liberty to administer interrogatories to the defendant under the Common Law Procedure Act, 1854.

The action was for certain alleged libels, and the only plea was, not guilty. The plaintiff had been clerk to the Commissioners of Patents, and in 1864 the defendant was appointed, together with the late Mr. Hindmarch, by the Commissioners of Patents to make inquiries into the management of the Patent Office, and also, amongst other things, to inquire into charges which had been made against the plaintiff, and to report thereon to the said Commissioners. The defendant and Mr. Hindmarch investigated the matters into which they were so appointed to inquire, and afterwards they made and sent in certain reports on the subject to the Commissioners of Patents, and the defendant wrote a letter to the Lord Chancellor, in which he commented on a statement the plaintiff had made during such inquiry. The libels complained of were alleged to be contained in this letter and in these reports.

The rule was moved for on an affidavit which set out the letter from the Commissioners appointing the defendant and Mr. Hindmarch to make the inquiry, and the other matters above detailed, and stated that, with reference to the second and final reports, the defendant admitted, in answer to certain questions in a suit of *The Attorney-General* v. *Edmunds*, that such reports had been lithographed by the direction of Mr. Hindmarch, with the concurrence of the defendant, and that no explanation was given as to the purposes for which such reports were so lithographed, and that the plaintiff had been informed by the Queen's printers, and believed that a large number of copies of the said reports so lithographed were printed by them. The plaintiff also stated in such affidavit that the charges made against him in the said reports were wholly untrue.

The interrogatories which it was sought to administer to the defendant were twenty-nine in number, and were directed chiefly to prove the publication of the libels, and that they were not privileged. The following specimens will serve

(3) The defendants have brought error, and the case was argued in the Court of Exchequer Chamber after last Hilary Term, but that Court has not yet delivered judgment.

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to illustrate their nature, viz.: 1. By whom were the reports, contained in the first and second counts of the declaration, and called the preliminary report, dated July 12, 1864, and the second report, dated January 31, 1865, drawn up? Were the same, or any, and what part thereof, drawn up with your sanction or knowledge? 3. Before the said reports were sent to the Commissioners of Patents, were they, or any, and what part thereof, shewn or communicated to any person or persons? If so, to whom? And were the same shewn or communicated to the said person or persons by you, or with your sanction or knowledge, and for what purpose? 4. Before the said reports were sent to the Commissioners of Patents, or at any, and what, time were any copies of the same, or either, and which of them, or any part of the same, made? And were the same lithographed? If so, how many, and by whom, and were the same lithographed by your direction, or with your sanction or knowledge, and for what purpose? 8. Were any copies of the said reports, or either and which of them, or copies of any parts of the same, or either and which of them, left at or sent to the Patent Office, either before or after the same were sent to the Commissioners of Patents? If so, with and to whom were the same, or either and which of them, left or sent, and was it by your direction, or with your sanction or knowledge? 9. Were any copies of the said reports, or either and which of them, or of any and what parts of the same sent by you, or with your sanction or knowledge, to any persons other than the Lord Chancellor Westbury or the Commissioners of Patents? If so, to whom and when were the same sent? 10. Was the letter or any part thereof containing remarks on the plaintiff's statements, dated October 29, 1864, and contained in the third count of the declaration, or were the contents of the same, or any and what part thereof shewn or communicated by you, or with your knowledge or sanction to any person or persons before or after the same was sent to Lord Westbury? If so, by and to whom? 12. Was the said letter or any part thereof in your handwriting? If not, in whose handwriting was the same? Was the same drawn up under your superintendence, or with your sanction or knowledge?"

A similar application to the present had been made to Martin, B., at chambers, but had been refused by that learned Judge.

Digby Seymour (with him *Macnamara* and *T. Atkinson*).—It is submitted that although some of these interrogatories are for the purpose of obtaining answers which might make the defendant criminate himself, the plaintiff is entitled to have them put, leaving the defendant to refuse to answer them on that or any other ground on which he may be privileged from answering them. The interrogatories are put *bonâ fide*, and are material to support the plaintiff's case at the trial, where one of the questions will be as to the nature and scope of authority given to the defendant by the said letter of the Commissioners appointing him to make the inquiry, the plaintiff's case being that the defendant exceeded such authority. Besides, upon the issue raised under not guilty, the plaintiff will have to shew the publication of the libel, that they were not privileged, and also the existence of malice. It was considered in *Bartlett* v. *Lewis* (12 Com. B. Rep. N.S. 249; 31 L. J. C.P. 230) to be no objection to interrogatories that they tender to charge the person to whom they were delivered with an indictable offence, but that the party interrogated was placed in the same position as a witness at the trial, and that he must pledge his oath that the interrogatories would tend to criminate him, and on that account object to to answer them.

[BYLES, J.—In Chancery it is otherwise; but I am aware that there has been a difference between the practice in Chancery in respect of bills of discovery and at common law under the Common Law Procedure Act, 1854. KEATING, J.—I think this Court in later cases has somewhat retraced its steps to what existed prior to *Bartlett* v. *Lewis* (12 Com. B. Rep. N.S. 249; 31 L. J. C.P. 230).]

No doubt in *Stern* v. *Sevastopulo* (14 Com. B. Rep. N.S. 737; 32 L. J. C.P. 268) the Court of Common Pleas qualified their decision in *Bartlett* v. *Lewis* (12 Com. B. Rep. N.S. 249; 31 L. J. C.P. 230), and, following *Tupling* v. *Ward* (6 Hurls. & N. 749; 30 L. J. Ex. 222), exercised a discretion as to

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allowing interrogatories, and in so doing they refused in that case to allow the defendants to be interrogated as to whether they had spoken the slander imputed; but in *Atkinson* v. *Fosbroke* (35 L. J. Q.B. 182; L. R. 1 Q.B. 628) the Court of Queen's Bench allowed the defendant, in an action for slander, to be interrogated as to the words uttered.

[BYLES, J.—In all these cases it is a matter in the discretion of the Court or Judge to allow the interrogatories. BOVILL, C.J.—You have to satisfy us that my Brother Martin exercised a wrong discretion in the matter. If the Court sees that the nature of the interrogatories is necessarily to lead to one or other of these results, either that the communication was a privileged one or that the answer would criminate the party interrogated, the question is whether the Court should then allow the interrogatories.]

In *Zychlinski* v. *Maltby* (10 Com. B. Rep. N.S. 838), where the action was for a malicious prosecution, the Court allowed the defendant to interrogate the plaintiff upon matters relevant to the issue, just as if he had been a witness at the trial. That case was followed by *Stewart* v. *Smith* (2 Notes of Cases, 41), where the same principle was adopted; and in *M'Fadzen* v. *the Corporation of Liverpool* (37 L. J. Ex. 193; L. R. 3 Ex. 279) the Court of Exchequer allowed interrogatories in a similar action, and held that any objection to answering them on the ground of subjecting the party interrogated to any criminal liability must be made by such party upon his oath.

Cur adv. vult.

BOVILL, C.J. (November 21), delivered the following judgment of the Court.[1]—This was an application for leave to administer certain interrogatories to the defendant under section 51. of the Common Law Procedure Act, 1854. The action was for alleged libels contained in the reports made by Mr. Greenwood and Mr. Hindmarch to the Commissioners of Patents on the occasion of a certain inquiry relating to the Patent Office and in a letter to the Lord Chancellor; and the avowed object of the interrogatories was for the purpose of shewing, first, that Mr. Greenwood had exceeded his authority; secondly, that he had circulated the reports to persons not privileged: and thirdly, that he had acted from malicious motives. The direct tendency, therefore, of these interrogatories was to make the defendant criminate himself, and to render him liable afterwards to criminal proceedings. An application had been made to my Brother Martin at chambers to allow these interrogatories, but he had refused the application, and the case comes to us by way of appeal from his decision. In all the decided cases upon the subject it has been considered that the Judge at chambers is to use his discretion as to what interrogatories shall be allowed to be administered, and that the Court will not interfere unless they are of opinion that such discretion has been improperly exercised. Now, in many cases interrogatories have been allowed which have tended to make the party interrogated incriminate himself, leaving it to him to refuse to answer the same, upon the ground that his answer might have that effect; for instance, in cases of malicious prosecution, where—in *Zychlinski* v. *Markby* (10 Com. B. Rep. N.S. 838) and *Stewart* v. *Smith* (2 Notes of Cases, 41)—the interrogatories were so allowed; and in cases of fraud they were allowed in *Bartlett* v. *Lewis* (12 Com. B. Rep. N.S. 249; 31 L. J. C.P. 230) and *Osborn* v. *the London Docks Company* (10 Ex. Rep. 698; 24 L. J. Ex. 140). But in an action for libel the Court of Exchequer, in *Tupling* v. *Ward* (6 Hurls. & N. 749; 30 L. J. Ex. 222), refused to allow interrogatories to be put to the defendants with the view of proving the authority of publication, and my Brother Martin in delivering the judgment of the Court said: "We are all of opinion that, in the exercise of the authority and discretion given to us by the 51st section of the Common Law Procedure Act, 1854, such interrogatories ought not to be allowed. It was scarcely contended that the defendants were bound to answer them; but it was urged that the interrogatories ought to be administered, leaving the defendants to refuse to answer if they thought fit.

(1) Bovill, C.J., Byles, J., Keating, J., and Brett, J.

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Without laying down any general rule on the subject, we think that in cases of this kind it would be unfair to submit questions which a party is clearly not bound to answer, the object being either to compel him to answer when not bound, or to refuse, and so create a prejudice against him. We therefore think that these interrogatories ought not to be allowed." This Court in the case of *Stern* v. *Sevastopulo* (14 Com. B. Rep. N.S. 737; 32 L. J. C.P. 268) acted again on the same principle. That was an action for verbal slander, and the Court refused to allow interrogatories to be put to the defendant as to the speaking of the words. That case is a strong one, because an order allowing the interrogatories had been made there by a Judge at Chambers, and the Court set aside that order. The cases which were relied upon by Mr. Seymour in moving for this rule were all cited and relied on in that case; and in dealing with that case Erle, C.J., says: " It appears to me that this is an attempt to extend the rule to a degree that might lead to most pernicious consequences; an extent to which, if there be no authority to warrant it, I for one should decline to become responsible for carrying it. In Mr. Day's excellent book on the *Common Law Procedure Acts*, 2nd edit., pp. 235, 236, *Tupling* v. *Ward* (6 Hurls. & N. 749; 30 L. J. Ex. 222) is referred to to shew that the Courts have a general discretion in the matter of allowing interrogatories; and *Moor* v. *Roberts* (2 Com. B. Rep. N.S. 671; 26 L. J. C.P. 246), to shew that such interrogatories as are merely of a fishing character are not to be allowed. The unprecedented nature of these interrogatories, the nature of the action, and the action of any special circumstances to warrant them, seem to me to afford abundantly sufficient grounds for holding that they overstep the boundary line. I do not mean to say that in no case will the Court allow interrogatories in an action of slander. But before I will consent to allow them I must be satisfied that there are very peculiar circumstances of grievance and oppression to justify so novel a proceeding." The rest of the Court concurred in the judgment. A similar question arose in the case of *Atkinson* v. *Fosbroke* (35 L. J. Q.B. 182; L. R. 1 Q.B. 628). The Court of Queen's Bench in that case agreeing on the general rule on which interrogatories are to be allowed, as stated in the case of *Stern* v. *Sevastopulo* (14 Com. B. Rep. N.S. 737; 32 L. J. C.P. 268), thought that under the very special and peculiar circumstances of that case, though it was an action of slander, the interrogatories might be allowed. In the present case we do not find that there are any such special circumstances as would take it out of the principle that was acted on by the Court of Exchequer in *Tupling* v. *Ward* (6 Hurls. & N. 749; 30 L. J. Ex. 222), and this Court in *Stern* v. *Sevastopulo* (14 Com. B. Rep. N.S. 737; 32 L. J. C.P. 268); in fact, every word of the judgments in each of those cases might be with propriety applied to the present case. The express and avowed object here is to put questions in order to compel the defendant to criminate himself. In the absence of any such special circumstances as would induce a Judge or the Court in the exercise of his or their discretion to allow such interrogatories to be put, we are of opinion that they ought not to be allowed. We are asked to say that my Brother Martin exercised his discretion wrongly. So far from thinking that he has done so, we think that he exercised his discretion very properly in not allowing these interrogatories, and that this application must therefore be refused.

Rule refused.

IN THE COMMON PLEAS. Dec. 2, 1868.

HAINES v. WELCH AND ANOTHER.

38 L. J. C.P. 118; L. R. 4 C.P. 91; 19 L. T. 422; 17 W. R. 163.

Referred to, *Quinn* v. *M'Kinley*, [1902] 2 Ir. R. 315 (K.B. D.).

Landlord and Tenant—Tenancy determining on Death of Landlord—Emblements—14 & 15 Vict. c. 25. s. 1—Rights of Succeeding Landlord—Distress.

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claiming emblements, is to continue to occupy until the expiration of the then current year of his tenancy, and the succeeding owner is to be entitled to recover and receive of the tenant, in the same manner as the tenant's lessor could have done if he had been living, a fair proportion of the rent from the death of such lessor to the time of the tenant so quitting.

The plaintiff occupied, as yearly tenant of A., who was tenant for life, a small labourer's cottage, with an acre of land, which was partly cultivated as a garden and partly sown with corn or planted with potatoes. The defendant became owner of the cottage and land on the death of A., and distrained for the proportion of rent due from the plaintiff in respect of such cottage and land between A.'s death and the expiration of the then current year of the plaintiff's tenancy up to which time the plaintiff remained in occupation.

The COURT, *who were at liberty to draw inferences of fact,* held *that the plaintiff was tenant of lands in respect of which emblements might be claimed within the meaning of* 14 *&* 15 *Vict. c.* 25. *s.* 1, *and that the defendant was entitled to recover such proportion of rent by distress.*

This was an action of trespass for the recovery of damages for an alleged illegal distress. The declaration charged the defendants with having broken and entered plaintiff's cottage and close, and made a distress on his goods and chattels. The defendants pleaded to the action not guilty, by statute 11 Geo. 2. c. 19. s. 21, Public Act, upon which plea issue was joined.

By consent of the parties, and by a Judge's order, the following CASE was stated for the opinion of the Court:

The plaintiff, at the date of the distress hereinafter stated, viz., October 12, 1866, was in occupation of a cottage and close at Holbeach, in the county of Lincoln, being the cottage and close mentioned in the declaration.

For several years the plaintiff, who married a daughter of one Ann Hitch, by her second husband, J. Harrison, had held the said cottage as a tenant of the said Ann Hitch from year to year from October 11, under a demise by the said Ann Hitch, at a yearly rent payable half-yearly, on April 6 and October 11.

Ann Hitch was tenant for life of the said cottage and close under a marriage settlement, the trusts of which were set out in the case.

The said Ann Hitch died in February, 1866, and upon her death the defendant Marriott became owner of the said cottage and close.

On October 12, 1866, the defendant Welch, as the broker of the defendant Marriott, made a distress upon the said cottage for the proportion of the said rent alleged to be due from the death of the said Ann Hitch up to October 11, 1866, and which had not been paid. The distress was sold.

The cottage is a small labourer's cottage standing upon a close containing more than an acre of land, which was partly cultivated as a garden, and partly sown with corn or planted with potatoes.

There never was any agreement between the plaintiff and the defendant Marriott as to the rent of the cottage after the death of Ann Hitch.

The Court was at liberty to draw inferences of fact in the same way as a jury.

The question for the opinion of the Court was whether, under the above circumstances, the defendants had any right to distrain.

Lanyon, for the plaintiff.—The question is, whether the defendant Marriott, who, under the trusts of the settlement became entitled to the cottage and close as owner on the death of the plaintiff's landlady Ann Hitch, had any right to distrain for the rent which accrued between the death of Ann Hitch and the end of the then current year of the plaintiff's tenancy. No relation of landlord and tenant between Marriott and the plaintiff had been created by the acts of the party, and his right to distrain, if at all, must rest on the 14 & 15 Vict. c. 25. s. 1. That section, after reciting that " it is expedient to amend the law to

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prevent or lessen the evils of the right to emblements and the loss and injury arising therefrom, and also the law relating to growing crops seized under execution, and to agricultural fixtures," enacts, "that where the lease or tenancy of any farm or lands held by a tenant at a rack-rent shall determine by the death or cesser of the estate of any landlord entitled for his life or for any other uncertain interest, instead of claims to emblements, the tenant shall continue to hold and occupy such farm or lands until the expiration of the then current year of his tenancy, and shall then quit, upon the terms of his lease or holding, in the same manner as if such lease or tenancy were then determined by effluxion of time or other lawful means during the continuance of his landlord's estate; and the succeeding landlord or owner shall be entitled to recover and receive of the tenant, in the same manner as his predecessor or such tenant's lessor could have done if he had been living or had continued the landlord or lessor, a fair proportion of the rent for the period which may have elapsed from the day of the death or cesser of the estate of such predecessor or lessor to the time of the tenant so quitting; and the succeeding landlord or owner and the tenant respectively shall, as between themselves and as against each other, be entitled to all the benefits and advantages, and be subject to the terms, conditions and restrictions, to which the preceding landlord or lessor and such tenant respectively would have been entitled and subject in case the lease or tenancy had determined in manner aforesaid at the expiration of such current year: provided always, that no notice to quit shall be necessary or required by or from either party to determine any such holding and occupation as aforesaid." It is submitted that the enactment does not apply to this case, because there were not here emblements within the meaning of that clause. Here there was only about an acre of land attached to a labourer's cottage, partly cultivated as a garden and partly sown with corn or planted with potatoes. That does not comprise emblements of sufficient importance to have been within the contemplation of the legislature in passing this Act, the title of which is "An Act to improve the Law of Landlord and Tenant in relation to emblements, to growing crops seized in execution and to agricultural tenants' fixtures."

[WILLES, J.—The question here is, whether this cottage and close are "farm or lands," within the meaning of the statute.]

It is submitted that they are not, and the defendant's remedy is only by action.

[WILLES, J.—The Act applies to Ireland as well as to England, and in Ireland there are farms as small as this piece of land. You can hardly call it a cottage with a curtilage.]

It is submitted that the plaintiff does not come within the meaning of the term agricultural tenant, to which only the Act was intended to apply. Next, it is submitted that the words "recover and receive" in this section do not include a power to distrain, but only a right to recover by action. The defendant should have sued for use and occupation.

Beasley, for the defendant, was not called on.

WILLES, J.—There is at least no authority against the construction, which it appears to me is the proper one to put on this enactment, and in my opinion this case falls within the statute. There was here that in respect of which the tenant might have claimed emblements, and therefore might have had a right to come on the land after the tenancy and to have taken away the crops when ripe. The case therefore comes within the mischief intended to be remedied by the Act, namely, the inconvenience arising from a person becoming entitled to land subject to the right of another to enter upon it for emblements, which would be very likely to create disputes. It is unnecessary to say whether the Act applies to all lands capable of having emblements, whether emblements were, in fact, there or not. It is within the Act unless the holding can be considered to be not a holding of farm or lands; but I agree with Mr. Lanyon that to be within the Act there must be that in respect of which emblements might be claimed. It is difficult to say that because the quantity of land is small, therefore it is not within the Act. Here the land was not necessary for

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minute matters in respect of which there could be no real emblements. As to the second point, namely, that there is no power given to distrain by the words "recover and receive," it is true, no doubt, that the word "recover" has a technical meaning in law, and that it technically means recover by action and by the judgment of the Court; and there are cases to be found in the books shewing that the word "recover" has received that limited construction, but there are others which may be found in which the word has been held to be used in the larger and more popular sense of recover by any legal means, which would include the right of distress, and I think that in that sense it is used in this enactment, especially when one finds in the company of what other words it is used, which is, that the owner is to be entitled "to recover" of the tenant in the same manner as "such tenant's lessor could have done if he had been living." The statute therefore applying, the defendants are entitled to our judgment.

KEATING, J., and BRETT, J., concurred.

Judgment for the defendants.

IN THE COMMON PLEAS. Nov. 12, 19, 1868.

LORD TORRINGTON *v.* LOWE.

[1] 38 L. J. C.P. 121; L. R. 4 C.P. 26; 19 L. T. 316; 17 W. R. 78.

Referred to, *Maxted* v. *Paine*, [1871] E. R. A.; 40 L. J. Ex. 57; L. R. 6 Ex. 132; 24 L. T. 149; 19 W. R. 527 (Ex. Ch.).

Contract—Sale of Shares—Stock Exchange—Liability of Purchaser—Contract to Indemnify—Deed under Seal—Principal and Agent.

STOCK EXCHANGE.—*The plaintiff sold on the Stock Exchange twenty shares in a joint-stock company to P. for the account day. The defendant, on a different day, and at a different price, but for the same account day as that for which the plaintiff had sold, bought of P. in like manner on the Stock Exchange, twenty shares in the same company. Before the account day the defendant gave the name of C. as the transferee of the shares he had bought, and a deed of transfer of the shares from the plaintiff to C. was duly made under seal, and executed by both the plaintiff and C., and the purchase-money paid to the plaintiff. The company being shortly afterwards in a course of winding-up, and the liquidators refusing to register the transfer of the plaintiff's shares, the plaintiff was put on the list of contributories in respect of such shares, and obliged to pay a call on them*:—Held, *that the plaintiff was not entitled to be indemnified by the defendant against such call.*

This was an action brought to recover the sum of 102*l.* 0*s.* 4*d.* and interest thereon at 5*l.* per cent. per annum, in respect of a call made by the liquidators of the Imperial Mercantile Credit Association, Lim., on certain shares in the said association, alleged to have been sold by the plaintiff to the defendant. The cause came on to be tried, at the Sittings in Middlesex after Trinity Term, 1867, before Keating, J., when by consent of the parties a verdict was found for the plaintiff for the sum of 150*l.*, subject to the opinion of the Court upon a CASE of which the following are the material facts:—

The Imperial Mercantile Credit Association, Lim., was incorporated under the Joint-Stock Companies Act, 1862, and registered on June 24, 1864. The capital was 5,000,000*l.* sterling, divided into 100,000 shares of 50*l.* each, and the liability of the members was limited.

In the months of February and March, 1866, the plaintiff purchased and

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had transferred to him 120 shares in the said association, and he duly became the registered owner of such shares.

On May 10, 1866, the plaintiff, being desirous of disposing of his said shares, instructed his stockbrokers, Messrs. Lawrence, Son & Pearce, to sell them on the London Stock Exchange, in the ordinary way, at the current price of the day. Accordingly the brokers sold the plaintiff's shares on that day to different jobbers on the Stock Exchange, and the following is a copy of the sold-note handed to the plaintiff by his brokers:

"7, Angel Court, London, May 10, 1866.

"Sold for Right Hon. Viscount Torrington, 120 Imperial Mercantile Credit shares, 10*l.* paid, viz., twenty to L. Paine, fifty to J. Paine, fifty to W. Morris, for 15th inst., at 8¾ dis. 150*l.*

"LAWRENCE, SON & PEARCE."

Such sales were made in the ordinary course of business for the next settling-day, viz., May 15, as appears by the said note. The names of L. Paine, J. Paine and W. Morris in the said sold-note were the names of the jobbers above referred to.

On May 2 the defendant instructed his brokers, Messrs. Spencer & Norton, to purchase on the Stock Exchange for the same account, viz., May 15, twenty shares in the said association; and they did accordingly on that day purchase from the said L. Paine twenty shares, and forwarded to the defendant a bought-note, of which the following is a copy:

"22, Throgmorton Street, London, E.C., May 2, 1866.

"Bought for and on account of John Lowe, Esq.,

Twenty Imperial Mercantile Credit, at 5⅛ dis. 10*l.* paid	£97	10	0
Commission		15	0
	£98	5	0

"SPENCER & NORTON, Brokers. For 15th."

The defendant never had any transactions with the plaintiff except as appears by this case, nor was he aware at the time of the above purchase who was the real seller of the shares to him. The said Spencer & Norton, on the said May 2, purchased for the defendant and other persons in manner aforesaid, but from other jobbers, other shares in the said association for the same account, viz., May 15, 1866.

In the regular course of business, and according to the rules and established custom of the Stock Exchange, it would be the duty of the jobber on the Stock Exchange, some day before the settling-day, to settle accounts with his purchasing and selling brokers, and then the purchasing broker, on the day before the settling-day, gives to the selling broker, through the jobber, the name and description of the transferee to fill into the transfer; and accordingly Messrs. Spencer & Norton, on May 14, having ascertained then for the first time from the said L. Paine that Messrs. Lawrence, Son & Pearce were to supply twenty of the shares purchased by them, instructed L. Paine, the jobber, to give to Lawrence, Son & Pearce the name of one Charles Cotton as the transferee of twenty of the shares so purchased by them.

A transfer into the name of the said Charles Cotton was then prepared in pursuance of the aforesaid instructions in fulfilment of one of the contracts so entered into by Messrs. Spencer & Norton on behalf of the defendant, as before stated; but the fact of the plaintiff being a transferor of twenty shares in fulfilment of one of the said contracts was the act of the brokers and jobbers only, without the previous knowledge of either of the parties to the action, and was done in accordance with the established custom of the Stock Exchange.

The transfer was duly executed by both parties in the proper form prescribed by the articles of association, and the following is a copy of the transfer:

"I, the Right Honourable George Byng, Viscount Torrington, of 4, Warwick Square, Pimlico, S.W., in consideration of 50*l.* paid to me by Charles Cotton, of 36, Cumberland Street, Warwick Square, do hereby bargain, sell, assign and transfer to the said Charles Cotton, Nos. 59,336 to 59,345, and 12,161

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to 12,170, of and in the undertaking called The Imperial Mercantile Credit Association, Lim., to hold unto the said Charles Cotton, his executors, administrators and assigns, subject to the several conditions on which I held the same immediately before the execution hereof. And I, the said Charles Cotton, do hereby agree to accept and take the said shares subject to the conditions aforesaid. As witness our hands and seals the 17th day of May, in the year of our Lord 1866."

In exchange for the certificates of the said twenty shares and the transfer thereof, which was duly executed by the plaintiff and Cotton, Messrs. Spencer & Norton paid to the plaintiff's brokers the price at which the shares had been sold by the plaintiff's brokers, who duly accounted to the plaintiff for the same. There was a rapid fall in the value of these shares between May 2 and 14. The price on May 14 was 10½*l.* to 9½*l.* discount.

The said Charles Cotton neither paid nor agreed to pay to the defendant any sum of money in respect of the said shares, and although there was no agreement or undertaking as to the terms on which the defendant was to make use of the name of the said Charles Cotton, yet the defendant had authority to have the shares transferred into the name of Cotton as the nominee of the defendant.

On May 12, 1866, a petition was presented to the Court of Chancery, praying that the said association might be wound up compulsorily. On May 14 another like petition was presented. On May 15 both these petitions were advertised in the *London Gazette*.

A third similar petition was presented on May 23, and on May 28 the association, by resolution duly confirmed at a meeting held on June 14, resolved to wind up voluntarily.

On June 25, Wood, V.C., made an order that the voluntary winding-up should be continued under the supervision of the Court, and such winding-up has since continued.

The transfer and certificates of the plaintiff's said twenty shares were duly carried by Messrs. Spencer & Norton, on June 22, 1866, into the office of the association, where they still remain. The liquidators declined to register the transfer, and consequently the plaintiff's name was included in the list of contributories in respect of the said twenty shares. Thereupon the plaintiff's solicitors wrote to the said Charles Cotton, informing him that they would endeavour to put him on the list of contributories in the place of the plaintiff in respect of these shares. When this was written neither the plaintiff nor his solicitors had any knowledge of the defendant.

The plaintiff, failing to have the name of Charles Cotton substituted for his own, was finally settled upon the list of contributories in respect of the said shares, and became liable to pay such calls as were made thereon.

On August 31, 1866, the liquidators made a call of 5*l.* per share on each of the said twenty shares; and the plaintiff, on December 10, 1866, paid 100*l.*, the amount of the said call, and 2*l.* 0*s.* 4*d.* for interest thereon, according to the articles of association.

The said Charles Cotton has not repaid the plaintiff the said call or interest, and the defendant has refused to pay the said amount or any part thereof, or to indemnify the plaintiff against the same.

The pleadings were not appended to the case, as the parties agreed that the Court should decide the question of liability and might draw inferences of fact.

The question for the opinion of the Court was whether, on the above state of facts, the plaintiff was entitled to be indemnified by the defendant against the amount of the said call and interest so paid by him as aforesaid.

Philbrick (*Sir John Karslake* with him), for the plaintiff.—It is submitted that the defendant was really the buyer of twenty of the shares sold by the plaintiff, and that Cotton, whose name was given as the transferee of such shares, was in fact the defendant's agent for that purpose.

[BOVILL, C.J.—How do you establish a contract between the plaintiff and the defendant?]

By the defendant's agreeing on May 14 to take twenty of the shares, which

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the plaintiff had previously sold, and by his then giving instructions for such shares to be transferred into the name of Cotton, the defendant became substantially the purchaser of these shares.

[BRETT, J.—There was a transfer of these shares from the plaintiff to Cotton executed under seal. Can you charge the defendant as an undisclosed principal where the contract is under seal?]

It is submitted that the defendant as principal can be made liable, notwithstanding his agent Cotton may be also liable under the deed which he executed. It comes within the principle propounded by Lord Wensleydale in *Higgins* v. *Senior* (8 Mee. & W. 834; 11 L. J. Ex. 199).

[*Arundel Rogers*, for the defendant, referred to *Story on Agency*, s. 450, where it is said, "Where a contract is made under seal between the agent in his own name and a third person, the principal cannot sue or be sued thereon, although it may be authorized by him."]

That only shews that the defendant cannot be sued on any covenant in the deed; but here the plaintiff is not seeking to sue on the deed, but on the contract or bargain made independently of such deed, and which, according to the usage of the Stock Exchange, was a contract between the plaintiff and the defendant—*Grissell* v. *Bristowe*.[1] The case of *Sheppard* v. *Murphy* (Ir. R. 2 Eq. 544; 16 W. R. 948), before the Irish Chancery Court of Appeal, is very similar to the present, and that case shews that where shares have been sold and purchased through brokers on the London Stock Exchange, there is a privity of contract between the original seller and the person who has ultimately become the purchaser of such shares, and such original seller may proceed against such purchaser for an indemnity against subsequent calls.

[BOVILL, C.J.—To make the present case resemble that case, the defendant's name should have been given as that of the person who would take the transfer, whereas the name given her was that of Cotton.]

But the moment it is ascertained that the defendant, and not Cotton, was the real principal, it is submitted that the plaintiff has a right to go against the defendant. The deed contains statements which are clearly not true, both as to the amount of the consideration-money and as to its payment by Cotton to the plaintiff. Why, then, may not the plaintiff go behind the deed and get at the real transaction, by which it would appear that the defendant was as much the purchaser of the shares, and therefore as liable to the seller, as was Murphy in the above of *Sheppard* v. *Murphy* (Ir. R. 2 Eq. 544; 16 W. R. 948).

Arundel Rogers (*M'Kellar* with him), for the defendant.—This action cannot be maintained. There was no privity of contract between the plaintiff and the defendant; the days were different on which instructions were given to their respective brokers to buy and sell, and the prices were different at which they respectively bought and sold. There is nothing whatever to shew that the defendant made any contract with the plaintiff. Secondly, if there was any contract between the plaintiff and the defendant, it was performed when the name of Cotton was given and accepted as the transferee. That was all which according to the usage of the Stock Exchange the defendant as the buyer would have to do—*Shaw* v. *Fisher* (5 De Gex, M. & G. 596). After executing the deed of transfer to Cotton, the plaintiff cannot make the defendant liable in this action. If he has any remedy at all against the defendant, it must be in equity only. The effect of the execution of a transfer of shares to a sub-purchaser at the request of the first was considered in *Cruse* v. *Paine* (37 L. J. Ch. 711), where Cruse had sold to the defendants in that case in the same way as the present plaintiff had sold to Paine, and the defendants gave the name of Hutchinson, into whose name the shares had been transferred, and Giffard, V.C., said, "If there is a contract between Mr. Cruse and the defendants, the mere fact that he has executed at their instance a transfer (and nothing more was done) cannot alter the liabilities of the one or the other." His Honour then

(1) 37 L. J. C.P. 89; L. R. 3 C.P. 112: this case has since been reversed by the Court of Exchequer Chamber, 38 L. J. C.P. 10; L. R. 4 C.P. 36.

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proceeds to shew that to do that there must be a new contract intended to be substituted for the first. Now here, by the execution of the transfer to Cotton, there never was intended to create a new contract between the plaintiff and the defendant, nor was any such created.

Philbrick, in reply, cited *Paine* v. *Hutchinson* (37 L. J. Ch. 485; L. R. 3 Ch. Ap. 388); *Hawkins* v. *Maltby* (37 L. J. Ch. 58; L. R. 4 Eq. 572); and *Evans* v. *Wood* (37 L. J. Ch. 159; L. R. 5 Eq. 9).

BOVILL, C.J.—The original contract which Lord Torrington made in this case was one made through his brokers on May 10, 1866, to sell to Paine, a stock-jobber, twenty shares. The purchase was to be completed on May 15, 1866, and the price was 8*l.* 15*s.* discount, which, at 10*l.*, the amount paid on each share, would be 1*l.* 5*s.* per share. The contract had to be performed by Paine, and he carried it out according to the usages of the Stock Exchange, which do not differ from other branches of commerce, where, if a man contracts to sell he delivers the article agreed to be supplied if he has it, or if not he gets it elsewhere, and so performs his contract. The practice of the Stock Exchange has not been found to produce inconvenience. The person who buys shares may sell them to another, and when the day for settling comes he may make his vendor transfer the shares to the person to whom he has so sold them. In this particular case there was another contract, by which Paine contracted to sell to the defendant, not the identical twenty shares which by the prior contract he had contracted to buy of the plaintiff, but any twenty shares in the Mercantile Credit Association which he could procure. This also was for May 15, the same settlement-day as in the other contract, but at a different price, namely, 5*l.* 2*s.* 6*d.* discount, which was equal to 4*l.* 17*s.* 6*d.* per share. There were thus two separate and distinct contracts, but the only contract made by the plaintiff was that of May 10, and which was made with Paine, and if it had stood there Paine alone would have been responsible to the plaintiff for the purchase of the twenty shares; but Paine having contracted with the defendant for the sale of twenty shares to him, proposes to substitute the defendant or his purchaser for the performance of his contract with the plaintiff. The defendant, as well as Paine, was only bound to provide the name of a buyer, and he accordingly gave the name of Cotton, which, so far as the plaintiff was concerned, was given in order to carry out the contract between the plaintiff and Paine. Now, it is not necessary to consider whether the plaintiff was bound to have accepted the name of Cotton or not, for he did accept that name, and he executed a deed of transfer of the shares to Cotton, whose name he had so accepted, and Cotton also executed the deed and took a transfer of the shares; and the whole of this, I think, was done in order to fulfil the contract between the plaintiff and Paine. It is plain, therefore, according to the authorities, that when this was done the plaintiff's remedy against Paine was at an end; but it is said that there was then a new contract between the plaintiff and the defendant. I think it is impossible to connect the two contracts together which the plaintiff and the defendant had respectively made with Paine. In what way then did the plaintiff enter into a new contract with the defendant? If the deed of transfer could amount to a new contract at all it would be a contract on that deed, and between the plaintiff and Cotton, and Cotton would be the person who would be liable to indemnify the plaintiff. It is said, however, that the plaintiff can go behind the deed, and charge the defendant as the undisclosed principal; but according to law the party who was a party to and signed the deed as principal would alone be liable, and no one else could be sued as an undisclosed principal. Moreover, how can the plaintiff, as regards any contract with the defendant, be in a better position than he would be as regards the contract with Paine? Paine's contract with the plaintiff at the utmost was only to give the name of a transferee, and when that was given and accepted he was discharged. How can the defendant's liability be more than Paine's? and when Paine was discharged by the giving of Cotton's name in fulfilment of the contract between Paine and the plaintiff, the defendant was equally discharged. I do not desire, however, to put the case on that footing. The deed of transfer created a liability

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on the part of Cotton, and, according to the rule of law, the defendant, who was no party to that deed, cannot be sued on it; and the case of *Cox* v. *Bishop* (26 L. J. Ch. 389) is a strong authority to shew that even in equity the defendant would not be liable. In that case it was sought to charge equitable assignees of a lease with the performance of the covenants in the original lease; but it was held by the Lords Justices, overruling a decision of the Master of the Rolls, that such assignees were not liable to the lessor for such covenants even for the time they were in possession of the property demised. The cases which were referred to by the learned counsel on behalf of the plaintiff are all distinguishable. The case which he most pressed upon us was *Sheppard* v. *Murphy* (Ir. Rep. 2 Eq. 544; 16 W. R. 948). That case was in substance this; Sheppard had sold certain shares to Kennedy on the Stock Exchange, and Kennedy had sold an equal number of such shares to Murphy on a different day and at a different price; and in that respect the circumstances were similar to the present. The name of Murphy was passed to Sheppard as that of the transferee, and Sheppard executed a deed of transfer of the shares to Murphy and was paid the price; but Murphy did not sign the deed, and in a suit by Sheppard for indemnity against calls in respect of such shares, Murphy was held liable, although he had not executed the deed. The ground on which he was held to be liable was this: that he had caused his own name to be handed in as the transferee, paid the price, and requested the transfer of the shares to be made out to him. If Murphy had executed the deed of transfer, there would have been no doubt as to his liability; and as he had agreed to accept the shares, and was bound to execute the deed, the Court of Chancery, acting on the well-known principle of equity, held him to be just as liable as he would have been if he had executed the deed. But what obligation was there on the defendant in this case to have executed the deed of transfer? All that was proposed was, that there should be a transfer to Cotton; and the only obligation, if any, on the defendant was, that Cotton should execute the deed, and that was performed. I have failed to discover any contract between the plaintiff and the defendant, either at common law or by the usage of the Stock Exchange, by which the defendant can be made responsible to the plaintiff. The defendant fulfilled every condition of the rules of the Stock Exchange, and our judgment therefore must be for him.

BYLES, J.—I am of the same opinion. It is clear, I think, that there was no contract even between the plaintiff and Paine which was not performed. Paine entered into a contract to provide a person who should take a transfer of the shares. He did so; Cotton was accepted by the plaintiff as such transferee; and both he and the plaintiff executed the deed. In every view of the case there was no remedy for the plaintiff against Paine after that had been done. But this is a stronger case than it would have been if the action had been against Paine; for here I can see no privity whatever between the plaintiff and the defendant. It is plain, therefore, that the judgment should be for the defendant.

KEATING, J.—I am of the same opinion. It appears to me that there was really no privity of contract between the plaintiff and the defendant. The original contract of sale was with Paine. Then, according to the usage of the Stock Exchange, the name of Cotton was given as the transferee. It is unnecessary to decide whether the plaintiff was bound to accept that name, because he did accept it, and he executed a deed under seal transferring the shares to Cotton, which Cotton also executed. The plaintiff's counsel felt the difficulty this created in the way of his case, and he sought to get rid of it, first, by endeavouring to shew that the defendant was liable as the real principal; but the contract being under seal he could not do so. Then he argued that Cotton was the agent of the defendant, and that the execution of the deed by Cotton was an execution of it by the defendant. But there is no ground for this; for Cotton never professed to execute the deed as the defendant's agent, but on the contrary he professed to execute it as a principal. The defendant never promised to execute any such deed, or to do more than to give the name

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of a transferee, which he accordingly did. I cannot help seeing that the result is oppressive to the plaintiff, who, supposing he had got rid of all liability in respect of these shares, finds that he is still liable, and that all he has done has been to execute a deed of transfer. However, there is, at all events, no contract between the plaintiff and the defendant on which the defendant can be made liable.

BRETT, J.—It seems to me that the only action which the plaintiff can bring is one of indemnity contained in the contract of bargain and sale. Therefore, the question is, with whom was such contract made? In the first place, the contract was with Paine. Now, by that contract, the plaintiff probably agreed to accept some name which was to be given as the transferee of the shares. The only name which was given here was that of Cotton. The next step for the plaintiff to prove, in order to fix the defendant with liability, would be that this name was given with the defendant's consent; but, however that may be, the contract which was eventually made was a contract in writing, and under the seals of both the plaintiff and Cotton. Therefore, the contract resulted in a contract which was nominally between the plaintiff and Cotton. Then the plaintiff undertakes to shew that though nominally with Cotton the contract was really with the defendant; and he attempts to do so by shewing that the defendant was the undisclosed principal. Now, by the law of England, he is not at liberty to do so; and, in the next place, I doubt whether the defendant was the principal of Cotton as a party to such a contract, because, by the contract which the defendant made with Paine, he, the defendant, undertook either to accept the shares himself or to give the name of another person. The defendant gave the name of Cotton; and when he did so, he did not intend to give the name of Cotton as his representative, but as a principal who, as such, was to be liable on the contract. I think, however, that the judgment of the Court must be founded on this, which is a rule of law, that, the contract being under seal, the plaintiff is not to be at liberty to shew who the other party to the contract was besides the parties to the deed.

Judgment for the defendant.

IN THE COMMON PLEAS. Nov. 30, 1868.

NICHOLS *v.* DAVIS.

38 L. J. C.P. 127; L. R. 4 C.P. 80; 17 W. R. 291.

Church—Parish Clerk—Assignment of Office—Action for Marriage Fees—Local Act.

ECCLESIASTICAL LAW.—*The office of parish clerk cannot be assigned.*

A. who, in the year 1818, *had been appointed for life to the office of parish clerk of the cathedral and parish church of M., with power to nominate a deputy, executed a deed in* 1833 *by which he purported to assign such office to B., and after that time he ceased to act as such parish clerk. In* 1850 *an Act was passed for the division into districts of the parish of M., by the 6th section of which it was provided, that during the continuance in office of the chaplains or minor canons and clerks then holding office in the cathedral and parish church of M. the fees for marriages, &c. at such church were to be paid to the district rector, who was to pay them to the said chaplains or minor canons, to be by them paid to the persons entitled thereto:*—Held, *that the deed executed by A. in* 1833 *could not by law operate as an assignment of his office, and that therefore he still continued to be the parish clerk of the said church.*

Held, *also that A. had a right to sue the district rector for the marriage fees due to him as parish clerk, notwithstanding the said 6th section of the statute, and notwithstanding that the chaplains and minor canons, to whom the rector was by that section to pay such fees, had ceased to exist, inasmuch as such clause*

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was only to provide a machinery for the distribution of the fees, and did not affect the rights of A.

Appeal from the decision of the Judge of the County Court of Manchester.

The action was brought to recover the sum of 2*l.* 17*s.* 6*d.* for marriage fees claimed by the plaintiff, as payable to him as lay parish clerk of the parish of Manchester, and of the cathedral or collegiate and parish church of Manchester, for marriages solemnized at St. Peter's Church, Oldham Road, Manchester, between January 1, 1860, and December 31, 1866.

The fees claimed by the plaintiff were those alleged to be reserved and payable by the defendant to him, pursuant to the 6th section of the Manchester Rectory Division Act, 1850 (13 & 14 Vict. c. 41).[1]

In July, 1818, the plaintiff was appointed to the office of lay parish clerk of the parish of Manchester, and of the said cathedral or collegiate and parish church of Manchester, by a deed[2] made by the late Sir Thomas Joseph de Trafford, Baronet, then Mr. Trafford, in whose gift the office was, as stated in section 18 of the said Rectory Division Act.

By an indenture, dated November 14, 1835, the plaintiff, in consideration of 1,900*l.*, assigned to Mr. Thomas Davenport his office of parish clerk of the said parish and church, and the emoluments arising therefrom.

The plaintiff has not since 1835 acted as parish clerk or appointed any deputy to act in his stead, other than by the said indenture of November 14, 1835.

The said Manchester Rectory Division Act received the royal assent on July 29, 1850.

The chaplains or minor canons and the clerk in orders, holding office at the

(1) The following is section 6 of 13 & 14 Vict. c. 41 : "And in order that the setting out and declaring, or setting out, constituting, and annexing, any district or parish, under the provisions of this Act, to any church or chapel already consecrated or to be hereafter consecrated, may not prejudice the revenues of the chaplains or minor canons or of the clerks now holding office in the cathedral and parish church of Manchester, be it enacted, That there shall be paid to the rectors of such districts or parishes respectively, and their successors for the time being, for the performance of marriages, churchings, and burials, during the continuance in office of the said chaplains or minor canons and clerks, or any of them, the fees which are usually and of right ought to be paid for every such marriage and burial, and such offerings as are usually and of right made for every such churching at the said cathedral and parish church of Manchester; and that the said rectors and their respective successors shall from time to time receive such fees and offerings, and pay to the said chaplains or minor canons such proportion of the same as incumbents of chapelries and districts within the parish of Manchester have hitherto paid of fees and offerings respectively received by them in respect of marriages, churchings, and burials in their several churches and chapels, to be by the said chaplains or minor canons paid to the person or persons for the time being entitled thereto, and in such shares and proportions as the fees and offerings respectively now payable at the said last-mentioned church are divided, and that the said fees and offerings shall be paid by half-yearly payments on the Feast of the Nativity of our Saviour Christ and of St. John the Baptist in every year : Provided always, that on the death of any one or more of the present chaplains or minor canons and clerks, or on the ceasing of any one or more of them to hold his or their office or offices respectively, or being compensated in manner hereinafter provided, such proportion of the fees and offerings to be paid to the said chaplains or minor canons and clerks as would have belonged to the person or persons so dying or ceasing to hold office, or being compensated as aforesaid, shall cease and determine; and from and after the death or vacation of office of all the said present chaplains or minor canons and clerks such fees only shall be payable at any such church or chapel as aforesaid as shall be fixed by the bishop of the diocese under the provisions hereinafter contained : Provided also, that nothing in this Act contained shall interfere with the right of performing marriages within the parish of Manchester (as now existing) already enjoyed by the incumbents of the churches of Saint Mary and Saint John in Manchester, until the next avoidances of the said churches respectively, when the same shall cease and determine, except as to the districts or parishes then severally annexed or to be annexed to the said churches."

(2) The deed was a deed-poll, by which, after reciting the right and power of the said Mr. Trafford and his ancestors "of nominating and appointing one of the officiating clerks of the Collegiate Church, in Manchester," the said Mr. Trafford did "nominate, constitute and appoint the said Humphrey Nichols" (the plaintiff) "to the said office of clerk to the said church : to have, hold, exercise and enjoy the said office by himself, his deputy or deputies, and to receive and take the revenues," &c., "for and during the term of his natural life, in the same way and manner to all intents and purposes as his predecessors, clerks of the said church, have been used," &c.

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time of the passing of the said Act, all ceased to hold their respective offices as chaplains, minor canons and clerk in orders before the commencement of the year 1855.

The defendant was the rector of St. Peter's Church, Oldham Road, Manchester, to which a parish, constituted out of the ancient parish of Manchester, had been annexed under the provisions of the above-mentioned Act.

The said church of St. Peter's was consecrated in January, 1860, and the defendant had been rector thereof since the time of its consecration.

From the time of such consecration up to December 31, 1866, there have been celebrated in St. Peter's church five marriages by licence and seventy by banns.

The fees payable for each marriage solemnized at the cathedral and parish church of Manchester were 4*s*. 6*d*. for each marriage by banns, and 10*s*. for each marriage by licence; and the fees which have been received by the defendant for each marriage solemnized at St. Peter's church have been 5*s*. 6*d*. for each marriage by banns, and 12*s*. for each marriage by licence.

Such fees as were payable to the cathedral and parish church of Manchester prior to the passing of the Manchester Rectory Division Act, 1850, in respect of marriages solemnized in district churches then existing in the parish, were received from the incumbents of such districts in one gross sum, by and on behalf of the then chaplains or minor canons and clerks of the said cathedral and parish church.

In the event of any fees being payable by the defendant to the parish clerk of the said cathedral and parish church in respect of marriages at St. Peter's, the County Court Judge found that such fees were 1*s*. for each marriage by licence, and 9*d*. for each marriage by banns, and the total amount of such fees at the said rates from January, 1860, to December, 1866, was 2*l*. 17*s*. 6*d*. The defendant had received for fees in respect of marriages so solemnized in St. Peter's church a sum larger in amount than the said sum of 2*l*. 17*s*. 6*d*.

The County Court Judge gave judgment for the plaintiff for the said sum of 2*l*. 17*s*. 6*d*., giving leave to appeal pursuant to 30 & 31 Vict. c. 142.

The question for the opinion of this Court was whether the plaintiff was entitled to recover by action in the said County Court the said sum or any part thereof.

Edwards, for the defendant (the appellant).—The plaintiff was not entitled to sue for these fees, for at the time of bringing the action he was not parish clerk. The plaintiff was appointed for life to the office of parish clerk of the said cathedral and parish church of Manchester by Sir Thomas J. De Trafford, in whom was vested, as recited by the 18th section of 13 & 14 Vict. c. 41, the right to appoint one of the two parish clerks of such church, the other of such clerks being appointed by the dean and canons, and commonly called the clerk in orders. The plaintiff having, in 1835, assigned his said office of parish clerk to Mr. Davenport, it is submitted he was not at the time of the passing of the 13 & 14 Vict. c. 41. a clerk then "holding office in the cathedral and parish church of Manchester," within the meaning of the 6th section of that Act. It is true that an office of trust, as a general rule, cannot be assigned; but there is no authority to shew that the office of parish clerk may not be assigned. In the case of the *Parish Clerk* (13 Rep. 70) the office of parish clerk was held to be merely temporal, and in Com. Dig. tit. 'Officer' (C), it is said, "An office in fee granted by a subject generally may be assigned," "though it be an office of trust, for heirs includes assigns." Moreover, the plaintiff, having purported by deed to assign the office, has never since acted as parish clerk, or otherwise exercised any of the rights of his office. A question may therefore arise whether, if he could not legally assign, he has not lost his office by non-user.

[WILLES, J.—That question could only arise where the interests of third persons are concerned.]

Then, further, it is submitted that even if the plaintiff be still the parish clerk he has no power to sue for the fees, for by section 6 of 13 & 14 Vict. c. 41.

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the rector was to pay the proportionate fees to the chaplains or minor canons, who were to pay and divide them amongst the persons entitled. Now, the chaplains and minor canons have all long ago ceased to hold those offices, and the plaintiff is neither a chaplain nor minor canon to whom the defendant was, by this 6th section, to pay such fees, if at all.

R. G. Williams appeared for the plaintiff, but was not called on.

WILLES, J.—Mr. Edwards has done all that it was possible for him to do, but he could not perform an impossibility. I am of opinion that the County Court Judge was right, and that none of the points which have been urged for the defendant ought to prevail. The first point was, that the plaintiff had ceased to be parish clerk. It could not be said that he was not parish clerk up to November, 1835, the date of the assignment, because it is expressly found that Sir Thomas J. De Trafford, who nominated him, had power to do so, and that relieves us from inquiring as to how he had such right; possibly it may have been by an Act of Parliament. Then, having such power, he nominated the plaintiff as parish clerk for life by a deed which as I read it, gave the plaintiff power to appoint a deputy. There is no mention of "assign" in that deed, and the appointment is to the office of a parish clerk in the ordinary way, with nothing to shew that the office differs from the ordinary office of a parish clerk. Then in November, 1835, the plaintiff professed by deed to assign his office to a Mr. Davenport, and the question is, whether such deed took the office out of the plaintiff, and vested it in Davenport, or whether it amounted to anything more than the appointment of a deputy. It would require some authority to shew that a parish clerk has power to assign his office of parish clerk, and to make it the subject of a bargain and sale. The only authority for this which has been referred to is a passage from Com. Dig. tit. 'Officer' (C), and the reason there given for the assignment of an office in fee is, that "heirs" includes assigns; but the Chief Baron goes on to say, "but an office of trust cannot be assigned without the assent of him who granted the office"; and further on, under the same title (D), he deals with those who make a deputy; and the first passage there, "every officer who may assign his office to another may make a deputy," shews that in the opinion of the Chief Baron the appointment of a deputy is a very different thing to the sale and assignment of an office out and out. Amongst the officers who may appoint a deputy he mentions a parish clerk, though with a doubt. It may be because if a sufficient deputy was appointed to the satisfaction of the clergyman, the clerk would not be proceeded against for the appointment; but if he appointed a dissolute or improper person, the clergyman might perhaps object. That statement of the power to appoint a deputy, however, excludes the notion of the clerk having the power to assign his office. The deed, therefore, cannot operate as an assignment, but, according to *Roe* v. *Tranmarr* (Willes, 682), it will operate as the law will allow it, and the plaintiff will probably be a trustee in equity for Mr. Davenport. As for the question of non-user, I do not deal with that, because it is not shewn to have been of a contumacious kind. There must be some proceeding shewing misconduct in order to deprive a person of an office by non-user. Then, assuming the plaintiff to be parish clerk, it was contended that section 6 of 13 & 14 Vict. c. 41. does not preserve his rights. The key to that section is to be found in the introduction to it, which states the object of that section to be that the constituting and annexing any district or parish under the Act "may not prejudice the revenues of the chaplains or minor canons, or of the clerks." To satisfy the word "clerks," which is in the plural, it must be read to include "lay clerk," which the plaintiff was. Then the section goes on to provide that, "during the continuance in office of the said chaplains or minor canons and clerks, or any of them," the rector is to receive the fees and to pay them to the said chaplains or minor canons, who are to pay them to the persons entitled; that is, that in order to save the rector the trouble of distributing the fees, he is to hand them over for that purpose to the chaplains or minor canons. It is therefore a mere machinery to insure the parish clerk's fees getting to his hands, but does not affect his rights to them. If that

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mode of payment fails, by the chaplains or minor canons ceasing to hold office, the only effect of that is, that the rector must pay these fees to the clerk in the ordinary way that debts are paid. The judgment of the County Court must therefore be affirmed.

KEATING, J.—I agree that the Judge of the County Court was right. I think that the plaintiff was parish clerk when he brought his action in that Court. He was appointed prior to 1833, by a person who had a right to appoint him, and in 1833 he executed a deed containing words which were large enough to operate as an assignment of his office, but, as has been pointed out by my Brother Willes, they could not so operate in law, and he therefore continued to remain parish clerk. It may be that the effect of such deed was to appoint a deputy, and that Mr. Davenport may, in equity, have a right to the emoluments. Then it is said that the plaintiff cannot bring an action for these fees, because the Act directs the fees to be paid by the rector to the chaplains or minor canons, and that as they have ceased to exist the rector cannot now pay them. But I agree that the interposition of the chaplains or minor canons, as the persons to receive the fees in the first instance, is a mere machinery for their getting to the parties ultimately entitled to them without unnecessary trouble to the rector. Then, although the machinery may fail, the plaintiff has a right to have what money he was formerly entitled to, and he can apply to the rector for it. The judgment of the County Court is therefore right.

BRETT, J.—I am of the same opinion on both points.

Judgment affirmed.

IN THE COMMON PLEAS. Nov. 23, 1868.

POTTER *v.* RANKIN.

38 L. J. C.P. 130; L. R. 4 C.P. 76; 19 L. T. 383.

Referred to, *Yglesias* v. *Corporation of the Royal Exchange Association*, [1870] E. R. A.; 39 L. J. C.P. 173; L. R. 5 C.P. 141; 22 L. T. 269; 18 W. R. 381 (C.P.); "*The Soto*," [1893] E. R. A.; 62 L. J. P. 17; [1893] P. 73; 69 L. T. 231; 41 W. R. 479 (P.D. & A.).

Costs—Commission to examine Witnesses Abroad—Legal Assistance to Commissioners.

EVIDENCE. K.—*Where a commission, issued to take evidence abroad, authorizes questions beyond the written interrogatories, and the Commissioners appoint attorneys to put such questions, the allowance of the expenses occasioned thereby is a matter for the discretion of the Master.*

This was a rule calling on the plaintiff to shew cause why the Master's taxation, as to the costs of legal assistance to Commissioners appointed to take evidence at Calcutta, should not be reviewed.

It appeared that a commission had been issued for taking evidence at Calcutta; that the Commissioners were to administer certain written interrogatories; that the plaintiffs and defendants were to be at liberty to put further questions; that the costs incidental to the commission were to be costs in the cause; and that the Commissioners had employed attorneys to put questions on behalf of the plaintiffs and defendants. The complaint now was that the Master had not allowed certain expenses incurred in such employment.

Sir G. Honyman shewed cause.—It is clear from *Cornet* v. *Dempsey* (1 Dowl. N.S. 422), *Stewart* v. *Steele* (4 Com B. Rep. N.S. 460), and other cases, that there is no positive rule of law obliging the Master to allow these costs. The Master has exercised his discretion; there is nothing in the affidavits to shew he is wrong; and the Court will not interfere.

Cohen, in support of the rule.—The defendant has a right to these costs.

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Before arbitrators, counsel and attorney would be allowed; here the plaintiffs and defendants are to be at liberty to put further questions, and all costs incidental thereto are to be costs in the cause. This was a difficult question as to a death-blow to a ship causing a particular loss. The practice is to appoint merchants as Commissioners, who cannot be expected to know how to interrogate, and who, therefore, have a right to appoint proper professional persons. *Bell* v. *Aitken* (37 L. J. C.P. 168) shews that even if the Master has exercised his discretion, the Court will interfere.

BOVILL, C.J.—This application is made on two grounds. The first is, that the defendant is entitled as of right to have these costs allowed, but I repudiate the notion that there is any such rule. There is no such rule, but the allowance is a matter of discretion. Then, secondly, it is said that the Master has not exercised his discretion, or exercised it wrongly. But the Master has exercised it, and it must be shewn clearly that he is wrong before the Court will interfere. There may be many cases in which it may be desirable for Commissioners to have assistance, but the occasion for such assistance and the amount of it must be a matter of discretion for the Master, and here some has been allowed; shewing he has allowed what he thought necessary. If the Master had not used a discretion, the case might be different; but he has, and the facts before us are not sufficient to induce us to give (as a matter of discretion) a decision contrary to that of the Master.

BYLES, J., KEATING, J., and BRETT, J., concurred.

Dismissed with costs.

IN THE COMMON PLEAS. Feb. 11, 1869.

SPEDDING *v.* NEVELL.

38 L. J. C.P. 133; L. R. 4 C.P. 212.

Referred to, *In re National Coffee Palace Co.*, [1884] E. R. A.; 53 L. J. Ch. 57; 24 Ch. D. 367; 50 L. T. 38; 32 W. R. 236 (C. A.); *Meek* v. *Wendt & Co.*, 1888, 21 Q.B. D. 126; 59 L. T. 558 (Q.B. D.).

Warranty and Misrepresentation of Authority to make Contract—Damages.

PRINCIPAL AND AGENT. J.—*The plaintiff was the holder of a nearly expired lease of certain premises for twenty-one years. The defendant, professing to act as the agent of the landlord, agreed with the plaintiff that the landlord should renew the lease. The plaintiff then assigned to B. the residue of the lease and all interest under this agreement. The landlord refused to grant the new lease because the defendant acted without authority, and B. had to leave. The plaintiff brought a suit in Chancery for specific performance, in which the landlord and the defendant swore there was no authority, and the bill was dismissed. B. then brought an action against the plaintiff, and recovered damages and costs, and the plaintiff afterwards brought the present action:*— Held, *first, that in the absence of its appearing that the defendant had not persisted in his representation and told the plaintiff not to bring the suit, the plaintiff was entitled to recover the costs of the Chancery suit; secondly, that the plaintiff was entitled to a sum arrived at by capitalizing the difference between the rent the plaintiff was to have paid and the actual annual value of the premises, as and for the value of the term; but, thirdly, that as in the particular case a re-sale was not in the contemplation of the parties, the plaintiff could not recover the damages and costs in B.'s action.*

The declaration in this action contained three counts: first, for the defendant's breach of an agreement contained in a letter set forth in the following case; second, for his falsely and fraudulently representing that he had authority to enter into such agreement; and third, for his breach of a warranty that he had such authority.

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At the trial, a verdict was entered for the plaintiff for 700*l.* subject to a CASE to be stated by the arbitrator.

CASE.

The plaintiff, Mrs. Harriet Spedding, on November 16, 1863, was in occupation of a house, shop, and premises, No. 23, Ebury Street, Pimlico, Mr. James Nevell, the defendant's brother, being the freeholder; the plaintiff was equitably entitled to or interested in the said premises for the residue of a term of twenty-one years, created by a lease granted by the said James Nevell to William Fuller, dated May 30, 1846, and expiring on March 25, 1867.

On February 18, 1867, the plaintiff became assignee by a legal assignment of the residue of the said term then unexpired.

The defendant had for several years previous to and during the year 1863 acted as the agent of his brother James Nevell in the receipt of the rents of the said house, shop and premises, and of other property of his said brother.

The plaintiff being desirous to obtain a renewal of the lease of the said premises applied to the defendant to obtain such renewal from his said brother; and afterwards, on November 16, 1863, the defendant, assuming to have his brother's authority, agreed on his behalf so to do, and made and signed an agreement, duly stamped as follows:

"5, Eccleston Street and 88, Ebury Street,
"Belgravia, London, Nov. 16, 1863.

"Madam,—I undertake on behalf of my brother, Mr. James Nevell, to renew to you the lease of house No. 23, Ebury Street, Pimlico, at the expiration of the term of twenty-one years from such period, at the rental of 70*l.* per annum, being an increase of 5*l.* per year, upon the following conditions, viz., that you modernize the house by putting in a new shop-front at your sole cost and expense; the terms of the present lease to be the terms of the renewed one, with this exception, that the words 'or wine, spirit and beer merchant' be added to the list of restrictive trades mentioned therein, to any of which it will be contrary to your agreement to let the shop or house during any part of your tenancy.—I am, Madam, yours truly,

"THOMAS NEVELL.

"Mrs. Harriet Spedding,
"10, Walton Place, S.W."

The defendant had no authority from his said brother, express or implied, to make any such agreement.

The plaintiff, shortly after the making of the said agreement of November 16, performed the said agreement by putting in a new shop-front, at an expense of 50*l.*, and she also expended a further sum of 10*l.* in permanently improving the said house, shop and premises.

On June 28, 1865, the following agreement was made between the plaintiff of the one part and George Budd of the other part: "Memorandum of an agreement made this 28th day of June, 1865, between Mrs. Harriet Spedding, of Walton Place, Brompton, widow, of the one part, and Mr. George Budd, of Hugh Street, Pimlico, messenger at a government office, of the other part.

"The said Harriet Spedding agrees to sell to the said George Budd all her, the said Harriet Spedding's, interest in all the term now to come and unexpired in a certain lease of the house and premises situate and being No. 23, Ebury Street, in the parish of St. George, Hanover Square, dated May 30, 1846, and made between James Nevell and William Fuller, and which will expire on the 25th day of March, 1867; and also all her, the said Harriet Spedding's, interest in a lease proposed and promised to be granted to her, the said Harriet Spedding, from the said 25th day of March, 1867, for a term of twenty-one years, at the rent of 70*l.*, being an advance of 5*l.* per year, but otherwise on the same terms

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and conditions as the existing lease, with this exception, that the words " or wine, spirit and beer merchant " be added to the list of restricted trades mentioned therein, at and for the sum of 150*l*., payable as follows, viz., the sum of 30*l*. as a deposit and in part payment of the said sum of 150*l*. to be paid at the signing of this agreement, and the remaining sum of 120*l*. on the 11th of August next, up to which day the said Harriet Spedding agrees to pay all outgoings on the said house and premises. The said George Budd hereby agrees to purchase the said interest of the said Harriet Spedding for the said sum of 150*l*., and he also agrees to take, by valuation in the usual way, the shop fixtures and stock-in-trade of the said Harriet Spedding, the amount of such valuation to be paid by the said George Budd to the said Harriet Spedding, on the said 11th day of August, in the following manner: one third of the amount by a bill at six months, one third by a bill at twelve months, and the remaining third by a bill at eighteen months, all such bills to be drawn by the said Harriet Spedding and accepted by the said George Budd, and, for the further security of the said Harriet Spedding, to be indorsed by Mr. William Goodyear, of the Talbot Inn, Little Chester Street, Belgrave Square, and to bear interest from the said 11th day of August at the rate of 5*l*. per cent. per annum. And inasmuch as the before-mentioned lease for twenty-one years from the 25th day of March is agreed to be granted to the said Harriet Spedding, she, the said Harriet Spedding, will use her best means and endeavours to obtain the said lease to be granted direct to the said George Budd; but on her superior landlord declining so to do will herself take up the lease and assign the same immediately to the said George Budd, his executors or assigns, all expenses of such lease and counterpart to be borne by the said George Budd, the said Harriet Spedding agreeing to pay the cost of the assignment in the event of such assignment becoming necessary. The said George Budd is hereby precluded from inquiring into the title of the said Harriet Spedding or her superior landlord. And it is agreed between the said parties that the title shall be taken to commence with the said proposed lease to the said Harriet Spedding. And lastly it is agreed between the said parties that in case the said George Budd shall fail to complete the purchase on the day above mentioned the deposit shall be absolutely forfeited to the said Harriet Spedding, and it shall not be necessary previously to tender an assignment. As witness the hands of the said parties the day and year first above written.

" Harriet Spedding.
" George Budd.

" Witness—Geo. Berry,
" 8A, Motcombe Street, S.W."

The said James Nevell refused to perform the said agreement on November 16, 1863; and on or about January 10, 1867, he gave notice by his solicitor that he should require possession of the said premises upon the expiration of the term created by the least of May 30, 1846.

No lease has been granted in pursuance of the said agreement of November 16, 1863, to the plaintiff or any other person.

The said George Budd was at the time of the expiration of the said lease of May 30, 1846, in the occupation of the premises, and carrying on a trade and business therein. The said James Nevell permitted the said George Budd to continue in such occupation until Christmas, 1867, when the said George Budd ceased to occupy the same. The said James Nevell took possession thereof, and shortly afterwards granted a lease of the said premises to one Thomas Perry, at a rent of 100*l*. per annum.

The said James Nevell having so refused to perform the said agreement of November 16, 1863, the plaintiff applied to the said George Budd to become a co-plaintiff jointly with her in a suit to be instituted in the High Court of Chancery, against the said James Nevell, for specific performance of the said agreement, and the said George Budd consented to become such co-plaintiff upon the plaintiff indemnifying him against all costs and expenses he might become liable to pay by reason of becoming such co-plaintiff. The plaintiff

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thereupon signed a written indemnity, a copy of which is to be taken as part of this case.

A suit was afterwards instituted in the High Court of Chancery, in which the now plaintiff and the said George Budd were plaintiffs and the said James Nevell was defendant, the bill praying that the said James Nevell might be decreed to specifically perform the said agreement and grant to the plaintiff a proper lease of the said house and premises for the term of years, and at the yearly rent, and according to the terms mentioned in the said agreement, the now plaintiff in the said bill stating her readiness and willingness, and thereby offering to perform the agreement on her part, and on the execution and delivery of the said lease to her to execute and deliver to the defendant, the said James Nevell, a counterpart thereof.

The said James Nevell put in an answer to the said bill, alleging, amongst other things, that the now defendant never communicated with him on the subject of a renewal of the said lease, and had no authority to enter into the agreement of November 16, 1863, and the now defendant, Thomas Nevell, was called and examined upon oath as a witness on behalf of the plaintiffs in the said suit before one of the examiners of the said Court: he stated in substance that he never communicated with his said brother on the subject of renewing the lease to the now plaintiff, and that it was very wrong in him to sign the agreement of November 16, 1863; that he had no authority to sign it on behalf of his brother the said James Nevell, and that his said brother knew nothing about it.

The said George Budd commenced an action against the now plaintiff for petition of the plaintiffs therein, ordered to be dismissed out of Court as against the defendant therein, with costs to be taxed. The now plaintiff thereupon paid to the said James Nevell 28*l*. 13*s*. 2*d*. for his taxed costs of the said suit, and the now plaintiff incurred costs of herself and her co-plaintiff in the said suit to the amount of 70*l*. (This last-mentioned sum, if recoverable in this action against the defendant, is to be subject to taxation.)

The said George Budd commenced an action against the now plaintiff for damages for breach of the agreement of June 28, 1865, and the said action was referred to the arbitration of Alfred Coxon, Esq., barrister-at-law, the costs of the said cause to abide the event thereof, and the said Alfred Coxon having heard both parties, awarded that the now plaintiff should pay to the said George Budd for damages the sum of 280*l*., together with the costs of the said reference and award. Mr. Coxon has been examined before me as a witness upon this reference, and I find that the said sum of 280*l*. so awarded was made up as follows: he found that the premises were of the annual value of 90*l*., and he capitalized the difference between that sum and 70*l*., the reserved rent on an 8*l*. per cent. table, making 205*l*.; he found that the plaintiff Budd had incurred a loss of 22*l*. 13*s*. 4*d*. on the re-sale of fixtures bought by him and put up on the premises: he found that the plaintiff Budd would sustain a loss in his business by removal therefrom, and incur expense by removal amounting to 35*l*., and that the plaintiff Budd had become liable to pay for solicitors' charges for advising him, and otherwise in and about the matters, the sum of 17*l*. 17*s*. 6*d*.; and throwing off the odd shillings and pence, Mr. Coxon awarded all those sums to the plaintiff Budd as damages, making in the aggregate the sum of 280*l*.

The now plaintiff has paid to the said George Budd the said sum of 280*l*. so awarded as damages as aforesaid, together with the sum of 66*l*. 5*s*., the taxed costs of the plaintiff Budd in the said action and in the said reference, and the now plaintiff has incurred costs to her attorney in defending the said action and attending the said reference to the amount of 80*l*. (but this last-mentioned sum is also to be subject to taxation).

Subject to the opinion of the Court, I award and direct that the verdict entered for the plaintiff do stand upon each and every count in the declaration, but that the amount thereof be reduced to the sum of 584*l*. 18*s*. 2*d*., made up as follows: 50*l*. costs of new shop-front; 10*l*. expended for permanent improvement of the premises; 28*l*. 13*s*. 2*d*. for the costs of the defendant James Nevell

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in the said suit of *Spedding and Budd* v. *Nevell*, and 70*l*. for the plaintiff's costs incurred in the said suit, subject to taxation as aforesaid; 280*l*. the damages awarded and paid by the now plaintiff in the action of *Budd* v. *Spedding*; 66*l*. 5*s*. the plaintiff's costs in the last-mentioned action and of the said reference, and 80*l*. the defendant's costs of the said last-mentioned action and reference, subject to taxation as aforesaid. And I further award and direct, that the defendant do pay to the plaintiff her costs of and incidental to this reference and the costs of this award, and that the defendant do bear his own costs of the same.

The pleadings in this action are to be taken as and form part of this case.

The question for the opinion of the Court is, whether the several sums, making together the sum of 584*l*. 18*s*. 2*d*., or any and which of them, or any part thereof respectively, are recoverable in this action on any count or counts in the declaration, and whether any and what deduction from the said sum of 584*l*. 18*s*. 2*d*. should be made in respect of the said sum of 150*l*. paid by the said George Budd to the now plaintiff as aforesaid; and the parties agree that the verdict shall stand for the said sum of 584*l*. 18*s*. 2*d*., or for any lesser sum as the Court may direct.

J. Brown (*Bush Cooper* with him), for the plaintiff.—First, the plaintiff is clearly entitled to the 50*l*. and 10*l*., as they were required to be expended under the agreement; but these items will not be pressed, because it is admitted that they are included in the value of the term, and she therefore cannot recover these items as well as the whole of the sum awarded in that behalf. Secondly, as respects the costs of the Chancery suit, the plaintiff was justified in thinking that the defendant had authority, and in bringing the suit; and therefore *Collen* v. *Wright* (7 El. & B. 301; 26 L. J. Q.B. 147; 8 El. & B. 647; 27 L. J. Q.B. 215) is in point. Thirdly, the present case does not fall within the case of *Flureau* v. *Thornhill* (2 W. Black. 1078), but within the cases of *Lock* v. *Furze* (19 Com. B. Rep. N.S. 96; 35 L. J. C.P. 141); *Robinson* v. *Harman* (1 Ex. Rep. 850; 18 L. J. Ex. 202) and *Engell* v. *Fitch* (37 L. J. Q.B. 145); and the plaintiff is therefore entitled to recover, not merely the value of the term, but also in respect of the good bargain with Budd; and indeed is entitled to go further than this, and be recouped the special damages and costs in the action by Budd, for the plaintiff was entitled to have the damages assessed in an action, as it was a matter in respect of which parties might well differ.

[*Quain, contra*, referred to *Williams* v. *Reynolds* (6 Best & S. 495; 34 L. J. Q.B. 221).]

[Brett, J., referred to *Collins* v. *Cave* (4 Hurls. & N. 225; 28 L. J. Ex. 204).]

No notice of action was necessary—*Duffield* v. *Scott* (3 Term Rep. 374); *Smith* v. *Compton* (3 B. & Ad. 407); *Wrightup* v. *Chamberlain* (7 Sc. 598).

Quain, for the defendant.—In order that the plaintiff may recover the costs of the Chancery suit, it is necessary, according to *Collen* v. *Wright* (7 El. & B. 301; 26 L. J. Q.B. 147; 8 El. & B. 647; 27 L. J. Q.B. 215), that the defendant should have persisted to the last in the false statement. The plaintiff should not have rushed into the suit without inquiry. And, as respects the claim for the value of the term, the sub-contract was without notice, and was not within the contemplation of the parties; and the plaintiff is only entitled to the sums of 50*l*. and 10*l*., and any expense she may have incurred in investigating the title. In order to recover more than this, there should be a wilful prevention by the defendant.

[Montague Smith, J., referred to *Simons* v. *Patchett* (7 El. & B. 568; 26 L. J. Q.B. 195).]

And *à fortiori*, she cannot recover the costs of Budd's action, when the sale was not contemplated by the parties, when there has been no persistence in the representation, and when nothing wilful has been done.

J. Brown, in reply.

Keating, J.—One of the counts of the declaration in this action is founded on a false representation of authority, and another on a warranty that the

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for his brother James Nevell, at the expiration of the then running lease, to grant a further lease at a rent of 70*l*. The defendant had, in fact, no authority from his brother; but the plaintiff thought he had, and in 1865 disposed of her interest in the premises to Budd. When the time for granting the new lease came, James Nevell repudiated the defendant's authority, and insisted on having possession at the end of the old term. Budd, who was in possession, had to give it up, and the reversioner let the premises at a rent of 100*l*. a year to another person. The plaintiff and Budd thereupon commenced a suit in Chancery against James Nevell for specific performance, in which suit James Nevell was examined, and swore that he had given no authority to the defendant; and the defendant swore that he had no authority, that his brother knew nothing about the matter, and that he had done very wrong. This, as far as appears, was the first time the plaintiff knew that the defendant had falsely represented that he had authority; and though we have been pressed that it does not appear that the defendant had not previously disclosed it, still it does not appear that this was so, and we cannot infer it. Things being so, the bill was dismissed; and Budd brought an action against the plaintiff for breach of the agreement made with him, and recovered damages and costs; and the plaintiff now brings this action against the defendant who caused all this mischief. The plaintiff's claim may be divided under three heads: First, it is said she is entitled to recover the costs of the Chancery suit; and I am of opinion that she can recover them. It has been argued that the case does not fall within *Collen* v. *Wright* (7 El. & B. 301; 26 L. J. Q.B. 147; 8 El. & B. 647; 27 L. J. Q.B. 215) and *Randell* v. *Trimen* (18 Com. B. Rep. 786; 25 L. J. C.P. 307), because there was no persistence by the defendant in the original false representation; but there is nothing to shew it was withdrawn till the evidence given in the Chancery suit, and therefore I think that the plaintiff is entitled to recover these costs. Secondly, it is said that the plaintiff is entitled to be placed in the same position as she would have been if the contract had been made with James Nevell's authority, and therefore to recover the value of the term as if the defendant had authority; and I think she has a right to recover the value of the term. The value might be ascertained in various ways; here there has been a re-sale, and also the arbitrator in the action by Budd against the plaintiff has found the value to be 205*l*., in arriving at which amount he may have taken a low estimate, inasmuch as he capitalized the difference between 70*l*. and 90*l*. per annum, whilst the premises in fact let for 100*l*. I assume the present arbitrator found that sum to be the value; but if the defendant thinks otherwise, and desires to go back to him that he may say as between these parties, what is the value, he may; but, for the purposes of this judgment, I assume that he does not object to this as being the value; and this being so, I think the plaintiff is entitled to recover it as the value of the term. Thirdly, it is said the plaintiff is entitled to the costs and damages in the action by Budd; but I am of opinion that she cannot recover those, for it seems to me here, adopting the argument of Mr. Quain, that, when the agreement of 1865 was made, it cannot have been then in the contemplation of the parties in this particular case (for I do not lay down any general rule) that a re-sale should take place; and further, it was made without any communication to or inquiry of, and without the knowledge of the defendant and his brother; and, without laying down a general rule that communication is necessary, or that if made it would render the defendant liable, yet it is one circumstance which induces me to think a re-sale was not in the contemplation of the parties so as to make these damages a natural consequence of the breach of contract or the false representation. These three heads substantially include all the damages claimed; and, for the reasons I have given, I am of opinion that the plaintiff is entitled to the damages claimed under the first two heads, but not to those claimed under the third.

MONTAGUE SMITH, J.—I am of the same opinion. This action, as far as

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it is founded on contract, is on a warranty made by the defendant, when he assumed to contract as agent for his brother, that he was such agent. The plaintiff, relying on this warranty, made a contract with Budd for the sale of her interest under the agreement for a new lease. Afterwards the brother refused to grant the lease; then a suit in Chancery was instituted for specific performance; and after its failure an action was brought by Budd against the present plaintiff. It seems to me that the plaintiff is entitled to recover the costs incurred in the Chancery suit, which failed because the defendant had no authority. It is said that this case differs from *Collen* v. *Wright* (7 El. & B. 301; 26 L. J. Q.B. 147; 8 El. & B. 647; 27 L. J. Q.B. 215), because there it appeared that the defendant persisted in his representation up to the proceedings in Chancery; but it seems to me consistent with the facts stated in the present case that this was so here, for I do not find that there was any communication to the plaintiff that she was not to go on with the Chancery suit; and even if there had been, she might be warranted in going on, because it might be a fair question, looking to the contradictory assertions, which of them was true. The suit proceeding, it turned out, on the examination of the defendant and his brother, that he had no authority, and the bill was dismissed. The expenses of this suit flow naturally out of the breach of the warranty, and the plaintiff is entitled to recover them in this action. Secondly, as respects the value of the term, I think that in this case, though I do not say it would be so in all cases, the measure of damages is the same as if the action were against the principal, because if the defendant had had authority there would have been made a binding contract with James Nevell, who was able to perform it. If James had had no title or been insolvent the matter might have been different; but he was solvent and had title, and the proper measure is the loss the plaintiff sustained because there was no valid contract with James; and we have to see what that contract would have been worth, and what damages the plaintiff has sustained by not having the contract assumed to be made. *Simons* v. *Patchett* (7 El. & B. 568; 26 L. J. Q.B. 195) establishes that the measure of damages, so far as giving the value of the term, is right. That was an action on an agreement, whereby the defendant assumed to act as agent for another person in the purchase of a ship, but had no authority; the ship could not be re-sold for the price agreed to be given by the defendant, and was sold for less; and it was held, that the plaintiff was entitled to recover the difference between the two prices. But Mr. Brown says, that as there was a re-sale to Budd, who has sued and recovered damages and costs, the plaintiff is further entitled to recover those damages and costs. I cannot, however, come to that conclusion. As my Brother Keating has already said, it would not be right to lay down a rule binding in all cases; and the question is, looking to the present agreement, was it fairly within the contemplation of the parties to it that there might be a re-sale so as to throw on the defendant the consequences arising therefrom? I find no sufficient reasons for holding that a re-sale was in the contemplation of the parties. I think that the true measure of damages is the value of the term enhanced by the contemplated expenditure, and that the loss upon and arising from the re-sale cannot be recovered. Mr. Coxon has found the value of the term to be 205*l.*, and has arrived at this amount by capitalizing the difference between the rent of 70*l.* and 90*l.*, which he finds to be the real annual value. It is true that the plaintiff sold to Budd for 150*l.* only; but we must either take Budd's agreement altogether or reject it altogether, and 150*l.* is not to be considered necessarily the real value, because he was also to buy at a valuation the fixtures and stock-in-trade, and in consideration of this the plaintiff may have taken a less sum for the term. Therefore we may fairly take 205*l.* as the proper sum. The defendant may, however, go back to the arbitrator if he be dissatisfied, but he must not forget that the premises were eventually let for 100*l.* per annum. It seems to me that this is all the plaintiff is entitled to recover. I think that the consequences of the breach of the agreement with Budd cannot fall on the defendant because they are too remote. I am, therefore, of opinion that the plaintiff is entitled to

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recover the costs of the suit in Chancery and the value of the term, but not the damages and costs in Budd's action.

BRETT, J.—I am of the same opinion for the same reasons.

Judgment accordingly.

IN THE COMMON PLEAS. Feb. 5, 1869.

BRETT *v.* JACKSON.

38 L. J. C.P. 139; L. R. 4 C.P. 259; 19 L. T. 790; 17 W. R. 532.

Referred to, *Hardy* v. *Fothergill*, [1889] E. R. A.; 58 L. J. Q.B. 44; 13 A.C. 351; 59 L. T. 273; 37 W. R. 177 (H.L.).

Debtor and Creditor—Deed of Assignment for Benefit of Creditors—Annuity not capable of Valuation.

BANKRUPTCY. N.—*An annuity deed provided, that if the annuitant refused, neglected, failed or became incapable to perform the stipulations contained in it, the annuity was to cease; that, among other things, the annuitant should use his best endeavours to preserve, extend and promote the success of a certain business, and not impede its success by any act, neglect, omission or default; that he should perform such services and duties as certain persons should reasonably require; that he should not carry on a certain business during a certain time and within a certain area; and that all disputes should be referred to arbitration*:—Held, *that such annuity was not capable of valuation under* 12 *&* 13 *Vict. c.* 106. *s.* 175, *and therefore not barred by a deed of assignment made by the grantor for the benefit of his creditors.*

This was an action brought for the recovery of 75*l.*, claimed to be due from the defendant to the plaintiff upon and by virtue of a certain deed, dated January 8, 1866, made between Charles Nolda of the first part, Charles Beardsell and Harry Todd Jackson, the defendant, of the second part, and Henry Brett, the plaintiff, of the third part, and by which deed the said Charles Beardsell and Harry Todd Jackson jointly and severally covenanted to pay to the plaintiff during his life the clear yearly sum of 150*l.*, by equal payments, on January 8, April 8, July 8, and October 8, if and so long as the plaintiff should perform and observe the stipulations on his, the plaintiff's, part covenanted to be performed by the said deed; and by the consent of the parties, and by the order of Byles, J., dated November 20, 1867, according to the Common Law Procedure Act, 1852, the following CASE has been stated for the opinion of the Court without pleadings:

In the year 1863 the plaintiff carried on the business of a woollen-warehouseman in the city of London, under the style or firm of Brett Brothers & Co., and in the same year he executed and perfected a deed of assignment of all his estate and effects to trustees for the benefit of his creditors, under the provision contained in the Bankruptcy Act, 1861. The plaintiff's stock-in-trade and goodwill and his interest in the premises in which the business was carried on were sold and transferred by the plaintiff's said trustees to Charles Nolda, Charles Beardsell and the defendant.

On April 8, 1863, a deed of arrangement was made between the said Charles Nolda, Charles Beardsell and Harry Todd Jackson, the defendant, of the one part, and Henry Brett, the plaintiff, of the other part, by which Messrs. Nolda, Beardsell and Jackson, in consideration of the services rendered and to be rendered by the plaintiff to them in the said business, and of the plaintiff's observing and performing the covenants and stipulations in the last-mentioned deed on his part to be observed and performed, agreed to pay him the sum of 600*l.* within twelve months, and also to pay him the sum of 150*l.* a year by quarterly payments as above mentioned. A copy of the said deed of April 8, 1863, is annexed to and is intended to form part of this case.

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On December 20, 1865, Nolda retired from the said firm of Nolda, Beardsell and Jackson, and on January 8, 1866, the deed sued on in this action was made between Nolda, Beardsell, the defendant, and the plaintiff.

The following is a copy of the deed sued on: "This indenture, made the 8th day of January, 1866, between Charles Nolda, of 73 and 74, Wood Street, in the city of London, warehouseman, of the first part, Charles Beardsell, of the same place, warehouseman, and Harry Todd Jackson, of the same place, warehouseman, of the second part, and Henry Brett, of No. 8, Leighton Crescent, Kentish Town, gentleman, of the third part. Whereas, by an indenture, dated the 8th day of April, 1863, and expressed to be made between the said Charles Nolda, Charles Beardsell and Harry Todd Jackson, therein described as all of Wood Street, Cheapside, in the city of London, woollen-warehousemen and copartners, of the one part, and the said Henry Brett, of the other part, it was covenanted, agreed and declared, amongst other things, that the said Charles Nolda, Charles Beardsell and Harry Todd Jackson, or the survivors or survivor of them, or the executors or administrators of such survivor, thereinafter called or referred to as Messrs. Nolda & Co., should pay to the said Henry Brett during his life, if he should so long continue to perform, observe and abide by the stipulations on his part thereinafter contained, a clear yearly sum of 150*l*., to be considered as accruing from day to day, and to be paid by four equal quarterly payments on the days therein mentioned. And further, that he, the said Henry Brett, should use his best endeavours to preserve and extend the business of Messrs. Nolda & Co. in manner therein mentioned. And whereas it has recently been agreed that the said partnership so carried on by the said Charles Nolda, Charles Beardsell and Henry Todd Jackson should be dissolved so far as relates to the said Charles Nolda as from the 20th day of December, 1865, and that the said business should thenceforth be carried on by the said Charles Beardsell and Harry Todd Jackson. And whereas upon the treaty for the said dissolution it was, amongst other things, agreed that the said Henry Brett should execute such release as is hereinafter contained, and that the said Charles Beardsell and Harry Todd Jackson and the said Henry Brett should enter into such further arrangements as are hereinafter contained. And whereas the said partnership has in pursuance of the agreement in that behalf been this day dissolved as from the said 20th day of December, 1865, now this indenture witnesseth, that in pursuance of the said agreement in this behalf, and in consideration of the premises, he, the said Henry Brett, doth hereby release the said Charles Nolda, Charles Beardsell and Harry Todd Jackson, and each of them, their and each of their executors and administrators, estates and effects, and the said Charles Nolda, Charles Beardsell and Harry Todd Jackson do, and each of them doth hereby release the said Henry Brett, his heirs, executors and administrators, estates and effects, from the covenants and agreements contained in the hereinbefore recited indenture, and from all actions, suits, accounts, claims and demands for or on account of the same indenture, or any clause or stipulation therein contained or otherwise relating to the premises. And this indenture also witnesseth, that in further pursuance of the agreement in this behalf, and in consideration of the premises, and of the mutual agreements and covenants hereinafter expressed and contained, it is hereby mutually agreed and declared, that the said Charles Beardsell and Harry Todd Jackson, so far as the stipulations hereinafter contained are to be performed or observed by or bind them respectively, do hereby, for themselves, their heirs, executors and administrators, and each of them doth hereby, for himself, his heirs, executors, or administrators, covenant with the said Henry Brett, his executors and administrators, and the said Henry Brett, so far as the stipulations hereinafter contained are to be performed or observed by or bind him, doth hereby, for himself, his heirs, executors and administrators, covenant with the said Charles Beardsell and Harry Todd Jackson, their executors and administrators, and separately with each of them, his executors and administrators, in manner following, that is to say,

"1. The said Charles Beardsell and Harry Todd Jackson, or the survivor

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of them, or the executors or administrators of such survivor, shall pay to the said Henry Brett during his life, if he shall so long continue to perform, observe and abide by the stipulations on his part hereinafter contained, a clear yearly sum of 150*l.*, to be considered as accruing from day to day, and to be paid by four equal payments on the 8th day of January, the 8th day of April, the 8th day of July and the 8th day of October, the first of such payments to be made on the 8th day of April next.

"2. If the said Henry Brett shall refuse, neglect, fail or become incapable to perform, observe or abide by all or any of the stipulations on his part hereinafter contained, then and immediately thereupon the said annual sum shall cease and be no longer payable, but it is not intended that the same shall in any respect release the said Henry Brett from the obligations imposed on him by the 5th article of these presents or any of them.

"3. The said Henry Brett shall use his best endeavours with both the old and the present customers of the late firm of Brett Brothers & Co., or of the late firm of Nolda & Co., or of the present firm of Beardsell & Jackson, and with all other persons, to preserve and extend the said business, and to promote the success thereof, and to carry on the same to the profit and for the benefit of Messrs. Beardsell & Jackson; and shall not by any act, neglect, omission or default injure the same, or impede the success thereof.

"4. For the purposes of the 3rd article of these presents, the said Henry Brett shall perform such services and discharge such duties as Messrs. Beardsell & Jackson shall reasonably require, save that he is not to be called upon to give his personal attendance to the working of the business of Messrs. Beardsell & Jackson.

"5. The said Henry Brett shall not at any time hereafter, while Messrs. Beardsell & Jackson, or either of them, shall continue to carry on the said business or any branch thereof, carry on or be concerned in the business of a woollen-warehouseman, or a buyer, seller, or packer or shipper of woollen goods, or goods of a fabric containing wool, in the city of London, or within a radius of twenty miles from St. Paul's Cathedral, or that city, either alone or in partnership with or as agent for a clerk of or assistant to any other person or persons except Messrs. Beardsell & Jackson; and shall not select, accept or execute any order for buying, selling, furnishing, supplying, packing, shipping or dealing in any such goods, except for and on behalf and for the sole benefit of Messrs. Beardsell & Jackson; and he shall not allow, nor so far as he can prevent it, suffer any other persons or person to use his name, or the name of Brett Brothers & Co., or any imitation or modification thereof, in the business aforesaid, or any similar business.

"6. Messrs. Beardsell & Jackson shall be considered to represent exclusively the late firm of Brett Brothers & Co., and shall be at liberty to style themselves late Brett Brothers & Co.

"7. If any dispute shall arise between the parties hereto or any of them, or their respective representatives, touching these presents or any article thereof, or the rights, duties, powers or liabilities of the respective parties hereto, or their respective representatives in relation thereto, such disputes shall be referred to arbitration, and settled by two arbitrators or their umpire, agreeably to the provisions of the Common Law Procedure Act, 1854. In witness whereof the said parties to these presents have hereunto set their hands and seals, the day and year first above written.

"CHARLES NOLDA. (L.S.)
"CHARLES BEARDSELL. (L.S.)
"H. TODD JACKSON. (L.S.)
"HENRY BRETT. (L.S.)

"Signed and delivered by the within named Charles Nolda, Charles Beardsell and Harry Todd Jackson, in the presence of R. Cumming, solicitor, 13, King Street, Cheapside.

"Signed, sealed and delivered by the within named Henry Brett, in the presence of R. Cumming."

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On August 25, 1866, the said Charles Beardsell and the defendant executed and perfected a deed of assignment of all their estate and effects to trustees for the benefit of their creditors, under and according to the provisions contained in the Bankrupt Act, 1861, of which the following is a copy: "This deed, made the 25th day of August, 1866, between Charles Beardsell and Harry Todd Jackson, of 73 and 74, Wood Street, in the city of London, warehousemen, trading under the firm of Beardsell & Jackson, of the one part, and Henry Parker Webb, of Tunbridge Wells, manufacturer, Jonathan Lockwood, of Huddersfield, merchant, and Ben Hurst, of Dobcross, in Saddleworth, Yorkshire, manufacturer, hereinafter called the trustees, on behalf and with the assent of the creditors of the said Charles Beardsell and Harry Todd Jackson of the other part, Witnesseth, that the said Charles Beardsell and Harry Todd Jackson do, and each of them doth, hereby convey all their and his estates and effects to the said trustees absolutely, to be applied and administered for the benefit of the creditors of the said Charles Beardsell and Harry Todd Jackson, in like manner as if the said Charles Beardsell and Harry Todd Jackson had been at the date hereof duly adjudicated bankrupts; and in consideration of the premises, each of the creditors of the said Charles Beardsell and Harry Todd Jackson doth, by these presents, release the said Charles Beardsell and Harry Todd Jackson, and each of them, from his and their respective debts, in like manner as if the said Charles Beardsell and Harry Todd Jackson had obtained a discharge in bankruptcy; but nothing herein contained shall affect the rights of the creditors as against any surety or co-debtor. In witness whereof the said parties hereto have set their hands and seals, the day and year first above written."

The said last-mentioned deed was duly executed, attested, stamped and registered according to the requirements of the 192nd section of the Bankruptcy Act, 1861; and a majority in number, representing three-fourths in value, both of the joint and of the separate creditors of the said Charles Beardsell and the defendant, whose debts amounted to 10*l.* and upwards, assented thereto.

From the date of the registration of the last-mentioned deed up to the present time, the said Charles Beardsell and the defendant have wholly ceased to carry on the said business or any branch thereof, either together or separately.

The amount claimed by the plaintiff became due after the registration of the deed of assignment.

The question for the opinion of the Court was, whether the deed of assignment, dated August 25, 1866, is or is not a bar to the plaintiff's claim. If the Court should be of opinion in the negative, then judgment was to be entered up for the plaintiff for 75*l.*, together with interest at 5*l.* per cent. from the date of writ and costs of suit. If the Court should be of opinion in the affirmative, then judgment of *nol. pros.* was to be entered up for the defendant with costs.

Lord, for the plaintiff.—First, this composition deed is bad. A composition deed is not binding which provides for only one class of creditors; as is shewn by *Ex parte Glen* (36 L. J. Bk. 51), where because the joint creditors were left out, and by *Tomlin* v. *Dutton* (37 L. J. Q.B. 153), where, because the separate creditors were left out, the deeds were held bad, and by *Rixon* v. *Emary* (37 L. J. C.P. 243), where the Court recognizes that doctrine; and in the present deed only the joint creditors are provided for. *The European Central Railway Company* v. *Westall* (35 L. J. Q.B. 9), where the wording was the same as in the present case, except that nothing was said about the separate estates, is in point. Secondly, even if the composition deed be good, the annuity is not barred. The annuity is subject to the performance of stipulations which prevent the annuity from being valued under 12 & 13 Vict. c. 106. s. 175. If the annuitant refuse, neglect, fail or become incapable to perform the conditions, the deed is to be void; and, amongst other things, he is to promote the business, &c., to give such personal attendance as should be reasonably required, and is not to set up business for himself. As to *Ex parte Parratt* (2 Mont. & Ayr. 626; 1 Deac. 696), the marginal note is misleading, for on referring to the facts and the judgment of the Chief Judge, it appears the annuity was not contingent on the condition mentioned in the note.

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Lanyon, for the defendant.—As to the first pont: no doubt a deed which does not allow both joint and separate creditors to sue is bad; but here "their and his" estate is assigned and is to be administered as in bankruptcy, which could only be by properly marshalling the separate and joint creditors against the separate and joint estates; and this distinguishes this case from those which have been cited. As to the second point, the Court cannot say that the annuity is incapable of valuation under section 175, which section alone applies. Formerly, perhaps, it would have been thought impossible to make a valuation in the present case, but now there are such various statistics, and the business and experience of actuaries are so various and extensive, that it is possible to value an annuity like the one now in question; and *Ex parte Parratt* (2 Mont. & Ayr. 626; 1 Deac. 696) is in favour of the present contention, for there the question of the annuity being dependent on a lease liable to forfeiture was discussed.

He also referred to *The Encyclopædia Britannica*, titles *Friendly Society* and *Annuity; Ex parte Annandale* (4 Deac. & C. 511; 2 Mont. & Ayr. 19); *Ex parte Broadley* (2 Mont. D. & D. 524; 11 L. J. Bk. 28); and *Ex parte Van Heythuysen* (2 Mont. & Ayr. 519; 1 Deac. 360; 5 L. J. Bk. 19).

Lord, in reply.—The lease was not before the Court in *Ex parte Parratt* (2 Mont. & Ayr. 626; 1 Deac. 696); and in *Ex parte Davis* (Mont. 121, 297), an annuity dependent on whether a widow married, and in *Mudge* v. *Rowan* (37 L. J. Ex. 79), an annuity dependant on whether a husband or wife cohabited again, were held incapable of valuation under section 175.

Byles, J.—I am of opinion that the plaintiff is entitled to our judgment. The statute enacts that any annuity creditor "shall be entitled to prove for the value of such annuity, which value the Court shall ascertain, regard being had to the original price given for such annuity." It is therefore to be such an annuity as the Court can ascertain the value of, and therefore, *primâ facie*, must be one the value of which is capable of being ascertained by calculation. In the present case, however, if the annuitant "refuse, neglect, fail or become incapable to perform, observe or abide by all or any of the stipulations on his part" the annuity is to cease; and then follow a number of stipulations as to things which are to be done: thus he is "to use his best endeavours . . . . to preserve and extend the said business, and to promote the success thereof, and to carry on the same to the profit and for the benefit of Messrs. Beardsall & Jackson, and shall not, by any act, neglect, omission or default, injure the same or impede the success thereof," and fulfil various other indefinite stipulations; and then "if any dispute shall arise . . . . touching these presents, or any article thereof, or the rights, duties, powers or liabilities of the respective parties . . . . in relation thereto, such disputes shall be referred to arbitration." These contingencies are, as it seems to me, incapable of being ascertained in point of value, and even if they could, still they are to be submitted to arbitration, and are made dependent on the view the arbitrator might take. I should therefore say, even in the absence of authority, that the value of this annuity could not be calculated under section 175. As respects the authorities, the only case which at first sight seems to be in favour of the defendants is *Ex parte Parratt* (2 Mont. & Ayr. 626; 1 Dears. 696), but in that case there was no suspension—by which I mean no distinct provision for the suspension—of the annuity, and only a remote possibility with respect to the lease, and though one ground taken was the possibility of the lease being forfeited, the lease was not before the Court, and this matter was only speculative; whilst, on the other hand, *Ex parte Davis* (Mont. 121, 297) is the other way, it having been there decided that the chance of a woman remaining a widow was not calculable under section 175. And, as it appears to me, there are two cases in point, viz., *Parker* v. *Ince* (4 Hurls. & N. 59; 28 L. J. Ex. 189) and *Mudge* v. *Rowan* (10 L. J. Ex. 79). Under these circumstances, I think that the value of this annuity is not provable under section 175, and that our judgment should therefore be for the plaintiff.

Keating, J.—I am of the same opinion. No doubt the cases have extended

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the provability of annuities beyond the ordinary meaning of the words of section 175, for the section seems to import that the annuity is one of easy calculation. The cases perhaps have gone beyond this, but none approximate to the best case. As respects *Ex parte Parratt* (2 Mont.& Ayr. 626; 1 Dears. 696), I agree that on examination it is not an authority, and that the facts and the judgment of the Chief Judge shew that the statement in the marginal note is not supported. And I agree that the stipulations here are most indefinite, and that this is not simply a case where an actuary can assume a probability as to what will occur, but a case where the annuity depends on matters as to which persons might well differ in opinion. Thus persons might legitimately differ as to what was a reasonable command. Again, the view which the arbitrator might take is mater of doubt; and again, a person might differ as to what were proper endeavours for advancing the business. All these matters are indefinite, and matters on which persons might disagree. I cannot believe that such contingencies were in the contemplation of the legislature, and therefore I think that the plaintiff is entitled to our judgment.

MONTAGUE SMITH, J.—I am of the same opinion. It is conceded that this annuity is provable, if at all, under section 175, which in terms provides only for the case of an annuity which had an original price, its words being, "shall be entitled to prove for the value of such annuity, which value the Court shall ascertain, regard being had to the original price given for such annuity." The Act therefore seems to contemplate an annuity for which there is an original price as a datum of value; and a doubt was expressed when other cases were attempted to be proved, as to whether the section extended to such other cases; but it appears that annuities have been held to be within it where there were some definite data having some analogy to such a definite ground as the original price mentioned in the section. A matter which depends on calculation can be clearly ascertained, but here there are no definite materials on which a person can calculate. An opinion as to the value may possibly be formed, and a jury might have to form one in the event of an action on the agreement; but that is very different to the calculation which the statute means, for, where the annuitant proves, the Court is to calculate the value, which evidently points to a case where there is no difficulty in calculating, and a sum may be worked in figures from definite data. It is admitted that this case is one *primæ impressionis*, and that no similar case has been before the Courts; and the only decision cited in support of the defendant is *Ex parte Parratt* (2 Mont. & Ayr. 626; 1 Dears. 696). That case has, however, been so fully distinguished by my Brothers that it need not be further referred to; and it seems to me that the present case was decided in principle in the case of *Ex parte Davis* (Mont. 121, 297), where the Court expressed a clear opinion that the annuity was not capable of valuation, though it was there less difficult to calculate its value than in the present case, for whereas it there only depended on the chance of a widow marrying, here its duration depends on various acts to be done by the annuitant, on the neglect of and incapacity to perform which acts the annuity is to cease. It is impossible for the Court, or any person acting for the Court, to calculate the value of this annuity, and therefore it is not within section 175, and the plaintiff is entitled to succeed. It is unnecessary to consider the validity of the composition deed, but I desire to express no doubt as to its validity.

Judgment for the plaintiff.

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IN THE COMMON PLEAS. Jan. 12, 1869.

BEALE AND OTHERS *v.* SMITH.

38 L. J. C.P. 145; L. R. 4 C.P. 145; 19 L. T. 565; 17 W. R. 317.

Parliament—Form of Election Petition—Particulars—31 & 32 Vict. c. 125.

ELECTION LAW. A.—*In a petition against the return of a member of Parliament it is sufficient to allege generally, that the respondent by himself and his agents has been guilty of bribery, &c.*

Where, in such a petition, a Judge has ordered particulars to be given of the persons bribed, &c., but refused to order particulars to be given of those who have bribed, &c., the Court will not interfere, unless the Judge be manifestly wrong, as it is a matter of discretion.

This was a petition against the respondent, who had been returned as parliamentary representative for the borough of Westminster.

The petition alleged generally, that the respondent by himself and his agents had been guilty of bribery, &c.

The respondent had applied at chambers for particulars, and Willes, J., had ordered particulars of the persons bribed, &c. to be given three days before the trial, but had refused to order particulars of persons who had bribed, &c.

Hawkins, on behalf of the respondent, now moved for a rule calling on the petitioners to shew cause why the petition should not be taken off the file, because it did not state the facts relied on, and why particulars should not be given of the persons who bribed, treated, &c.—First, the petition is bad in form. By 31 & 32 Vict. c. 125. s. 20. an election petition is to be in such form and state such matters as may be prescribed; by section 3 "prescribed" is to mean "prescribed by the rules of Court"; rules 2, 3, 4, and 5 make provisions as to the form of the petition; and rule 5, which contains the form, says, that "the facts and grounds on which the petitioners rely" are to be stated. The petition should, therefore, not merely state the grounds, but also the facts supporting those grounds, and here only the grounds are stated. Secondly, at all events, particulars should be given of the persons who are to be charged with bribery, as well as of those to be charged with taking bribes. There is a total denial of the charges in the petition, and of any knowledge of how they can be supported; it is alleged that information is being obtained by the petitioners by means of treating and circulars, and it is impossible to be prepared to meet charges respecting an election in such a place as Westminster if information of those charges is postponed till the day of trial; and the old practice should not be followed, as it worked injustice, which should be obviated under the new procedure.

BOVILL, C.J.—In this case an order has been made by my Brother Willes calling on the petitioners to give certain particulars, and the respondent now desires to obtain further particulars. He frames his motion in two ways: first, he asks that the petition may be taken off the file as being bad in form, because it does not state the facts; and, secondly, he separately asks for further particulars. As respects the question of form, the petition follows the form given in the rules, and no injustice is worked by it, because by rule 6 ample powers are given for obtaining particulars; it was intended that the petition should not run to a great length; the facts and grounds are to be stated shortly; and then it is in the discretion of the Judge to grant an order for further particulars. As respects the question of further particulars, this matter has been before my Brother Willes, and the practice which has been adopted by him and the other learned Judges appointed to try these petitions is an improvement on the old practice, under which no previous information was obtainable. In one view, perhaps, further particulars may appear advantageous, in another inconvenient; certain particulars have been ordered to be given three days before trial; if there be any surprise, &c. the Judge may adjourn the trial, for where there is any

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abuse of the process of the Court he may prevent injustice; and we must be clearly satisfied that my Brother Willes exercised his discretion wrongly before we interfere. I am not so satisfied, and therefore think there should be no rule.

BYLES, J., and KEATING, J., concurred.

MONTAGUE SMITH, J.—I am of the same opinion. As respects the second point, it is sufficient to say that the learned Judge had discretion under rule 44, and we should not interfere unless he is manifestly wrong. It is competent for the Judge who has to try the petition to see if the particulars are sufficient, and if he finds larger particulars necessary the particulars may be extended by him.

Rule refused.

IN THE COMMON PLEAS. Jan. 23, 1869.

VILLESBOISNET *v.* TOBIN AND OTHERS.

38 L. J. C.P. 146; L. R. 4 C.P. 184; 19 L. T. 693; 17 W. R. 322.

Referred to, *Inman* v. *Jenkins*, [1870] E. R. A.; 39 L. J. C.P. 258; L. R. 5 C.P. 738; 22 L. T. 659; 18 W. R. 897 (C.P.); *Hill* v. *Campbell*, [1875] E. R. A.; 44 L. J. C.P. 97; L. R. 10 C.P. 222; 32 L. T. 59; 23 W. R. 336 (C.P.).

Interrogatories—Tendency to Criminate—Special Circumstances—Discretion of the Judge.

DISCOVERY. D.—*Interrogatories, the answers to which might tend to criminate the party interrogated, will not be allowed to be delivered under the Common Law Procedure Act*, 1854, *on the common affidavit only, but some special circumstances must be laid before the Judge to induce him to order them, and it is in his discretion to determine whether the special circumstances are or are not sufficient for that purpose.*

This was an application for a rule to shew cause why the plaintiff should not be at liberty to deliver to the defendants certain interrogatories under the Common Law Procedure Act, 1854, section 51, which Martin B., had refused at chambers to allow.

The action was for damages for false representations contained in a prospectus of a joint-stock company.

The first count of the declaration alleged that the defendants were interested in a company called the Ovens Gold Quartz Mines Co., Lim., and were desirous of having the shares of the said company applied for and taken, and the amount of such shares paid up, and that thereupon the defendants, to induce the plaintiff to apply for and take certain shares in the aforesaid company, and pay up the amount of the said shares, falsely and fraudulently represented to the plaintiff that 2,500 shares in the aforesaid company had been applied for, whereas in truth, as the defendants then well knew, the number of shares that had been applied for was much smaller, and the defendants, by the said false and fraudulent representation induced the plaintiff to apply for and take certain shares, &c. The second count was similar, only alleging the false representation to be that 2,500*l.* had been paid up for shares in the said company.

The defendants separately pleaded not guilty.

Issues thereon.

The interrogatories which the plaintiff applied, before Martin, B., at chambers, for leave to deliver were eighteen in number. Of these the learned Judge allowed the first six, but refused to allow the following.

7. Were 2,500 shares of or in the said company ever, and when first, applied for?

8. Was 1*l.* per share paid upon any and what number of shares on or before the 30th day of May, 1867?

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9. What is the total number of shares which have been applied for in the said company?

10. What is the total amount of money received by the said company on account of shares applied for; and how much thereof was received on and before the said 30th day of May, 1867?

11. Have any and what number of shares ever, and when, been allotted?

12. Were any allotments of shares cancelled, and if yea, how many, and of how many shares, and when and to whom had the same been allotted?

13. Were any deposits, and of what amounts, at any and what time or times, returned to any and what person, and why?

14. Were any certificates of shares in the said company issued at any and what times, to any and what persons, and in respect of what number of shares?

15. How many shares did you, at any and what time, apply for or hold in the said company?

16. Have you ever, and when, paid any and what moneys in respect of any shares applied for or held by you in the said company?

17. What minute-books, diaries, books of account, papers or documents, had the said company in its possession or under its control, and in whose custody or under whose control are such books, papers and documents?

18. What books, letters, papers or documents, relating to the promoting or getting up of the said company, or in any way to the conduct or management of the affairs thereof, or to the matters in dispute herein, have you in your possession or under your control? and do you object, for any and what reasons, to produce the same for inspection by the plaintiff and his attorney, and to allow copies thereof or extracts therefrom to be taken from them?

The present application was made on an affidavit by the plaintiff's attorney, which contained the following statements:

"This action is brought to recover damages from the defendants, who are named as three of the directors of the Ovens Gold Quartz Mines Co., Lim., in the prospectus of the said company," (a copy of which was annexed to the affidavit) "for the false and fraudulent representations contained in the said prospectus, that 2,500 shares in the said company had been applied and paid for, whereby the plaintiff was induced to apply and pay for 200 shares in the said company.

"An action has also been commenced by the above-named plaintiff against the said Ovens Gold Quartz Mines Co., Lim., to recover from the said company the amount so paid by the said plaintiff for the said shares, and in such action an order was made by Cleasby, B., on the 14th of December, 1868, for discovery of the documents in the possession of the said company relating to the matters in dispute in the said action, but the said company have failed to make such discovery in obedience to the said order.

"On the 23rd, and again by adjournment on the 24th of December, 1868, a summons in this cause for leave for the plaintiff to deliver interrogatories to the defendants was heard by Martin, B., when the several interrogatories hereunto annexed were submitted to him, and his Lordship allowed the interrogatories numbered 1 to 6, but disallowed the remainder.

"That previous to the commencement of this action, at an interview which I had with Mr. Luke Williams, the manager of the said Ovens Gold Quartz Mines Co., Lim., the said Luke Williams informed me that only three persons had applied and paid for shares in the said company, one of whom was the plaintiff, who had applied and paid for 200 shares, and the other of such persons had applied and paid for 300 shares and one share respectively, and the said Luke Williams produced for my inspection the bankers' pass-book of the said company which shewed the correctness of this statement.

"That being unable to obtain an inspection of the books and other documents of the said Ovens Gold Quartz Mines Co., Lim., pursuant to the order above mentioned, it is material and necessary for the plaintiff that the defendants should answer the whole of the said interrogatories, and I believe that the plaintiff will derive material benefit in this cause from the

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discovery which he seeks by the said interrogatories, and that the plaintiff has a good cause of action on the merits."

Day, in support of the present application.—The objection to allowing the interrogatories now sought to be put to these defendants is that the defendants might be compelled to admit that they had been parties to a fraud, and as there are several defendants this might subject them to an indictment for a conspiracy. The objection is one which could not have been made had the action been against one defendant only; and is the objection to prevail because the action is brought against several, the interrogatories being *bonâ fide* put for the purpose of obtaining evidence in support of this action? The case of *M'Fadzen* v. *the Mayor and Corporation of Liverpool* (37 L. J. Ex. 193; L. R. 3 Ex. 279) shews that if the interrogatories are material for the party's case who asks to administer them, and are put *bonâ fide*, the Court will admit them; and if the answers would disclose anything tending to make the party interrogated criminally liable, he must refuse to answer on that ground.

[KEATING, J., referred to *Edmunds* v. *Greenwood* (38 L. J. C.P. 115).]

That was a peculiar case, and the Court there, having regard to the nature of that action and the peculiar circumstances of that case, declined, in the exercise of their discretion, to interfere. In *Bickford* v. *D'Arcy* (35 L. J. Ex. 202; L. R. 1 Ex. 354) the interrogatories were held to be admissible although the answers of the defendant might have rendered him liable to a penalty under the Attorneys Act for having practised wrongfully as an attorney; and the Court of Exchequer distingushed that case from the case of *Baker* v. *Lane* (3 Hurls. & C. 544; 34 L. J. 1 Ex. 57), on the ground that the interrogatories in that last case were not considered by the Court to be put *bonâ fide* merely for getting answers in support of that action.

[KEATING, J.—Cannot the information asked for in the present interrogatories, particularly as to the number of shares applied for and paid up, be obtained in another way? Because if it can there would then appear to be some ulterior object in putting them beyond obtaining evidence of these facts.]

There is no such ulterior object. The questions are put only to obtain evidence in support of the action. It appears from the affidavit that the plaintiff has been unable to obtain an inspection of the books and papers of the company notwithstanding the order of Cleasby, B., and without such books there would be no means to get this information except by interrogating the parties. *Bartlett* v. *Lewis* (12 Com. B. Rep. N.S. 249; 31 L. J. C.P. 230) followed and adopted the case of *Osborn* v. *the London Dock Company* (10 Ex. Rep. 698; 24 L. J. Ex. 140), which has ever been considered the leading case on this subject; and those cases shew that the party interrogated is to be considered as placed in the same position as a witness at the trial, and that it is no objection to the questions of the party interrogating that the answers to them might tend to criminate. The party interrogating has a right to have the oath of the party interrogated that they would have that tendency. Those cases also establish that the administering of interrogatories under the Common Law Procedure Act, 1854, is not to be confined to the cases in which a Court of equity would grant a discovery. They have been always followed, except by the cases of *Tupling* v. *Ward* (6 Hurls. & N. 749; 30 L. J. Ex. 222) and *Baker* v. *Lane* (3 Hurls. & C. 544; 34 L. J. 1 Ex. 57), and perhaps the recent case of *Edmunds* v. *Greenwood* (38 L. J. C.P. 115), in each of which the Court seems to have proceeded on the special circumstances of each case. *Baker* v. *Lane* (3 Hurls. & C. 544; 34 L. J. 1 Ex. 57) was afterwards explained in the case of *Bickford* v. *D'Arcy* (35 L. J. Ex. 202; L. R. 1 Ex. 354) by the Court of Exchequer, which had decided it; and in *Bartlett* v. *Lewis* (12 Com. B. Rep. N.S. 249; 31 L. J. C.P. 230) Willes, J., deals with *Tupling* v. *Ward* (6 Hurls. & N. 749; 30 L. J. Ex. 222), and shews that it did not overrule *Osborn* v. *the London Dock Company* (10 Ex. Rep. 698; 24 L. J. Ex. 140). The authorities, therefore, are to the effect that it is only in exceptional cases that such interrogatories are not allowed.

Quain shewed cause in the first instance.—These interrogatories ought not

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to be allowed. The declaration in this action contains what in substance are counts for a conspiracy, and the object of these interrogatories is to get admissions from the defendants which might criminate them. It appears from the affidavit of the plaintiff's attorney that he has got from Williams, the manager of the company, information as to the number of shares applied for and paid up, and that Williams shewed him the bankers' pass-book. Therefore the plaintiff has got the information which several of these interrogatories are said to seek. Consequently, they must be put for some other object than that of assisting the plaintiff in proving his case in this action. According to the decision of the Court in *Edmunds* v. *Greenwood* (38 L. J. C.P. 115), in a case like this, where the answers might criminate the party interrogated, it is for the party seeking to interrogate to shew the existence of such special circumstances as should induce the Court in the exercise of its discretion to allow them. It is not sufficient to rest the case on the common affidavit, but the party must shew at least that the information required, and which is necessary for the support of his case, cannot be obtained by any other means. Here, so far from doing that, the plaintiff has shewn that the circumstances, instead of being in favour of allowing the interrogatories, are the other way, for he has got, at all events, may get the evidence he wants from other sources. Moreover, this application is by way of an appeal from the decision of a Judge at chambers, upon a matter too which was in his discretion.

[KEATING, J.—Did my Brother Martin exercise his discretion on the circumstances of this case, or did he refuse to allow the interrogatories because he acted on a supposed rule that interrogatories which tend to criminate ought not to be allowed to be put?]

[*Day*.—The learned Judge would not allow interrogatories which tended to criminate the party interrogated.]

He had all the circumstances before him and did not consider the case a proper one in which such interrogatories as these should be allowed. The practice in Chancery is not now to put interrogatories in the bill; and therefore, where a defendant there wishes, in his answer, to raise the point as to his not being obliged to criminate himself, the matter does not come before the Court as it does at common law as to the propriety of allowing the interrogatories; consequently, the Chancery Court requires the person claiming to be privileged from answering the bill, on that ground that his answer might criminate him, to pledge his oath to his belief that it will have that effect. That was the case of *Scott* v. *Miller* (28 L. J. Ch. 584).

Day replied.

KEATING, J.—In this case an application was made at chambers on behalf of the plaintiff to Martin, B., to be allowed to administer certain interrogatories to the defendant, under section 51 of the Common Law Procedure Act, 1854, and my Brother Martin seems to have allowed some and disallowed others, considering that the answers to the latter might render the person interrogated liable to a criminal prosecution, and that the plaintiff had shewn no special circumstances entitling him to put such interrogatories. It is very difficult to reconcile the cases on this subject; but I think there seems to be no doubt that, in all cases where it is sought to administer interrogatories, the answers which might render the person interrogated criminally liable, if there is anything giving colour to the supposition that they are put for the purpose of the criminal prosecution, and not merely *bonâ fide* in aid of the civil action, they ought not to be allowed. No doubt the case which goes furthest in favour of the interrogatories is *Bartlett* v. *Lewis* (12 Com. B. Rep. N.S. 249; 31 L. J. C.P. 230); that case is somewhat in conflict with the case of *Tupling* v. *Ward* (6 Hurls. & N. 749; 30 L. J. Ex. 222); though Willes, J., in his judgment in the former, suggested that they may be reconciled on the ground that the Court of Exchequer in *Tupling* v. *Ward* proceeded on the special circumstances of the case. However that may be, I find no case which lays down that the plaintiff has *the right* to administer interrogatories of this character; it is a matter on which the Courts will exercise their discretion in each case. In *Edmunds* v.

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Greenwood (38 L. J. C.P. 115) all the cases underwent careful consideration, and the Court, after taking time to consider, there say: "In the absence of any such special circumstances as should, according to the general current of authorities, induce a Judge sitting at chambers, or the Court, in the exercise of their respective discretions, to allow interrogatories such as these to be put, we are of opinion that they ought not to be allowed in an action of this description;" from which it would appear that some special circumstances ought to be shewn rendering such interrogatories necessary before they are allowed. I rather think that the plaintiff's affidavit in this case was drawn with that view, since it refers to the order for inspection made in the action against the company apparently to shew that the information sought by these interrogatories cannot otherwise be obtained. If the statement is introduced for that purpose, it seems to me to fall very far short of what is required: the affidavit does not state in terms that the information cannot be obtained in any other manner; nor does it furnish particulars from which such should be inferred. The rule laid down in *Edmunds* v. *Greenwood* (38 L. J. C.P. 115) seems to be that, where there are no special circumstances, the interrogatories should not be allowed; and I cannot see any such circumstances in this case; certainly none which would justify us in setting aside the order of my Brother Martin, and so interfering with the discretion of the Judge at chambers. It is suggested that he acted on a hard and fast rule that such interrogatories ought never to be allowed, and did not exercise his discretion on the circumstances of the case. But we cannot assume this; and as I see no reason to depart from the rule stated by this Court in *Edmunds* v. *Greenwood* (38 L. J. C.P. 115), I am of opinion that these interrogatories should not be allowed.

MONTAGUE SMITH, J.—If I knew that my Brother Martin had acted upon the notion that, in all cases, he would not allow interrogatories to be put where the answers might have a tendency to criminate the party interrogated, and had not exercised his discretion on the circumstances of this case, I should be disposed to make this rule absolute; because I am not satisfied that there was here such an absence of special circumstances that the defendant ought not to be called upon to answer these interrogatories. But if my Brother Martin exercised his discretion in the matter in the circumstances of the particular case, then, upon the general ground that the Court will not interfere with the exercise of the discretion of a Judge at chambers, unless it clearly sees he is wrong, I should feel equally satisfied to discharge the rule. I am left in doubt in what way my Brother Martin disposed of this matter; but as I infer from the argument that the special circumstances were brought before him, I must, I think, presume that he took them into consideration and exercised his discretion thereon; and therefore, as my Brother Keating agrees with my Brother Martin in the exercise of such discretion, or at all events does not disagree with him, I do not dissent from this rule being discharged. The subject is not in a very satisfactory state. The question arose soon after the passing of the Common Law Procedure Act, 1854, whether interrogatories were to be administered on the principle of discovery in equity, or whether they might be carried to a wider extent; and the question as to allowing such an inquiry as is here objected to, because it might tend to criminate the party interrogated, came early before the Court of Exchequer, in *Osborn* v. *the London Docks Company* (10 Ex. Rep. 698; 24 L. J. Ex. 140), when that Court held that the interrogatories might be put to the party on the same principle of inquiry as if he were in the witness-box to be examined, he having the privilege to refuse to answer them if he chose, on the ground that his answer would have a tendency to criminate him. That case was followed by this Court in *Bartlett* v. *Lewis* (12 Com. B. Rep. N.S. 249; 31 L. J. C.P. 230), and therefore the principle which ought to govern the allowing of such interrogatories was apparently settled by authority. Cases have arisen since that time which cannot, I think, be altogether reconciled with the earlier decisions. As far as I can see, the only intelligible rule to be deduced from the cases, including that of *Edmunds* v. *Greenwood* (38 L. J. C.P. 115), is, that when the interrogatories are *bonâ fide* put for the purpose of

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discovery, and are relevant to the matter in issue, they may be allowed, although the answers to them may tend to criminate the party answering (if answered in one way), leaving to such party the option of refusing to answer on that ground. But where such interrogatories are sought to be put, the Court and the Judge at chambers will require a stronger case to be made out for allowing them than is requisite in ordinary cases, and such interrogatories will not be allowed on the common affidavit only, but some special circumstances must be laid before the Judge, by affidavit or otherwise, to induce him to order them. As my Brother Keating has said, no hard and fast line can be laid down, and it must be left to the discretion of the Judge in each individual case to determine whether the special circumstances are or not sufficient for allowing such interrogatories.

Rule discharged without costs.

IN THE COMMON PLEAS. Feb. 12, 1869.

(County Court Appeal.)

COX *v.* THE GREAT EASTERN RAILWAY COMPANY.

38 L. J. C.P. 151; L. R. 4 C.P. 181.

Carriers by Railway—Carriage of Cattle—Cattle-Plague Order—Cleansing Truck—Right to Charge for Cleansing.

CARRIERS. C.—*By the Consolidated Cattle-Plague Order of August*, 1867, *made under the* 11 *&* 12 *Vict. c.* 107, *it was ordered that "every carriage truck required to be cleansed and disinfected should be cleansed and disinfected once in every twenty-four hours during the time when it is used for any animal" in a prescribed manner; and by a clause in their Railway Act a railway company were empowered to receive a certain rate as a maximum rate of carriage for the conveyance of animals, inclusive of every expense incidental to such conveyance, except for any extraordinary services performed by the company, in respect of which they might make a reasonable extra charge*:—Held, *that the railway company who had carried a cow on their railway for the owner had no right to charge him, in addition to the charge for carriage, with the cost of cleansing the truck, as such cleansing was not a service performed for the owner of the cow within the meaning of the said clause of their Railway Act.*

This was an appeal from the decision of the Judge of the County Court of Suffolk, holden at Ipswich.

The case stated that the action was brought to recover 20*l.* for the conversion of a cow belonging to the plaintiff, and that it was tried by a jury. The plaintiff was a cattle-salesman residing at Ipswich. The defendants were railway carriers, subject to the provisions of the Railways Clauses Consolidation Act, 1845, and also governed by a private Act of the 25 & 26 Vict. c. ccxxiii.

On November 18, 1867, the defendants carried a cow from Diss to Ipswich for the plaintiff, and upon its arrival at Ipswich gave notice thereof and of their charge for the same by an order note, in which it was stated that the animal had arrived at the Ipswich station, and that the company's charges were, for the carriage of the animal 5*s.* 8*d.*, and for the cleansing the truck 1*s.*, making altogether 6*s.* 8*d.*

By the regulations of the Board of Trade, as set forth in the *London Gazette* of August 23, 1867, the truck-cleansing was required to be done and was done by the company, and it was to be taken that 1*s.* was a reasonable sum to charge for such cleansing.

The plaintiff objected to pay the 1*s.*, but tendered the 5*s.* 8*d.* to the company, who, however, refused it, and then detained and sold the cow under the 97th section of the Railways Clauses Consolidation Act, 1845.

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Upon the above trial, the Judge of the County Court directed the jury to find a verdict for 18*l*., being of opinion that the defendants were not entitled to charge the plaintiff for cleansing the truck; or, if so entitled, that the defendants were not entitled to detain and sell the cow for the same, and gave leave to either party to appeal against such direction by virtue of the County Court Act, 1867, s. 13.

The questions for the opinion of the Court were: first, whether the defendants had a right to charge the plaintiff with the cost of the cleansing? secondly, whether, the defendants having a right to charge the plaintiff such costs, they had a right to distrain?

Kemp, for the defendants (the appellants).—The cleansing of the truck was required to be done under rule 54 of the Consolidated Cattle-Plague Order of August 20, 1867, made under the 11 & 12 Vict. c. 107, as amended by the 29 Vict. c. 15. That 54th rule is as follows: "Every pen, carriage-truck, horse-box, vehicle, or boat required to be cleansed and disinfected, shall be cleansed and disinfected once in every twenty-four hours during the time when it is used for any animal in manner following: by sweeping out and effectually removing all dung, sawdust, litter or other matter from the pen, &c., and then by thoroughly washing," &c. This cleansing was a service which was beyond the ordinary duty of a carrier to perform, and was therefore an extraordinary service for which the railway company were entitled to make a reasonable extra charge by virtue of section 230 of their private Act—25 & 26 Vict. c. ccxxiii.[1]

[MONTAGUE SMITH, J.—It does not appear when the cleansing was done. If it was done after the truck had been used by the plaintiff's cow, how could that be for his benefit?]

It is submitted that it must be taken that the cleansing was before the cow was put into the truck. It could not be intended that the expense of this cleansing and disinfecting, which really was for the benefit of the owners of animals using the trucks, should fall entirely on the railway company. By the prior orders of 1866 the railway company or persons who carried animals for hire were expressly required to cleanse and disinfect the trucks after the animals had been taken out of them. But these orders have been repealed, and this direction is omitted in the order of 1867, which is in favour of what is contended, that the service of so cleansing is for the benefit of the owners of the animals.

J. Brown (*Blofield* with him) appeared for the plaintiff (the respondent), but was not called on.

KEATING, J.—It is unnecessary to refer to the second question stated in the case, as I am of opinion that the defendants clearly had no right to charge the plaintiff with the cost of the cleansing of the truck, it not being in respect of a service done for him in particular. The Order in Council makes it necessary to cleanse the trucks when used in order to prevent the spread of the cattle plague. It does not appear from what is stated in the case whether the truck in question was cleansed just before or after the plaintiff's cow was put into it, but in either way I do not think that the cleansing can be a service rendered to the plaintiff individually as contradistinguished from the rest of the public. The object of the statute and of the Orders in Council made under it was to prevent the spread of the disease generally; and I cannot see how the defendants, acting under such Orders, would have any right to make this charge. Therefore, I am

(1) The following are the words of such 230th section: "And with respect to the conveyance of goods, minerals and things, carriages and animals, the company may lawfully demand and receive, as a maximum rate of carriage for the conveyance thereof along the railway, including the tolls for the use of the railway, and waggons or trucks, and locomotive power, and every expense incidental to such conveyance, except a reasonable sum for loading, covering and unloading of goods at any terminal station of such goods, and for delivery and collection, and any other services incidental to the service or duty of a carrier, where such services, or any of them, are or is performed by the company, and except a reasonable sum for warehousing and wharfage, or for any other extraordinary services performed by the company (in respect of which the company may make a reasonable extra charge), any rates or sums not exceeding the rates or sums following, viz.," &c.

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of opinion that the County Court Judge was right, and that his judgment should be affirmed.

MONTAGUE SMITH, J.—I am of the same opinion. I am not satisfied that the cleansing of the truck was a service performed by the defendants for the plaintiff within the meaning of the 230th section of the defendants' Railway Act, 25 & 26 Vict. c. ccxxiii. The case does not find whether the service was performed before or after the cow was put into the truck, and if it was afterwards I cannot see how causing the truck to be disinfected can possibly be said to be a service done for the plaintiff. It is, however, to be observed that the order in question does not say that the railway company are to cleanse the truck for every animal that uses it, but that they are to do so once in every twenty-four hours in which it is so used. That clearly gives the company no right to charge the owner of any particular animal that may be put into the truck with the expense of cleansing.

BRETT, J.—It seems to me that the cleansing of the truck is a duty cast on the railway company for the benefit of the public generally in order to prevent the spread of the cattle disease, and not for the benefit of any individual in particular; consequently the plaintiff ought not to be charged with the expense incurred by the company in the performance of that duty.

Judgment affirmed.

IN THE COMMON PLEAS. Jan. 15, 1869.

SAXBY *v.* THE MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RAILWAY COMPANY.

38 L. J. C.P. 153; L. R. 4 C.P. 198; 19 L. T. 640; 17 W. R. 293.

Discussed, *Barker* v. *Herbert*, [1911] E. R. A.; 80 L. J. K.B. 1329; [1911] 2 K.B. 633; 105 L. T. 349 (C. A.).

Watercourse—Obstruction—Liability of Owner of Land for Wrongful Act of Strangers.

WATER AND WATERWAYS. C.—*In an action for obstructing the flow of water from a stream to certain works of the plaintiff the evidence shewed only that the defendants were owners of the soil of the stream, and that the obstruction had been placed there in order to use the water for certain works before it came to the plaintiff's works, but without the sanction of the defendants and by persons who were strangers to the defendants, and between whom and the defendants there was no connexion by title or otherwise. The defendants derived no advantage from the continuance of the obstruction, and offered to allow the plaintiff to enter and remove it, but they declined to do so themselves*:—Held, *that there was no evidence of a wrongful continuance of the obstruction by the defendants, and that under these circumstances the plaintiff was rightly nonsuited.*

The first count of the declaration alleged that the plaintiff was possessed of certain print-works, land and premises, and by reason thereof was entitled to the flow of a stream or watercourse for working the said works and for the more beneficial use and enjoyment thereof, and the defendants obstructed and diverted, to wit, by means of a weir and planks and other obstructions, the water of the said stream away from the said print-works, lands and premises, and the plaintiff was thereby injured.

The second count was abandoned at the trial; and the third count merely alleged that the plaintiff was possessed of certain land, and was entitled to the flow of a stream or watercourse through the said land, and that the defendants obstructed and diverted the water of the said stream or watercourse from the said land of the plaintiff.

Plea—Not guilty. Issue thereon.

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The cause was tried, before Channell, B., at the Chester Spring Assizes for 1868. It appeared that a canal company, incorporated in 1794, by 34 Geo. 3. c. xxvi., for making the Peak Forest Canal, made a cutting in the bed of a natural stream called Todd's Brook, which had since by statute been united with and become the property of the defendants. Todd's Brook flowed into the river Goit, and below the point where Todd's Brook joined it some print-works, called the Furness Print-Works, were situated, which were worked by the water of the Goit. In 1854, a Mr. Welch, who was then the proprietor of these print-works, erected some other print-works, called the Whaley Bridge Print-Works, on land of his higher up the Goit and between the Furness Print-Works and the junction of Todd's Brook with the Goit. Welch, being also the occupier of the adjoining land, placed a dam or weir across the artificial cutting which had been made in Todd's Brook, and conducted the water of the brook to the Whaley Bridge works. The water, after it had been so used and fouled at these works, was then discharged into the Goit, about a mile above the Furness works. In 1858, Welch, who had thus occupied and used both works together, sold the Furness Print-Works to the plaintiff, without reserving any right to divert the water of Todd's Brook; and he subsequently sold the Whaley Print-Works to Messrs. Grave & Co. The plaintiff, insisting upon his right to have the water from Todd's Brook as it had formerly flowed, required the defendants to remove the weir and restore the watercourse to its original state. The defendants, though owners of the soil of the cutting across which the weir had been put, were not the owners of the adjoining land; and in the correspondence which took place between their attorneys and those of the plaintiff they stated that they wished to be neutral in the matter, and that though they declined to remove the weir themselves, as they were unwilling to be involved in a lawsuit with those who had put it there, they would make no objection to the plaintiff sending any one to remove it. The plaintiff did remove it, but it was shortly afterwards restored, though it did not appear by whom, only that it was not done by the defendants; and the plaintiff, declining to remove it again, although offered every facility for that purpose by the defendants, brought this action. Under these circumstances the learned Judge, being of opinion that there was no evidence to go to the jury in support of the action, nonsuited the plaintiff.

A rule *nisi* was afterwards obtained, on behalf of the plaintiff, to set such nonsuit aside, and for a new trial, on the ground that there was evidence to go to the jury of the defendants' liability.

Against this rule

M'Intyre now shewed cause.—The nonsuit was right. The diversion of the water had been effected by a riparian proprietor when the two works were united and worked by the same proprietor. The defendants did not claim under the person who had made the obstruction, nor did they adopt his act or derive any benefit from it. They were willing to permit the plaintiff to enter on their land to remove the obstruction, and if he should be improperly prevented by anybody from doing so he would have a right of action against the person who should so prevent him, and therefore there was no necessity for the present action in order to ascertain and enforce the plaintiff's rights, if he had any. There was, however, no evidence of any wrongful act by the defendants. On moving the rule the case of *Reedie* v. *the London and North-Western Railway Company* (4 Ex. Rep. 244) was cited, for the observations of Rolfe, B., in delivering the judgment of the Court, as to the liability of the owner of real property for nuisances arising from the mode in which his property has been used by strangers. Such observations might apply if there had been evidence to shew that the defendants in the present case had adopted the wrongful act complained of, as is the case where a person lets a house or land with a nuisance on it, although that nuisance had been created previously by some former occupier. The strongest instance of this is in the case of *Gandy* v. *Jubber* (5 B. & S. 78; 33 L. J. Q.B. 151), where the owner, who continued a yearly tenant after a nuisance had been created by the yearly tenant, was held liable

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for the continuance of the nuisance, although he had no knowledge of the existence of such nuisance.

[*Mellish*, for the plaintiff, informed the Court that that case had been in effect reversed on appeal, but he stated that as the defendant had consented to a *stet processus*, the case in the Exchequer Chamber had not been reported, although the Judges there had said that the judgment of the Court of Queen's Bench ought to be reversed.]

There is the case of *Fletcher* v. *Rylands* (35 L. J. Ex. 154; L. R. 1 Ex. 265), which, however, is very distinguishable.

[MONTAGUE SMITH, J.—That case does not touch the present one.]

There really is no reported case in which a person has been held liable for a trespass or wrong committed against his will, unless he has been a party to its wrongful continuance. The defendants here never did either the one or the other of these things, nor had they any interest in either creating or continuing the diversion of the stream.

Mellish and *Bowen*, in support of the rule.—The question is whether, if there be something on land which causes a continuing nuisance, the owner and occupier of such land is not legally liable to the person who sustains a damage from such nuisance. There is, no doubt, very little authority to be found on the subject where the act causing the nuisance has been done by a stranger and wrongdoer. It was settled by *Penruddock's case* (5 Rep. 100 b) that a nuisance created by the dropping of water was a new wrong each time it occurred, so that if not reformed after request made to the person who came in afterwards as feoffee of the premises from whence the water dropped, an action was maintainable in respect of it, but that, without such request, it was not maintainable against such feoffee. Therefore, that case drew a distinction between the person who did the wrong and the person who allowed it to continue.

[KEATING, J.—There the feoffee was a party claiming the premises under the person who had done the nuisance.]

That is true. The case of *The Queen* v. *Watts* (1 Salk. 357) decides that an indictment lies against a tenant for suffering a house to remain ruinous and likely to fall down.

[BOVILL, C.J.—That was founded on the duty to prevent an injury to the public.]

But there was no obligation beyond what arose from being the occupier of the property. In *The Queen* v. *the Bradford Navigation Company* (34 L. J. Q.B. 191), a canal company empowered by statute to take the water of certain brooks and use it for their canal, were held liable to be indicted for a nuisance arising from the water becoming polluted by drains before it reached the canal; and, though the decision in *Gandy* v. *Jubber* (5 B. & S. 78; 33 L. J. Q.B. 151) was questioned by the Court of Exchequer Chamber, there has been nothing to diminish the effect of the observation of Crompton, J., in that case, that "In the earliest times it was held that the owner of land, if the occupier, was bound to keep his land free from nuisance." And, in *Reedie* v. *the London and North-Western Railway Company* (4 Ex. Rep. 244), Rolfe, B., in delivering the judgment of the Court, said, "It is not necessary to decide whether, in any case, the owner of real property, such as land or houses, may be responsible for nuisances occasioned by the mode in which his property is used by others not standing in the relation of servants to him, or part of his family. It may be that in some cases he is so responsible. But then his liability must be founded on the principle that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others. If, for instance, a person occupying a house or a field should permit another to carry on there a noxious trade so as to be a nuisance to his neighbours, it may be that he would be responsible though the acts complained of were neither his acts nor the acts of his servants." The defendants in this case had notice of the wrongful obstruction, and the fact of their saying that they desired to be neutral shews that they sanctioned the continuance of it. At all events, there was evidence to go to the jury of such continuance, and the authorities apply

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which shew the liability of the owner of land to be indicted for a nuisance to the public, as in such a case an individual who has sustained a personal damage would have a right of action.

BOVILL, C.J.—I am of opinion that my Brother Channell was right in directing a nonsuit to be entered, on the ground that there was no evidence for the jury on which they might find a verdict for the plaintiff. With regard to the act itself which the plaintiff complains of, that act was not the act of the defendants, nor was it ever adopted by them, nor did it cause any benefit to their property. In truth, the act was done by other persons against the will of the defendants, and was an act which they had neither ordered nor adopted, but which had placed them in the greatest difficulty. It is said, however, that the defendants ought to be held responsible for the continuance of this wrongful act. If, after it had been done, it had appeared either that they had adopted it or had had some benefit from it there might, perhaps, have been some evidence of their liability to go to the jury. But this was not so, and it is simply the case of an act done by others which has not been approved of by the defendants. It is said that the defendants might, at least, have removed the obstruction, but it seems that the plaintiff had also power to do the same; for the defendants gave him leave to come on their land for that purpose. Therefore there were two parties, namely, the plaintiff and the defendants, who had power to remove it, but the consequence of removing it was serious, for it involved a conflict with those who had put it there; and, further it subjected the party so removing it to the liability of an action at the suit of the persons who had placed it there. Under these circumstances it is impossible, I think, to say that there was any evidence on which a jury could properly be allowed to find a verdict for the plaintiff.

BYLES, J.—I am of the same opinion. If the defendants had created the obstruction they would, undoubtedly, have been liable in this action, but that was not so, for the act here had been done by strangers. The defendants did not know by whom or under what right the act had been done, and they did not continue the obstruction, but were willing to have it removed, only they would not incur the expense or responsibility of such removal.

KEATING, J.—I do not understand that the Court, by what they are now deciding, are interfering with the general rule which imposes a liability on the owner of land in respect of creating or continuing a nuisance to a neighbour. Here there was no continuance, nor could there be, except a privity was shewn between the defendants and those who had created the nuisance. I think, therefore, my Brother Channell was right in nonsuiting the plaintiff.

MONTAGUE SMITH, J.—I am of the same opinion. I wish to place my decision on the narrow ground that there was no evidence of a wrongful continuance of the obstruction by the defendants. It appears that the defendants were as ready as the plaintiff to remove it, and that they invited the plaintiff to co-operate with them for that purpose, so that there was not any continuance by them of the obstruction which would make them liable in this particular action.

Rule discharged.

IN THE COMMON PLEAS. Jan. 26, 1869.

SCOTT *(Chamberlain of London)* *v.* COUSINS. THE SAME *v.* INGLIS.

38 L. J. C.P. 156; L. R. 4 C.P. 177; 20 L. T. 32; 17 W. R. 324.

Broker—Acting as Broker within the City of London—Clerk—57 Geo. 3. c. lx., s. 2.—Penalties.

PRINCIPAL AND AGENT. B.—*C., who was the book-keeper of a joint-stock company incorporated for the purpose of buying and selling shares and stocks for other persons, and who was authorized to act and sign for the manager in his*

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absence, made a contract in the absence of such manager, and within the city of London, between A., a customer of the company, and S., a jobber, for the purchase by A. of certain railway stock, and C. signed his own name, with the words "per pro. Manager," to a bought-note of such contract, which was headed with the name of the company. On another occasion I., who was the secretary of such company, made in like manner a contract between A. and S. for the sale by A. of such stock, and he signed his own name, with the word "secretary" added, to a sold-note of such contract. Both C. and I. received a fixed salary from the company, and derived no other profit from making these contracts. Neither the manager nor any officer or other person connected with the company was a duly admitted broker, pursuant to statute 6 *Ann. c.* 16:—Held, *that both C. and I. acted as brokers within the said city within the meaning of the statute* 57 *Geo.* 3. *c.* lx. *s.* 2, *and not being duly admitted were liable to the penalties imposed by that enactment.*

These were actions brought by the plaintiff, as Chamberlain of the City of London, to recover from each defendant a penalty of 100*l.*, for acting as a broker within the limits of the city of London without being duly admitted and licensed by the Court of Mayor and Aldermen.

The defendant in each action pleaded not guilty by statute 21 Jac. 1. c. 4. s. 4, on which issue was joined.

Both actions were tried together, before Bovill, C.J., at the London Sittings after Trinity Term, 1868. The facts as they appeared at the trial were these: The defendant Cousins was the book-keeper and accountant, and the defendant Inglis was the secretary, of a company incorporated and registered under the Joint-Stock Companies Act, 1862, and called the Open Stock Exchange, Lim., which had offices in Lothbury, in the city of London, and was a company established for buying and selling, on behalf of other persons, shares and stocks and other such securities, both by public auction and privately on commission or otherwise. There was no evidence that any of the directors, manager, or other person connected with the company was a duly licensed broker. In February, 1868, a Mr. Ainslie called at the office of the company, in Lothbury, and saw there the defendant Cousins, of whom he inquired the price of 1,000*l.* Great Eastern Railway Stock. Cousins thereupon went and ascertained the price from Mr. Soilleux, a jobber and member of the Stock Exchange, and returned and informed Mr. Ainslie, who instructed him to buy at 30⅝ for the next account-day. Cousins accordingly went back to the Stock Exchange and bought the stock of Soilleux at that price. He then made out and signed a contract-note, which he delivered to Mr. Ainslie. The following is a copy of such note:

"The Open Stock Exchange, Lim.

"5, Lothbury, London, E.C., Feb. 10, 1868.

"Bought, by order and for account of Wm. Ainslie, Esq., of E. Soilleux, for February 28, 1,000*l.* Great Eastern Stock @ 30⅝ £306 5 0

Stamp and fee 1 17 6

Commission 1 5 0

£309 7 6

"C. COUSINS, p. pro. Manager."

The defendant Cousins stated at the trial that he was authorized to act and sign for the manager in his absence, and that it was the usual course for him to have acted as he did on this occasion when the manager was absent.

The occasion on which the other defendant, Inglis, was sought to be made liable for acting as broker without a licence was on a re-sale by Mr. Ainslie of this 1,000*l.* Great Eastern stock, when the defendant Inglis was the person Mr. Ainslie saw at the company's office, and who having gone and sold the stock to the same jobber, Soilleux, signed a sold-note, similar to the said bought-note, adding, however, the word "secretary" after his signature. Both the defendants received a salary each, and had no profit out of the transactions.

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Neither party desiring the opinion of the jury, the Chief Justice decided that the plaintiff was entitled to a verdict for 100*l.* in each action, but he gave leave to the defendant in each action to move to enter a verdict for him if the Court should be of opinion that such defendant was not liable to the penalty, the Court being at liberty to draw inferences of fact.

A rule *nisi* to that effect having been obtained in each action,

Archibald now shewed cause.—The earliest statute prohibiting persons acting as brokers in the city of London unless sworn before and duly admitted by the mayor and aldermen is the 13 Edw. 1. statute 5. There was afterwards the 6 Ann. c. 16, which was amended by the local Act 57 Geo. 3. c. lx., and by section 2 of that last Act it is enacted, "That if any person shall take upon him to act as a broker, or employ, or cause, permit or suffer any person or persons to be employed with, under or for him to act as such within the said city and liberties, not being admitted in pursuance of the said recited Act" (6 Ann. c. 16), "every such person so offending shall forfeit and pay to the use of the mayor and commonalty and citizens of the said city for every such offence the sum of 100*l.*, to be recovered by action of debt in the name of the Chamberlain of the said city in any of His Majesty's Courts of record, in which no protection, essoign or wager of law shall be allowed, or any more than one imparlance." These defendants say that they acted merely as servants or clerks, and are therefore not liable to the penalty imposed by this Act; but it is submitted that what these defendants respectively did in this matter, whether as servants or not, was sufficient to constitute an acting as broker within the meaning of this statute.

[BOVILL, C.J.—No doubt there was clear evidence of such acting as a broker unless the party so acting be protected by reason of the situation in which he stood as a servant of the company.]

The company were not—indeed, being a body corporate, they could not be —themselves licensed brokers, and it did not appear that any officer of the company was such broker. Then, can a person evade these statutes by being a clerk or agent of persons who are not authorized to act as brokers? The statutes intended to forbid any one acting as a broker who was not licensed.

[BYLES, J.—Does the statute strike at the clerk? May not an authorized broker act by a clerk who is not a broker?]

A sworn broker enters into a bond with sureties, and the condition of the bond, which is set out in *Kemble* v. *Atkins* (Holt N.P. 432, note (a)), shews that such broker is not to "employ any one under him to act as a broker within the city and liberties thereof not being duly admitted." It is not necessary to deal with the question whether a clerk of a duly admitted broker may act or not for his master without incurring the penalties of the statute, for neither of these defendants were acting on behalf of any one who had authority to act as a broker.

Montagu Chambers and *Mansel Jones*, in support of the rules.—The statute of 57 Geo. 3. c. lx. s. 2. applies only to the principal who so wrongfully acts as broker, and does not apply to the person employed by him. The words of that section, "take upon him to act as broker or employ" any person "under or for him to act as such," do not apply to either of these defendants, who were only servants employed, and not persons employing others. They received no profit from the transaction, but were merely servants, receiving a fixed salary, and as such were not, it is submitted, within the meaning of this statute, which was directed entirely against those who, as principals, acted as brokers for their own profit or employed others to act for them.

BOVILL, C.J.—In each of these cases there was a contract for purchase and sale. In the first transaction, Mr. Ainslie was a buyer, and the contract was between him and Mr. Soilleux, the jobber. Some person intervened between Ainslie as the buyer and Soilleux as the seller; and who was that person? In fact, in that first transaction it was Cousins alone with whom Ainslie and Soilleux communicated, who were certainly the two principals on that occasion. The terms of the bargain being settled, a contract note was signed in point of

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fact by Cousins, and in his own name, adding these words, " per pro. Manager." When the evidence was given for the defendants at the trial, it appeared that the company managed such transactions as these ordinarily through their manager, but that if he were absent, it was the duty of Cousins to act for him. He was not the clerk of the manager, but a person whose duty it was in the absence of the manager to make the bargains, the profits resulting from which belonged to the company. There was no evidence that the manager, or any one connected with the company, was a licensed broker of the city of London, even if that would have sufficed. Then, on these facts, as the company, being a company incorporated under the Joint-Stock Companies Act, could not act by itself, but must employ some one to act for them, it seems to me that they did employ Cousins to act for them, and for that purpose to make the bargains and contracts required in their business. Under these circumstances, it seems to me that the case falls distinctly within the Act, and that Cousins is liable to the penalty. The case as against Inglis was, with reference to the latter part of the transaction, when, after the purchase of the shares, and after they had been continued from account-day to account-day, they were eventually re-sold by Ainslie to Soilleux, the jobber. That transaction was completed by Inglis, who was the only intervening person, and who signed the contract sold-note thus: " R. W. Inglis, Secretary." It seems to me that, as in the other case, so in this, the party signing the note was acting as broker, and liable therefore for the penalty.

BYLES, J.—I think that my Lord rightly decided this case at the trial. The defendants were acting as brokers, and there was no one else but them acting as such for the principals in the transaction, and therefore they come within the meaning of the statute. It is not necessary for me to say, and therefore I give no opinion whether a duly authorized broker can act by his clerk, and if he cannot, whether the clerk would be liable for the penalty.

KEATING, J.—I am of the same opinion. I think that both these defendants acted as principals. There was no one connected with the company, that we hear of, whether as manager or secretary, or otherwise, who was shewn to be a duly admitted broker. Then these two defendants acted as brokers, and could only act as principal brokers, because there was no one for whom they could be agents. Consequently the verdict in each action was right, and the rule in each must be discharged.

MONTAGUE SMITH, J.—I am of the same opinion. I think that these two defendants took upon themselves to act as brokers, and that they come within the first part of this second section. There was no broker duly licensed from whom either of them could derive authority. They did not profess to act for any licensed broker, but for the company, who could not act except by some servant or agent. They acted each in an independent capacity as the servant of the company, not deriving any authority from any one who was authorized to act as a licensed broker.

Rule in each action discharged.

IN THE COMMON PLEAS. Nov. 16, 1868; Feb. 12, 1869.

CROPTON AND OTHERS *v.* DAVIS AND WIFE.

38 L. J. C.P. 159; L. R. 4 C.P. 159.

Will—Construction—Equitable Estate in Fee subject to Defeasance.

WILL. I.—*A testator devised a house to trustees on trust to apply the rents for the advancement and benefit of his granddaughter M. until she should attain the age of twenty-one, but in case she should die under that age, then he devised the said house to his daughters E. and C., their heirs and assigns, as tenants in common. He afterwards appointed two other of his daughters*

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executrices, and his son executor of his will, to whom he bequeathed all the residue of his real and personal estate, not specifically bequeathed, as tenants in common:—Held, *that the testator's granddaughter M. took, under the above devise, an equitable estate in fee in the said house, subject to defeasance in case she should die under twenty-one years of age.*

This was an action of ejectment, brought by the plaintiffs against the defendants, in which the plaintiffs claimed to be entitled to the possession of a house, No. 4, Coronation Terrace, Ilfracombe, Devonshire, of which the defendants were in actual possession; and by consent of the parties, and by order, the following SPECIAL CASE was stated for the opinion of the Court:

John Martin, deceased, made his will in writing, bearing date February 17, A.D. 1855, duly signed and attested as then and now by law required. The following was part of the said will:

"I give and devise all that my dwelling-house situated on Hillsborough Terrace, Ilfracombe, aforesaid, being No. 4, and also all that my dwelling-house and premises, situated on Montpelier Terrace, Ilfracombe, being No. 9, and also all that my dwelling-house and premises situated on Coronation Terrace, Ilfracombe, being No. 4, and all my furniture and other effects in the said houses respectively, to Henry Day and Robert Henry Moon, of Ilfracombe aforesaid, gentlemen, upon trust as to the dwelling-house No. 4, Hillsborough Terrace, and the furniture therein, and No. 9, Montpelier Terrace, to receive the rents, and to pay the same to my said wife during her life, if she shall so long continue my widow and unmarried, and after her decease, or second marriage, which shall first happen, then as to the dwelling-house and premises No. 4, Hillsborough Terrace, with all the furniture and effects therein, upon trust to apply the rents for the advancement and benefit of my granddaughter her heirs and assigns for ever; and as to the dwelling-house and premises No. 9, Montpelier Terrace, upon trust to convey and assure the same to my daughter Caroline Rogers Martin, her heirs and assigns for ever. And as to the dwelling-house and premises No. 4, Coronation Terrace, and the furniture therein, upon trust to apply the rents for the advancement and benefit of my granddaughter Mary Annie Clarke, until she attains the age of twenty-one years; but in case my said granddaughter should die under that age, then I devise the said dwelling-house and furniture to my daughters Elizabeth Annie Martin and Caroline Rogers Martin, their heirs and assigns, as tenants in common. And I hereby declare that the said trustees or trustee shall, after the decease or second marriage of my said wife, and during the minority of my said children, apply the whole or such part as they or he shall think fit, of the rents to which my children Elizabeth Annie Martin and Caroline Rogers Martin shall, for the time being, be presumptively entitled under the trusts hereinbefore declared, for or towards the maintenance or education of such children respectively, either directly or to her guardian respectively, without seeing to the application thereof, or requiring any account for the same, and shall accumulate the residue (if any) thereof."

After making provision for the receipts of the trustees being good discharges to purchasers, and for the appointment of new trustees in case of death, &c., the will concluded as follows: "And I appoint my said wife and the said Henry Day and Robert Henry Moon guardians of my infant children and grandchild Mary Annie Clarke. And I appoint my son Henry Martin and my daughters Mary Clarke and Annie Cropton executor and executrixes of this my will, to whom I bequeath all the residue of my real and personal estate, of whatever kind or description, and not hereinbefore specifically bequeathed, as tenants in common, but so that the shares of my said daughters Mary Clarke and Annie Cropton shall be for their separate use, and shall not be subject or liable to the debts or engagements of their present or any future husbands, but the residue as aforesaid shall be subject to the payment of my debts, legacies and funeral and testamentary expenses, and also to the payment of 25*l*. 10*s*. yearly to Mrs. Seal during her life."

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The said Mary Annie Clarke mentioned in the said will is the defendant Mary Annie Davis; she attained the age of twenty-one years before the commencement of this suit, and is living and married to the defendant Robert Davis. The said Henry Martin mentioned in the said will is dead. The said Mary Clarke and Annie Cropton mentioned in the said will and her husband Thomas Cropton are the plaintiffs in this action, and any interest that Henry Martin would have had in No. 4, Coronation Terrace, had he been living, has passed to the plaintiffs. The widow of the testator died in the month of March, 1867. The question for the opinion of the Court was, whether the plaintiffs or the defendants are, under the will above set forth, entitled to the premises No. 4, Coronation Terrace, Ilfracombe aforesaid.

In last Michaelmas Term,

Digby Seymour (*Beresford* with him) argued the case for the plaintiffs, and *Joseph Brown* (*R. E. Turner* with him) argued for the defendants.

Cur. adv. vult.

The judgment of the Court[1] was delivered, on February 12, by—

BRETT, J.—This was an action of ejectment brought by the plaintiffs to recover possession of a house, No. 4, Coronation Terrace, Ilfracombe. The plaintiffs claimed as residuary devisees under the will of John Martin, deceased, or as representatives of his son Henry Martin, who was also his heir-at-law. The defendants claimed in right of the defendant Mary Annie Davis, as devisee under the will. John Martin, the testator, by his will, dated February 17, 1855, after several bequests to his wife and other members of his family, proceeded to devise three houses, including that in dispute, to trustees, in trust, as to the two first houses, to receive the rents and to pay the same to his wife during her life or widowhood, and after her decease or second marriage, as to the first upon trust to convey and assign the same to his daughter Elizabeth Annie Martin, her heirs and assigns for ever, as to the second, in similar terms, to his daughter Caroline Rogers Martin, and as to No. 4, Coronation Terrace, upon trust to apply the rents for the advancement and benefit of his granddaughter Mary Annie Clarke, until she should attain the age of twenty-one years; but in case his said granddaughter should die under that age, then he devised the said dwelling-house to his daughters Elizabeth Annie Martin and Caroline Rogers Martin, their heirs and assigns, as tenants in common. The will afterwards contained an appointment of the testator's son Henry Martin and his daughters Mary Clarke and Annie Cropton to be executor and executrices of his will, to whom he bequeathed all the residue of his real and personal estate, of whatever kind or description, and not thereinbefore specifically bequeathed, as tenants in common, &c., but the residue aforesaid should be subject to the payment of his debts, legacies and funeral expenses, and also to the payment of 25*l.* 10*s.* yearly to a Mrs. Seal during her life.

It was contended on behalf of the plaintiffs that no estate whatever in No. 4, Coronation Terrace was devised to the defendant Mary Annie Davis, the granddaughter of the testator, but that the devise of the estate was to the trustees, with a direction to apply the rents for the advancement and benefit of his granddaughter whilst under age; and if any estate was devised to her, it was only until she should attain the age of twenty-one years, when it passed to Henry Martin and to the plaintiffs Mary Clarke and Annie Cropton, under the residuary clause, or to Henry Martin as his heir-at-law. On the part of the defendants it was contended that upon the words of the devise alone, or upon them coupled with the intention otherwise manifest on the face of the will, the defendant Mary Annie Davis took an estate in fee subject to defeasance if she should die under twenty-one years of age. The cases chiefly relied upon on behalf of the defendants were—*Newland* v. *Shephard* (2 P. Wms. 194); *Peat* v. *Powell* (Amb. 387); *Gardiner* v. *Stevens* (30 L. J. Ch. 199); *Tomkins* v. *Tomkins*, cited by Lord Hardwicke in *Goodtitle* v. *Whitby* (1 Burr. 224) and *Goodright* v. *Hoskins* (9 East, 306). In answer to which cases it was argued

(1) Keating, J., Montague Smith, J., and Brett, J.

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on behalf of the plaintiffs, that Lord Hardwicke, in *Fonereau* v. *Fonereau* (3 Atk. 316), had disapproved of the doctrine in *Newland* v. *Shephard* (2 P. Wms. 194), that *Peat* v. *Powell* (Amb. 387) was decided on the authority of *Newland* v. *Shephard* (2 P. Wms. 194), that both these cases are questioned in *Jarman on Wills*, vol. 2. p. 253, and that they are overruled in the case of *Fitzhenry* v. *Bonner* (2 Drew. 36).

Upon consideration of the will now in question, we are of opinion that the trustees took a legal estate in the three houses mentioned in the devise; that the defendant Mary Annie Davis took an equitable estate in No. 4, Coronation Terrace, and that such estate was an estate in fee, subject to defeasance in case she should die under twenty-one years of age. As to the first objection to this interpretation, taken on behalf of the plaintiffs, we think that, inasmuch as all the profit or produce of the house was to pass to the benefit of the testator's granddaughter, it sufficiently appears to have been the testator's intention that an estate in the house should pass; and as to the second objection, without saying that if the devise had stood alone it would have raised, by necessary implication, an estate in fee, we think that looking to it and the other portions of the will together, it manifestly appears to have been the testator's intention to give the whole interest in the house No. 4, Coronation Terrace to his granddaughter, to go over to his daughters Elizabeth Annie Martin and Caroline Rogers Martin only in a case which has not happened, viz., in case his granddaughter Mary Annie Clarke should die under twenty-one years of age. If this were not so, the strange consequence would follow that if the granddaughter died under twenty-one the estate would go over to the daughters Elizabeth Annie Martin and Caroline Rogers Martin, whereas if the granddaughter attained the age of twenty-one it would go over to the residuary legatees, who are other persons. Such an intent cannot, we think, be presumed from the structure and language of the will. We are of opinion that the decision of Wood, V.C., in *Gardiner* v. *Stevens* (30 L. J. Ch. 199), which seems to recognize the doctrine of the earlier cases, is in accordance with our present judgment, and that it is not in conflict with the decision of Kindersley, V.C., in *Fitzhenry* v. *Bonner* (2 Drew. 36), which seems to admit that words such as are used in the devise now in question, are sufficient to pass the whole interest, "if, looking to the language and to all the dispositions of the will and the circumstances, there is an irresistible inference in favour of implying such a gift." We think there is such an inference in the present case, and therefore give judgment for the defendants.

Judgment for the defendants.

IN THE COMMON PLEAS. Jan. 22, 23, 1869.

HULL ELECTION PETITION. PEASE AND OTHERS, *petitioners;* NORWOOD AND CLAY, *respondents.*

38 L. J. C.P. 161; L. R. 4 C.P. 235; 19 L. T. 648; 17 W. R. 320.

Parliamentary Elections Act, 1868 (31 & 32 *Vict. c.* 125. *ss.* 6, 8, 9, 22)—*Security for Costs—Joint Respondents to the same Petition.*

ELECTION LAW. A.—*In the case of a parliamentary election petition presented under* 31 & 32 *Vict. c.* 125, *against the return or election of two or more members who are made respondents to the same petition, it is not necessary to give, on behalf of the petitioner, a separate security for costs in respect of each respondent, but one security for* 1,000*l. is sufficient, notwithstanding that section* 22 *states that for all purposes of the Act such petition shall be deemed to be a separate petition against respondent.*

Where such security is given by recognizance the latter must be entered into by other persons than the petitioners in order to be a recognizance within

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the meaning of the Act:—Held, *however* (Keating, J., *and* Montague Smith, J., *dubitantibus*), *that an objection to the recognizance that some of the petitioners signed it as sureties is an objection to the sufficiency and not to the validity of the security, and is therefore amendable by a deposit of money under section* 9.

The petitioners in this case were Joseph Walker Pease, Henry Barkworth, Anthony Bannister, William Leetham, and eight other persons, and the petition, which was presented by them under the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), complained of the undue election of the two respondents for the borough of Kingston-upon-Hull at the election holden on November 16, last.

The respondents were made respondents to the same petition, and the security for costs given on behalf of the petitioners, within three days after the presentation of the petition, was a recognizance entered into by the said petitioners J. W. Pease, H. Barkworth, A Bannister and W. Leetham, for 250*l.* each.

The respondents thereupon took out a summons before one of the election petition Judges, to set aside the petition on the ground that the recognizance so entered into was not a recognizance in accordance with the 31 & 32 Vict. c. 125, and was wholly null and void, and in support of such summons identified by affidavit the persons who had entered into the recognizance with the said petitioners J. W. Pease, H. Barkworth, A. Bannister, and W. Leetham.

Upon the hearing of such summons Willes, J., endorsed the same as follows: "I make no order in the terms thereof, and treating it by arrangement as a summons properly before me to declare the security insufficient, I declare the security to be insufficient, and I deem the sum of 1,000*l.* requisite to make the security sufficient; and I order that if 1,000*l.* be deposited in the manner prescribed by the general rules within three days from the date of this order, not including such date, the petition shall be deemed at issue, and that unless the amount be so deposited, all proceedings on the petition shall be stayed."

This order was dated December 21, 1868. There was no consent on the part of the respondents to its being made.

Within the time limited by the said order for doing so 1,000*l.* was deposited on the part of the petitioners in the manner prescribed by the general rules.

On the first day of this term a rule was obtained by

Mellish, for the respondent Clay, and by *H. James*, for the respondent Norwood; and by each rule the petitioners were called upon to shew cause why the said order of Willes, J., should not be rescinded, and why all proceedings in the petition against such respondent should not be stayed on the ground that the said recognizance was not a recognizance within the provisions of the Parliamentary Elections Act, 1868, and that no recognizance had been given or money deposited within the meaning of the said Act.

Sir J. Karslake shewed cause.—The question turns on 31 & 32 Vict. c. 125, and the material sections are 5, 6, 8, 9, 10, 20, 22, 31, 42. The first objection taken on the other side is that the recognizance, the form of which is given by rule 19, is void, because it is made by the four petitioners, and not by sureties for them. But the respondents have no right to treat it as void, but must go before a Judge to get it set aside. The late Act follows 11 & 12 Vict. c. 98. ss. 12, 13, 14, 15, 16, 17, under which statute, as appears from *May's Parliamentary Practice*, 5th edit., 602-606, and the *Falkirk case* (*May's Parliamentary Practice*, 5th edit., p. 606), the objection was to be taken before the examiners. The recognizance is to provide as to costs up to a certain amount, and if entered into, and no objection taken, then, by section 10, the Master is to treat the petition as at issue. Here the recognizance, good on its face, was lodged, but because it is ascertained that it is entered into by some of the petitioners, it is said it may be treated as a nullity; but no provision says so, and there is a tribunal to determine what amendments shall be made. It may be that there are four obligors whose sufficiency may be mooted; if one be sufficient this may be remedied; so if all be infants, though by law the bond is void, the parties

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must go before a Judge, especially if the recognizance is good on its face, as it is here. This gives the proper effect to the word "insufficient" in section 9.

[BOVILL, C.J.—By section 26 the old practice is to be observed in cases to which the New Rules do not extend.]

If the practice under the old Act is to be looked to, the *Falkirk case* (*May's Parliamentary Practice*, 5th edit., p. 606), which shews the objection must have been before the examiner, is an authority to shew that now it should be taken before a Judge; and the legislature in section 9 uses the widest terms, the words being "any objection." Here the summons asked to have the petition set aside, and the Judge refused, but ordered that a deposit should be made. The proper course was to have asked the Judge to decide that the recognizance was void. The question whether it was good or bad was for him, and he had a right, under section 9, to order a deposit, for in every case questions as to the security are to be determined by a Judge. Section 8 provides as to the recognizance and the mode of objecting to it; then comes section 9, which allows a deposit, and then the 21st and following rules, which provide as to the procedure before a Master or Judge. The object is that the costs may be secured. The respondent may waive this, but if he does not he must object in the way specified. After a certain time, the Master is to assume matters to be at issue, and is to put the petition in the list. If the respondent were entitled at any stage to treat the recognizance as bad, it would be most inconvenient, and it was never intended that the respondent was to take the matter in his own hands. It is not for him to treat the recognizance as void, but he must go before a Judge to alter it or get a deposit. If the Judge decided by agreement the Court has no jurisdiction, and the respondent is concluded.

[*H. James*, for the respondent Norwood, said the Judge acted *in invito*, not by agreement.]

Further, it is absolutely necessary to go before the Master if the recognizance is on its face good, and anything to the contrary is a fact to go before him. The other side also take another point, viz., whether, as there are two respondents, 2,000*l.* is required. Now, first, the matter has been decided by a Judge, and the Court has no jurisdiction; secondly, it is sufficient. By the old practice petitions against two members might be joined; and sections 6 and 22 of the present Act provide that the security in a petition shall be 1,000*l.*, and that two or more candidates may be respondents in the same petition, and the Judge held that the old practice was to be followed. The wording of sections 41 and 42 favours this view. By the other construction, at every stage, double proceedings would be necessary, though the Acts complained of be joint.

[BOVILL, C.J.—The Act is to be read with 13 Vict. c. 21. s. 4, and the plural number may be used for the singular; and by 11 & 12 Vict. c. 98. s. 3. only 1,000*l.* was required.]

To prevent frivolous petitions a security is required. The 11 & 12 Vict. c. 98. gave the same form of recognizance, and also contained section 108, because 13 Vict. c. 21. was not then in force.

Mellish and *H. James*, in support of the rules.—There was no agreement or consent to the learned Judge making the order which he did, and it has never been acted upon by the respondents.

[BOVILL, C.J.—We are all agreed that there was nothing which passed before my Brother Willes at chambers which precluded the respondents from making the application which is now before the Court. The questions to be argued on this rule will be the main questions in the case.]

Then the first question will be, whether the recognizance was not a nullity. It is submitted that it was just as if there were no security, and in that case there would be no power to amend. Before 11 & 12 Vict. c. 98. objections to the sufficiency of securities were made before the examiner, but objections as to the validity of the recognizance were made to the House, and there was no power to amend, and if invalid the petition fell; then section 13 of 11 & 12 Vict. c. 98. gave the examiner power to examine as to the validity, from which

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section 8 of the present Act is taken, leaving out the words " that the same is invalid or . . . . not duly entered into or received . . . ."; section 15 provided as to the procedure of such examination; and section 46 enacted, that if the examiner reported the recognizances were objectionable, no further proceedings were to be taken. Then the present Act, by section 5, provides that the petition shall in future be to this Court; and by section 6, that certain things shall be done on the presentation of a petition. All the conditions in section 6 are conditions precedent, and the petitioner is to give security, *i.e.*, money, or a surety, which must be something more than his own liability, for he is independently liable.

[BOVILL, C.J.—What ought the examiner under 11 & 12 Vict. c. 98. to have done? It would seem he would have received and certified, and then have heard objections under section 13. If the old practice is to prevail an objection is necessary.]

If they be the same persons it would be his duty to reject, if he knew it; by section 7 he has to certify, and he has power to inquire whether they be other than petitioners. As respects the present Act, by the other construction a man might deposit 1*s.*, and then must be taken before the Master, and so get time. Section 8 clearly does not apply to an invalid security; and then section 9, as is shewn by the expressions " further time " and " time limited," refers to section 8.

[BOVILL, C.J.—Section 9 says, not " such objection " or " recognizance," but simply " any objection to the security." Why is it not general?]

If a man be one day too late, there is no power to amend; suppose there is no security, what is a respondent to do except come to the Court to take the petition off the file; he cannot object to the security. This proceeding is not an objection to the security, but merely in order to bring to the notice of the Court that there is no security, that a condition has not been fulfilled, and that all proceedings ought to be stopped, and the respondents went to a Judge because the Court was not sitting. Rules 21 and 22 point to objections under section 28.

[BYLES, J.—Rule 23 is sweeping: " any objection made to the security."]

If section 9 be not built solely on section 8, then it would follow that objections under and objections not under section 8 would be taken at different times, and further, the petitioner might give the go-by to section 6 by an illusory security. The words of the 4 & 5 Vict. c. 58. s. 42. shew that the sureties must be some one else than the petitioners, and the 11 & 12 Vict. c. 98. s. 3. is unequivocal. Now, as to 1,000*l.* being sufficient. This turns on section 22, which, after saying different candidates may be joined, provides that " for all the purposes of this Act such petition shall be deemed to be a separate petition against each respondent." That is, the petitions are to be tried at the same time for convenience, but are only the same for mere matter of form. Under the old practice, there might be joint petitions for joint Acts, but it was a moot point whether the petitioners could go into separate Acts.

[BOVILL, C.J.—Section 22 is introduced after sections as to trial, and it may be that it means only that they are to be separate when and after they come to trial.]

It seems to assume there would be two petitions but for the section, and it gets rid of any doubt about this and says, but for all purposes they are to be two. It was intended that joint or separate Acts might be tried in one petition, but that they were to be treated as separate.

Manisty, O'Brien, Serjeant, Huddleston, Nasmyth, Cave, and *Beaumont,* argued shortly in support of, and

Sir P. Colquhoun, Price, O'Malley, Jelf, Herschel, Gates, and *Jeune* argued against similar orders which Willes, J., had made in other petition cases which raised the same points as those in the principal case.

BOVILL, C.J.—We have already, during the progress of the argument, intimated our opinion that the parties are not precluded by anything that passed at chambers from coming to the Court by way of appeal against the order made

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by my Brother Willes. The questions which we have had to consider arise upon the construction to be put upon some sections of the Parliamentary Elections Act, 1868, 31 & 32 Vict. c. 125. We have found great difficulty, looking at the language of the Act, and comparing one section with another, in discovering the meaning of the legislature: and I am by no means certain that the conclusion we have arrived at is the correct one. It is therefore with some hesitation that I express the opinion which I have formed, and which seems to me in some measure to solve the difficulty.

The first question is, whether, where the petition is against two or more members whose election is complained of, the security to be given by the petitioners under section 6 is to be to the amount of 1,000*l.* only, or whether the statute requires it to be for 1,000*l.* in respect of each member petitioned against. In considering that question, we must not disregard the previous legislation and the practice which prevailed on the trial of election petitions before the tribunal which formerly existed. According to that practice and the last Act upon the subject, the 11 & 12 Vict. c. 98, it seems to have been established that although the petition might be against the return of two or more members, one security for 1,000*l.* alone was required; and by section 26 of the Parliamentary Elections Act, 1868, it is expressly enacted that, "until rules of Court have been made in pursuance of this Act, and so far as such rules do not extend, the principles, practice and rules on which Committees of the House of Commons have heretofore acted in dealing with election petitions, shall be observed so far as may be by the Court and Judge in the case of election petitions under this Act."

The principal object of the late Act was to substitute a new tribunal for the trial of these petitions in lieu of the Committees of the House of Commons; and, although numerous changes are introduced by the Act, they all seem to be addressed to the making of provisions suitable for the new tribunal, viz., the Court of Common Pleas and the Judges appointed for the trial of election petitions pursuant to section 11. If it had been intended to make so important a change with regard to the extent of the security as that here contended for by the respondents, I should have expected to find some distinct and express enactment on the subject. But, so far as there is any specific provision, all the earlier sections of the Act throughout point to one petition and one security only. It is said, however, that there is a provision (in section 22) which renders it necessary for the Court and the election Judges to treat the petition, where there are more respondents than one, as separate petitions for all purposes. That section enacts that "two or more candidates may be respondents to the same petition, and their case may for the sake of convenience be tried at the same time, but for all the purposes of this Act such petition shall be deemed to be a separate petition against each respondent." That section therefore assumes that there may be one petition against two or more respondents, and that the proceedings thereon may be continued to trial as upon one petition against all the respondents, where the same objection applies to one. In a case of that kind, it is plain that there could only be one petition and one trial. What, then, does the section mean as applicable to such a case when it says that "for all the purposes of this Act such petition shall be deemed to be a separate petition against each respondent"? In point of fact it is not so, and cannot be made so. I have great difficulty in putting any sensible construction upon this part of the Act. What are the "purposes" of the Act? To test the validity of the election of the sitting members, to unseat them and to seat other persons. For the purposes of the judgment and the consequences that are to follow it, it may be that the petition is to be considered a separate petition against each respondent, though that construction does not meet the whole difficulty. No satisfactory solution has been offered by any of the learned counsel who have appeared for the respondents in the several cases which depend upon our judgment in this case. It was, indeed, suggested by Mr. Mellish that section 22 applies to candidates only. But the answer to that is that, by the interpretation clause, section 3, "candidate" includes

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"member." For the purpose of the practical application of the section to the present cases, however, I do not think it necessary to attempt to define the meaning of the expression to which I have referred. The only question before us is, whether it applies to the security which is to be given. Now the security is no part of the petition, or of the proceedings upon or under the petition; it is a matter which is wholly collateral to the petition, and is made a condition by an express and positive enactment having reference to one petition; and I cannot construe section 22 as requiring a separate security to be given in the case of each separate respondent. As a general principle, our law does not require a plaintiff to give security for costs; and in many cases there would be as much reason for calling upon the respondent as upon the petitioner to give security for costs upon an election petition. It was probably found in former times, when political feeling ran high, that it became a habit to put forward sham petitions; and it may be that that which was at first imposed as a test of *bona fides* ultimately became a real security. The security, however, is not the only remedy for the costs which the respondent has. Under the old Acts, all the petitioners were liable for costs in certain cases. That liability was from time to time enlarged; and under the present Act (section 42) the security is only to be had recourse to upon the failure of the petitioners to pay costs. If the deposit or recognizance was intended to be the actual and only security for the full amount of all the costs to be incurred under the petition, considerable hardship would no doubt arise where there was one security only for 1,000*l.* and several respondents, especially where there were separate cases against the several respondents, each requiring a different time and mode of trial, the one being comparatively inexpensive, the other involving a prolonged inquiry and large expenditure of money; and more particularly in the city of London, where there might be one petition against four members. It being perfectly clear that, down to the passing of the Act of last session, one security for 1,000*l.* was the limit in all cases, if the legislature had thought it right to alter it, I should have expected that they would have done so in clear and unambiguous terms, and not left it to be inferred from such language as we find in section 22. If we are wrong in the construction we put upon the Act, or if parliament shall think that the deposit or recognizance should be a security for the actual costs incurred, it will be for them to interfere. It may be that they may think that the respondent also should give security. We, however, cannot speculate. All we have to do is, to deal according to the best of our judgment with what the legislature has declared. Looking, therefore, at the former practice, and at the objects of this Act of Parliament, and seeing that there is no express enactment requiring more than one security to be given, and that the security is a matter collateral to the petition, I have come to the conclusion that the view taken by my Brother Willes, and concurred in by the other election Judges, was right. This objection, therefore, in the principal case, as well as in all the other cases which depend upon it, fails.

The next question which arises is, whether a recognizance entered into by some out of a larger number of petitioners is a compliance with the Act of Parliament; and if not, a further question arises, as to the nature and effect of the objection, and whether it can be raised under the 8th or the 9th section of the Act, and can be removed by a deposit, or whether effect is only to be given to it under the general jurisdiction of the Court. I entirely concur with my Brother Willes and the other election Judges that the security must be by persons other than the petitioners themselves. The recognizance is to be "a security given on behalf of the petitioner"—section 6, and there are many clauses in the Act which point to the same construction. I am therefore of opinion that the recognizance in this and in all the other cases where it was signed by petitioners is not a compliance with the Act. Then arises the question, what is the nature of the objection, and whether it is an objection to the *validity* or to the sufficiency of the security? In order to answer that question, it will be necessary to refer to the Act which regulated the rights of the parties in this respect before the passing of the Act of last session, viz., the

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11 & 12 Vict. c. 98. Under section 13 of that Act, the power given to the respondent to object to the recognizance was given in these words: "Any sitting member petitioned against, or any electors petitioning and admitted parties to defend the election or return, may object to any such recognizance on the ground that the same is *invalid*, or that the same was not duly entered into or received by the examiner of recognizances, with the affidavit thereunto annexed as hereinbefore required, or on the ground that the sureties or any of them are *insufficient*, or that a surety is dead, or that he cannot be found or ascertained from want of a sufficient description in the recognizance, or that a person named in the recognizance has not duly acknowledged the same." Under that section there are two classes of objections referred to: first, that the recognizance is *invalid* or has not been duly entered into or received by the examiner; secondly, that the sureties, or any of them, are *insufficient*, or that a surety is dead, &c. All these objections, under the 11 & 12 Vict. c. 98, had to be disposed of by the examiner of recognizances. His decision was final; and there was no power of amendment, except by the substitution of a new surety in the place of one who had died. That being so, when the Act of the last session was passed, certain sections were introduced with a view to objections to the recognizance being made upon various grounds; but it is somewhat remarkable that throughout the Act there is no provision which expressly defines the mode in which objections to the *validity* of the recognizance are to be determined: and in section 8, which authorizes and requires certain objections to be made, the time at which the objections are to be presented, and their nature, are distinctly stated:—"It shall be lawful for the respondent, where the security is given wholly or partially by recognizance," within a prescribed time, "to object in writing to such recognizance, on the ground that the sureties or any of them are *insufficient*, or that a surety is dead, or that he cannot be found or ascertained from the want of a sufficient description in the recognizance, or that a person named in the recognizance has not duly acknowledged the same." All these objections are included in the second class mentioned in section 13 of the 11 & 12 Vict. c. 98; and I have failed to discover any reason why objections to the *validity* of the recognizance were not included in section 8 of the late Act, and it seems to me that it is only such objections as are mentioned in section 8 that can be deemed to come within section 9. That section is as follows:—"Any objection made to the security given shall be heard and decided on in the prescribed manner. If an objection to the security is allowed, it shall be lawful for the petitioner, within a further prescribed time, not exceeding five days, to remove such objection by a deposit in the prescribed manner of such sum of money as may be deemed by the Court or officer having cognizance of the matter to make the security sufficient. If on objection made the *security is decided to be insufficient*, and such objection is not removed in manner hereinbefore mentioned, no further proceedings shall be had on the petition; otherwise, on the expiration of the time limited for making objections, or, after objection made, on the *sufficiency* of the security being established, the petition shall be deemed to be at issue." If there had been nothing in the Act upon the subject, it might have been assumed that all objections to the security must be heard and decided under the general jurisdiction by the Court or by a Judge sitting as a Judge of the Court, and not as a Judge appointed under the Act. Now, the language of section 8 of the Act of last session being similar to part of section 13 of the Act of 1848, I am disposed to put the same construction upon the former as was put upon the latter; and, so far as this question is concerned, it will not be necessary to refer to all the grounds of objection enumerated. I will mention only that one included in the first class of section 13 is a ground of *invalidity*, the other, in the second class, is a ground of *insufficiency*. Here, there was a recognizance in point of fact, and a *valid* one in the sense that it might be enforced by the ordinary remedies. Further, it is a recognizance which is good upon the face of it. It seems to be in the nature of a suretyship. It is further a recognizance which, even looking at it as the recognizance of some of the petitioners, is at all events a security for the other petitioners; and it creates

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a different degree of liability and constitutes an additional security for the petitioners themselves who sign it. If that be so, can it be said that it is an objection to the validity of the recognizance that the parties to it are principals as well as sureties? or that they are not sureties at all? What meaning is to be given to the word "*insufficient*"? May it include personal incapacity? I agree that it does not mean a general incapacity of entering into a suretyship, but insufficiency for the purpose of the Act. Take the case of infancy: would that go to invalidity or mere insufficiency? It seems to me that it would fall within the latter. So, in the case of a married woman; she would be insufficient as a surety, because she is as a married woman incapable of contracting. Is it to be the less *insufficiency* because created by the Act itself? I can understand that if any illegality conclusively appears upon the face of the recognizance, it may amount to no recognizance at all. It does not appear with certainty that the four persons who signed the recognizance were four of the petitioners; indeed, the names and descriptions upon the two documents are not identical. And, even if they were, does that make the recognizance *invalid* on the face of it? It seems to me that the utmost that can be said is that it is a presumption of fact that they are the same persons. Then, if it be a presumption of fact, it is liable to be rebutted by contrary evidence; and there must be some tribunal before which the fact is to be tried. What right have the respondents to ask to have the recognizance taken off the file, or that they may be relieved from the petition? The recognizance is to my mind valid as a recognizance, but liable to be objected to on the ground that the parties who have entered into it are principles as well as sureties. It seems to me that this objection is one which goes only to the *sufficiency* of the sureties; and in that view it is an objection which falls expressly within section 8 of the 31 & 32 Vict. c. 125. If so, it must equally come within section 9, and then the objection may be removed by making a deposit under that section. This is the view which was taken by my Brother Willes and the other election Judges; and I am of opinion that they were right in so deciding. The consequence is, that a sum of 1,000*l.* having been duly deposited in pursuance of the order, the objection to the recognizance fails, and the petition must be allowed to proceed.

The points which have been argued upon these rules were undoubtedly points of grave difficulty; and it is not without considerable hesitation that I have come to the conclusion I have as to the proper construction of the Act of Parliament. The matters were very properly brought to the attention of the Court; and, under the circumstances, I think justice will substantially be done by discharging the several rules without costs.

BYLES, J.—I am of the same opinion. It is unnecessary for me to do more than add a very few words. No doubt this Act of Parliament, like many others, is difficult to construe, and it may be that in order to give effect to the Act some liberality must be introduced into the construction of some of its words. But the legislature require us to construe it, however difficult it may be, and to take their general intention, so far as we can gather it from the Act itself, as a guide to conduct us through its dark passages.

The first question is, whether, where there is one petition against more than one member a security for 1,000*l.* is enough, or whether there is to be a security for as many thousand pounds as there are members petitioned against.

Now, as my Lord has already pointed out, the old practice was perfectly clear; and section 26 of the "Parliamentary Petitions Act, 1868," obliges this Court in express terms to adhere to the old practice where no rules have been made superseding it. Then by sub-sections 4 and 5 of section 6 security to the amount of 1,000*l.* is to be given for the payment of expenses, payable to the member whose return is complained of. The word "member" being in the singular number, creates no difficulty, for, by force of the Act, 13 Vict. c. 21. s. 4, we are to read it as member or members, unless the context forbid.

Let us see what we are now asked to do. We are asked (certainly without any express words to warrant it) to do this; namely, wherever there are two members jointly petitioned against, to double the security; wherever there are

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three, as there are in many counties and in some large towns, to treble the security; and in the case of the city of London to quadruple the security. We certainly ought, I think, to look for some positive enactment to enable us to do this, especially when the number of voters has greatly increased, and when their station in society and their means are such as to make them, when petitioners, less able to give security than voters who were entitled to petition on former occasions. I should require some stronger words than those I find before I came to the conclusion that the legislature has indirectly and by inference doubled, trebled and quadrupled the security which is to be given.

The difficulty, if any, is introduced by section 22, which enacts, that " two or more candidates may be made respondents to the same petition, and their case may for the sake of convenience be tried at the same time, and for all the purposes of the Act such petition shall be deemed to be a separate petition against each respondent." I am not at all sure that the qualification introduced in the last passage of this section does more than enact that when cases are tried together, there may nevertheless be separate judgments, separate costs, separate subpœnas, and the like; but I think it does not apply to the payment or security, which is a condition precedent to the definitive reception and prosecution of the petition. Upon these grounds, I entertain no doubt that 1,000*l*. is a sufficient amount of security in every case.

The next question is a question of much more difficulty, and it is whether there was power to amend the security by allowing the deposit of 1,000*l*. That depends on sections 8 and 9, where the statute says, " it shall be lawful for the respondent where the security is given by recognizance within a further time, not exceeding five days, to object in writing to such recognizance, on the ground that the sureties, or any of them, are insufficient, which objection may be removed by deposit of such a sum of money as will make the security sufficient." Now, the language would have been perhaps more appropriate to this particular case, if the statute had used the word " incompetent " instead of " insufficient." But I think the word " insufficient " is not to be read as limited to the narrow sense of pecuniary insufficiency. For example, infants, married women, foreigners residing abroad would no doubt be deemed insufficient. It is, I think, enough to bring the case within the healing efficacy of the Act, if the sureties are persons who although they ought not to be sureties are persons who have honestly undertaken the full liability of sureties, and are able to fulfil their engagement, especially if, as in this case, the security on the face of it is good, and could not be decided to be bad by the Master without an inquiry. It is true there are here several sureties and several petitioners, the names and surnames of whom are the same, but the question would have been exactly as it is now, if there had been one petitioner and his own name and the name of one of his sureties had been John Smith of a large town. I think in determining this matter we have not only to consider that the security is good on the face of it, but to recollect that these persons who entered into a recognizance, are by the terms of the recognizance mutually sureties for one another. The strict literal sense therefore of the Act of Parliament may be satisfied so far as to authorize the substituted deposit.

But I confess I am very much governed in my decision of this last question by another consideration. We are bound, as I have already said, to carry into effect, if we can, the general intention of the legislature as expressed in the statute, and in so doing to put, if necessary, not a violent but a liberal construction on particular expressions. This is a substantial security. It was intended that these parties should undertake at least the obligation of being sureties; they are of ability to do so, and there was no fraud. At the same time, no doubt, there was an error in what they did, but I think an amendable error.

KEATING, J.—The petition, which was signed by thirteen persons, embraced the two members returned for the borough. The time having gone by for giving security pursuant to section 6 of the 31 & 32 Vict. c. 125, the respondents went before a Judge at chambers and asked to have the petition taken off the file, on the ground that no recognizance had been entered into within the meaning of

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the statute. The ground of objection was that the recognizance was entered into by four of the thirteen petitioners, and so in truth there was no recognizance *with sureties*, as required by the Act. My Brother Willes refused to make the order as prayed; but, treating the summons as an objection to the sufficiency of the security, held the security to be insufficient, and required a sum of 1,000*l.* to be deposited within five days. The respondents now come and ask the Court to do what the learned Judge refused to do, the contention before us on their part being that there was in effect no security at all, and therefore that the proceedings upon the petition ought to be stayed. If that contention were well founded it would, in my opinion, be the duty of this Court, even at this stage, to stay the proceedings. The main ground urged before us was that section 8 of the statute only provides for objections to the validity of the recognizance on the ground of the pecuniary insufficiency of the sureties; and it was insisted that what is complained of here is not insufficiency within the 8th section, and therefore is not aided by the provision in section 9. I agree that section 9 applies only to the objections specified in section 8; and, supposing this not to be an objection to the recognizance by reason of the insufficiency of the sureties, I think the provision in section 9 would not aid the petitioners in their argument. Now, the respondents contend that there is a total absence of all security here, because the petitioners themselves could not be sureties. We have already in the course of the argument thrown out an intimation of opinion that the petitioners could not be sureties within this Act. But, a security appearing upon the face of it to have been regularly entered into, the question is whether when it is brought to the knowledge of the Court that the persons signing the recognizance are principals, the Court is not bound to hold it to be no security within the Act. I must confess I have entertained considerable doubts, and I cannot say that those doubts are entirely removed. At the same time, I feel the full force of the observations of my Lord and my Brother Byles as to the importance of giving a wide and liberal construction to this Act of Parliament; and therefore I do not press my doubts so far as to dissent from the order made by my Brother Willes.

As to the amount of the security, I agree with my Lord and my Brother Byles that one security for 1,000*l.* is enough. Looking fairly at the words of the Act, and reading them as any person of ordinary understanding would read them, I come to the conclusion that section 6 distinctly provides for one security only of 1,000*l.*, and that no other or greater security is mentioned throughout the Act. The only argument in favour of the contrary construction is the provision in section 22, that two or more candidates may be made respondents to the same petition, but for all the purposes of the Act such petition shall be deemed to be a separate petition against each respondent. The word there used is "candidates"; but, by the interpretation clause, section 3, "candidate" is to be read as any person elected a member, or who has been nominated as or declared himself a candidate at an election. If the legislature had intended to impose the further condition that, where the petitions are to be deemed separate, a separate security for 1,000*l.* should be given on each, it seems extraordinary that they should not express that intention in distinct terms, and not leave it to inference and conjecture. Upon the whole, it seems to me that the giving security is a step that is initiatory in the proceedings on the petition; that a single security for 1,000*l.* is all that the statute requires; and that the 22nd section has no such effect as has been contended for. I agree, therefore, that the rules should be discharged; but, seeing that some difficulty and doubt surround the matter, I think there should be no costs.

MONTAGUE SMITH, J.—This is an application to the Court to stay the proceedings on this petition; and assuming that the objections to the security do not fall within the grounds of objection mentioned in the 8th section, I think this is the right course to take. It appears to me that the 8th and 9th sections are to be read together, and that the grounds of objection which can be gone into on the 8th may be amended, as the 9th section shews, not by leave of the Court, but by the parties themselves as of a right given to them by the statute.

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The reason why no power was given in the 8th section to object to the invalidity of the security generally seems to be that the legislature meant to allow an amendment in certain specified cases only. Therefore the legislature specified the grounds of objection which, if made, might be amended, and left open what was to happen if the recognizance should be invalid on other grounds. The statute omits altogether to make provision for what is to be done in a case of that kind. Inasmuch as it is clear, in my opinion, that a valid recognizance is a condition to the right of the petitioner to proceed with his petition, I am of opinion that the course which has been taken here, of applying to the Court to stay the proceedings because there had not been a performance of what the legislature has made a condition to the prosecution of the petition, is right. It seems to me it is consistent with what was done by Parliament itself when it had the control of these petitions within its own walls. There was no power to amend the security at the time when this Act passed, but if the security was objectionable on the ground of invalidity or insufficiency then the order for proceeding with the petition was discharged by the House. I think, if I may be allowed to say so, that the most convenient provisions which have been enacted on this subject are to be found in the temporary Act of 11 & 12 Vict. c. 18; and if the powers there given to the select committee appointed to try election petitions were now entrusted to the election Judges or to the master, it seems to me that full security might be given to the sitting members, and petitioners would be secured from danger arising from mistakes perhaps beyond their control and which did not result from any default on their part. Such being in my view the construction of the Act with regard to procedure, it is now to be considered whether the two objections which have been made to this security are good objections, and whether, if good, the security can be amended.

Now, with regard to the first objection, viz., that this security is for a sum of 1,000*l.* only, the petition being against two members, I entirely agree with the rest of the Court that on the proper construction of this Act of Parliament the sum of 1,000*l.* is sufficient. No difficulty whatever would have arisen if clause 22 had not been inserted in the Act. The old practice was that a petition might be presented against two members, and in that case one security to the amount of 1,000*l.* was sufficient. The legislature in passing this Act of Parliament has provided that there shall be still the sum of 1,000*l.* given by the petitioner as security, and though I have looked through every clause in the Act in which anything is enacted on the subject of security, I find no trace whatever of any indication on the part of the legislature to alter its old practice in that respect, or to impose greater impediments in the way of petitioning than existed before. Certainly when the practice of parliament has existed so long, it must have been very well known that one security had always been deemed sufficient in the case of one petition against two members, and if the legislature had intended to alter that state of things, I should have expected it would have so in distinct terms. The whole question turns on the insertion of the 22nd clause, which, no doubt, is in very wide terms, but it is plain that those terms must have some limitation, otherwise there seems no object in making the provision at all, that there may be one petition against two members, for if everything was to be in duplicate, nothing would be saved except the paper on which the petition was written. It seems to me that the Act, in saying that the petition may be against two, and the trial may be against both at the same time as one proceeding, if convenient, but providing that for all purposes it shall be deemed separate against the two members, meant, as my Lord has put it, for all purposes under the petition, but was not meant to apply to the condition as to security imposed on the petitioner. The security under the former Acts was a condition precedent to the presentation of the petition. Here, no doubt, it is made a condition subsequent, but it is still a condition to the prosecution of the petition, and is collateral to the petition itself. On these grounds, and for the reasons already given by the other members of the Court, I think we should be putting a construction on this Act which the legislature did not intend if we imposed a larger obligation on the petitioners than that which existed before.

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The other objection is certainly, to my mind, more formidable. The Act requires that the security shall be by a deposit of 1,000*l.*, or a recognizance entered into by sureties. I confess that I have felt during the argument, and that I still entertain, considerable doubt whether the recognizance here was a recognizance at all within the meaning of the Act of Parliament, and whether the objection does not go to its validity altogether, and not to its sufficiency. However, as my Lord and my Brother Byles, and the election Judges who have considered it, have come to a clear opinion that the objection is one as to the sufficiency only, and is amendable, I have hesitation in arriving at a conclusion different from theirs, though I confess I cannot see my way to agree with them, or to comprehend how a principal can in any sense be deemed a surety for himself. After all, the matter is one of practice only, as to which certainty is of the essence of benefit, and as there is no appeal from this Court, and my Brother Keating does not dissent, I also do not wish to dissent from the judgment of the rest of the Court upon this point. The result is that these rules will be discharged.

Rules discharged.

IN THE EXCHEQUER CHAMBER. Feb. 4, 1869.

(Error from the Court of Common Pleas.)

THE METROPOLITAN BOARD OF WORKS *v.* THE METROPOLITAN RAILWAY COMPANY.

38 L. J. C.P. 172; L. R. 4 C.P. 192; 19 L. T. 744; 17 W. R. 416: affirming, [1868] E. R. A. 1600; 37 L. J. C.P. 281; L. R. 3 C.P. 612; 19 L. T. 10; 16 W. R. 1117 (C.P.).

Adopted, *Thames Conservators* v. *Pimlico, &c., Railway*, [1869] E. R. A.; 38 L. J. C.P. 4; L. R. 4 C.P. 59; 19 L. T. 734 (C.P.). Discussed, *Roderick* v. *Aston Local Board*, [1877] E. R. A.; 46 L. J. Ch. 802; 5 Ch. D. 328; 36 L. T. 328; 25 W. R. 403 (C. A.). Distinguished, *In re Dudley Corporation*, [1882] E. R. A.; 51 L. J. Q.B. 121; 8 Q.B. D. 86; 45 L. T. 733 (C. A.). Referred to, *London and North-Western Railway* v. *Evans*, [1893] E. R. A.; 62 L. J. Ch. 1; [1892] 2 Ch. 432; 66 L. T. 526 (Ch. D.): reversed, [1893] E. R. A.; 62 L. J. Ch. 9; [1893] 1 Ch. 16; 67 L. T. 630; 41 W. R. 149 (C. A.); *Manchester Corporation* v. *New Moss Colliery*, [1906] E. R. A.; 75 L. J. Ch. 145; [1906] 1 Ch. 278; 93 L. T. 762; 54 W. R. 240 (Ch. D.): reversed, [1906] E. R. A.; 75 L. J. Ch. 772; [1906] 2 Ch. 564; 95 L. T. 277 (C. A.): the latter decision affirmed, [1908] E. R. A.; 77 L. J. Ch. 392; [1908] A.C. 117; 98 L. T. 467 (H.L.).

Lands Clauses Consolidation Act—Compensation—Sewer—Easement—Statutable Powers to construct Sewer—Right to Lateral Support of Adjoining Land.

COMPULSORY PURCHASE. LONDON. C.—*By the* 11 *&* 12 *Vict. c.* 112. *s.* 38. *the Metropolitan Commissioners of Sewers were empowered to make such sewers as might be necessary, and to carry them "into, through or under any lands whatsoever, making compensation for any damage done thereby." By section* 69 *"full compensation was to be made to all persons sustaining any damage" by the exercise of the powers of the Act; and by section* 54, *vaults and cellars adjoining the sewers were to be substantially made, and so as not to interfere with such sewers. The Commissioners had power to purchase only by agreement lands or easements necessary for the formation or protection of works which the Commissioners were authorized to execute under the Act; but the* 18 *&* 19 *Vict. c.* 120. *gave full power to the Board of Works, to whom the rights and property of the Commissioners were transferred, to compulsorily purchase any land or easement which they might require. A railway company*

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in the execution of the works authorized by their Act made an excavation in their own land, which caused damage to a sewer of the Board adjoining such land, and which had been constructed less than twenty years previously by the Commissioners under the 11 & 12 *Vict. c.* 112. *The excavation was properly made by the railway company, and was sufficiently strutted to have supported the adjoining soil in its natural position, but not to support it with the sewer, and consequently the sewer gave way and was damaged*:—Held, *by* the Court (Cleasby, B., *dubitante*), *that the Board had not acquired any right to lateral support for their sewer from the adjacent land, since no such right had been purchased from the owner of such land, nor was it conferred by the* 11 & 12 *Vict. c.* 112, *or by the construction of the sewer under that Act. The Board, therefore, was held to be not entitled to compensation from the railway company, for the injury the sewer had sustained.*

Error from a decision of the Court of Common Pleas (reported 37 L. J. C.P. 281), on a special case, the material facts in which are fully stated in the report of the case in the Court below.

The plaintiffs were the Metropolitan Board of Works, in whom the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. cxx.), vested, *inter alia*, the Fleet Sewer, part of which had been constructed in 1855 by the Metropolitan Commissioners of Sewers under the powers given them by 11 & 12 Vict. c. 112.

The defendants were authorized by their Act, the Metropolitan Railway Act, 1851 (17 & 18 Vict. c. ccxxi.), to construct a railway, a portion of which was parallel to the line of the said sewer, and for the purpose of constructing such portion of their railway they caused an excavation to be made on lands which they had purchased under their Act. This excavation was about 16 feet below the bottom of the said sewer, and at about a distance of 15 feet from the brickwork of the same. Both the sewer and the works of the railway company were properly made and constructed; and the works of the excavation would have been sufficient for the support of the adjacent soil in its natural position, but were not sufficient to support it with the sewer. The result was, that the part of the sewer which had been so constructed by the Commissioners in 1855 burst; and the question was, whether the plaintiffs were entitled to compensation from the defendants for this injury to the sewer, the amount of which had been ascertained by an arbitrator appointed under the Lands Clauses Consolidation Act, 1845, to be 18,000*l*.

The majority of the Court below (Bovill, C.J., Byles, J., and Montague Smith, J.) decided that the plaintiffs had no right to compensation, on the ground that they had no right to lateral support for the sewer from the adjacent land of the defendants. The plaintiffs appealed from this decision.

Sir J. Karslake (*Raymond* with him), for the plaintiffs.—The question in this case turns mainly on the 11 & 12 Vict. c. 112, under which that part of the sewer was constructed which was damaged by reason of the defendants' works, and it is submitted that the right to have such support from the adjacent land as was necessary for the sewer was impliedly given by that statute. A claim for compensation for this might have been made by the owner of such adjacent land; but it is submitted on the part of the plaintiffs that the payment in such compensation was not a condition precedent to the acquisition of the right to such support. The Act made it obligatory upon the Commissioners of Sewers (who are now represented by the plaintiffs) to make this sewer, and therefore the Act gave them a right to make it, with a right to lateral support from the adjacent land. The 7th section vests the sewers then made and all sewers which they should thereafter make within certain limits in the Metropolitan Commissioners of Sewers; the 37th section subjects all sewers to their control; and the 38th section shews their duty. They are directed by that section to repair the sewers vested in them, and to cause to be made such sewers as shall be necessary, and they are thereby authorized "to carry any such sewers through, across or under any turnpike-roads or any street or place laid out as or intended for a street, or through or under any cellar or vault

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the report of the surveyor it should appear to be necessary) into, through or under any lands whatsoever, making compensation for any damage done thereby as hereinafter provided." Then section 54 shews what the legislature intended and required for the protection of the sewer even as against adjoining landowners. "No building," it says, "shall be erected in, over or under any sewer vested in the Commissioners without the consent of the Commissioners first obtained in writing; and all vaults and cellars adjoining their sewers shall be substantially made, and so as not to interfere or communicate with any such sewers"; and if any building or vault is so made it may be pulled down, and the charges of doing so are thrown upon the landowner who has made it. The 6th section, which relates to the power of purchasing lands or easements, shews that the Commissioners can only purchase by agreement "any land which may be necessary for the formation or protection of any works" which they are authorized to make, or "any land or any right or easement in or over any land which it may be necessary or expedient to purchase to prevent the obstruction of sewerage or drainage within the limits of the commission." By the 67th section, the Lands Clauses Consolidation Act, 1845, except the provisions with respect to the purchase and taking of lands otherwise than by agreement, is incorporated with the 11 & 12 Vict. c. 112. The 69th section provides for making compensation. It says, "Full compensation shall be made out of such rates to be levied under this Act as the Commissioners shall by their decree direct to all persons sustaining any damage by reason of the exercise of any of the powers of this Act." This is the provision for making compensation which is referred to in section 38 by the words "hereinafter provided." The result is, the Act has directed the Commissioners to make sewers, and for that purpose has authorized them to go under any land or through any cellar or vault, making compensation, which is to be a full compensation, for any damage done thereby, but not empowering the Commissioners to purchase any land or easement unless they can agree with the landowner for such purchase.

[KELLY, C.B.—The question is not whether the Commissioners are to make compensation for damage done, but whether they are entitled to support for their sewer from the adjoining lands, and so prevent the landowner from using his land as he would by law be otherwise entitled to do, and that without the purchase of such support.]

Not without making compensation. But the making the compensation is not a condition precedent to acquiring the right to the support. If the landowner granted to the Commissioners a right to make a sewer over his land he would have granted not only the right to make the sewer, but also all such easements as would be necessary to keep the sewer up—*The Caledonian Railway Company* v. *Sprot* (2 Macq. H.L. C. 449). It is submitted that the same right is impliedly conferred in like manner by the statute. The making of sewers is a work for the public benefit, and as to the execution of which the Commissioners have no option, and the statute therefore is different from one in favour of a railway or other private company where the work is done for the benefit of the shareholders, and where the statute therefore generally requires the compensation to be made before the right is given to enter and take the land required for the company. Now, it is manifest that a sewer must rest on something; it cannot be supported except the bottom of the invert rest upon the soil itself. Then, is it to be contended that because the Commissioners have not bought the land under the sewer, which they had no power to buy except by agreement, therefore the sewer is not to be supported by such subjacent soil, but that the landowner may dig under it and let the sewer down, and for this purpose there really is no difference between "subjacent" and "adjacent" land? It is submitted that the work having been done in performance of the duty imposed by the Act there was a right to have the support both of the subjacent and adjacent land, and that though the landowner might have a right of compensation he would have no right to break down the sewer.

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[MELLOR, J.—Is it reasonable to suppose that the words in section 38, "making compensation for any damage done," mean compensation in respect of a servitude imposed on the adjoining land?]

Yes, it is submitted that they do. Section 69, with which section 38 must be read, says the compensation is to be to "all persons sustaining any damage by reason of the exercise of any of the powers of the Act." There is no obligation to make the compensation in the first instance. The case of *Pettiward* v. *the Metropolitan Board of Works* (12 Com. B. Rep. N.S. 489; 34 L. J. C.P. 301) is an authority to shew that it may be claimed long afterwards, and when the damage has become apparent.

[MELLOR, J.—If your construction of the statute be right, what is the value of section 54? Why should there be a special provision as to building over or under any sewer?]

Because the land not being vested in the Commissioners, the landowner would have a right to build over or under the sewer. Then, if the Commissioners had, as contended, a right to the support of the adjacent land, that right was not taken away by section 104 of the Metropolitan Railway Act, 1854 (17 & 18 Vict. c. ccxxi.). With reference to the Metropolis Local Management Act (18 & 19 Vict. c. 120), the 135th section vests the main sewers, of which this sewer was one, and the rights of the Commissioners, in the Metropolitan Board of Works, and, no doubt, by sections 150, 151, and 152, the Board has compulsory power to purchase easements and land; but the Act does not make it compulsory on the Board to use that power. If the plaintiffs have established that there was such right of support impliedly granted by the 11 & 12 Vict. c. 112, then, what has been done by the defendants has been an interference with a statutable right, and the plaintiffs are entitled under the Lands Clauses Consolidation Act, 1845, to claim compensation.

The Solicitor-General (*Horace Lloyd* with him), for the defendants.—The plaintiffs have no such right as they claim, either at common law or by statute. The defendants constructed their railway through the land adjacent to the sewer in question in execution of the powers of their Act, and without any negligence. That is found by the case; and the sewer not being twenty years old, it is clear there can be no common law liability. Then, what statutable right have the plaintiffs to the power they claim of preventing the defendants from using their land in the way they have used it? No express enactment has been pointed out; but the plaintiffs say that the statute of the 11 & 12 Vict. c. 112, gave power to construct a sewer in the proper way, and that if they did so construct the sewer, it followed by necessary implication that a statutory power was conferred of inflicting upon the neighbouring land, and that, too, without payment. whatever burden was necessary for sustaining the sewer. This is a fallacious argument; the sewer need not be subterranean, and there is nothing to shew that at the time of its construction there was any necessity for this lateral support. It cannot be that in the absence of any direct enactment to that effect, the Commissioners had a right to construct their sewer anyhow, so as to impose an indefinite amount of responsibility upon the landowner for which they made no compensation. This is not a damage within section 38 of the 11 & 12 Vict. c. 112, and for which the owner of the land could have recovered compensation. The damage done, to be within that section, must be damage actually done to the land through which the sewer is constructed. Then, further, the damage in this case could not be the subject-matter of compensation, for no one can recover compensation under the Lands Clauses Consolidation Act for doing anything for which an action would not lie but for the statute which authorized its being done. What action would lie at the suit of the adjacent landowner for the supposed inferior value of his land by the servitude imposed thereon by the construction of this sewer? The case of *Pettiward* v. *the Metropolitan Board of Works* (12 Com. B. Rep. N.S. 489; 34 L. J. C.P. 301) does not apply. No doubt, where there is a damage compensation for it may be claimed at any time afterwards, provided it be claimed as soon as it has been ascertained that there is a damage, but here there was

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no damage for which an action would have lain. Then, can it be said that the legislature intended to confer the power of inflicting such a servitude as is here claimed without compensation? It may be, as has been contended, that when the sewer was constructed the Commissioners had no power to purchase otherwise than by agreement; but the fact that it was necessary that express power to purchase easements over land should be given by the 18 & 19 Vict. c. 120, sections 150 and 151, is a strong argument to shew that such a servitude could not be inflicted without buying it. The servitude claimed not being a common law right can only be acquired under statute, and the fact of the last Act giving in express terms the power of purchasing such easement as might be necessary for the support of any sewer, is the strongest possible argument to shew that the previous statute did not convey that easement even by implication. By what necessary intendment can such an easement as this be said to be acquired? It has been attempted to assimilate the case to where a man who sells land to a railway company is deemed to impose a burden on his land contiguous to the railway, that such land should not be used so as to let the railway down. That rests upon a settled principle of law that a man shall not derogate from his own grant. That cannot apply here, where, by passing through land of one person, the owner of adjoining land is sought, without compensation or a right of action, to have imposed on him for all time a limitation in the use of his property.

[CLEASBY, B.—Section 145 of 11 & 12 Vict. c. 112 gives the Metropolitan Commissioners of Sewers all the rights of the Commissioners of Sewers under the statute 23 Hen. 8. c. 5, except so far as the Act of Victoria varies them. If a sewer had been constructed under a commission issued under the statute of Hen. 8., could an adjoining landowner have done anything which directly and immediately would have had the effect of damaging and destroying the sewer?]

If it gave any such right as the plaintiffs claim, one would expect to see some allusion to it in the Act of Victoria. Unless there was something to shew that the common law rights of the subject were interfered with by direct words it is apprehended such rights would remain.

Sir J. Karslake, in reply, cited *The North London Railway Company* v. *the Metropolitan Board of Works* (Johns. 405; 28 L. J. Ch. 909).

KELLY, C.B.—We are of opinion in this case that the judgment of the Court below should be affirmed. A claim is made to a large sum of money in respect of damage done to a sewer, of which the plaintiffs are to be deemed in point of law proprietors, by the defendants having dug into land not contiguous, but near to the sewer, and so causing the sewer to burst; and also for the costs of an arbitration by which the amount of damage was determined. The question which arises on the case is, whether the defendants have done an illegal act. Now, what is it that the defendants have done? They are seised in fee simple of a quantity of land near to the plaintiffs' sewer, within which land they have constructed a railway; and they found it necessary in the course of their works to excavate to a depth exceeding by 16 feet the bottom of the sewer; and it was by this excavation that the support of the sewer was taken away and the damage to it occasioned. It cannot be denied that the defendants in thus excavating were only availing themselves of one of the original rights attached to the ownership of their property, and that if the plaintiffs can complain of it, it must be because they have in some way entitled themselves to such lateral support as may be necessary for the safety of the sewer. The plaintiffs are a public body not acting for their own profit, but appointed for great and important purposes, and have succeeded under 18 & 19 Vict. c. 120. to all the rights of the Commissioners of Sewers, who were also a public body, and by whom this sewer was constructed under the provisions of 11 & 12 Vict. c. 112. The question immediately arises, whether by those statutes, or what has been done under them, the plaintiffs have acquired a right to lateral support for the sewer. The right they claim is an easement, and, as such, might be acquired either by the provisions of an Act of Parliament or by means of the

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sale and conveyance of the right by the owners of the adjoining land. The plaintiffs contend that in this case it has been conferred upon them by the provisions of the above-mentioned Acts of Parliament, and that the sewer having been properly made, the right at once arose and became vested in the Commissioners of Sewers, in whose place they stand. If the Act of Parliament (11 & 12 Vict. c. 112.) really intended that the plaintiffs should have such a right, one would have expected to find the usual provisions, viz., that the board might construct the works; but that, if they did any injury, they should make compensation for it; and if they required any land or easement, they should have power to purchase it. We find, however, no such provisions. The most important sections are the 38th and the 66th. The first gives power to make sewers "into, through and under any lands," and directs that compensation should be made to their owners, but gives no power to purchase the lands, or to make compensation to any one except those "into, through and under" whose lands the sewer is made. The section appears to have no reference to the owners of neighbouring lands, such as the defendants. When we come to section 66 we find that it is wider in its terms, and contemplates that it may be desirable to take lands near to the sewer, and it therefore provides that "it shall be lawful for the Commissioners to purchase by agreement, or to take on lease on such terms as they may think fit, any land which may be necessary for the formation or construction of any works which the Commissioners are authorized to execute under this Act," which implies that the plaintiffs may from time to time acquire neighbouring lands for the protection of the sewer. The Act, however, only authorizes them to acquire these lands by agreement. In a later Act, passed shortly after the making of the sewer now in question, they are authorized to take compulsorily any land or easement that they may require, which confirms the view we take of the case, that the legislature contemplated that if any land or easement should be required, it should become the property of the board, not by force of the Act without compensation, but under the first Act by voluntary agreement, and by the last, by compulsory purchase. It was argued for the plaintiffs that, since no compulsory powers for the purchase of any land or easement are given by the earlier Acts, that if such an easement was absolutely necessary, the easement must be considered to have been conferred upon them at once without any purchase, or any payment or compensation for its value. It is enough to say that we find nothing in the Act of Parliament to warrant such a conclusion, and that we cannot interpolate such provisions in the Act, especially where it is expressly provided that such easement may be purchased by agreement. Looking at the date of the Acts, it may well have been thought that at that time there would be no difficulty in obtaining the necessary land and easements, and, in fact, for very many years the powers that were given proved to be sufficient. It is only when so unexpected a work has been accomplished as the construction of underground railways throughout the metropolis that the existence of these sewers has proved to be endangered, and we find accordingly that in the later Act, which was passed after these underground works were begun, or at least contemplated, express power is given for the compulsory purchase of an easement such as that now in question, for the protection of the sewer. But it is said that although it can hardly be supposed the legislature would have given such a right without some compensation to the persons whose land is subjected to the easement, the making of the sewer would in itself amount to a damage to the adjacent owner over whose lands the easement was claimed, and that he would therefore be entitled to compensation under 11 & 12 Vict. c. 112. s. 38. The right to lateral support, though usually of small value, is sometimes of great price, as in the case where there are mines under the land for which the easement is claimed, or where a railway is intended to be made through it, as in the present case; and, in fact, if the plaintiffs had such a right as they claim, they might have obtained an injunction to prevent the railway, on which such vast sums had been expended, being completed so as to interfere with their sewer. It is to meet the difficulty arising from these considerations that the plaintiffs have

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endeavoured to shew that the defendants were entitled to compensation for the making of the sewer. What damage, however, resulted to the defendants' predecessors when the sewer was made? The land was not damaged, and the easement upon it of the right to lateral support was a mere speculative possibility, unforeseen and unthought of. There seems no ground therefore for saying that there could have been a claim for compensation by the defendants of their predecessors for the making of the sewer. Under these circumstances, we are of opinion that no right to lateral support was acquired by the mere construction of the sewer under the Act, but that such a right can be acquired only by purchase. Two cases have been cited for the plaintiffs. The case of *Pettiward* v. *the Metropolitan Board of Works* (12 Com. B. Rep. N.S. 489; 34 L. J. C.P. 301) is said to have decided that the obtaining a right to lateral support by the construction of a sewer is a damage to the owner of the land over which the easement is claimed. The case, however, really only decides that a person may seek and recover the damage caused to him by the construction of the sewer, whenever he actually sustains it. The nature of the damage in that case, when it is looked at, appears to have been that a sewer had been constructed in, under and through the lands of the plaintiff's predecessors, and that the plaintiff had been prevented thereby from building certain houses in the way he had planned. The other case, *The North London Railway Company* v. *the Metropolitan Board of Works* (Johns. 405; 28 L. J. Ch. 909), goes only to shew that before an easement can be acquired by a public body they must have either the authority of an Act of Parliament or an agreement with its owner. The result therefore of the whole case is, that the plaintiffs have no such right to lateral support for their sewer as they claim, and the defendants are entitled to our judgment, and the judgment of the Court of Common Pleas must be affirmed.

CHANNELL, B., PIGOTT, B., MELLOR, J., and HANNEN, J., concurred.

CLEASBY, B.—I ought to say that I still retain the doubt expressed by me during the argument, whether where works have been constructed, as in this case, by a body acting with all the powers originally given by an Act of 23 Hen. 8. c. 5, and continued by various subsequent Acts, a right to lateral support ought not to be considered as conferred by those Acts. Otherwise, I should expect to find clauses enabling the Commissioners compulsorily to acquire so essential a right. The consequence would be that after a work of great national importance, a sea-wall for instance, had been constructed under those Acts, protecting a large area of country, an adjoining landowner might dig down any depth below its foundations, and on the water rising the wall would give way and the country be flooded. The idea in my mind is, that as there is a right conferred to have the sewer, so there is conferred along with it a right to the under-support and the lateral support, by a liberal application of the maxim that when anything is granted, whatever is essential to the enjoyment of it is, if it can be, granted also. But as this view, though adverted to by me, was not insisted upon in the argument, or noticed in the Court below, it is most probable that I am mistaken in it.

Judgment affirmed.

IN THE COMMON PLEAS. Feb. 11, 1869.

TAYLOR *v.* DUNBAR.

38 L. J. C.P. 178; L. R. 4 C.P. 206; 17 W. R. 382.

Followed, *Inman* v. *Steamship Co.* v. *Bischoff*, [1883] E. R. A.; 52 L. J. Q.B. 169; 7 A.C. 670; 47 L. T. 581; 31 W. R. 141 (H.L.); *Pink* v. *Fleming*, [1890] E. R. A.; 59 L. J. Q.B. 559; 25 Q.B. D. 396; 63 L. T. 413 (C. A.); "*The Alps*," [1893] E. R. A.; 62 L. J. Ad. 59; [1893] P. 109; 68 L. T. 624; 41 W. R. 527 (P. D. & A.). Referred to, *Cunningham* v. *Maritime Insurance Co.*, 1899, 2 Ir. R. 257 (Q.B. D.).

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Marine Insurance—Damage from Delay.

MARINE INSURANCE. D.—*Meat was shipped at Hamburg for London, and was insured against perils of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes and people, of what nation, condition or quality soever, barratry of the master and mariners, and of all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods. The voyage was much prolonged by storms. The meat was in no way affected by the sea water or such storms, but owing to the length of time to which the voyage was protracted and delayed by the weather, became putrid, and was necessarily thrown overboard*:—Held, *that the insurer was not liable.*

This was a *special case*, and the question was, whether an insurer under a marine policy of insurance was liable for the loss of certain meat thereby insured. The following are the only material facts: The meat was insured from Hamburg to London, and the only material words of the policy were; "Valued at 5,000*l.*, on dead meat on deck or below; including all risk of washing overboard or jettison; average payable on each shipment separately, or on the whole, on all interest shipped by Holtzay, of Hamburg. Touching the adventures and perils which we the assured are contented to bear and do take upon us in this voyage, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes and people, of what nation, condition or quality soever, barratry of the master and mariners, and of all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandises and ship, &c., or any part thereof." The voyage was greatly delayed and prolonged by storms, particularized in the case, which, however, stated that the said meat was in no way affected or injured by the sea or sea water, or by the storms or tempest, but that it was discovered that the said meat, owing to the length of time to which the voyage was protracted and delayed by the weather, had become putrid, and was necessarily thrown overboard at sea.

Beasley, for the plaintiff, referred to *Phillips on Insurance*, *Arnold on Insurance*, *Kent's Commentaries*, *Emerigon*, *Montoya* v. *the London Assurance Company* (6 Ex. Rep. 451; 20 L. J. Ex. 254); *Laurence* v. *Aberdein* (5 B. & Ald. 107); *Gabay* v. *Lloyd* (3 B. & C. 793); *Ionides* v. *the Universal Marine Association* (14 Com. B. Rep. N.S. 259; 32 L. J. C.P. 170); *Everth* v. *Smith* 2 M. & S. 278) and *Philpot* v. *Swann* (11 Com. B. Rep. N.S. 270; 30 L. J. C.P. 358).

Sir G. Honyman, for the defendant, was not called on.

KEATING, J.—There is no doubt that the proximate cause of damage was the delay in the voyage, and there is equally no doubt that such delay was caused by the perils of the seas; but no case has gone to the length of saying, though the duration of the voyage has been prolonged by perils of the sea, that the assured is entitled to recover on such a policy as the present, and we should establish a dangerous precedent if we held otherwise.

MONTAGUE SMITH, J.—I am of the same opinion. The loss arose from the goods perishing by reason of delay in the voyage, and therefore is not within the perils mentioned in the policy. To bring a loss within such a policy the loss must be due proximately to those perils which are therein enumerated, and delay is not one of them. The goods in the present case were not injured by sea water, or by being knocked about by the storm, for it is stated that the loss arose solely from the length of time to which the voyage was protracted by the weather. If they had been so injured the case would be within *Laurence* v. *Aberdein* (5 B. & Ald. 107); but if we held that delay by bad weather or other perils assured against was within a policy in the present form we should open a door to claims not intended to be within it, and it has never been held that such

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a claim is within a policy so framed. I am therefore of opinion that the defendant is entitled to our judgment.

BRETT, J.—Damage to goods by delay, even if the delay is caused by tempest, is not a loss by the perils assured against; in no case has it been held that it is; and if the parties so intended they could easily put it in the policy. Judgment therefore should be for the defendant.

Judgment for defendant.

IN THE COMMON PLEAS. Jan. 18, 1869.

(Appeal from Revising Barrister's Court.)

LAWE *v.* MAILLARD.

38 L. J. C.P. 179; L. R. 4 C.P. 547.

Parliament—Referring Case back to Revising Barrister—Costs.

ELECTION LAW. A.—*Where the Court sends a case back to the Revising Barrister to decide a matter of fact which he has referred to the decision of the Court instead of deciding it himself, and the appellant then drops the appeal, the respondent is not entitled to costs.*

This was an appeal from the decision of the Revising Barrister for the city of Gloucester.

The question was whether or not the canons of the Cathedral Church of Gloucester were liable to pay poor-rates for the houses (in the cathedral close) in respect of which they claimed the right of voting. On the case coming on for argument, it appeared that in truth the question turned on whether or not the cathedral close was extra-parochial, and that the Revising Barrister, instead of deciding this, had simply decided that the claimants had not paid all the poor-rates, and disallowed their claims, but submitted the correctness of his decision to the Court, the decision to be obtained on the facts and merits of the case. The Court refused to decide the question of fact, and referred the matter back to the Revising Barrister. The appellant then dropped the appeal, and the respondent now applied that the appeal be dismissed, with costs.

J. J. Powell, for the respondent.

Dowdeswell (*Gilmore Evans* with him), for the appellant.

BOVILL, C.J.—We[1] are all of opinion that the respondent is not entitled to costs. Even if both parties agreed to refer this question to the Court, the refusal to decide it is the act of the Court. The appellant only appealed on the case as it stood, and all the costs arise from the Revising Barrister trying to get this Court to decide on the facts.

Appeal dismissed, without costs.

IN THE COMMON PLEAS. Nov. 20, 24, 1868; Jan. 18, 1869.

(Appeal from Revising Barrister's Court.)

MEDWIN, *appellant;* STREETER, *respondent.*

38 L. J. C.P. 180; L. R. 4 C.P. 488; 19 L. T. 827; 17 W. R. 380; 1 Hop. & C. 157.

Parliament—Borough Vote—Rated Occupier—Claim to be rated, when too late—30 & 31 Vict. c. 102—2 Will. 4. c. 45. s. 30.

(1) Bovill, C.J., Byles, J., Keating, J., and Smith, J.

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ELECTION LAW. A.—*The qualification required for a borough franchise, under the Representation of the People Act,* 1867, *must be complete by July* 31 *of the qualifying year. Therefore, a person claiming such franchise as a rated inhabitant occupier, but who had never been rated to any of the poor-rates which had been made during the twelve months previous to July* 31 *of the qualifying year, cannot rely on a claim to be rated made under the* 2 *Will.* 4. *c.* 45. *s.* 30, *which was not served on the overseers until after such July* 31.

Appeal from the decision of the Revising Barrister appointed to revise the list of persons entitled to vote in the election of a member for the borough of Horsham.

The case stated that the respondent claimed to have his name inserted in the lists of persons entitled to vote in the election of a member for the said borough of Horsham, in respect of the occupation by him of a house, No. 9, Park Terrace West, in the parish of Horsham, and within the said borough.

There is only one parish within the said borough, namely, the parish of Horsham; and the name of the said respondent having been omitted by the overseers of the said parish from the list made and published by them of the persons entitled to vote in the election of a member for the said borough, he proved the service on the said overseers on August 4, 1868, of a claim to have his name inserted in such list in respect of the occupation of the said house.

The appellant, who was on the list of persons entitled to vote in the election of a member for the said borough, duly objected to the name of the said respondent being inserted in the said list. The said respondent had never been rated in respect of the said house, but he paid all rates due in respect of the said house up to January 5, 1868, prior to July 20 following. On August 24, 1868, the respondent served on the said overseers of the said parish of Horsham a claim to be rated in respect of the said house, and which claim was in the following form:

"Claim to be rated.

"To the Overseers of the Parish of Horsham.—I hereby give you notice that I claim to be rated to all rates made by you for the relief of the poor since the 31st day of July, 1867, in respect of a house situate in Park Terrace West, and numbered 9, in the parish of Horsham, in my occupation; and I hereby tender payment of the full amount of all rates made previously to the 5th day of January last and now due, if any. Dated this 24th day of August, 1868."

This notice was duly signed by the said respondent. At the time of the service on the said overseers of the said notice of claim to be rated, there was only one poor-rate in force within the said borough, and which was made on January 15, 1868. It was contended, on behalf of the said appellant, that the said claim to be rated, served by the respondent on the overseers on August 24, 1868, was invalid and insufficient. That the said claimant was bound to prove that he was entitled to vote on July 31, 1868, and that a claim to be rated, dated and served subsequently to the said July 31, was too late and invalid, and did not entitle the said claimant to have his name inserted in the said list. The Revising Barrister thought the said claim to be rated was too late and invalid; but the Court of Common Pleas in Ireland having decided in two cases, *Agnew* v. *Reilly* (2 Ir. L. R. 560) and *Muldowney* v. *Malcolmson* (15 Ir. L. R. 375), under provisions contained in the Irish Reform Act (13 & 14 Vict. c. 69. ss. 55, 110.) similar to those contained in the English Reform Act (2 Will. 4. c. 45. s. 30), that a claim to be rated, dated and served in August, was sufficient and valid, and related back to the previous July 20, and also had relation back to the time the rate was made, the Revising Barrister held the said claim to be valid. The respondent, having, in other respects, proved his title to vote, the Revising Barrister inserted his name in the list of persons entitled to vote for a member for the said borough.

The question for the opinion of the Court was, whether the said claim to be rated, dated and served by the respondent on the overseers on August 24,

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1868, was valid, and sufficient to entitle the respondent to have his name inserted in the said list of voters.

Keane (*Lumley Smith* with him), for the appellant.—The demand to be rated made under the 2 Will. 4. c. 45. s. 30. only applies to the rate for the time being, which, according to *Bushell* v. *Luckett* (2 Com. B. Rep. 111; 15 L. J. C.P. 89), means the then existing rate; and that, in the present case, was the rate made on January 15. The demand, however, was made after the qualifying period, viz., the year ending July 31, had elapsed, and therefore was made too late. It is said that it had relation back to the time when the rate was made by force of section 30 of the 2 Will. 4. c. 45; and reliance is placed on the Irish cases of *Agnew* v. *Reilly* (2 Ir. L. R. 560) and *Muldowney* v. *Malcolmson* (15 Ir. L. R. 375). Those cases were decided on the Irish Reform Act, 13 & 14 Vict. c. 69. ss. 55, 110. The 110th section is analogous to section 30 of the 2 Will. 4. c. 45; but there is some difference in the language between the two sections. In the Irish Act, in case the guardians neglect to insert the name in the rate after the claim has been made, he is to "be deemed to have been rated in respect of such premises in the rate in respect of which he shall have claimed to be rated"; but in the English Act it is to be "from the period at which the rate shall have been made." *Malcolmson's case* (15 Ir. L. R. 375) was only a decision on the authority of *Reilly's case* (2 Ir. L. R. 560), Fitzgerald, J., saying, "If that case be rightly decided—and I am not prepared to say it is not—it seems to me to rule this." The effect of those Irish cases no doubt is, that the claim is to have relation back to the time when the rate was made, and that the claimant is to be deemed to be rated from that time. That this can be the case when the claim is made after the qualifying period, is directly opposed to the late decision of this Court in *Ainsworth* v. *Creeke* (38 L. J. C.P. 58).

[Bovill, C.J.—Our decision in that case is not inconsistent with the Irish cases, because there the claim was made on the day of revision by the Revising Barrister; whereas, in the last of the Irish cases, it was considered that it ought to be made before the holding of the revising sessions; but I agree that the reasons which we gave for our decision in *Ainsworth* v. *Creek* (38 L. J. C.P. 58) are directly opposed to those in the Irish cases, unless there be any material difference between the English and Irish Acts.]

Mohahan, C.J., says, in *Reilly's case* (2 Ir. L. R. 560), that the Barrister has not any right to inquire when the applicant was put on the rate, if the claim had been complied with by the guardians; that is opposed to what Erle, J., said in *Pariente* v. *Luckett* (1 Lutw. 446).

[Bovill, C.J.—That does not apply here. If the claimant is put on the rate, it is by force of the Act of Parliament.]

It is submitted that everything must be done within the qualifying year. It is too late afterwards.

Pickering, for the respondent.—The case of *Ainsworth* v. *Creeke* (38 L. J. C.P. 58) does not affect this case. There a ratification was relied on as made at the Revising Barrister's Court, which was clearly too late. Here the respondent had paid all the rates due to January 5, which was all he was required to pay by 14 & 15 Vict. c. 14. s. 1. in order to be qualified; and he finds afterwards that his name has been omitted from the poor-rate, having been lulled into believing that he was rated from the fact of paying the rates. The 30th section of 2 Will. 4. c. 45. was intended to meet such a case by enabling him to claim to be rated, and thereupon the overseers are to put him "upon the rate for the time being"; and in case of their neglect to do so, he is to "be deemed to have been rated to the relief of the poor" in respect of the premises "from the period at which rate shall have been made in respect of which he shall have so claimed to be rated."

[Bovill, C.J.—The point raised here is, whether the claim was made in time.]

It was not intended that the overseers should have the power of

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disqualifying a voter, and therefore section 30 makes the position of the voter the same as it would have been if the overseers had done their duty.

[BRETT, J.—But how do you deal with section 3 of 30 & 31 Vict. c. 102, which makes it necessary that the qualification should be perfect by July 31?]

It is submitted that by force of section 30 of 2 Will. 4. c. 45. he is to be deemed to be so qualified by July 31. The reasons of the Judges in the Irish cases on this point are, it is submitted, unanswerable. If the voter is to be unable on August 24, to make the claim to be rated so as to give him the benefit of the 30th section, when can he do so? On August 1, when the list is published, he finds his name has been omitted. Is he to make the claim on August 2? He naturally takes the day when the other claims are sent in, and makes his claim therefore before August 25. By section 16 of 6 & 7 Vict. c. 18. power is given to voters and persons claiming to vote to inspect the poor-rate book, but that is only during certain hours between August 10 and 31, so that that power will be useless if the claim cannot be made after July 31 in time to qualify the claimant.

Keane replied. *Cur. adv. vult.*

BOVILL, C.J. (on Jan. 18) delivered the judgment of the Court.—In this case, which was argued last term, before my Brothers Byles, Keating, and Brett and myself, the claimant, Henry Russell Streeter, claimed to vote as the rated occupier of a dwelling-house in the borough of Horsham. The claimant had not been rated at all in respect of the house in question; but had at some time before July 20, 1868, paid to the overseers all rates which would have been due previous to January 5, 1868, in respect of the said house. After January 5, namely, on January 15, a rate had been duly made in the borough, but in it the claimant was not rated. On August 24, 1868, the claimant finding that his name was not in that rate, and never having previously claimed to be put upon that rate, served on the overseer a claim to be rated to all rates made since July 31, 1867, and in such claim stated that he tendered payment of all rates due prior to January 5, 1868. On these facts the Revising Barrister, contrary to his own opinion, but in deference to two cases decided in Ireland, held that the claimant was entitled to vote, and inserted his name on the register of voters. It was contended before us, on behalf of the appellant, that the claimant was not duly qualified as a voter on July 31, 1868, because he had not then been rated to all rates made since the previous July 31, nor had then done anything declared to be equivalent to having been so rated, and that nothing done after July 31, 1868, could obviate the objection that he was not qualified on that day. It was contended on behalf of the respondent that the claim and tender of August 24 had relation back to the time of the making of any rate to which such claim applied, and put the claimant in the present case in the same position as if he had been rated on January 15, 1868, in the rate then made and published. The solution of the question thus raised depends upon the construction of the various enactments regarding the qualification and registration of voters. By 30 & 31 Vict. c. 102. s. 3, "Every man shall be entitled to be registered as a voter, &c., who (among other things) is *on the last day of July in any year, and has during the whole of the preceding twelve calendar months*, been an inhabitant occupier, &c., and has *during the time of such occupation* been rated, &c., to all rates (if any) made for the relief of the poor," &c. By statute 2 Will. 4. c. 45. s. 27, "No occupier shall be registered unless he shall have occupied such premises as aforesaid for *twelve calendar months next previous to the last day of July* in such year, nor unless such person, &c., shall have been rated in respect of such premises to *all rates, &c., made during the time of such his occupation*," &c. The collocation of phrases is different, but reading the later by the former statute it seems that the true meaning of the later enactment is, that no man shall be registered unless he has been rated to all rates made during the twelve months previous to July 31 of the qualifying year. The claimant has not been so rated, and therefore *primâ facie* was not

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otherwise relating to the representation of the people in England and Wales, and the registration of persons entitled to vote, shall remain in full force and shall apply as nearly as circumstances admit," &c.; and by section 59, "This Act, so far as is consistent with the tenor thereof, shall be construed as one with the enactments for the time being in force relating to the representation of the people and with the Registration Acts," &c., and therefore it is necessary to consider whether the claimant, although he has not been rated, may not have done something which is equivalent for the purposes of qualification and registration to his having been rated. By 2 Will. 4. c. 45. s. 30, "It shall be lawful for any person occupying, &c., to claim to be rated, &c., whether the landlord shall or shall not be liable to be rated to the relief of the poor in respect thereof, and upon such occupier so claiming and actually paying or tendering the full amount of the rate or rates, if any, then due, &c., the overseers, &c., are hereby required to put the name of such occupier *upon the rate for the time being*, and in case such overseers shall neglect or refuse so to do (*i.e.*, to put his name on the rate for the time being) such occupier shall nevertheless for the purposes of this Act be deemed to have been rated, &c., *from the period at which the rate shall have been made* in respect of which he shall have so claimed to be rated as aforesaid" (*i.e.*, the rate for the time being). This seems to refer to a claim made at all events during the time the rate is current. This claim cannot effectually be made in respect of a previous rate after a subsequent rate is made and published. This interpretation was acceded to by Maule, J., in *Bushell* v. *Luckett* (2 Com. B. Rep. 111; 15 L. J. C.P. 89). By the 14 & 15 Vict. c. 14. s. 1, "No person so claiming to be rated and paying or tendering on or *before the 20th of July* in each year, the full amount of the rate or rates (if any) due in respect of such premises on the 5th of January preceding shall be required to make any further claim in regard to any future rate, &c., but shall be entitled to be put on the list and to be registered as a voter," &c. This enactment, made by way of amendment to that last cited, applies to any claim, properly made before July 20, to be rated to all rates made before such claim, and accompanied by payment or tender before July 20 of all rates due on the previous January 5. The required payment or tender is only in respect of rates due on or before January 5; but the enactment does not dispense with a rating or a valid claim to be rated in respect not only of the rates made before, but also of those made after January 5, and before the claim or before July 20. It does not dispense with the necessity of the claim, in order to make it valid, being made in respect of a rate current at the time, and does not refer to a claim made *after* July 20. Neither of these provisions, in terms at all events, enables a claimant, by claiming after July 31, to be rated in respect of a rate made previous to July 31, to maintain that he was on July 31 qualified to vote by reason of having then been rated to all rates made during the previous year. These sections do not aid the contention of the respondent, or do away with the *primâ facie* disability arising upon the 3rd section of 30 & 31 Vict. c. 102. If we look to the Registration Acts, the necessity of the qualification being complete on July 31 seems to be even more fully made out. The only jurisdiction or power which the Revising Barrister can properly exercise is that which is given to him by the statutes under and by which his office is created. By 6 Vict. c. 18. s. 7, the objection given, which is to be answered by the claimant, is, that every person upon the register for the time being for any county may object to any other person upon any list of voters for such county, as *not having been entitled on the last day of July then next preceding* to have his name inserted. &c. By section 15 the persons who may claim in boroughs as having been improperly omitted by the overseers are those who can and shall claim as having been *entitled on the last day of July then next preceding* to have their names inserted, &c. This seems further to shew that under section 14 the persons whose names the overseers ought to insert are those who would be entitled on July 31. By section 17 the power to object in boroughs is to any person as not

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having been entitled on the last day of July next preceding to have his name inserted, &c. By section 37 the Revising Barrister has power to insert in any county list the name of any person who has claimed in case it shall be proved *that he was entitled on the last day of July then next preceding* to be inserted, &c. By section 38 the same limitation to the power of the Revising Barrister is imposed in boroughs. And by section 40, the section on which the action of the Revising Barrister mainly depends, it is expressly enacted that when any person shall have been objected to by the overseer, or by any other person, &c., such barrister *shall then require it to be proved that the person so objected to was entitled on the last day of July then next preceding* to have his name inserted, &c., and in case the same shall not be proved to the satisfaction of such barrister, or in case it shall be proved that such person was *then* incapacitated by any law or statute from voting in the election, &c., such barrister shall expunge the name of every such person from the said lists, &c. It would surely require very specific words elsewhere to override the force of these specific enactments, and to authorize the Court to say that, although on July 31 the claimant would not have been entitled, yet by reason of something done by him after July 31 he is entitled, and that the Revising Barrister should not require it to be proved that the claimant was entitled on July 31; and even though it should be proved that he was not entitled on July 31, should insert his name in or refuse to expunge it from the register of voters. The case of *Powell* v. *Bradley* (34 L. J. C.P. 67) seems to shew that for some purposes at least July 31 is the day on which the qualification must be complete. It has, however, been argued that if the construction contended for by the appellant be adopted, no practical effect can be given to section 16 of 6 Vict. c. 18, and the power therein given to inspect the rate-book is futile. It would seem, however, that such power of inspection, even in an extreme case, might be useful for the purpose of seeing what the overseer has done or omitted, even though a claim has previously been made, and for thus guiding a claimant as to the amount of evidence which will be required from him before the Revising Barrister. This argument seems hardly sufficient to overrule the express enactments above referred to. Convenience and safety seem to point to the same conclusion as that to be deduced from the words of the statutes. If that which it is asserted may be done after July 31 may be then legally done, there seems nothing to prevent its being done even before the Revising Barrister in Court, and we have already substantially decided in the case of *Ainsworth* v. *Creeke* (38 L. J. C.P. 58) that a claim at that time would be too late. It seems to us that the true construction of the English statutes and convenience and safety alike require that the qualification must be complete on July 31. We are, however, met by authority to which we shall ever feel inclined and bound to pay the highest respect, the authority of the Irish Judges in the cases of *Agnew* v. *Reilly* (2 Ir. L. R. 560) and *Muldowney* v. *Malcolmson* (15 Ir. L. R. 375). We have carefully and anxiously considered those cases, as well as the statutes 1 & 2 Vict. c. 56, on which is founded the administration of the poor laws in Ireland, and the 13 & 14 Vict. c. 69. on which the qualification and registration of voters in Ireland depend. We are bound to confess that there is so much similarity between many of the enactments in the English Registration Acts and the last-mentioned Irish statute, that many of the reasons which have led us to the construction we feel bound to put on the English Acts could hardly have permitted us to concur with some of the remarks of the Irish Judges on the Irish statutes in those cases; but even in one of those cases it seems to have been considered by some of the Judges that the claim must be made before the Court of the Revising Barrister is opened; and the administration of the system of poor-law rating in Ireland is so different from that in England, and the qualification as to rating of voters, the formation of the list of voters, and the machinery for preparing them and taking the registration are so different, and give rise to so many different considerations and arguments, that we do not feel called upon or authorized to discuss further the propriety of of the ultimate decision in those cases upon the Irish statutes. We confine

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ourselves to saying that, having regard to the English statutes, we, for the reasons before stated, are of opinion that the decision of the Revising Barrister in this case, given in deference to the Irish cases, was wrong, and his own personal opinion was correct. The decision of the Revising Barrister will, therefore, be reversed, and the register be amended accordingly.

Decision reversed.

IN THE COMMON PLEAS. Jan. 22, 1869.

(Appeal from Revising Barrister's Court.)

FRYER, *appellant;* BODENHAM, *respondent.*

38 L. J. C.P. 185; L. R. 4 C.P. 529; 19 L. T. 645; 17 W. R. 294; 1 Hop. & C. 204.

Referred to, *Durant* v. *Kennett*, [1870] E. R. A.; 39 L. J. C.P. 17; L. R. 5 C.P. 262; 21 L. T. 603; 18 W. R. 286 (C.P.); *Fernie* v. *Scott*, [1872] E. R. A.; 41 L. J. C.P. 20; L. R. 7 C.P. 202; 25 L. T. 836; 20 W. R. 236 (C.P.).

Parliament — Borough Vote — Eleemosynary Occupation — Inhabitant Occupier—Representation of the People Act, 1867, *s.* 3.

ELECTION LAW. A.—*The appellant claimed a borough vote in respect of his occupation of one of a series of houses known as Lord Coningsby's Hospital, to which he had been duly nominated. The persons who occupy these houses are nominated by the owner of certain estates, out of which fixed payments are made to such occupants, who are called servitors, and are subject to certain rules made for their government in* 1614, *when the hospital was founded, and which they must obey under the penalty of a fine. They pay no rent, and clothes and coals are supplied to them out of the funds of the hospital. When a man is appointed to one of the houses he holds it, with a garden near to it, for life, and cannot be disturbed in his occupation by any one, except for a murder or a felony, or something of that kind. None of the houses had ever been let by any of the persons appointed to them, but a garden appertaining to the house held by the appellant had been let by him because he was too old to cultivate it himself:*—Held, *that the appellant had a freehold interest in the house to which he had been appointed, and this his occupation thereof was not of such an eleemosynary character as to prevent his acquiring the borough franchise as an inhabitant occupier under the Representation of the People Act*, 1867.

This was an appeal from the decision of one of the Revising Barristers for the city of Hereford.

The respondent objected to the name of the appellant being retained in the St. John Baptist list of voters for the said city.

The case stated that it was proved before the Revising Barrister, that the appellant, John Fryer, occupied one of a series of eleven houses known as Lord Coningsby's Hospital, originally founded in 1614, and that he had so occupied during the qualifying period, and had been separately rated, and had paid all poor-rates in respect of such occupation, but that some of the said rates had been afterwards returned to him by Mr. Arkwright, hereinafter named, in consequence of a request made by the occupants of the hospital, but such return was optional and a mere matter of grace on his part. It was further proved that a notice of objection, good in form, was duly served on the said John Fryer, and that the said John Fryer's claim was in respect of occupation of one of a series of houses, known as Lord Coningsby's Hospital, for and occupied by six soldiers of three years' service, and five domestic servants, who have lived in service for seven years and who are badly off in their circumstances. That the said eleven occupiers (of whom the claimant was one) are called servitors, and that one of them is appointed superintendent or corporal by Mr. Arkwright, and is called Corporal Coningsby. It was further proved that the persons who occupy these

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eleven houses are nominated by John Hungerford Arkwright, Esq., of Hampton Court, who owns the Coningsby estates, out of which fixed payments to the occupants of the houses are made. It was further proved that rules had been made in the year 1614 (when the hospital was founded) for the government of the occupants of the hospital, but it appeared that these had become partly obsolete; but it was in evidence that Mr. Arkwright could do as he liked with regard to the rules, and that he appointed the inmates of the hospital as servitors to their respective houses, and that the funds of the hospital came from Mr. Arkwright's estate, and are distributed equally among the servitors. The evidence given also proved that the servitors paid no rent, and that clothes and coals were supplied to them out of the funds of the said hospital. The houses are built on two sides of a quadrangle, a portion of the other sides of which is occupied by a chapel and a common hall. This quadrangle is entered by an iron gate, which opens into the street, and the key of which gate is kept by the corporal of the hospital. The gate is locked at nine o'clock in the evening, after which time none of the occupants can enter from or go out into the street or beyond the limits of the hospital without the special licence of the corporal. The occupants of the houses occasionally dine together in the common hall, and they are expected to attend service on certain fixed days in the chapel and not to be absent more than three days at a time without the leave of the corporal. When a man is appointed to one of the houses, he holds it and a garden near to it for his life, and cannot be disturbed in his occupation by Mr. Arkwright or anyone else, except for a murder or a felony, or something of that kind. It was agreed that none of the houses had ever been let by any of the persons appointed to them, but a garden outside the hospital and appertaining thereto held by the said John Fryer had been let by him because he was too old to cultivate it himself. There is no service or duty to be performed by the servitors, but they are subject to certain rules of the hospital which they must obey under penalty of a fine. They are bound by these rules to attend the chapel at regular times, to keep the windows of their houses clean, not to become intoxicated, nor to use profane oaths, and not to be absent from the hospital for more than three days at any one time without the corporal's leave. The said John Fryer did not produce any deed or other document.

The Revising Barrister held that the occupation of the appellant was eleemosynary in its character, and that he did not occupy as owner or tenant within the meaning of the Representation of the People Act, 1867, and he accordingly expunged his name from the register.

Dowdeswell (*G. Brown* with him), for the appellant.—It is submitted that this case falls within the principle of *Simpson* v. *Wilkinson* (7 Man. & G. 50; 14 L. J. C.P. 49) and *Roberts* v. *Percival* (18 Com. B. Rep. N.S. 36; 34 L. J. C.P. 84), in which the inmates of Lord Burleigh's hospital were held to have a freehold interest in the rooms assigned to them, and were entitled, in respect of such interest, to vote for the county. What would be a sufficient estate to entitle the claimant to a county vote under the old Reform Act would clearly be sufficient to qualify for a borough vote under the 30 & 31 Vict. c. 102. s. 3, where it is only required he should be "an inhabitant occupier as owner or tenant." If he has a freehold for life in the house he occupies, he occupies it as owner: and that is alone sufficient, as the value is immaterial. Here it is found that, when a man is appointed to one of the houses, he holds it and a garden near to it for his life, and that he cannot be removed, except for felony or such like criminal misconduct, which never will be presumed. There is no substantial distinction between the rules to which he is subject and those governing the inmates of Lord Burleigh's hospital; and in the present case, as in the case of Lord Burleigh's Hospital, there is no corporate body, or anything from which a corporation must be presumed, in whom the property, both legally and beneficially, would be vested. Moreover, that was not the question before the Revising Barrister, who only decided that the occupation of the appellant was eleemosynary and not as owner or tenant. It is submitted that, if the appellant had a right to occupy the premises, it is immaterial that he did so occupy in an

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acquired because the occupation was eleemosynary was pressed by counsel in *Roberts* v. *Percival* (18 Com. B. Rep. N.S. 36; 34 L. J. C.P. 84), but it did not prevail; and Erle, C.J., said: "A great deal of ambiguity has been brought into these cases by saying that a man would be prevented from being qualified, though he had a legal or equitable freehold, if the mode of occupation was eleemosynary. I have a great desire to avoid introducing anything that is, to my mind, an entirely mistaken notion as to the question whether the party is owner of the equitable freehold or not. In deciding that question, it may be very material to see whether the trustees hold in trust to take the profits and dispose of them in an eleemosynary manner to the objects of the donor's bounty; but if a person have an estate, whether legal or equitable, it matters not whether the motive of the donor of the estate was of a charitable nature, or whether the feelings of the parties who took the estate and enjoyed the profits under it ought to be the feelings of eleemosynary grantees." Here the appellant occupied in an independent character and for his life, without power in any one to remove him. It is not necessary that he should occupy as owner; he may occupy "as owner or tenant"; it is sufficient that he does not occupy as servant. The word "tenant" is to be considered as used in its largest sense, and to comprise tenant at will or sufferance. The cases of *Randall* v. *Stevens* (2 El. & B. 641; 23 L. J. Q.B. 68) and *Locke* v. *Matthews* (13 Com. B. Rep. N.S. 753; 32 L. J. C.P. 98) are instances of a tenancy existing notwithstanding the tenant was put into possession from charitable motives; and they shew, therefore, that the question whether the occupation was eleemosynary is an immaterial one.

Macnamara, for the respondent.—The appellant did not occupy as owner or tenant within the meaning of the 30 & 31 Vict. c. 102. s. 3. No relation of landlord and tenant ever existed between the appellant and Arkwright, and the nature of the occupation and the restrictions upon it divest it from being the occupation of an owner. It is found by the case "that Mr. Arkwright could do as he liked with regard to the rules."

[KEATING, J.—There must, I presume, be some modification to that statement. For instance, Mr. Arkwright could not make a rule that the inmates should only occupy for three years, since that would be inconsistent with the statement that when a man is appointed he holds for life, and cannot be disturbed in his occupation by Mr. Arkwright, except for murder or felony.]

That is so; but reference is made to the power of Mr. Arkwright to make what rules he liked, in order to shew how the occupation is made subordinate to rules. The occupation required to confer the franchise must be of an independent character, and not that of a servant, nor of one who is the object of a charity. The cases which have been cited as to the Burleigh hospital were decisions as to the right to a county vote, where the only question was, whether the claimant held a legal or equitable freehold in the land; but here the claim is to a borough vote, where the question is, whether the occupation is as owner or tenant.

[BOVILL, C.J.—The circumstance that the occupation was conferred as an act of charity will not necessarily prevent the occupier occupying as tenant or owner.]

The hospital in this case is only an almshouse. It is found that the eleven occupiers, of whom the claimant was one, are called "servitors," and that clothes and coals are supplied to them out of the funds of the hospital; and it is submitted that the occupation, under the circumstances stated in the case, is only of an eleemosynary, and not of an independent, character.

[BOVILL, C.J.—It is of an independent character in this sense, that the occupier cannot be turned out; and he does not occupy as a servant. KEATING, J.—Is there any case in which it has been held that such an occupation as this would not confer the franchise?]

Heartley v. *Banks* (5 Com. B. Rep. N.S. 40; 28 L. J. C.P. 144) is the leading case upon this subject as to borough votes, and there the occupation of the Military Knights of Windsor was held to be subordinate to the purposes of the

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charity, and not such as would confer a borough franchise under the 2 Will. 4. c. 45; and Cockburn, C.J., in delivering the judgment of the Court, said: "Whether the interests of these parties in the benefits of the charity be a freehold interest or not, we are of opinion that there is no such estate or interest in these houses as can properly be deemed an ownership;" and the Court distinguished that case from that of *Simpson* v. *Wilkinson* (7 Man. & G. 50; 14 L. J. C.P. 49), on the ground that in that last case "the recipients of the charity had the direct and uncontrolled management of the property in their own hands; and the only question raised in that case was, whether the Revising Barrister was right in presuming a commencement of the estate of the bedesmen by the royal licence prior to the passing of the 39 Eliz. c. 5." The case of *Heath* v. *Haynes* (3 Com. B. Rep. N.S. 389; 27 L. J. C.P. 50) was that of Earl Leicester's hospital, incorporated by an Act of Parliament, and the brethren of which were appointed for life, subject to removal for the causes specified in the rules. There each of the brethren, as such, occupied exclusively two rooms in the hospital, and was rated in respect of such occupation; but it was held, that he did not occupy as owner or tenant, and was therefore not entitled to a borough vote. In *Bridgewater* v. *Durant* (11 Com. B. Rep. N.S. 7; 31 L. J. C.P. 46), Erle, C.J., in delivering the judgment of the Court, said: "Occupation alone of a house is not sufficient to qualify: thus, occupation as a member of a corporation aggregate—*Heath* v. *Haynes* (3 Com. B. Rep. N.S. 389; 27 L. J. C.P. 50); or as a receiver of charitable bounty—*Heartley* v. *Banks* (5 Com. B. Rep. N.S 40; 28 L. J. C.P. 144); or for purposes connected with services to be performed—*Dobson* v. *Jones* (5 Man. & G. 112; 13 L. J. C.P. 126); *Clarke* v. *the Overseers of St. Mary, Bury St. Edmunds* (1 Com. B. Rep. N.S. 23; 26 L. J. C.P. 12); or under an appointment from governors of a charity at their discretion *Davis* v. *Waddington* (7 Man. & G. 37; 14 L. J. C.P. 45), have been held not to qualify. The question is one of fact, and it was for the Revising Barrister to draw his own conclusion from the premises before him." The case of *Freeman* v. *Gainsford* (11 Com. B. Rep. N.S. 68; 31 L. J. C.P. 33) also shews that, because each inmate of the hospital may enjoy the house which is assigned to him for his life, it does not follow he does so as owner, or that he is therefore qualified to vote. Looking at the nature of the occupation of the houses by the servitors in the present case, it is submitted that such occupation is manifestly subordinate to the purposes of the charity, and that it never was intended by the legislature that persons in the receipt of a charitable bounty like the inmates of this hospital should have the franchise, as exemplified by the express provision of the Reform Act, which disqualifies borough electors who have been in the receipt of parochial relief or other alms.

Dowdeswell was not called upon to reply.

BOVILL, C.J.—I am of opinion that the claimant in this case was the occupier of a house as owner within the meaning of the Representation of the People Act, 1867; and it seems to me that the present case is undistinguishable in principle from that of *Roberts* v. *Percival* (18 Com. B. Rep. N.S. 36; 34 L. J. C.P. 84). There the cases which have been cited by Mr. Macnamara of *Heartley* v. *Banks* (5 Com. B. Rep. N.S. 40; 28 L. J. C.P. 144) and *Freeman* v. *Gainsford* (11 Com. B. Rep. N.S. 68; 31 L. J. C.P. 33) were strongly relied on, as they have been here, against the voter; but the distinction between them and the case then before the Court was pointed out by Erle, C.J., in his judgment, where he says, "There is a broad distinction in my mind between the present case and each of those cases; for in them there was a governing body, in whom the legal estate was necessarily to continue vested, for the purpose of executing the trust to be performed by them, and the profits of the endowment did not belong absolutely, and without any intervening person, to the persons who claimed to be qualified by reason thereof. The trustees were to receive the profits, and then the poor Knights of Windsor were entitled to claim a portion of the money out of those profits; and so the inmates of Lord Shrewsbury's hospital were entitled to receive a portion of the money from the trustees with-

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out themselves having any estate at all, though in each of those cases the trustees were bound to find the lodgings for the inmates. But I see that, in Lord Burleigh's hospital, the members are, when named, to be placed in certain rooms, and in those rooms they are to continue until they die." Now apply that to the present case, and the observation that the persons are to continue in the rooms to which they have been appointed until they die are very applicable, for here there is a distinct finding that, "when a man is appointed to one of the houses, he holds it and a garden near to it for his life, and cannot be disturbed in his occupation by Mr. Arkwright or any one else, except for a murder or a felony, or something of that kind." Therefore, there is a freehold interest for life in the person when once he has been appointed to a house. As regards the exception for murder or felony, there was a similar power of removal in *Roberts* v. *Percival* (18 Com. B. Rep. N.S. 36; 34 L. J. C.P. 84), as appears from the ordinances of the hospital which are set out in the report of *Simpson* v. *Wilkinson* (7 Man. & G. 50; 14 L. J. C.P. 49), a case upon the same hospital, and amongst which will be found (Ordinances 11 and 12) ordinances to the effect that the occupants should lose the benefit of their occupation if convicted of drunkenness, barratry, adultery, or such-like faults.

The Revising Barrister having stated the right under which the claimant in the present case occupied, gives, as the ground why he held such occupation to be not as owner or tenant so as to entitle him to the franchise, that the occupation was eleemosynary in its character; but it is manifest that there are many occupations which may be given as an act of charity, and yet the occupiers may occupy as owners or tenants; and in *Roberts* v. *Percival* (18 Com. B. Rep. N.S. 36; 34 L. J. C.P. 84) it was clearly laid down by Erle, C.J., that the motive of the donor in bestowing the right to occupy cannot affect the character of the occupation. I think the present case cannot be distinguished from that of *Roberts* v. *Percival* (18 Com. B. Rep. N.S. 36; 34 L. J. C.P. 84), but is distinguishable from the other cases cited by Mr. Macnamara on the grounds mentioned by the Court in *Roberts* v. *Percival* (18 Com. B. Rep. N.S. 36; 34 L. J. C.P. 84). My Brother Byles, who has been obliged to leave the Court, desired me to say that he entirely concurs with us that the decision of the Revising Barrister should be reversed.

KEATING, J.—I am of the same opinion. No doubt, in the case of *Heartley* v. *Banks* (5 Com. B. Rep. N.S. 40; 28 L. J. C.P. 144), there are expressions in the judgment of the Court as to the nature of the occupation of the Military Knights of Windsor which have created the difficulty in the present case; but that case is not only distinguishable from the present one in the facts, but it underwent a review in *Roberts* v. *Percival* (18 Com. B. Rep. N.S. 36; 34 L. J. C.P. 84), and all the points relied on by Mr. Macnamara were insisted on there, and yet this Court held that they did not prevent the claimant from acquiring the franchise by right of his having an equitable freehold in the premises. Now, the decision of the Revising Barrister in the present case is, that the occupation was eleemosynary, and probably he intended by that to bring the case within the expressions used in the judgment in *Heartley* v. *Banks* (5 Com. B. Rep. N.S. 40; 28 L. J. C.P. 144); but he has also set out in this case the facts which were proved, and the circumstances on which he founded his opinion; and this Court has held that if the Revising Barrister states the circumstances under which he came to a conclusion, though it is one of fact, and submits those circumstances to the Court, this Court will see how far he was justified in coming to the conclusion he has arrived at. The fact that the mode of occupation is eleemosynary will not, as pointed out by Erle, C.J., in *Roberts* v. *Percival* (18 Com. B. Rep. N.S. 36; 34 L. J. C.P. 84), necessarily prevent the occupier from being the owner of a freehold interest, and therefore disentitle him to the franchise; and here there is a distinct finding that the appointees under this charity had each a right to occupy the particular house to which he was appointed for his life, subject to being divested from that occupation only upon the happening of an event, which one cannot expect as likely to take place, namely, the commission by him of a felony. Where the legal estate in these houses may

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be is not stated, but the only persons who deal with the occupation are these servitors. Moreover, an Act of ownership is stated which is of great importance. It is stated that, though none of the houses had ever been let by any of these appointees, yet a garden had been let by the appellant Fryer, as he was too old to cultivate it himself. That, however, was an act of ownership, and he appears to have exercised it without interference by any one. Under these circumstances, I am of opinion that the Revising Barrister was mistaken in thinking that the occupation being eleemosynary alone prevented the appellant from acquiring the right to vote.

MONTAGUE SMITH, J.—I am of the same opinion. It appears to me that the appellant had a freehold interest in the house assigned to him. It is expressly found that he had it for his life, and that he could not be disturbed in his occupation of it, except for murder or felony. There is nothing which makes his removal from that estate depend on anything that is arbitrary or indefinite. If then he has a freehold in the house, it is plain that he is also in the occupation of it, for it is not suggested that any other person was in such occupation. I therefore should have thought that this was the decision we should have arrived at if there had been no authorities on the matter; but I think that the case falls clearly within those of *Simpson* v. *Wilkinson* (7 Man. & G. 50; 14 L. J. C.P. 49) and *Roberts* v. *Percival* (18 Com. B. Rep. N.S. 36; 34 L. J. C.P. 84), and is distinguishable from that of *Heartley* v. *Banks* (5 Com. B. Rep. N.S. 40; 28 L. J. C.P. 144) and the other cases which are in the same category. In *Heartley* v. *Banks* (5 Com. B. Rep. N.S. 40; 28 L. J. C.P. 144) it did not appear that any one of the knights was the occupier of any room definitely assigned to him, nor that he had a freehold interest in any particular room; and that case is also distinguishable from the present one on the other grounds mentioned in *Roberts* v. *Percival* (18 Com. B. Rep. N.S. 36; 34 L. J. C.P. 84). For these reasons, I am of opinion that our decision should be for the appellant.

Decision reversed.

IN THE COMMON PLEAS. April 23, 1869.

(Appeal from Revising Barrister's Court.)

TRENFIELD, *appellant;* LOWE, *respondent.*

38 L. J. C.P. 191; L. R. 4 C.P. 454; 20 L. T. 394; 17 W. R. 673; 1 Hop. & C. 237.

Referred to, *Fernie* v. *Scott*, [1872] E. R. A.; 41 L. J. C.P. 20; L. R. 7 C.P. 202; 25 L. T. 836; 20 W. R. 236 (C.P.).

Parliament—County Vote—Equitable Freehold—2 Will. 4. c. 45. s. 18—Actual Occupation—Rights of After-Grass and Depasture.

ELECTION LAW. A.—*A piece of land, called a riding, divided into about eighty allotments of an acre each, had been held for centuries by the bailiff and bailiff burgesses of the town of C., who from time immemorial, whenever a vacancy had occurred, had invested an inhabitant of such town with the possession of one of such allotments, to hold the same for his life and the life of his wife so long as he and she should reside in such town, subject and chargeable with waste, and also subject to the rules of the said bailiff and bailiff burgesses. Each holder of such allotment manured and mowed the same, and after the crop of grass had been taken off by him the bailiff and bailiff burgesses were accustomed to grant the after-grass for five weeks to such other inhabitant as they thought fit, and at the expiration of such five weeks the whole riding was thrown open to all the inhabitants of the town to depasture sheep and cattle there until December 15, when it was closed. Each holder of such allotment was separately rated to and paid the poor-rates, and the annual value of such allotment was between 3l. and 5l.*:—Held, *that each holder had such an*

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equitable estate of freehold in the land, with the possession of which he was so invested, as would confer a county vote; and that he was in the actual and bonâ fide *occupation of such land within the meaning of* 2 *Will.* 4. *c.* 45. *s.* 18, *notwithstanding the said rights of after-grass and pasture granted to the other inhabitants.*

Appeal from the decision of the Revising Barrister appointed to revise the lists of voters for the Western Division of the County of Gloucester.

The appellant, John Trenfield, claimed to have his name placed on the list for the parish of Old Sodbury, but was objected to.

The CASE stated that the following facts were established by the evidence: The bailiff and bailiff burgesses of the town or borough of Chipping Sodbury, is a body of very ancient origin, and existed, as appears by the records of the town and Court rolls of the manor of Chipping Sodbury, long previously to the year 1681, but no charter of incorporation is at present known to have existed. The said bailiff and bailiff burgesses are appointed as hereinafter mentioned.

In the year 1681 a charter was granted by Charles the Second. A translation of this charter is given in *Sir Robert Atkyns's History of Gloucestershire*, and is referred to as a part of this case.

Shortly after the granting of this charter the inhabitants became anxious for its repeal, and according to a statement in *Rudder's History of Gloucestershire*, published in 1779, which is also referred to as a part of this case, the charter was annulled by proclamation at the request of the inhabitants themselves in 1668. Whether the charter of Charles the Second was formally annulled or not, it fell into complete disuse, and from the year 1668 or 1669 down to the present time the borough or town has been under the government of the bailiff and bailiff burgesses as prior to the last-mentioned charter.

The bailiff and bailiff burgesses, amongst other property, are entitled to a piece of inclosed pasture land, situate in the adjoining parish of Old Sodbury called "The Mead Riding," and containing by admeasurement ninety acres. The origin of the title of the bailiff and bailiff burgesses to this piece of land is not shewn, but they have held it for centuries; and in *Rudder's History of Gloucestershire*, this and other property is referred to as derived from ancient grants made in the reign of King John and King Henry the Second. The piece of land called the Mead Riding is divided by metes and bounds and trenches into eighty-one allotments, none less than an acre in extent, and many of them from an acre to an acre and a half, but all are called "acres." The bailiff and bailiff burgesses have from time immemorial given these acres to the inhabitants in the following manner:—On an acre falling vacant, a meeting of the bailiff and bailiff burgesses is convened, and held at the usual place of meeting, in the Town Hall of the town of Chipping Sodbury, and such meeting decides by majority of votes to whom, being an inhabitant of the town or borough of Chipping Sodbury, such vacant acre shall be given; after such decision has been made, one or more of the bailiff burgesses and the inhabitant to whom the acre has been given enter upon the acre in question, and a sod or turf is then cut from the acre by the hayward of the riding (an officer appointed in Court leet of the manor) and a twig stuck in it, and thereupon one of the bailiff burgesses, acting on behalf of the bailiff and bailiff burgesses, gives possession of an acre by delivering the twig and turf to the donee, at the same time reading the following formula, which is called the investiture:

"The piece of land on which we are now standing (commonly called an acre) has lately fallen into the possession of the bailiff and bailiff burgesses of Chipping Sodbury, and in pursuance of their direction I invest you therewith by delivering to you this twig and turf: To hold the said piece of land for your life and the life of any woman that may be your lawful wife and survive you, so long as you and your wife shall reside in this town, and subject and chargeable with all manner of waste, particularly waste in felling or cutting any tree or trees whatsoever growing or that may hereafter grow on the said piece of land. And also subject to all the present rules and orders of the said bailiff and bailiff

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burgesses respecting the grounds called 'The Ridings,' as well as those that may be from time to time relating thereto."

This completes the ceremony, and a minute is usually recorded in the minute-book of the bailiff and bailiff burgesses to the effect that the acre which fell in on the death of A. was given to B.

The acre thus obtained is held by the donee according to the terms of the investiture, and is drained, manured and mown by the holder, who at spring and fall pays to the bailiff in respect thereof, for what are called dues, the sum of 2*s*., which goes to the bailiff in aid of his expenses of office, which are considerable.

With regard to the Mead Riding aforesaid, the following custom has prevailed from time immemorial. After the crop of grass has been mown and taken off by the several parties who for the time being are the holders of acres as aforesaid, the bailiff and bailiff burgesses convene a meeting of themselves and grant out the after-grass in what are called stems to such of the inhabitants of Chipping Sodbury as they think fit, to the number of eighty-two, this being the number of acres of which the riding is considered to consist. Each such stem confers the right to depasture a cow in the riding for five weeks from September 10. At the expiration of such five weeks, the riding is thrown open by the bailiff and bailiff burgesses, according to custom, to all the inhabitants of Chipping Sodbury, to depasture sheep and cattle therein until December 15, when it is closed; but manure may be taken out on the acres after the grass is cut and carried until August 1, and also from January 5 to February 14 in each year.

Each holder of an acre is separately rated to and pays the poor and church rates of Old Sodbury, and is also separately assessed to the income-tax for that parish in respect of such acre, and no instance has been known of a person once elected as the holder of an acre being dispossessed or ceasing to hold such acre, except upon his death, or his ceasing to reside in the town of Chipping Sodbury. In no case is the clear annual value of an acre in the said Mead Riding less than 3*l*., but in no case does it amount to 5*l*.

The said John Trenfield, being an inhabitant of the said town of Chipping Sodbury, was in the year 1847 duly elected by the said bailiff and bailiff burgesses to an acre in the said Mead Riding, and was thereupon duly invested with the possession of the same acre, according to the form of investiture in manner aforesaid. The said John Trenfield has ever since been and now is such an inhabitant as aforesaid, and in the enjoyment and possession of such acre. The clear annual value of the acre of the said John Trenfield is more than 3*l*. but less than 5*l*.

The said John Trenfield duly claimed to have his name placed and retained on the list of voters for the parish of Old Sodbury, in the western division of the county of Gloucester, in respect of the acre so held by him as aforesaid, but his vote was objected to on the ground that his interest in the land in respect of which he claimed to vote was not such an estate of freehold as would confer a county vote.

The Revising Barrister decided that the said claimant had not, under the circumstances stated, such an estate of freehold in the land in question as would confer a vote for the county.

Pickering (*J. G. Edwards* with him), for the appellant.—The appellant had an equitable estate of freehold in the land in question which entitled him to a vote for the county. After the centuries which have elapsed, it may now be presumed that the bailiff and bailiff burgesses hold the land which is divided into these allotments in trust for the several persons who are from time to time chosen out of the inhabitants and admitted into possession of one of these allotments. In this respect such persons are as much entitled to the vote as the bedesmen in *Simpson* v. *Wilkinson* (7 Man. & G. 50; 14 L. J. C.P. 49) and *Roberts* v. *Percival* (18 Com. B. Rep. N.S. 36; 34 L. J. C.P. 84), the parish clerk in *Roberts* v. *Drewitt* (18 Com. B. Rep. N.S. 36; 34 L. J. C.P. 48), or the owners of benchers' chambers in Lincoln's Inn—2 *Peckwell*, 109, *Rogers on*

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in the town, and therefore was for an indefinite and uncertain period, and its duration was not liable to be determined at the will of the grantors—*Preston Estates*, 405, Co. Lit. 42 *a*, the authorities collected in Mr. Serjeant Manning's note to *Davis* v. *Waddington* (7 Man. & G. 46; 14 L. J. C.P. 45) and *Beeson* v. *Burton* (12 Com. B. Rep. 647; 22 L. J. C.P. 33). The question then is, whether there is anything in the existence of the rights of depasture which it appears are given to the other inhabitants which so interferes with the freehold estate which the appellant takes in the land in question as to prevent its being in his "actual and *bonâ fide* occupation" within the meaning of section 18 of the 2 Will. 4. c. 45. The Representation of the People Act, 1867 (30 & 31 Vict. c. 102. s. 5), has only altered this 18th section by reducing the yearly value of the qualifying property required to take the case out of that section from 10*l.* to 5*l.*, and therefore where it is not of that reduced value, the person who has only a freehold for life must still, no doubt, be "in the actual and *bonâ fide* occupation" of the land. It is submitted, however, that the appellant in this case was in such occupation. The rights of depasture which the other inhabitants have do not oust the appellant from his actual occupation of the soil. A grant of the herbage does not pass the soil—Co. Lit. 4 *b*; and here it is expressly found that the appellant has always been in the possession of the allotment, and has been rated to and paid the poor-rates.

Joshua Williams, for the respondent.—The appellant has not an estate in the land at all, either legal or equitable. He has only a mere franchise, and in this respect the present case differs from those of *Simpson* v. *Wilkinson* (7 Man. & G. 50; 14 L. J. C.P. 49) and *Roberts* v. *Percival* (18 Com. B. Rep. N.S. 36; 34 L. J. C.P. 84), where the bedesmen were in the actual and exclusive occupation of particular rooms. Here the appellant can do nothing with this land but mow it, and in fact what he has is a right to mow it. His interest is like that of the freemen of Bedford in *Nash* v. *Coombs* (37 L. J. Ch. 600; L. R. 6 Eq. 51), who were entitled so long as they were resident there to turn out one head of stock annually upon certain commonable land. The main objection to the appellant's right to the vote is, that he is not in the actual occupation of the land within the meaning of section 18 of 2 Will. 4. c. 45 during the whole of the year. In *Rogers on Elections*, 10th edit., p. 5, it is stated, with respect to the occupation required by this 18th section, that it "is peculiar from the introduction of the word *actual*, which does not occur in the section conferring the borough franchise." "The question, What is actual occupation? has been supposed to be illustrated by the decisions under one of the Pauper Settlement Acts (1 Will. 4. c. 18), where the same words are used, and in which it was held that no constructive occupation by a tenant or lodger, nothing, in short, but the person's own exclusive occupation of the whole premises, satisfied the provisions of the Act," citing *The King* v. *St. Nicholas, Rochester* (5 B. & Ad. 219; 5 L. J. M.C. 45), *The King* v. *St. Nicholas, Colchester* (2 Ad. & E. 599; 4 L. J. M.C. 46), *The King* v. *Berkswell* (6 Ad. & E. 282; 6 L. J. M.C. 35) and *The King* v. *St. Giles's-in-the-Fields* (4 Ad. & E. 495; 5 L. J. M.C. 51). The case of *The King v. the Trustees for the Burgesses of Tewkesbury* (13 East, 155) shews that the persons who have the right to aftermath are the occupiers of the land. What interest, then, had the appellant? The freehold was in the bailiff and bailiff burgesses, and though the appellant might acquire perhaps an equitable estate for life, it could be only in the particular mode of enjoying the land, and not an estate in the land itself. He would only have a right to manure and to mow, but he could not stack the grass when cut, and for portions of the year others would have the right to use the land. The case of *Suckerman* v. *Warner* (2 Bulst. 248) shews that the mere right to mow would not make the person who has such right an occupier.

Pickering replied.

KEATING, J.—In this case the question has been faintly argued whether the

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claimant took an estate of freehold for life. Mr. Williams did not lay much stress upon this point, and I have no doubt that the intention was, that the claimant should take possession of the land for life, subject to the rules of the bailiff and bailiff burgesses, some of which rules involved the rights of other persons to go on the land to depasture with cows and sheep, and also to take the after-grass. He was admitted into the possession of the land by the bailiff and bailiff burgesses, into whose possession it had fallen by this form of investiture.—[The learned Judge here read the words of the investiture, as stated in the case.]—And so far as the possession is concerned, the case distinctly finds that the claimant, "the said John Trenfield, has ever since been and now is such inhabitant as aforesaid, and in the enjoyment and possession of such acre." It seems, therefore, to be clear that the claimant took an equitable estate of freehold; but the main point which has been raised is, whether, within the meaning of section 18 of the Reform Act, he can be considered to have been in the actual and *bonâ fide* occupation of the land, and it has been argued that he was not in such occupation because he was not in the exclusive occupation in consequence of the rights of other persons to a right of common of pasture on the land. I have doubted whether the occupation was of such a nature as the statute contemplated; but, on consideration, I think that we may reasonably hold that the claimant had the *bonâ fide* occupation of the land within the meaning of the 18th section. It is found by the case that he was rated to the poor-rate as the occupier, and there really was no other person who could have been so rated, and under all the circumstances I have come to the conclusion that the claimant was in the occupation within the meaning of the 18th section. I doubt whether the Revising Barrister intended to raise this question, but inasmuch as it has been argued, I thought we ought to give our opinion upon it.

MONTAGUE SMITH, J.—I am of the same opinion. I think that Mr. Pickering put the title upon the right ground, namely, that the legal estate was in the bailiff and bailiff burgesses, and that they had invested the claimant with an equitable freehold for life. I share the doubt of my Brother Keating, whether anything more than that question was intended to be raised for our opinion, because the case finds that the claimant was objected to on the ground that his interest in the land in respect of which he claimed to vote was not such an estate of freehold as would confer a county vote, and that the Revising Barrister decided that the claimant had not, under the circumstances stated, such an estate of freehold in the land as would confer a vote for the county. It has been scarcely argued by Mr. Williams that the claimant had not such an equitable estate of freehold as would confer a vote, provided the restriction required by the statute where the annual value was less than 5*l.* had been complied with; but he argued that such restriction had not been complied with, as the claimant was not, it was said, in the actual and *bonâ fide* occupation. I think, however, that he was. It was plainly intended by the investiture to put him in the actual possession of the land. It is stated in the case that the claimant was so put in possession, and he was clearly in the actual and beneficial occupation of the land during part of the year. It seems, however, that there was a right of pasture over the land during the rest of the year, but that was no more than a stinted right of common over the meadow, and I think that the putting the cattle on the land under that right would not prevent the person who was in the possession of the land from having such possession. There is nothing that I can see which would prevent such person from being on the land during the time such right of pasture was exercised, and doing anything with the land which was not inconsistent with such right. The form of the investiture is not unimportant. It treats the person who is thereby invested as the person who is to be considered as the possessor of the land, and liable for waste. I therefore think that this point, though not expressly raised, ought, if raised, to be decided in favour of the claimant.

Decision reversed.

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IN THE COMMON PLEAS. May 4, 1869.

TAUNTON ELECTION PETITION. WAYGOOD AND ANOTHER v. JAMES.

38 L. J. C.P. 195; L. R. 4 C.P. 361; 21 L. T. 202; 17 W. R. 824.

Referred to, *Stevens* v. *Tillett*, [1871] E. R. A.; 40 L. J. C.P. 58; L. R. 6 C.P. 147; 23 L. T. 622; 19 W. R. 182 (C.P.); *Aldridge* v. *Hurst*, [1876] E. R. A.; 45 L. J. C.P. 431; L. R. 1 C.P. D. 410; 35 L. T. 156; 24 W. R. 708 (C.P.).

Parliament—Election Petition—Finality of Decision.

ELECTION LAW. A.—*A petition was presented against the return of C. as member for the borough of T., on the ground of bribery, &c., and such petition also claimed the seat for J., an unsuccessful candidate. At the trial J., being called as witness, was cross-examined by the respondent's counsel as to acts of bribery, &c., and the Judge was addressed on the point; the Judge decided that C. was improperly returned, and J. entitled to the seat. Twenty-one days after the return had been altered in pursuance of this decision, a petition was presented against the return of J.*:—Held, *that the decision of the Judge as to the status of J. was final; that this would have been so even if a recriminatory case had not been entered into, as the opportunity was afforded; and that the proper course was for the Court to stay all proceedings.*

This was a rule calling on the petitioners to shew cause why the petition should not be taken off the file, and all proceedings thereon stayed on the ground that the judgment of Blackburn, J., was final, and that no fresh petition could be presented against the return of Mr. Henry James.

It appeared that November, 1868, Mr. A. C. Barclay, Serjeant Cox, and Mr. Henry James were candidates at the parliamentary election for the borough of Taunton; that Mr. Barclay and Serjeant Cox were returned; that such return was filed with the clerk of the Crown, November 19; that a petition was duly presented by T. M. Williams and J. Meller against the return of Serjeant Cox on the ground of bribery, which petition claimed that Mr. Henry James ought to have been returned; that on March 2, 1869, the petition came on for trial before Blackburn, J.; that no witnesses were called by the respondent, but that Mr. Henry James and other witnesses for the petitioners were cross-examined to shew bribery, &c. on the part of Mr. Henry James; that counsel for the respondent argued that bribery, &c. by Mr. Henry James had been shewn; that the learned Judge determined that Serjeant Cox had been guilty, by his agents, of bribery and not properly returned, and that Mr. Henry James had not been guilty of bribery, &c. by himself or agents, and that (on a scrutiny) he was duly elected instead of Serjeant Cox; that on March 5 the learned Judge so certified to the House of Commons; that on March 8 the House ordered the certificate to be entered in their journals, and gave the necessary directions for altering the return; that on March 9 the alteration was made; and that the present petition against the said return of Mr. Henry James was presented on March 29 on the ground of bribery and treating.

Manisty and *Cohen* shewed cause.—It is submitted that Mr. James was not returned till March 9, or at all events the 5th (in either of which cases the petition is in time because of excluded days), and that it was therefore competent to the petitioners within twenty-one days afterwards to petition against him. Now, looking to 31 & 32 Vict. c. 125. ss. 5. and 6, it is quite clear that Mr. James was not returned at all events till something more was done than the matters therein alluded to, and that no power to petition existed. He, however, by matters subsequent, has been now returned. Then, when and how has he been returned? It is submitted it has been by the action of the clerk of the Crown, on March 9. By the 7 & 8 Will. 3. c. 7. s. 5, the clerk of the Crown is directed to enter all returns, and by section 13 of the 31 & 32 Vict. c. 125 the House

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is directed, on receiving the Judge's certificate, to order the entry thereof and direct everything to be done necessary for confirming or altering the return. Section 53 is relied on by the other side, and it is said that because it is competent to a respondent to go into a recriminatory case, therefore, whether he avails himself of the opportunity or not, the time is gone by as against the whole world. The effect of this is that by the neglect or collusion of a candidate petitioned against, he may prevent a petition by independent persons to test the validity of the return of the other candidate, unless, indeed, they should have contemporaneously petitioned, in which case, by section 23 (substituted for the 11 & 12 Vict. c. 98. s. 48), the petitions would be tried together. This is not an impossible case, for suppose the two candidates on the same side in politics, the respondent, though willing to prevent the other candidate from turning him out, would on failure be unwilling to do what would perhaps let in one of the other side.

[BRETT, J.—The rule formerly was that the petition must be within a certain time. WILLES, J.—There is no authority for a second inquiry into the conduct of a member where an opportunity of having it gone into has been afforded. MONTAGUE SMITH, J.—Where there was an opportunity of going into a recriminatory case the matter could not be inquired into again; but where it could not, time was given to allow persons to go into one.]

The House of Commons would allow any one to come in; here the constituents are prevented.

[WILLES, J.—In *Rogers on Elections*, 9th edit. 470, note (*o*), it is said, "In the *Southampton case*, after P., an unsuccessful candidate, had been declared duly elected, a petition was presented against him on the grounds of want of qualification and acts of bribery. The Speaker (Mr. M. Sutton), however, stated that such petition could not be received, since both these allegations might have been brought forward on the hearing of the former petition, though it was presented by electors and not by P." BOVILL, C.J.—If the decision were the other way, would it not be conclusive? for the 17 & 18 Vict. c. 102. s. 86. expressly enacts that if a candidate be declared guilty of bribery he cannot be elected during the same parliament; if so, should it not also be so if in his favour? WILLES, J.—In *The Dumfries case*, did not the House re-open an inquiry? *O'Malley, amicus Curiæ*.—The Committee carefully guarded themselves against deciding more than that there was an existing disqualification.]

The constituency is handed over to the sitting member; that, in truth, is the result of the contention on the other side. In the cases cited the House had a discretion; here the Court has none, and must decide that, whether a recriminatory case is gone into or not, the decision is conclusive. Such a conclusion is directly opposed to section 5, which allows three classes of persons to petition. And it may be pointed out that though the decision of the House of Lords is final, yet two cases really involving the same matter may be taken up and result in two decisions of the House, opposed in fact, and it may be that the word "final" is used in this sense.

Mellish (*Giffard* and *Griffits* with him), in support of the rule.—The decision was *in rem* and final, and, even if no recriminatory case had been gone into, it would have been final, as it is quite sufficient that it might have been gone into. The provisions of the statute shew that the judgment is not *inter partes;* thus the respondent may be changed, and the Judge may go on if the original petitioner desires to withdraw. As to what has been said about fraudulent abstinence from recrimination, no statute can prevent a corrupt giving up under all circumstances which may be suggested, and the words of the statute must govern; and when its provisions shew that the decision is not *inter partes*, and the construction now contended for makes the act consistent, such construction appears to be the correct one. By the other construction, after full evidence has been gone into and a decision given, the matter may be tried over again on the very same evidence, and possibly a different judgment given by another Judge on the very same materials, which would be an absolute scandal to the

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administration of justice. The present argument, no doubt, goes the length stated by the other side, that there cannot be a petition against a member seated as here; and it is said that an independent elector may be prevented from disputing the right to the seat by collusion of the candidates. Cases, no doubt, may be put of possible hardship, but the same difficulties may be put the other way, and no practical difficulty in obtaining a full investigation can arise if it be really desired, and certainly the cases put by the other side are not usual ones. The words of section 6 are so general that, perhaps, if the scheme of the Act were against finality, the Court might say the other side were right; but as it is the other way, the section must mean that the return of the returning officer is to be the time from which the right of petition is to run. The important section, however, is section 11, par. 13, which says plainly that the decision is to be final, and the Judge is to determine, not *inter partes*, but finally. Section 13 also treats it as final, and obliges the House to act on it as such. Then section 32, allowing the Judge himself to call witnesses, though perhaps no great protection, was intended to be so, and so also were sections 38 and 39, which allow a change of petitioners; which latter sections also shew the decision not to be *inter partes*. Then section 53, which allows the recriminatory case to be gone into, shews the intention that such case should be broached at that time, and puts the case exactly on all-fours with the cases under the old practice, where, as has already been pointed out, the opportunity having been afforded and not taken, the matter could not be relied on at any future time.

BOVILL, C.J.—In this case the petition, which was presented by two voters, sought to avoid the election of Mr. Serjeant Cox, and also claimed the seat on behalf of Mr. Henry James, who was a candidate at the election. Upon such a petition it is clear, according to the terms of the Act of Parliament, that a distinct issue was raised on each of the points involved in that petition. The 53rd section of the Act distinctly authorizes and gives jurisdiction to the Judge to try the issues with respect to the candidate on whose behalf the seat is claimed, or who is alleged by the electors or the voters to have been the person returned as their representative; and, according to rule 7 of the Rules framed by the Election Judges, provision has been made for carrying into complete effect the intention of the legislature, and for the trial of all the issues which are raised on such a petition. It is true that the candidate is no party to the petition, but that was well known to the legislature, and from the nature of things the probability is, that the matter will be fairly and properly conducted without collusion; and there are some provisions in the Act for the purpose of preventing collusion under certain circumstances. The inquiry is one not as between party and party, but one affecting the rights of the electors, the persons who are or may be members or candidates, and the House of Commons itself and its privileges; and this inquiry is to take place before one of the Election Judges, who is to inquire into and decide the questions raised for his determination. One of those issues, undoubtedly, must be on such a petition as this, whether the candidate, for whom the seat is claimed, was or was not duly elected at the election; that is an issue distinctly raised, and the parties may go into it if they please, or may abstain from so doing, and the opportunity is therefore afforded of having the question discussed and absolutely and finally determined by the Election Judge. If the decision on such a petition be against the candidate, then, under the Bribery Act of 1854, he becomes disqualified, whilst if the decision be in his favour then the consequence follows that the return is amended, the provisions of the Act are carried out, and by the decision of the Judge he becomes the sitting member. In the present case, of all others this matter seems to me to have become *res judicata*. Not only was the issue raised by the petition, but the question so raised was gone into, and it matters not that affirmative evidence was not offered on behalf of the sitting member, and that he contented himself with the cross-examination of the witnesses who were offered by the petitioners; for in that way evidence was obtained and was submitted to the consideration of the Judge, and the learned counsel who appeared for the sitting member argued

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the case as to the disqualification of the gentleman who is now the sitting member, Mr. James. The issue having been raised, the evidence gone into, and the arguments of counsel heard, upon that the Judge has decided, and I am at a loss to distinguish this case from one where witnesses have been examined in any number, a scrutiny has been gone into, which has continued for days, possibly for weeks, and ultimately a decision given in favour of the candidate who claims the seat. In such a case as that, it cannot be contended for a moment that the intention of the legislature was that after the fullest inquiry has been made, ample evidence given, arguments adduced on either side, and the matter finally determined by the Judge, exactly the same question might be brought under discussion before another Judge, and the whole inquiry gone into again. That would be nothing more nor less than an appeal against the decision of the Judge who decided in the first instance, and notwithstanding that no power of appeal is to be found anywhere in the Act. So far from its being the intention of the legislature that there should be any appeal, or that the decision of the Judge should be questioned on a matter of fact, parliament, by the 13th paragraph of the 11th section of the Act, expressly declares that the decision of the Judge shall be final to all intents and purposes. If it is to be final to all intents and purposes, can it be said to be final unless it is to conclude the parties in a matter which was in issue, and on which the decision of the Judge has been pronounced? The argument on the other side would go to defeat the very express enactment, as it seems to me, contained in the Act. That the decision is to be final is further shewn not only by the absence of any power of appeal, or of questioning the decision of the Judge, but by the 13th section, which declares that upon the certificate of the Judge being communicated to the House of Commons by the Speaker, it shall give the necessary directions for confirming or altering the return, or issuing a writ for a new election, or carrying the determination of the Judge into execution, as circumstances may require. In this view of the case, it would seem that in every instance where the seat is claimed by the petition, and the matter distinctly raised, then, whether the matter is gone into or not, as it is raised and is a point in issue which the Judge may determine, and which he would determine in the absence of evidence in favour of the one side or the other, the decision is equally conclusive whether the evidence is given or not. The consequence is that in every case where the seat is claimed there can be no new petition; and that if there be an alteration of the return the sitting member will be unseated and the other candidate declared duly elected, and I can quite understand why the present Act so provides, as this is exactly the practice which prevailed in parliament before the recent legislation. The practice was that where a seat was claimed, and there was an opportunity of contesting the validity of the election of the party claiming the seat, the House of Commons would not allow the matter to be gone into afterwards, or allow any further time for the presentation of a petition, and, *à fortiori*, it would be so in a case like the present, where not only was the question raised, but the matter was gone into by argument and evidence, and a decision pronounced by the Judge. In former times, where a petition proceeded on some technical ground, as to the form of the return, the mode of adding up the figures, or the like, it seems that it was the practice of the House to relax their rules, and by a special resolution to allow a fresh petition to be presented, but there is no such provision in this case, nor can any such doctrine apply in the case now under consideration. It is sufficient to say that there is no clause in this Act which authorizes any new petition where a matter has been already inquired into, and solemnly determined by the Judge. The status of the member is declared by the judgment of the Election Judge. By that decision Mr. James was declared duly elected, and that decision becomes binding on every person, on every elector, on the candidate, on the sitting member, and also on the House of Commons. Under these circumstances, I am of opinion that the present rule must be made absolute, not however to take the petition off the file, but to stay all further proceedings on the petition, which, in the opinion of the Court, is the proper course to be adopted.

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WILLES, J.—I am entirely of the same opinion, and I agree with my Lord that, in point of form, it would be better to stay all proceedings on the petition rather than to take it off the file, if it be only for the purpose of having jurisdiction over the deposit. On the main question only one doubt has crossed my mind, which is this, that unquestionably Mr. James has been seated subject to the assault of a less numerous body of opponents than might have assailed him had he been returned in the first instance; because, if he had been returned instead of Mr. Serjeant Cox, any voter, or the candidate Mr. Serjeant Cox, might have presented a petition against him; whilst, as matters have turned out, he has only been exposed to a recriminatory charge in the nature of a petition to avoid his election by Mr. Serjeant Cox (or if he had withdrawn such person as might have been substituted); and it may be plausibly said that a member not returned in the first instance, but obtaining the seat as Mr. James has done in this case, goes through a less searching ordeal than would have been the case if he had been returned in the first instance. When, however, this comes to be looked at, I do not think it really presents a practical objection to the result at which the Court is prepared to arrive; because, though each voter or candidate may present a petition against the persons who are returned, he is not entitled to do so in respect of any private claim, but as representing the general body of the public, or rather such part of them as are directly interested in the representation of the borough. The object of the legislature is to insure a proper tribunal, and the most ample opportunity of investigating the circumstances of the election. Accordingly, against a member who is returned in the first instance, any person may present a petition; but if an unsuccessful candidate petition against a successful one, then, if he does not claim the seat, there is no recrimination; but if he claims the seat, then the respondent is entitled to protect himself, and is entitled, before any question of scrutiny can be raised, to prove his recriminatory case against the petitioner for the purpose of shewing that he is not a person who can stand in the place of the respondent. It is true, if he proves his recriminatory case, the petitioner can still insist on going into the scrutiny, in order to turn out the respondent, though he is incapacitated from obtaining the seat himself; but the interest of the person who claims the seat, and the strong vested interests for the time of the person who has the seat, are abundant on the one side and the other to insure that a full inquiry shall take place into the circumstances of the election. I think there is a sufficient practical distinction between the case of a petitioner and that of a member actually in the possession of that which is considered and sought after as a great prize, a seat in parliament, to have induced the legislature to trust the latter to use all fair and proper means for the purpose of preventing the seat being taken from him and handed over to the person who petitions against him; and probably that may account for the legislature being content that a matter which might have been brought forward by anyone of a numerous body, if the petitioner had been returned in the first instance, should, to a certain extent, be left in the option and at the discretion of the respondent to bring forward or not when the seat is claimed. Besides, a respondent who proceeds to trial under such circumstances gives a pledge of the good faith, sincerity and earnestness with which he defends the petition; and if he feels disposed to drop the matter, the Act provides for his doing so at a period when no great costs have been incurred, enables him to give a notice of withdrawal, and in case this be done, furnishes ample means, not merely for enabling him to withdraw, but also for letting other persons come in his place, if they think proper. These proceedings seem to have been considered by the legislature sufficient to be substituted in the case of a charge against an unsuccessful candidate claiming a seat for the proceedings which might have been taken against him if he had been returned in the first instance; at all events they are the only proceedings the legislature has expressd in the Act, and by the Act must we be guided. In a case like the present, where the matter sought to be brought forward (constituting, it may be, a criminal charge against the member) has been once gone into and disposed of, there is the strongest

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reason for its not being re-opened; and we have the opinion of a very distinguished and experienced Speaker of the House of Commons (Mr. Manners Sutton) that this course could not have been taken under the old practice of parliament, even if (the opportunity having been afforded) the matter had not been inquired into. If such a case should arise as that put by Mr. Manisty in that part of his argument where he pointed out the possibility of collusion or fraud in the election court between the petitioner and the respondent, I conceive that, notwithstanding the terms of this Act, it may be that, inasmuch as there are no means whereby this Court could deal with such a case, and it is a case which necessarily would require to be dealt with, it would fall within the general competence and jurisdiction of the House of Commons to deal with all matters affecting the return of its member—a competence and jurisdiction which has been questioned only once, and established beyond all doubt, in *Goodwin's case* (2 *State Trials*, 91). For these reasons, I think the rule should be made absolute to stay proceedings.

MONTAGUE SMITH, J.—I am of the same opinion. There was an inquiry before one of the Election Judges on a petition claiming the seat, which involved, not only the question whether the member who had been returned was duly elected, but whether the person for whom the seat was claimed was duly elected. That is an issue raised when the seat is claimed; on that issue the decision of the Judge must be given, and when given, I think that the decision is final. I should have thought on general principles that where a Judge has jurisdiction over an issue, and where no appeal to any other tribunal is given from his decision, such decision would be final. But it further appears to me that, upon the plain words of the 13th sub-section of the 11th section of the Act, the certificate of the Judge is made by virtue of the statute final and conclusive. Language could hardly be stronger than the words used in that section. It is enacted that "at the conclusion of the trial," *i.e.* the trial of the petition under which, by the 53rd section of the Act, the issue may be raised whether or no the candidate claiming the seat was duly elected, "the Judge who tried the petition shall determine whether the member whose return or election is complained of, or any and what other person was duly returned or elected, or whether the election was void, and shall forthwith certify in writing such determination to the Speaker," so that the Judge is bound on such a petition to determine who was duly elected at the election, and to certify his decision to the Speaker, and "upon such certificate being given such determination shall be final to all intents and purposes." It seems to me exceedingly difficult to say, after this express enactment, that the determination of the Judge that Mr. James was duly elected can be in any way impugned. Certainly the statute does not shew any mode by which it could be impugned. The statute gives no appeal, but on the contrary contains the very words that are to be found in statutes, in like cases when it is intended that there should not be an appeal—"the determination shall be final to all intents and purposes." The learned counsel, Mr. Manisty, pointed out some consequences which might arise from the inability of the electors to question the proceedings of a candidate claiming the seat at an election; but consequences still more serious might follow if under the scheme of this Act a second petition were to be allowed, because, in that case, a candidate might be put to all the anxiety, vexation and expense of a second inquiry, and public justice might be open to the scandal of having a different judgment upon the same issue, even upon the same evidence, from two Judges of co-ordinate jurisdiction. I think the consequences which would arise from our holding that there might be a second petition are much more serious than those which will occur from our holding that such a petition cannot be presented. The consequence suggested by Mr. Manisty was this, that the respondent might collude with the petitioner, and so stifle an inquiry into any corrupt practices committed by the candidate for whom the seat was claimed. Collusion of this kind may possibly occur, but it also may occur in many other cases for which the Act makes no provision, and if such an evil is hereafter found to arise, the legislature may supply the remedy very easily by enacting

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which might be tried with the original petition. There would then still be but one inquiry. It seems to me that the whole scheme of the Act is founded on this, that there shall be but one inquiry into the election, and that the whole inquiry shall take place on the original petition, with such substitutions as are allowed by the Act. The decision given on such inquiry is a decision *in rem*, and the intention of the Act is expressed in very plain terms that the determination of the Judge upon it shall be final, and put an end to all further investigation into the election.

BRETT, J.—There are two questions raised, as it seems to me: first, whether the petition can properly be presented; secondly, if it can properly be presented, is it one which ought to be entertained? In my view of the case neither question can arise, except in the case where the seat is claimed by an unsuccessful candidate, because if the unsuccessful candidate does not claim the seat there can be no reasonable ground for petitioning against him; neither can there be a judgment as to his status or position. As respects the first question, until the decision of the Judge has been given, the unsuccessful candidate has not been returned to the clerk of the Crown in Chancery; and after that decision, it is enacted, by the 13th section, not that a new return is to be made, but that the old return is to be altered; and then the name of the successful candidate is inserted in the return, which bears the original date. So that it seems to me both from the facts and the construction of the statute that there can be no valid petition against an unsuccessful candidate who claims the seat. That was put forward by Mr. Manisty as an invincible objection; but it does not seem to me to be so; for it does not lead to any injustice, as by the 53rd section the candidate who does claim the seat lays himself open to all the consequences to which a successful candidate is liable on petition. I therefore think that a petition cannot be properly presented to this Court, and that in the case of a candidate claiming the seat there can be no valid petition, and that no such petition is required. Supposing, however, this not to be so, then arises the next question, viz., whether on such a petition there can be a second trial with regard to the election. It seems to me that there cannot, because upon the true construction of this Act the first judgment is a judgment upon the status of the person originally elected, and is binding against all the world. Section 11, sub-section 13 states in terms that the judgment is to be final and conclusive, and the meaning of the words there used is to be construed by reference to section 13, which shews that it is not only to be binding as between the parties, but it is to be binding on the House of Commons. It is made obligatory on the House of Commons to carry out the decision of the Judges' certificate ministerially, without any discretion on their part. This is strong to shew that the meaning of the words in section 13 is, that the judgment there mentioned is to be final. And sections 38 and 39, which allow a change of parties, go to shew that the judgment is to be a judgment on the status of the person originally elected—a judgment *in rem* binding against all the world. Two objections have been made to this view. First, there was a powerful objection made by Mr. Manisty, the effect of which was, that assuming the sitting member to conduct the case against the claimant without sufficient energy, yet without fraud, that the constituency is practically barred by the present decision of the Court. That, to a certain extent, is true; but it seems to me that section 32 is the means by which the legislature intended to meet that difficulty. It is obvious that the legislature might, if they pleased, have given power to any one to intervene, or have appointed an officer to intervene in these cases, as the Queen's Proctor does in cases of divorce, but they have not done so; and the only meaning that I can give to section 32 is, that the Judge is to act in a more mitigated manner in the same way. It may be that the section may not carry out the intention of the legislature, but up to the present time it has not been tried, and however that may be, I can give no meaning to it, unless it was passed in order to meet the difficulty pointed out.

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The other objection was, that the sitting member and the candidate may fraudulently collude; but it is to be noticed that a judgment *in rem* may be challenged and set aside, on the ground of fraud between the parties to the deception of the Court; and, if it could be shewn that a judgment had been so obtained, it might well be argued that the judgment was not final. What would be the proper means of re-opening the question I can hardly say; whether there might be a fresh trial on the old petition I know not; or it may be, as was suggested by my Brother Willes, that the House of Commons in such a case would not be barred by the section which makes them bound to carry out the certificate; and that it would be null and void; so that by the instrumentality of the House a new trial under those circumstances might take place. But suppose that were not so, and that this is a *casus omissus*, still it does not to my mind alter the determination to be arrived at from the construction of the Act itself. For these reasons, therefore, I am of opinion that such a petition as is now before us cannot properly be presented to this Court, which is only authorized to receive petitions presented according to the Act; and that, even if properly presented, yet that, there cannot be a second trial, which practically would be an appeal from the first.

Rule absolute to stay proceedings, with costs.

May 5, 6, 1869.

MANCHESTER ELECTION PETITION. ROYSE AND ANOTHER, *petitioners;* BIRLEY, *respondent.*

38 L. J. C.P. 203; L. R. 4 C.P. 296; 20 L. T. 786; 17 W. R. 827.

Discussed, *O'Carroll* v. *Hastings*, [1905] 2 Ir. R. 590 (K.B. D.).

Parliament—Incapacity on account of being a Government Contractor—22 Geo. 3. c. 45. s. 1.—Executed Contract—Knowledge that Contract is with Government—Secretary of State for India.

ELECTION LAW. A.—*To incapacitate a person from being elected as a member of the House of Commons as "executing, holding or enjoying" a contract made for the public service within the meaning of the 22 Geo. 3. c. 45. s. 1, such contract must, at the time of the election, be an executory one.*

Where, therefore, under a contract for the supply of goods, the goods had been delivered to and accepted by the government before the election, and at the time of the election nothing remained to be done under the contract except for the government to pay the price which previously had become ascertained and was payable, the contractor was held not to be disqualified, inasmuch as, at the time of the election, the contract was executed, and was not within the statute.

The statute 22 Geo. 3. c. 45. s. 1. applies only to cases where the person contracting with the government knew, or ought reasonably to have known, that he was so dealing with the government.

Quære—*Whether the Secretary of State for India is such an agent of the government, that a contract with him in Council for the supply of goods for the Indian department is within the statute.*

Petition against the return of the respondent, Mr. Hugh Birley, as one of the representatives for the parliamentary borough of Manchester, on the ground that he was a contractor with the Commissioners of Her Majesty's Treasury, or with some other person or persons for or on account of the public service.

The case raised by the petition was stated as a special case for the opinion of the Court, pursuant to the Parliamentary Elections Act, 1868; and the following are the material facts as they appeared in such SPECIAL CASE.

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The writ for the election of representatives for the parliamentary borough of Manchester was dated November 11, 1868; the nomination took place on November 16, and the polling on November 17; and, on November 18, 1868, the Mayor of Manchester declared that Mr. Hugh Birley was elected one of the representatives. Mr. Birley was, during the whole of the year 1868, and still is, a member of the firm of Charles Macintosh & Co., of 83, Cannon Street, London, and Cambridge Street, Manchester, patentees and manufacturers of the vulcanized india-rubber; and, for the purposes of the special case, it was admitted that there had been dealings, as thereinafter mentioned, by the said firm of Charles Macintosh & Co. with the Secretary of State for India in Council, and with the Broadmoor Asylum for Criminal Lunatics, which it was contended on the part of the petitioners were, and on the part of the respondent were not, contracts within the meaning of the Act of the 22 Geo. 3. c. 45. With respect to the said dealings with the Secretary of State for India in Council, the case stated several contracts, but the following facts relate to the only one which was relied on by counsel for the petitioners upon the argument as amounting to a contract within the statute.

About June 14, 1868, the said firm of Charles Macintosh & Co. received, at their warehouse in London, a printed form from the India Office, signed by H. C. G. Bedford, for the Director General of Stores, stating that certain specified goods were required for exportation to India, and that tenders for supplying the same would be received on or before Monday, June 22, 1868, at two o'clock.

The following is a copy of the said form:

"India Office, Westminster, S.W.
June 13, 1868.

"Gentlemen,—I am directed by the Secretary of State for India in Council to acquaint you that the articles specified in the annexed list are required for exportation to India, and that tenders for supplying the same will be received on or before Monday, June 22, 1868, at two o'clock. The date for delivery is written on the form of tender. You will have the goodness to abstain from taking any steps towards the provision of the goods until you shall have been informed by letter that your prices have been approved. The goods are to be delivered into the store depôt, Belvidere Road, Lambeth, London, and no charge is to be made for carriage or cartage to the depôt, nor for the packages or wrappers in which the goods may be inclosed or enveloped, as the same will be returned to you on application. Payment will be made in cash after the examination of the stores has been completed, for which due time must be allowed. Every delivery at the depôt shall be accompanied with a list of the particular articles sent in; the articles shall be therein designated as in the words of the accompanying form of tender and no other; forms for such lists may be obtained on application to the inspector of stores. In the cases in which patterns exist for any of the articles for which you are invited to tender, they may be seen on application to the inspector of stores, at his office, Belvidere Road, Lambeth. You are at liberty as often as you see fit, within the usual hours of business, to inspect the patterns; and the officers of the inspector of stores department will afford you ready assistance in comparing with the said patterns any stores which you may send in as a preliminary delivery, or for your own satisfaction by way of assuring yourself of the correctness of your work. The pattern number of each article is shewn against it in the form of tender. The opinion of the inspector of stores as to the quality of the goods shall be final. Notice in writing will be given to you of any rejected goods, and the same must be removed at the expense of the contractor within one week from the date of such rejection being notified. In case any of the stores shall remain undelivered at the date specified, or having been delivered and rejected shall not be replaced with approved goods within such period, the Director General may at his discretion reject the same and cancel the order, or he may call upon the contractor to pay, as and by way of liquidated damages, 2*l*. per cent. on the value of all such stores; any stores remaining undelivered (or having been delivered

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and rejected) one month after such specified date, will be subject to a further penalty of 2*l.* per cent., and any stores remaining undelivered (or having been delivered and rejected) two months after such specified date, will be subject to a still further penalty of 3*l.* per cent. Should the stores not be delivered at the expiration of three months from the date specified for their delivery, the Secretary of State shall have power to close the contract, inflicting all fines which may have been incurred and to purchase elsewhere the quantities not supplied, charging the contractor with excess of price, if any, paid for the stores so repurchased over that at which he contracted to furnish them. All such stores as may be rejected by the inspector of stores as unfit for the service must be replaced with approved stores on or before the day fixed in this letter, but the inspector of stores is at liberty to allow contractors to take away any small quantities of stores having been delivered in time which may require amendment in trifling particulars, and he will receive back the same when amended without any deduction from the full price, although the final delivery of the stores may be delayed a few days after the stipulated time; if, however, the quantity of objectionable stores be considerable, the Director General will not allow this indulgence, but will close the account on the day originally fixed in the order, reporting the same as directed above. In your reply, I request you will describe the articles and quantities exactly as designated in the annexed form of tender, shewing the price against each, and will write upon the cover 'Tender for India Rubber.' If there should appear to you any omission or deficiency in the description of the articles herein set forth, you will point out the same, in order that this letter may be correct before you make your tender. I am your obedient servant,

"HENRY C. G. BEDFORD,
For Director General.

"N.B.—On the completion of the order, separate claims for the stores for each presidency and department must be forwarded to this office in duplicate, addressed to the Director General of Stores. In describing the stores in your claims, the terms of the form of tender must be carefully observed. Printed forms for claims may be obtained on application at this office."

On June 18, 1868, the said firm of Charles Macintosh & Co. forwarded a tender for the said goods to the India Office.

The following is a copy of the said tender:

"To the Secretary of State for India in Council.

"Sir,—We hereby offer to supply the under-mentioned stores at the prices quoted. We agree to all and each of the conditions contained in the paper of particulars bearing date June 13, 1868. In case this tender shall be accepted, we agree to submit the names of two parties who, if approved by you, will join with us in a letter of indemnity to guarantee the payment of the amount of any fines and charges to which we may become liable under the 8th article of the conditions of this contract, and we further agree to enter into a deed of contract under seal (when required) for the due performance of the several conditions dated June 13, 1868, under which we have tendered, together with a bond to be executed by us and our sureties for the due fulfilment of our said tender. We also agree to abide by this tender for the period of two weeks from the date fixed for receiving the same, and in default of our so doing to pay the sum of 5*l.* per cent. on the aggregate amount of this tender to the Secretary of State for India in Council as and by way of liquidated damages in this respect. We are, Sir, your humble servants,

"CHAS. MACINTOSH & Co.

"Dated at Manchester, this 18th June, 1868."

At the end of this letter was a list of india-rubber articles offered to be supplied, with the prices for each, amounting in the aggregate to 287*l.* 18*s.* 8*d.*

On June 24 or 25, 1868, the said firm of Charles Macintosh & Co. received a letter from the said India Office, announcing that their tender had been accepted, subject to the conditions stated in the said letter of June 13. The goods mentioned in the said tender were, together with an invoice, delivered into

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the said India Store Depot, Belvidere Road, on August 17, 1868. About September 30, 1868, the said firm of Charles Macintosh & Co. received a letter from the said India Store Department, objecting to a portion of the goods. The goods objected to were received back by the said firm, and were replaced by other goods, which were delivered at the said India Store Depot, in Belvidere Road, and accepted as satisfactory on October 23, 1868. On January 18, 1869, the said firm received from the said India Office a sum of 285*l.* 5*s.* 10*d.* in payment for these goods, a small deduction having been made for difference in weight, &c.

With respect to the said dealings with the Broadmoor Lunatic Asylum for Criminal Lunatics, the Special Case stated that by the 23 & 24 Vict. c. 75 it was amongst other things provided that it should be lawful for Her Majesty, by warrant under her Royal Sign Manual, to appoint that any asylum or place in England which Her Majesty might have caused to be provided or appropriated, and might deem suitable for that purpose, should be an asylum for criminal lunatics, and accordingly, by a warrant dated June 28, 1861, under Her Majesty's Royal Sign Manual, the Broadmoor Asylum, at Wokingham, in the county of Berks, was appropriated and has ever since been used for that purpose.

On or about November 10, 1868, the said firm of Charles Macintosh & Co. received by the post a demand order, of which the following is a copy:

"No. 3389. Demand.

"Broadmoor Asylum, Nov. 9, 1858.

"To Messrs. Macintosh & Co., London.

"The following articles are required for the service of the above establishment, to be delivered in accordance with your contract:

Contract No.	Articles.	Quantity.	Head of Service to which Chargeable.
Chas. T. Phelps.	India Rubber Chambers unhandled. John Steward.	3 Doz.	Furniture, &c. Superintendent.

"The attention of contractors, &c., is directed to the instructions on the back."

The instructions were as follows:

"Note.—Every delivery of goods must be accompanied by a price invoice, quoting the No. of the demand and the head of service as specified. At the close of each quarter forms will be sent for rendering the accounts, which must be transmitted without delay. Want of attention to the above will, probably, cause delay in payment of the accounts."

The London agent of the said firm of Charles Macintosh & Co. accepted such order[1] before November 16, but, although in the said demand order (which was partly printed and partly written) the said articles are stated to be required "to be delivered in accordance with your contract," there was not, in fact, at the time of the sending of the said order any such contract, and this demand order was the only order or authority for the articles being supplied. Mr. H. Birley was not aware at the time of the election that the said order had been accepted, nor did he or his said London agent, Mr. Brown, know until the presentation of the petition in this case that the Broadmoor Asylum was, as in fact it is, a government institution, supported by an annual parliamentary grant, and used for the purposes of the Crown. The goods mentioned in such demand were forwarded by railway on November 26, 1868, together with an invoice, in which the price was stated to be 7*l.* 11*s.*

The questions for the opinion of the Court were, in effect, whether the

(1) Mr. Mellish, in his argument, explained how this was, viz., that an officer from the asylum brought the order to Messrs. Macintosh's, when their agent, on seeing the order, said that the articles should be sent as required."

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aforesaid contract with the Secretary of State for India in Council was a contract for or on account of the public service within the meaning of the said statute 22 Geo. 3. c. 45; and whether, if it was such contract, the same was a subsisting contract at the time of the said election. Also, whether the aforesaid dealing with the superintendent of the Broadmoor Asylum was a contract within the said statute; and whether the election of Mr. H. Birley was void by reason of such contracts, or either of them.

Manisty (*Bryce* with him), for the petitioners.—With respect to the contract with the Secretary of State for India in Council for the goods, which amounted to 287*l.* 18*s.* 8*d.*, it is submitted that it came within the 22 Geo. 3. c. 45. s. 1, which enacts, "That from and after the end of this present session of parliament any person who shall, directly or indirectly, himself or by any person whatsoever in trust for him, or for his use or benefit, or on his account, undertake, execute, hold or enjoy, in the whole or in part, any contract, agreement, or commission made or entered into with, under, or from the Commissioners of His Majesty's Treasury, or of the Navy or Victualling Office, or with the Master-General or Board of Ordnance, or with any one or more of such Commissioners, or with any other person or persons whatsoever for or on account of the public service, or shall knowingly and willingly furnish or provide, in pursuance of any such agreement, contract or commission which he or they shall have made or entered into as aforesaid, any money to be remitted abroad, or any wares or merchandise to be used or employed in the service of the public, shall be incapable of being elected or of sitting or voting as a member of the House of Commons during the time that he shall execute, hold or enjoy any such contract, agreement or commission, or any part or share thereof, or any benefit or emolument arising from the same." Assuming, for the purpose of this argument, that the Secretary of State for India is an officer of the government within the meaning of this section, then the contract in question in this case incapacitated Mr. Birley from being elected so long as he held or enjoyed, that is to say, was entitled to "any benefit or emolument arising from the same." It cannot, therefore, be said that the contract was at an end within the meaning of this section when the goods had been supplied, but it was still a subsisting contract at the time of the election, for the statute shews that it is the benefit which is to be derived from it which incapacitates the contractor from being elected.

[BRETT, J., referred to section 7, which provides for members holding contracts being discharged on giving twelve months' notice.]

That 7th section applies only to the persons who were then members, and shews how strict the legislature was even to the then existing members. Until the contractor was paid he had not reaped the fruits and benefit of his contract. By making an early payment it would naturally be in the power of government to influence a member, and so the case would be within the mischief which the statute was intended to remedy. Then the Secretary of State for India was an officer of the government within the statute. The 21 & 22 Vict. c. 106. s. 1. transfers the territories and government of India to Her Majesty; and the subsequent sections shew how the Council is appointed and constituted, how the property in India is vested in the Crown, and how accounts of the revenues of India are to be laid before parliament. The contract with the Secretary of State for India in Council was, therefore, within both the letter and spirit of 22 Geo. 3. c. 45. s. 1. It was as much a contract on behalf of the public service as the contract with the Comptroller of the Stationery Department, which was lately decided by the committee of the House of Commons to render Sir Sidney Waterlow incapacitated.

[MONTAGUE SMITH, J.—That was the case of a continuing contract.]

The *Leominster case* (*Rogers on Elections* (11th ed.), Appendix, 1) shews that the Act applies to contracts which are within the mischief of the Act, though not known in practice at the time the Act passed. In the *Maidstone case* (*Rogers on Elections* (11th ed.), Appendix, 4) the contractor had assigned his contract before the election.

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revenues of the Crown.]

It is submitted that that makes no difference. The Secretary of State for India is an officer of the Crown, and a contract with him is the same as a contract with the Crown.—[He referred also to *Mr. Forsyth's case* (*Rogers on Elections* (11th ed.), p. 225).]—Then, as regards the contract with the Broadmoor Asylum, that was clearly a contract with the government, which was subsisting at the time of the election; but it is said that the respondent did not know that the asylum was a government institution. That is immaterial. The word "knowingly" in the second part of the 1st section of 22 Geo. 3. c. 45. does not apply to and cannot annihilate the language of the first part of that section. The second part was meant to meet the case of a person who, having made a contract with the government, had transferred it to some one else before the election, and yet afterwards supplied the goods, although he no longer continued to hold the contract. Here the contract with the Broadmoor Asylum was within the first part of the 1st section; and if the word "knowingly," which occurs only in the second part, is to be imported into the first part of the section, the Act of Parliament will be entirely altered.

Mellish (*Birley* with him), for the respondent.—Contracts with the Secretary of State for India in Council are not within this statute of 22 Geo. 3. c. 45. The ordinary rule for construing a statute is, that where there are particular words used, and then general words, the general words are to be limited to cases of the same kind as those named in the particular words. All the persons expressly named in the 1st section are ministers of the Crown, dismissible at pleasure, and the money payable under such contracts is money which would have to be voted by the House of Commons, and it is submitted that this may be taken to shew what the statute means by the words "for and on account of the public service." When this statute was passed a Secretary of State for India was not known. The statute was before the union with Ireland, and would a contract at that time with the Irish government have been within the Act, so as to have disqualified the contractor from a seat in the English House of Commons? It was thought necessary, however, to extend the provisions of this Act to Ireland after the union by the 41 Geo. 3. c. 52. In *Thompson* v. *Pearce* (1 B. & B. 25), a contract between an army-clothier and the colonel of a regiment to furnish the regiment with army clothing was held not to be within the Act, as the colonel, and not the Crown, was liable for the articles supplied.—[He then examined the constitution of the Indian Council and the 21 & 22 Vict. c. 106, and contended that the contract with the Secretary of State for India in Council was a contract with a *pro tanto* corporation, and payable out of the revenues of India, and was different from a contract with any of the boards mentioned in the 22 Geo. 3. c. 45.]—The next point is, whether a contract which has been performed by the contractor, but not paid for by the government, is within the statute. It is submitted that it is not. Otherwise a government, by owing a man and never paying him, might for ever disqualify him from having a seat in parliament. What was such a person to do in order to be qualified? He could not even release the government from payment of the debt, if the government chose not to be released. How could he be said to be enjoying "the benefit or emolument arising from the contract" when he was kept out of the pay that was due to him? A contract which is executed cannot be within the Act. Section 7, which enables existing members to get discharged "from the execution of" any such contract, shews that the statute contemplates only contracts which have still to be executed by the contractors. Then, as regards the contract with the Broadmoor Asylum, it is submitted that it never was intended that a contract which was not known to be made with any one on behalf of the government should be held to be within the Act. The words "knowingly and willingly," in the second part of the 1st section, throw light on the preceding part of the section.

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[BRETT, J.—If disqualified from being elected, may he not also be liable to the penalty of 500*l.* imposed by the 9th section?]

Yes; there is no distinction. The statute is highly penal, and the legislature could not have intended to have subjected the person to either the pecuniary penalty imposed, or to the penalty of losing his seat, unless he knowingly offended. Who could be presumed to know that the Broadmoor Asylum was a government establishment, and that by undertaking to execute such a small order as this he was making a contract with the government?

Manisty replied.

Cur. adv. vult.

The following judgments were delivered on May 6:

WILLES, J.—This was a petition, presented under the Parliamentary Elections Act, 1868, praying that the election and return of Mr. Hugh Birley at the last election for the city of Manchester might be determined to be null and void, upon the ground that he was disqualified by the Act of 22 Geo. 3. c. 45. The question arose in this way: Mr. Birley is a member of the firm of Messrs. Macintosh & Co., who are india-rubber manufacturers, and they had an order from the Secretary of State for India in Council for the supply of goods under a certain contract, to the department presided over by that officer. This contract was fulfilled on October 23, 1868, to the extent that all the goods had then been delivered and finally accepted as being a complete fulfilment of such contract, and nothing remained to be done under it, except for the government to pay the price which had then become ascertained. Therefore on October 23, 1868, Messrs. Macintosh & Co. had become creditors of the public, to speak popularly, in respect of the price of the goods, and, in fact, the only relation that existed between them and the public from that time was that of creditor and debtor. There was another contract relied on by the petitioners, and that arose in this way: an order was given by an officer of the Broadmoor Asylum, which is an asylum for the reception of criminal lunatics, not established under an Act of Parliament, which might be considered as notice to all the world that it was a government establishment, but under a warrant bearing the sign manual, by which it was declared to be a public institution for the reception of criminal lunatics, Her Majesty having the power, under the 23 & 24 Vict. c. 75, to issue such warrant. Broadmoor Asylum was not, in fact, known to Mr. Birley or his partners or to their agent, to whom the order was given as a public institution, until after the election and supply. Before the election, the asylum, being in want of some india-rubber articles, sent an order to Messrs. Macintosh for three dozen of them. That order was inquired after by a person who came on the part of the asylum to Messrs. Macintosh & Co.'s place of business, and he was informed that the goods would be sent. That is the construction to be put upon the statement in the case that the order was accepted; and the value of the goods being under 10*l.*, it must be treated that this formed a contract for the delivery of the goods. Those goods were sent after the election, and after some correspondence the price appears to have been agreed upon and settled at 7*l.* 11*s.* These being the facts, the question is, whether Mr. Birley, at the time of the election, did fall within the disqualifying statute, 22 Geo. 3. c. 45. It was insisted, on the part of the petitioners, that the Secretary of State for India, contracting for the Indian service under his control, was contracting for the public service. It was also insisted that a person who had completely performed his contract, so that he had nothing to do but receive the price, and nothing to hope for in respect of that payment except receiving that which was his due, was still a person holding or enjoying a contract within the disqualifying clause of the statute. Each of those propositions was denied on the part of the respondent. With respect to the second contract, which was the order for the Broadmoor Lunatic Asylum, there can be no doubt that it was literally a contract for the public service; but the question raised with respect to that was, whether a mere casual, isolated order, given across the counter, so to speak, by a person not known to be contracting for the government or supplying the means of ascertaining at the

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time whether he was so or not, and accepted by a trader who is not aware that he is dealing with the government either then or at the time of the election, comes within the prohibition of the statute. These questions must be disposed of separately. With regard to the contract with the Secretary of State for India in Council, the first question is one deserving much consideration, and it might not be useful to express a judicial opinion upon that, except in a case in which it was necessary to dispose of it. Certainly, the impression upon my mind at first, and I do not say that that impression has been entirely removed, was that a contract with the Secretary of State for India, who is one of her Majesty's principal Secretaries of State, would be a contract for the public service; but I do not think it necessary to express an opinion upon that, because, upon the second ground, it appears to me that the respondent was not a contractor within the 22 Geo. 3. c. 45, because, before the election, he had ceased to be a person holding or enjoying a contract within the meaning of that statute, and had been converted into a mere creditor of the government, whose claim had been ascertained, and whose right was to receive his money, and as to whom, as it appears to me, it would be an injustice to say that a mere delay in payment on the part of the government should have the effect of disqualifying him as a candidate. It appears to me very clear, when the terms of the Act come to be examined, that it was not the intention of the legislature that the mere relation of debtor and creditor subsisting shall of itself create a disqualification. If that were so, it would be impossible to avoid the absurdity suggested by Mr. Mellish, that the mere omission of the government to pay a small sum of money, namely, a small balance to a contractor who had completely fulfilled his contract, whether by reason of there having been a dispute that was not adjusted until shortly before the election, or even by reason of an accident, leaving out a few pounds at the time of payment, should constitute the status of disability. If that were really the meaning of the Act, of course we should have no other duty but to adopt it, but we have the preliminary duty of being quite sure that the legislature did intend such a state of things before we pronounce it to be law. Now the 22 Geo. 3. c. 45. deals with two classes of persons: it deals with persons to be elected in future elections to parliament, and it also deals with persons who were in the House of Commons at the time. And the first piece of information of what the legislature intended, I think, may be derived from the comparison of the 1st section, which deals with the first of these classes, with the 2nd section, which deals with the second class. The 6th, 7th and 10th sections also throw light upon the matter. Now, reading the 1st section by itself, with the light of the preamble, that this was an Act for "securing the freedom and independence of parliament," and finding the specific provisions in the section seem to point to the execution of a contract with the government, and finding also the provision for disqualification is limited to the time during which the person contracting should "execute, hold or enjoy any such contract, agreement or commission," I think the enactment refers to the case of a man having a contract under which he is to derive some future benefit from dealing with the government in respect of which they might control him, as, for instance, by directing their officers not to look too closely to the sort of goods he sent in, or the like. I should be strongly disposed to come to the conclusion that a person cannot be said to execute, hold or enjoy a contract when the only thing he can be said to enjoy is the not being paid money in respect of something which he has completely done at some former time, and for which he would have been entitled to have been paid on the spot and at the instant, if that were the course of business. Looking at the fact that there is no general provision that a public creditor shall not be a member of the House of Commons. I should have thought, if that 1st section stood alone, it would be wrong to come to the conclusion that, because the government owed a person a debt, that person is disqualified by this statute if there had been previously a contract under which such debt accrued. The 2nd section seems to tend in the same direction: "That if any person, being a member of the House of Commons, shall, directly or indirectly, himself, or by any other person whatsoever in trust

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for him, or for his use and benefit, or on his account, enter into, accept of, agree for, undertake or execute in the whole or in part any such contract, agreement or commission as aforesaid; or if any person being a member of the House of Commons, and having already entered into such contract, agreement or commission or part or share of any such contract, agreement or commission by himself or by any other person whatsoever in trust for him, or for his use or benefit, or upon his account, shall, after the commencement of the next session of parliament, continue to hold, execute or enjoy the same or any part thereof, the seat of every such person in the House of Commons shall be and is hereby declared to be void." It would certainly be a violent conclusion, as it appears to me, to arrive at, that, if a person, who at the time of the passing of this Act happened to be a contractor who had fulfilled his contract, and to whom it only remained that the government should pay what was due to him for what he had supplied, should be kept out of his money till the commencement of the next session of parliament, that such a person thereupon, for no fault whatsoever, and in respect only of the delay of payment, should lose his seat. That would tend rather in an opposite direction to what the Act intended, for it would tend to destroy the freedom and independence of parliament. Because, if such a thing were conceivable, if there happened to be two contractors in the House, the one a follower of the government and the other not, a delay of the Treasury might make one of them unseated while the other by being paid would retain his seat. That would be a strange conclusion. Then, passing over the 3rd and 4th sections, I come to the 5th clause, which provides that " Where any contract, agreement or commission has been made, entered into or accepted, with a provision that the same shall continue until a year's notice be given of the intended dissolution thereof, the same shall not disable any person from sitting and voting in parliament until one year after the said notice shall be actually given for the determination of the said contract, agreement or commission, or till after twelve calendar months to be computed from the time of passing this Act." That is quite inapplicable to the case of a mere creditor, unless it were to be supposed that he was to give up his debt as a condition of remaining in the House. Then the 6th section rather alters the language, although it means to express the same idea as the clause as to time in the 1st section, because it is, " that nothing herein contained shall extend or be construed to extend to any person on whom, after the passing of this Act, the completion of any contract, agreement or commission shall devolve by descent or limitation, or by marriage, or as devisee, legatee, executor or administrator until twelve calendar months after he shall have been in possession of the same." That looks very much like a contract which is to be completed, and under which something is to be done beyond mere payment, being the sort of contract which was intended by the legislature to be a disqualification. The 7th section of the Act applicable to then members looks the same way: " That any person who is now a member of the House of Commons and holds and enjoys any such contract, agreement or commission as aforesaid, may be discharged from the execution thereof on giving twelve months' notice to the person or persons with or from whom such contract, agreement or commission is made, entered into or accepted of his desire that the same shall cease and determine, and such contract, agreement or commission after the expiration of the term aforesaid shall be null and void." Those are the sections which, as far as I can understand, apply, and they all point to the same conclusion. There have been several cases, I am aware, upon the construction of the Act; but no decision either of our own Courts or, as far as I can learn, of the parliamentary committees in which the continuance of the relation of debtor and creditor has alone been held to keep the contract open, so that the candidate being a creditor of the government at the time of the election has been held to be disqualified. That completes all I have to say upon the question arising out of the contract with the Secretary of State for India in Council. The second question is, whether the order which was accepted for the utensils for the Broadmoor Asylum should be considered as a disqualification. I must take it that the goods were ordered for the

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service of the government, because they were ordered to be used at an asylum for criminal lunatics, but they were ordered, not under a formal tender and acceptance by the government, which would ordinarily take place in the case of a contract popularly so called, but simply by an officer of the Broadmoor Asylum sending a written order to the place of business of Messrs. Macintosh to "send down three dozen chambers," and by somebody calling at Messrs. Macintosh's about these things, and being told "They will be sent as you ordered them." There was an entire absence of any notice to Messrs. Macintosh that the goods were ordered for or on account of the public service. They were ordered by a person who professed to be an agent for the Broadmoor Asylum, but who said nothing as to the nature of the asylum; and it is found in the case that it was only at a very late period that Messrs. Macintosh became aware that the Broadmoor Asylum really was a government establishment. The question therefore is, whether a casual, isolated order for goods, which is unknown to the seller to be an order from government, and which is such an order as was only equivalent to a person going into a shop and asking for and buying an article, that would be charged to the Treasury, falls within the meaning of the Act. That raises the question whether knowledge is any element in the disqualification. In dealing with that it is right to look to the Act, which contains a highly penal provision, not only in respect of forfeiture of the seat, but also of a sum of money imposed upon the member who sits in violation of the Act, and in the 10th section it is enacted "that in every such contract, agreement or commission to be made, entered into or accepted as aforesaid, there shall be inserted an express condition that no member of the House of Commons be admitted to any share or part of such contract, agreement or commission, or to any benefit to arise therefrom." Unquestionably if this provision is intended to be imperative upon all persons dealing with the government there are no means of carrying it into effect; and it seems hardly applicable to contracts for so small an amount that the execution of them is left to the hands of inferior officers, who would, in ordering the things, give no notice that they were dealing for the government, any more than if they went in and bought the goods across the counter. The 10th section proceeds thus: "And that in case any person or persons who hath or have entered into or accepted, or who shall enter into or accept any such contract, agreement or commission, shall admit any member or members of the House of Commons to any part or share thereof, or to receive any benefit thereby, all and every such person or persons shall for every such offence forfeit and pay the sum of 500*l.*" Now, would Mr. Macintosh, if he had admitted a member of the House of Commons into partnership with him, after taking this order of the Broadmoor Asylum, without knowing the public creditor who was behind the Broadmoor Asylum, be bound to pay the sum of 500*l.*? I answer unhesitatingly that that would be one of those cases in which it would be necessary to read into the 10th section the words "knowingly and willingly," which are in the 1st section. That is an indication of the intention of the legislature that knowledge or at least means of knowledge should be a condition of the penal consequences which are to follow. Now, the same sort of provision is in the 9th section, which refers to the members themselves, and I need not go through the same course of reasoning as to the language of the 9th section; it is open to the same sort of remarks as the 10th section, and the word to be noticed is the word "presume," which seems to me to imply not a mere ignorant act, but an act in which a person knowingly takes upon him to do that which the law says shall not be done under the circumstances. It is unnecessary that I should make any further observations upon the Act in order to explain the reason why I have come in my own mind clearly to the conclusion that Mr. Birley was not disqualified by the Act, either in respect of the first contract, because that contract had been completed and fulfilled by his firm, and the government was a mere debtor, and there is no sensible reason for disqualifying a man simply because he happens to have money due to him which is not paid him, or in respect of the second contract, because there was a total absence of knowledge that the contract was

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with the government. I can only add, in conclusion, that I am the more satisfied it must have been the intention of the legislature that the Act should apply only to cases where the contract was entered into with knowledge, because one can hardly conceive a substantial case of a government contract, unless made under circumstances in which the person dealing with the government knew or had the means of knowing that he was dealing with the government.

I am desired by the Lord Chief Justice, who, I regret, is unable to attend, to say that he concurs in the decision I have pronounced.

MONTAGUE SMITH, J.—I am of the same opinion. It is contended that Mr. Birley is disqualified from being elected for the city of Manchester because he was a partner in the house of Messrs. Macintosh & Co., which at the time of the election held two contracts with the government: one with the Secretary of State for India in Council, and the other with the Broadmoor Lunatic Asylum. Now, first, as to the contract with the Secretary of State for India in Council, I think it is unnecessary, in the view we take, to decide whether such a contract is a contract for the public service within the meaning of the 22 Geo. 3. c. 45. It is a question which will require serious consideration when it becomes necessary to decide it, and I desire to express no opinion upon it. I decide this case, so far as regards that contract, upon the ground that at the time of the election the contract was no longer executory, and nothing more remained to be done upon it than for the government to pay the price of the goods. Looking at this Act of Parliament, and the general tenor of it, I certainly am strongly of opinion that the legislature intended it to apply only to contracts of a continuing nature, such as contracts for the building of works, and contracts for a recurring supply of goods, though I do not say that a contract for a single supply of goods is not within the terms which are used. But to my mind it very plainly appears that the statute did not mean to disqualify a contractor unless the contract was in an executory state on his part, that is to say, that something remained to be done by him, and that in no other way can the Act of Parliament be properly construed. Now, the words "undertake and execute" in the 1st section clearly apply only while the contract is executory; and though the other words, "hold" and "enjoy," are more general, it seems to me they refer to holding a contract or enjoying a contract which is executory, that is, a contract under which something has to be done by the contractor, either one act or recurring acts, and that he is only disqualified "during the time that he shall execute, hold or enjoy" any such contract. The words "hold and enjoy" may have been inserted to meet cases where a contractor, holding a contract, did not himself execute it. The words "during the time" clearly shew that parliament was contemplating a contract which would endure for some period of time, and that during that period of time something should remain to be done on the part of the contractor under that contract. The 4th and 6th clauses also point to contracts having some duration in point of time for the performance of that which the contractor was to do under them. I repeat that I do not say that if there is a contract for a single supply of goods that that contract is not within the Act, so long as it remains to be performed on the part of the contractor, he having to supply the goods and the government having a right to reject or find fault with them. But when the contract is no longer executory on the contractor's part, and he is only a creditor of the government, I do not think he can be said to "execute, hold or enjoy" within the meaning of this Act of Parliament. The consequences of holding otherwise would be, that a man might be disqualified from entering parliament by the misfeasance of the government, and more, it would be twisting the Act so as to produce the very consequence it was sought to avoid, namely, giving the government a control over a man, and leaving it to their discretion, by paying him or not, whether they would allow him to enter parliament or not. I think we ought not to put a construction upon the clause which would lead to such a consequence, unless we are compelled by plain and direct words so to do. On these grounds, therefore, I come to the conclusion that Mr. Birley was not disqualified by reason of Messrs. Macintosh & Co. being unpaid at the time of the election for the goods

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superintendent and an answer sent, the case really comes to no more than if the superintendent of the asylum had gone to the shop of Messrs. Macintosh & Co., and ordered three dozen of these articles, which are not supplied till after the election. It may be that that is a contract within the terms of this Act, though, as I have said, I do not think it was in the contemplation of those who passed this statute that such a transaction should be deemed a contract within the terms of this enactment. However, assuming it is, I am clearly of opinion that where the order is not given by some recognized government officer, so that the fact of giving the order is itself notice that it is an order on behalf of the government, and where it is consistent with the order, that it may be given on the part of a private person, and, in point of fact, the person of whom the goods are ordered does not know but that that is the case, such last-mentioned person is not disqualified by this statute; for I think there must be a contract with the government by the person sought to be disqualified which is known by him, or ought reasonably to be known by him, to be a contract with government. Here it is found, in point of fact, that Mr. Birley and his partners did not know that the order was given on the part of the government, and there is every reason, upon the facts, for coming to the conclusion that the order received was not one which upon its face gave any notice to the person receiving it that it was an order on behalf of the government. I confess I am very glad that, upon this last contract, we are able to come to this conclusion, because it would be monstrous to hold that the representation of one of the largest cities in the kingdom should depend upon the question, whether the candidate was a partner in a firm which had taken an order for some articles of such small value that the contract was not required by the Statute of Frauds to be in writing. I cannot help thinking that it would be very desirable that this Act should be revised, because it certainly appears to me to be totally inapplicable to the present state of commerce, and that it really provides a pitfall into which men who mean to walk uprightly and according to law may, unwittingly, tumble. I think Mr. Birley is entitled to keep his seat.

BRETT, J.—I am of the same opinion. The questions are, what is the construction of the 1st section of this statute? and, how is that section to be applied to the two cases before the Court? Now, as to the construction of the statute, it seems to me that the first thing to be considered is, what is the canon of construction to be applied? Is it that which is to be applied to a highly penal statute, or is it not? That depends, I think, on the 9th section. In the 9th section there is disability spoken of twice in the same terms, and there are two results made to follow from that disability. The first part of that section says, "that if any person hereby disabled or declared to be incapable to sit or vote in parliament shall nevertheless be returned," the election shall be void. And the second part of that section, using exactly the same words as to disability and incapacity, says, "And if any person disabled and declared incapable by this Act to be elected shall after the end of this session of parliament presume to sit or vote," he shall be subject to the penalty of 500*l.* for every day he shall sit or vote in the House. Inasmuch as the same words are used, it seems to me that whatever are the necessary incidents in order to make the person liable to the penalty of 500*l.* are also necessary incidents in order to make the election void. For instance, if knowledge is necessary in order to make the person liable to the penalty, and is a necessary incident for that purpose, it is also a necessary incident in order to make the election void. Therefore, the whole section and the whole Act, I think, are to be construed as of a highly penal character. If that be so, then the points raised in this case on this 1st section are, first, with whom is it necessary that disqualifying contract should be made? On the one side it is said it must be made with a person who is an agent of the government capable of making contracts binding the government, and the payment of which must be voted by the parliament of Great Britain. On the other side, it is contended that it is sufficient if it is made with an agent

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of the government, and that it is not necessary that the payment should be out of the public funds of Great Britain. I confess I am inclined to think that the latter contention is right, and that the Secretary of State for India is such an agent for the government. He is so much an agent of the government, holding office under the government, that in taking office he vacates his seat, and is obliged to go to a new election. I should have thought that any contract made with him was within the statute, and that it was immaterial that the money was to be paid out of the revenues of India, because otherwise it would seem to me that the mischief pointed at in this Act might be committed with impunity, and that a government might exercise very considerable influence over the independence of parliament by means of the revenues of India. But I quite agree that it is not necessary to decide that point in the present case. Then the next point is, whether it is necessary that at the time when the person is elected the contract, even supposing it is made with the government, should be executory. That depends upon the view to be taken of this 1st section. Now the first part of that section applies to any person who shall "undertake, execute, hold or enjoy" any contract therein mentioned. To undertake a contract would seem to be to enter into it; the word "execute" would seem to refer to the case of a person who takes on himself the execution of a contract not originally made with him; the word "hold" to the case of a possible transfer of a contract which had been made already with some other person; and the word "enjoy" to the case of a person with whom the contract was not made, but who as *cestui que trust* is to enjoy the benefit of it. But then the second part of that section says that any such person shall be incapable of being elected "during the time that he shall execute, hold or enjoy any such contract." Now, for such person to be executing, it seems to me he should be in a position to be called upon to execute, and if so, the words "hold" and "enjoy" would mean hold or enjoy in the same sense, *i.e.*, holding or enjoying a contract which the contractor may be called upon to execute, or under which there may be something still to be executed. I think that such an interpretation may fairly be given from what appears in the 1st section by itself. But when you look at the 2nd section, and interpret that by the 7th section, I think the view indicated becomes much stronger, because the words in the 2nd section are the same as those used in the 1st, though they are applied to the case, not of a person entering into these contracts before he is elected, but after he is elected and has become a member of parliament. The 2nd section says that if any person being a member of parliament shall "enter into, accept of, agree for, undertake or execute" any such contract, or if he shall after the commencement of the next session of parliament "continue to hold, execute or enjoy the same," his seat is to be void. Therefore these are the same words as in the 1st section, and if the contract in the 2nd must be executory, it does seem to me that the contract contemplated by the 1st section must also be an executory contract. Now the 7th section deals with the case of persons who being in parliament at the time this Act was passed were disabled by reason of the words used in the 2nd section, and provides a mode by which such persons might get discharged from the execution of such contracts, and so get rid of the disability. The 7th section clearly contemplates that the contract from the disability under which the members could escape was still an executory contract. It seems to me therefore strong to shew that the contracts in the 2nd section are contracts still executory. And the 10th section would seem also to carry out the same view. If that be so, then, for the reason that I have already mentioned, it seems to me contracts under the first part of the 1st section must also be considered executory. The next question is, whether under the first part of the 1st section the contract there mentioned must be entered into with knowledge that it is with the government. It was argued that it was not necessary that there should be such knowledge, because it was said there were no words to that effect in the first part of the section, whereas the second part of the section is introduced by the words "knowingly and wilfully." But the first part of that section seems to me to be pointed to the case of entering into a

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contract; and the second part to the case of carrying out a contract. Mr. Manisty argued that that second part was intended to apply only to the case where a person having entered into a contract and given it up should nevertheless afterwards go on with it again. But considering how highly penal this statute is, it seems to me rather the more favourable construction to say, that the first part applies to contracts knowingly entered into with the government, and that the second part applies to the case where a contract has been entered into with the government in fact, but without the knowledge of that fact by the contractor, and he afterwards, upon its coming to his knowledge that the contract was with the government, he nevertheless goes on and insists upon executing it. If that be so, knowledge is required under the first part of the section just as well as under the second part. Then we come to the facts of the present case. In the first contract brought under the notice of the Court, it must be considered that it was a contract for the supply of goods to be paid for by cash payment. There was no credit. There was power indeed under the contract for the government to object to the goods when delivered, but before the election the goods had been supplied, and the government had accepted them as satisfactory, so that there was nothing to do but to pay the money; and the credit having expired, it would not be necessary for the creditor to sue upon the contract, but he could sue as for goods sold and delivered. It seems to me, under these circumstances, that at the time of the election the contract was executed, and was therefore not within the statute. Then, as to the case of the contract with the Broadmoor Asylum, I think the objection fails, because it is distinctly stated in the case that not only Mr. Birley did not know there was a contract with the agent of the government, but he actually did not know that any contract had been made. I must say, when one considers the results of a contrary decision, it does seem almost impossible that the Court could hold otherwise than it is about to do; because with respect to the contract in the first case, if the Court held differently, the government, when it had been supplied with goods, and had nothing to do but to perform the simple duty of payment, might be able to keep a person out of parliament for ever simply by not paying him his debt. And with respect to the contract in the second case, as was pointed out by Mr. Mellish, if the traveller of some large firm received an order from a person whom he did not know was an agent of the government, yet if he was such agent, although none of the principals of that traveller knew at the time of the election even that a contract had been entered into, and certainly not that it had been entered into with the government, then any one of the principals who should be elected to parliament, although he knew nothing of the matter until after he was elected, or perhaps until after he had sat in parliament for six months, would find his election void, and, according to my view of the matter, would find himself fixed with a penalty of 500*l.* for every day he sat or voted in parliament during those six months. The injustice of such a construction of a penal act seems to me fully to justify the Court in the interpretation of it which they have come to. I will only further say that the view which the Court now takes is not at all inconsistent with the decisions of the committees of the House of Commons in the case of Sir Sidney Waterlow, and in the Leominster case, because in both those cases there was, at the time of the election, something remaining to be done under the contract, whereas here the contract was, as it appears to me, no longer executory.

Judgment for the respondent, with costs.

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